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State Aid to Promote Culture and Heritage Conservation: Museums and Other Cultural Institutions as Recipients of EU State Aid

Abstract: This article addresses the issue of whether EU State aid granted for the purposes of promoting culture and heritage conservation is subject to the prohibition of Article 107(1) TFEU and its derogations. Specifically, the article outlines the problem of “economic activity”, and hence being an “undertaking” insofar as regards bodies operating in the field of culture and heritage conservation (e.g. museums). It covers the European Commission’s approach thereto, together with its decisions made in the field of State aid, as well as the relevant case law of the Court of Justice of the European Union (particularly examining the impact of the *MOTOE* decision for the topic at issue). The article offers a critical assessment of the Commission’s approach, positing that it is not in line with Article 107(1) TFEU as it is currently interpreted by the Court, and is at odds with the Commission’s own 2016 Notice on the notion of State aid.

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Introduction

This article addresses the concept of State aid to promote culture and heritage conservation, and the type of State aid subject to the rules enshrined in the law of the European Union (EU) in general, and in Articles 107-109 of the Treaty on the Functioning of the European Union (TFEU)¹ in particular. This article is meant to examine the development of EU law in that area and, additionally, to offer a critical account of the approach of the European Commission vis-à-vis the applicability of Article 107(1) TFEU, taken together with Article 107(3)(d) TFEU and to recipients of that aid, in that such recipients are increasingly likely to be considered “undertakings” for the purposes of Article 107(1) TFEU, and thus entities engaged in economic activity. The research problem at issue here, and the research question thus formulated, is based on the approach of the European Commission in deeming certain entities active in the field of culture and heritage conservation that are not businesses (e.g. public museums not set up to turn a profit) to be “undertakings” for the purposes of Article 107(1) TFEU and subject to the rules of State aid law, and whether such an approach is in line with the current state of EU law as interpreted by the Court of Justice of the European Union. To that end, the recent decisional practice of the European Commission (hereinafter: “the Commission”) is reviewed critically herein, together with the case-law of the Court of Justice of the European Union (hereinafter collectively “the CJEU” or, specifically as to the Court of Justice, “the Court”). The law and the jurisprudence of the CJEU is related as they stood on 30 April 2022, with some later developments. The structure of this paper is to first review State aid to promote culture and heritage conservation *ratione materiae*, then *ratione personae* (including specifically the cases on “cultural” undertakings), and finally to offer a benchmark for the Commission’s approach by carrying out an analysis of case-law of the CJEU. In terms of methodology, the Commission’s case repositories² and the contents of the EUR-LEX are used here, together with the results of advanced searches therein.

¹ OJ C 202, 7.06.2016, p. 47, as amended: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:%3A02016E%2FTXT-20200301&qid=1657298464095> [accessed: 08.07.2022].

² See the Commission’s State aid register at https://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=3.

State Aid to Promote Culture and Heritage Conservation *Ratione Materiae*

Primary EU law addresses the concept of “culture” in Article 167 TFEU, a single Article that comprises the entirety of Title XIII TFEU.³ In addition, Article 3(3) of the Treaty on the European Union (TEU)⁴ provides, *inter alia*, that the Union “shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced”. While neither Article 167 TFEU nor Article 3(3) TEU provide any definition of the term “culture” (or “heritage” for that matter) to which they refer, the General Court (GC) that serves as the lower instance court of the CJEU has ruled that the concept of “culture”, as provided in Article 167 TFEU taken together with Article 3(3) TEU, “encompasses matters linked to the promotion of linguistic diversity in the European Union”.⁵

Article 107(1) TFEU states that save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market. This rule, read together with the so-called “standstill obligation” as enshrined in Article 108(3), third sentence, of the TFEU (“The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision”), is capable of targeting activities that fall within the concepts of culture and heritage conservation (as it applies to “any” aid). Thus, it is not inconceivable that – on the condi-

³ It reads: “Article 167

1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.
2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas: – improvement of the knowledge and dissemination of the culture and history of the European peoples, – conservation and safeguarding of cultural heritage of European significance, – non-commercial cultural exchanges, – artistic and literary creation, including in the audio-visual sector.
3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.
4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.
5. In order to contribute to the achievement of the objectives referred to in this Article: – the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States, – the Council, on a proposal from the Commission, shall adopt recommendations”.

⁴ OJ C 202, 7.06.2016, p. 13, as amended: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016M%2FTXT-20200301> [accessed: 08.07.2022].

⁵ Case T-391/17, *Romania v. European Commission*, Judgment of the General Court (Second Chamber) of 24 September 2019, ECLI:EU:T:2019:672, para. (60), upheld by the Court in Case C-899/19 P, ECLI:EU:C:2022:41.

tion that the prerequisites of Article 107(1) TFEU are met – aid falling within the concepts of culture and heritage conservation would be subject to the prohibition of State aid. Nevertheless, certain fields wherein aid is granted are subject to certain derogations from the prohibition of Article 107(1) TFEU. One such derogation is enshrined in Article 107(3)(d) TFEU, which however does not explicitly refer to Article 167 TFEU or to Article 3(3) TEU.

Pursuant to the rule set out in Article 107(3)(d) TFEU, aid to promote culture and heritage conservation may – where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest – be considered to be compatible with the internal market by the European Commission. That rule may be applied either alone⁶ or together with appropriate *soft-law* guidelines,⁷ including where such guidelines would apply only by analogy.⁸

There is some dicta from the General Court (GC), formerly the Court of First Instance (the CFI), on what is now Article 107(3)(d) TFEU. Perhaps unsurprisingly, this dicta come from the *CELF v. SIDE* saga, wherein the now-GC has kept annulling subsequent decisions of the Commission that had been taken pursuant to what is now Article 107(3)(d) TFEU. First, it has been held in T-155/98 *SIDE v. Commission* that what is now Article 107(3)(d) TFEU requires definition of the relevant market on the part of the Commission – and that should that institution intend to review a State aid measure pursuant to that rule; a failure to do so, either by not carrying any such assessment at all or where the market definition is regarded as erroneous, constitutes a manifest error of assessment which vitiates such a decision and renders it null and void.⁹ Second, according to the CFI in T-348/04 *SIDE v. Commission*, the rule in what is now Article 107(3)(d) TFEU, introduced into what is now Union law on 1 November 1993 by virtue of the TEU Treaty as a “derogation from the general prohibition of State aid”, may not be applied to State aid measures taken before 1 November 1993, again on pain of nullity.¹⁰ There is a view in the scholar-

⁶ E.g. European Commission, *State Aid SA.60697 (2020/N) – Slovakia: State Aid Scheme to Support the Culture of National Minorities in Slovakia*, 16 April 2021, C(2021) 2634 final, para. (32), https://ec.europa.eu/competition/state_aid/cases1/202121/291083_2274256_130_2.pdf [accessed: 11.10.2022].

⁷ E.g. Communication from the Commission on State aid for films and other audiovisual works, OJ C 332, 15.11.2013, p. 1; see European Commission, *State Aid SA.100581 (2021/N) – Germany. Amendment and Prolongation of the Bavarian Game Support Measure SA.46572 (2017/N)*, 7 January 2022, C(2022) 85 final, para. (2), https://ec.europa.eu/competition/state_aid/cases1/202204/SA_100581_90EA6D7E-0100-C04D-AE83-D195DAB9C7F3_61_1.pdf [accessed: 11.10.2022].

⁸ See European Commission, *State Aid SA.63373 (2021/N) – Italy: Tax Credit for the Production of Video Games of ‘Italian Nationality’ with Cultural Value*, 26 October 2021, C(2021) 7852 final, para. (27), https://ec.europa.eu/competition/state_aid/cases1/202149/SA_63373_203A687D-0000-C26A-BEF0-E81CB-FEB8F4A_63_1.pdf [accessed: 11.10.2022].

⁹ Case T-155/98, *Société internationale de diffusion et d’édition (SIDE) v. Commission of the European Communities*, Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 28 February 2002, ECLI:EU:T:2002:53, paras. (56), (57), and (71).

¹⁰ Case T-348/04, *Société internationale de diffusion et d’édition (SIDE) v. Commission of the European Communities*, Judgment of the Court of First Instance (Third Chamber) of 15 April 2008, ECLI:EU:T:2008:109, paras. (61) and (70).

ship that it is “the rule that the notion of culture must be applied to the content and nature of the work or publication, and not the medium or its distribution per se”.¹¹ This view is supported by the statements of reasons for the Commission decisions on Article 107(3)(d) TFEU,¹² although not in the text of the rule itself or in the case-law of the CJEU, making this essentially a position of the Commission within the scope of its discretion.

There is also a view in the scholarship that the concept of “culture”, as enshrined in Article 107(3)(d) TFEU, should be “interpreted narrowly”.¹³ However, there is no support in the text of the rule itself or in the case-law of the CJEU for any such view. While Article 107(3) TFEU is in itself (including Article 107(3)(d) TFEU) a *derogation* from the general prohibition of State aid, and thus should be construed as an exception to the general rule in what is now Article 107(1) TFEU,¹⁴ the actual level of discretion on part of the Commission insofar as regards the assessment of the compatibility of aid measures with the internal market (which necessarily includes what to consider as “culture” for the purposes of Article 107(3)(d) TFEU) has nevertheless been described as “wide” by the Court.¹⁵ Indeed the rule at issue, as the decisional practice of the Commission discussed below shows, has been applied to “culture” ranging from ancient Minoan artifacts through to Polish salt mines and to German video games, making “culture”, for the purposes of Article 107(3)(d) TFEU, quite diverse.¹⁶ To the extent that the scholarship might rely on T-8/06 *FAB Fernsehen v. Commission* to support the position outlined above, it should be noted that the CFI did not provide any such view in that case. Instead, in T-8/06 *FAB Fernsehen v. Commission* – which concerned the DVB-T broadcasting standards – the CFI took

¹¹ L. Hancher, T. Ottenvanger, P.J. Slot, *EU State Aids*, 5th ed., Sweet & Maxwell, London 2016, p. 148.

¹² See European Commission, *State Aid No N 542/05 – Slovak Republic: Vydavateľ'stvo spolku slovenských spisovateľ'ov s.r.o. (Publishing Company of the Group of Slovak Writers). Individual Aid in Favour of Weekly Literature Magazine*, 21 December 2005, C(2005) 5047, para. (12), https://ec.europa.eu/competition/state_aid/cases/201938/201938_605475_17_1.pdf [accessed: 11.10.2022].

¹³ A. Pošćić, *State Aid and Gambling Services*, in: V. Tomljenović et al. (eds.), *EU Competition and State Aid Rules: Public and Private Enforcement*, Springer, Berlin–Heidelberg 2017, p. 279; C. Quigley, *EU State Aid Law and Policy*, 3rd ed., Hart Publishing, Oxford 2015, p. 214, with the latter author relying on judgment of the Court of First Instance (Seventh Chamber) of 6 October 2009: Case T-8/06, *FAB Fernsehen aus Berlin GmbH v. Commission of the European Communities*, ECLI:EU:T:2009:386, para. (87), not reported in English.

¹⁴ See Case T-348/04, para. (62).

¹⁵ Case C-654/17 P, *Bayerische Motoren Werke AG and Freistaat Sachsen v. European Commission*, Judgment of the Court (Fifth Chamber) of 29 July 2019, ECLI:EU:C:2019:634, para. (80).

¹⁶ As a side note, the Commission itself has offered a working document supporting this view – a so-called “analytical grid” titled *Infrastructure Analytical Grid for Culture, Heritage and Nature Conservation*, https://ec.europa.eu/competition-policy/system/files/2021-04/notion_of_aid_grid_culture_en.pdf [accessed: 11.10.2022], wherein it has stated (para. 2) that “the area of culture, heritage and nature conservation covers a vast array of purposes and activities, inter alia museums, archives, libraries, artistic and cultural centres or spaces, theatres, opera houses, concert halls, archaeological sites, monuments, historical sites and buildings, traditional customs and crafts, festivals and exhibitions, as well as cultural and artistic education activities. It covers also natural heritage, including conservation of biodiversity, habitats, and species”.

the occasion to say that what is now Article 107(3)(d) TFEU should be interpreted narrowly “as any exception”, which is in line with how Article 107(3) TFEU should be applied in general, and that the applicant there had not adduced any evidence (nor was any found by the CFI) that the applicant’s activities had been “cultural”. The CFI, however, did not exclude the notion that “greater selection and variety of television programmes” could result in cultural offerings, which, in my view, can hardly be seen as a “restrictive” construction of “culture” for the purposes of Article 107(3)(d) TFEU.¹⁷

In addition, aid for culture and heritage conservation might be subject to the so-called General Block Exemption Regulation (GBER), or Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in the application of Articles 107 and 108 of the Treaty,¹⁸ with Article 53 GBER providing specific rules for that exemption. GBER-related aid is by definition granted to undertakings; thus the beneficiary of such aid must be implicitly regarded as engaged in economic activities. The Commission has adopted a soft-law act to provide guidelines for applying Article 53 GBER – the General Block Exemption Regulation (GBER) Frequently Asked Questions.¹⁹ There, on what is meant by “cultural and natural heritage” (para. 225 FAQ), the Commission has provided that

GBER does not define such recognition procedure as this does not fall within the remit of the European institutions. Therefore, it is for the concerned Member State to decide which projects or activities can be declared as cultural or natural heritage. As soon as that project or activity is formally recognized as cultural or natural heritage by a competent public authority of this Member State, the condition for application of Article 53 would be deemed to be fulfilled.

¹⁷ Case T-8/06, paras. (87) and (88) in original German: “Die Klägerin macht im Wesentlichen geltend, dass der Umstieg der privaten terrestrischen Rundfunkanbieter auf DVB-T eine größere Angebotsvielfalt bei Fernsehprogrammen und damit kulturelle Vielfalt ermöglicht habe. Hierzu ist zunächst festzustellen, dass die Ausnahme in Art. 87 Abs. 3 Buchst. d EG *wie jede Ausnahme* [emphasis added – Ł.S.] eng auszulegen ist. Die Klägerin erbringt im vorliegenden Fall keinen Beweis dafür, dass ihr Sender oder ihre Programmgestaltung als „kulturell“ im Sinne der erwähnten Bestimmung des EG-Vertrags einzustufen wäre und daher unter die genannte Ausnahme fallen könnte. Außerdem ergibt sich aus den Akten nicht, dass die Umstellung auf DVB-T *eine größere Auswahl und Vielfalt der Fernsehprogramme und damit des kulturellen Angebots mit sich gebracht hätte* [emphasis added – Ł.S.]”. Thus one should agree with A. Held in that the scope of Article 107(3)(d) TFEU seems to be wide rather than narrow, and that it is the responsibility of Member States to define what “culture” is for the purposes of Article 107(3)(d) TFEU with the Commission limited to check for manifest errors of assessment on their part; see A. Held, in: N. Pesaresi et al. (eds.), *EU Competition Law. Volume IV – State Aid, Book Two*, 2nd ed., Claeys Casteels, Deventer 2016, p. 928.

¹⁸ OJ L 187, 26.06.2014, p. 1, as amended; consolidated English text: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014R0651-20210801> [accessed: 11.10.2022].

¹⁹ European Commission, *General Block Exemption Regulation (GBER): Frequently Asked Questions*, March 2016, https://ec.europa.eu/competition-policy/system/files/2021-04/regulations_gber_practical_guide_gber_en.pdf [accessed: 09.07.2022].

In my view, this position on the part of the Commission is incorrect in that the GBER *does* adopt a certain approach as to what is meant by “cultural and natural heritage”, i.e. it excludes certain activities from it. Pursuant to recital 72 of the statement of reasons to the GBER, insofar as regards Article 53 GBER “the list of eligible cultural purposes and activities should not include commercial activities such as fashion, design or video games”. Given that such “commercial activities” are not exhaustively listed in the GBER proper, and that by definition the recipient of block-exempted aid has to be – as is the case with State aid in general – an “undertaking” and thus be engaged in economic activities,²⁰ this position taken by the Commission is at best not well-reasoned. The Commission is also known to approve “cultural” aid for, *inter alia*, “development of high quality, culturally or pedagogically valuable digital games and innovative, interactive media projects with a games element” pursuant to Article 107(3)(d) TFEU. This makes, e.g., video games hardly “non-cultural” from the outset.²¹

Lastly, again according to the Commission, certain types of aid in the field of culture and heritage conservation might also fall outside Article 107(1) TFEU solely because of their “purely local” nature,²² even though it has been held that the effect on trade between Member States could be only potential²³ and still fall within

²⁰ See e.g. Case C-150/16, *Fondul Proprietatea SA v. Complexul Energetic Oltenia SA*, Judgment of the Court (Fifth Chamber) of 18 May 2017, ECLI:EU:C:2017:388, para. (22).

²¹ See e.g. European Commission, *State Aid SA.100581 (2021/N) – Germany...*, para. (2). See also European Commission, *State Aid SA.51820 (2018/N) – Germany: North Rhine-Westphalian Games Support Measure*, 10 December 2018, C(2018) 8662 final, para. (9), https://ec.europa.eu/competition/state_aid/cases/277019/277019_2042144_125_2.pdf [accessed: 11.10.2022], wherein the Commission uses Article 107(3)(d) TFEU to approve a video games-related scheme with a budget of €14 million that has previously operated pursuant to the de minimis rule; requiring notification as regards cultural video games, where the GBER may accommodate aid schemes that could at times amount to €150 million annually (see Article 1(2)(a) GBER), is hardly reasonable of the Commission. For the above reason, I do not subscribe to the notion that e.g. the GBER does not “expand on any particular ‘European dimension’ of cultural heritage” (cf. E. Psychogiopoulou, *Cultural Heritage and the EU: Legal Competences, Instrumental Policies, and the Search for a European Dimension*, in: A. Jakubowski, K. Hausler, F. Fiorentini (eds.), *Cultural Heritage in the European Union: A Critical Inquiry into Law and Policy*, Brill, Leiden–Boston 2019, p. 70). By selecting certain areas of culture and excluding others (e.g. video games, which includes indie gaming), the GBER does indeed tacitly expand a certain version of cultural heritage, by allowing to finance some parts of culture without the Commission’s say-so and excluding others.

²² European Commission, *State Aid SA.45512 (2016/N) – Spain: Aid to Support the Valencian Language in the Press*, 1 August 2016, C(2016) 4865 final, para. (12), https://ec.europa.eu/competition/state_aid/cases/264487/264487_1783453_87_2.pdf [accessed: 11.10.2022], in that a beneficiary supplies goods or services to a limited area within a Member State and is unlikely to attract customers from other Member States, while at the same time it cannot be foreseen, with a sufficient degree of probability, that the measure will have more than a marginal effect on the conditions of cross-border investments or establishment.

²³ European Commission, *SA.38391 (2014/N) – Estonia: State Compensation of Damage Incurred by an Owner of an International Exhibition*, 28 July 2014, C(2014) 5398 final, para. (33), https://ec.europa.eu/competition/state_aid/cases/252919/252919_1575478_57_2.pdf [accessed: 11.10.2022].

Article 107(1) TFEU.²⁴ This reflects a notion sometimes espoused by the Commission, including in a draft soft-law act²⁵ and in two press releases,²⁶ to the effect that it should not be required to scrutinize certain types of “less important” aid measures. However, this approach is contrary to the case-law of the Court, which requires that there be no threshold or percentage below which it may be considered that trade between Member States is not affected, and that the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected.²⁷

State aid to promote culture and heritage conservation is featured in the Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU (“the Notice”),²⁸ wherein the Commission indeed admits that aid in the field of culture *might* fall outside economic activities subject to Article 107(1) TFEU. In my view, this Notice constitutes a useful tool for the purposes of assessing the Commission’s overall approach. The scholarship on EU law has noted that the area of State aid may contain legally binding guidelines that are not always negotiated with Member States, *inter alia* pursuant to the decision of the Court in *C-382/99 Netherlands v. Commission*.²⁹ Be that as it may, the case-law of the Court is clear that the Commission itself is bound by the guidelines it adopts. The institution at issue indeed may not depart from such guidelines in cases where they impose a limit on the exercise of its discretion, and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as

²⁴ The Commission is known to have found measures to fall within Article 107(1) TFEU should they “might have” a potential effect on trade (see European Commission, *State Aid SA.60697 (2020/N) - Slovakia...*).

²⁵ See European Commission, *Draft Communication from the Commission: A New Framework for the Assessment of State Aid which Has Limited Effects on Intra-Community Trade*, https://ec.europa.eu/competition/state_aid/reform/sit_let_en.pdf [accessed: 11.10.2022]. This draft has never been finally adopted, however.

²⁶ See European Commission, *State Aid: Commission Gives Guidance on Local Public Support Measures that Can Be Granted without Prior Commission Approval*, 29 April 2015, Press release no. IP/15/4889 and European Commission, *State Aid: Commission Gives Guidance on Local Public Support Measures that Do Not Constitute State Aid*, 21 September 2016, Press release no. IP/16/3141.

²⁷ See e.g. Case C-518/13, *Eventech Ltd v. The Parking Adjudicator*, Judgment of the Court (Second Chamber) of 14 January 2015, ECLI:EU:C:2015:9, para. 68.

²⁸ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.07.2016, p. 1.

²⁹ See O. Ştefan, *Soft Law in Court: Competition Law, State Aid, and the Court of Justice of the European Union*, Wolters Kluwer, Aalphen aan den Rijn 2013, p. 171. See also Case C-382/99, *Kingdom of the Netherlands v. Commission of the European Communities*, Judgment of the Court (Fifth Chamber) of 13 June 2002, ECLI:EU:C:2002:363, para. 24, the most recent authority relied on by that author. However, apart from the Commission itself and specifically as regards the issue of others being bound by Commission’s unilateral guidelines, later case-law suggests that this binding effect does not apply to Member States (or to the Council discharging its self-standing Treaty powers, e.g. pursuant to Article 108(2) TFEU) where they have not accepted such guidelines. See Case C111/10, *European Commission v. Council of the European Union*, Judgment of the Court (Grand Chamber) of 4 December 2013, ECLI:EU:C:2013:785, para. 74.

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equal treatment or the protection of legitimate expectations.³⁰ Even where guidelines, such as the Notice, are not intended to produce binding effects, national courts and other authorities are expected to take them into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding European Union provisions.³¹ The GC has also posited that the Notice, while not binding on the Union Courts, is the source of “useful guidance”.³²

The Notice provides in Section 2.6 – titled “Culture and heritage conservation, including nature conservation” – that “taking into account their particular nature, certain activities related to culture, heritage and nature conservation may be organised in a non-commercial way and thus be non-economic in nature. Public funding thereof may therefore not constitute State aid”.³³ Furthermore, it should be noted firstly that the Commission

considers that public funding of a cultural or heritage conservation activity accessible to the general public free of charge fulfils a purely social and cultural purpose which is non-economic in nature. In the same vein, the fact that visitors of a cultural institution or participants in a cultural or heritage conservation activity, including nature conservation, open to the general public are required to pay a monetary contribution that only covers a fraction of the true costs does not alter the non-economic nature of that activity, as it cannot be considered genuine remuneration for the service provided.³⁴

Secondly, the Commission posits that “many cultural or heritage conservation activities are objectively non-substitutable (for example, keeping public archives holding unique documents) and thus exclude the existence of a genuine market”, and that “such activities would also qualify as non-economic in nature”.³⁵

On the other hand, the Commission has opined that

in contrast, cultural or heritage conservation activities (including nature conservation) predominantly financed by visitor or user fees or by other commercial means (for example, commercial exhibitions, cinemas, commercial music performances and festivals

³⁰ Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S (C-189/02 P), Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others (C-202/02 P), KE KELIT Kunststoffwerk GmbH (C-205/02 P), LR af 1998 A/S (C-206/02 P), Brugg Rohrsysteme GmbH (C-207/02 P), LR af 1998 (Deutschland) GmbH (C-208/02 P) and ABB Asea Brown Boveri Ltd (C-213/02 P) v. Commission of the European Communities*, Judgment of the Court (Grand Chamber) of 28 June 2005, ECLI:EU:C:2005:408, para. 211.

³¹ Case C-410/13, *‘Baltlanta’ UAB v. Lietuvos valstybė*, Judgment of the Court (Second Chamber) of 3 September 2014, ECLI:EU:C:2014:2134, para. 64.

³² Cases T-778/16 and T-892/16, *Ireland and Others v. European Commission*, Judgment of the General Court (Seventh Chamber, Extended Composition) of 15 July 2020, ECLI:EU:T:2020:338, para. 151.

³³ The Notice, para. 34.

³⁴ *Ibidem*.

³⁵ *Ibidem*, para. 36.

and arts schools predominantly financed from tuition fees) should be qualified as economic in nature. Similarly, heritage conservation or cultural activities benefitting exclusively certain undertakings rather than the general public (for example, the restoration of a historical building used by a private company) should normally be qualified as economic in nature.³⁶

While in the context of the Union rules on State aid the Commission has no power to interpret Article 107(1) TFEU authoritatively,³⁷ the effect *ratione materiae* in terms of its *application* of Article 107(1) TFEU in the field of culture and heritage conservation ought to be that there are certain areas that are, or could be, in line with the internal market, or that are not caught by Article 107(1) TFEU.

The Commission has opined in Paragraph 37 of the Notice that while there would be

cases where an entity carries out cultural or heritage conservation activities, some of which are non-economic activities as set out in paragraphs 34 and 36 and some of which are economic activities, public funding it receives will fall under the State aid rules only insofar as it covers the costs linked to the economic activities.

The Commission elaborated on that position in its addendum in footnote 50, where it stated that

as explained in paragraph 207, the Commission considers that public financing provided to customary amenities (such as restaurants, shops or paid parking) of infrastructures that are almost exclusively used for a non-economic activity normally has no effect on trade between Member States. Similarly, the Commission considers that public financing to customary amenities that are provided in the context of non-economic culture and heritage conservation activities (for instance, a shop, bar, or paid cloakroom in a museum) normally has no effect on trade between Member States.

In any case (including where there would be State aid compatible with the internal market), a State aid measure must be addressed to an “undertaking”, such as is understood within the scope of EU competition law.³⁸ Insofar as regards culture

³⁶ Ibidem, para. 35.

³⁷ Case C-71/04, *Administración del Estado v. Xunta de Galicia*, Judgment of the Court (Third Chamber) of 21 July 2005, ECLI:EU:C:2005:493, para. 37. This is without prejudice to the powers of the Commission to adopt regulations pursuant to Article 108(4) TFEU, which are binding *erga omnes* and at the same time necessarily imply some form of *ex ante* interpretation of Article 107(1) TFEU on part of the Commission.

³⁸ Joined Cases C-622/16 P to C-624/16 P, *Scuola Elementare Maria Montessori Srl v. European Commission, European Commission v. Scuola Elementare Maria Montessori Srl and European Commission v. Pietro Ferracci*, Judgment of the Court (Grand Chamber) of 6 November 2018, ECLI:EU:C:2018:873, paras. 103 and 104. According to the Court, the concept of “undertaking” covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, whereas any activity consisting in offering services on a given market, that is, services normally provided for remuneration, is an economic activity. The essential characteristic of remuneration lies in the fact that it is consideration for the service in question.

and heritage conservation by museums, the scholarship has at times provided, pre-2016 Notice, that “classic museum activities (such as education, collection of significant and/or instructive items of art, and suchlike), or pursuit of activities that are of scientific nature” are not activities of undertakings.³⁹

Decisional Practice of the Commission: State Aid to Promote Culture and Heritage Conservation *Ratione Personae*

It has been suggested in the scholarship that an in-depth assessment of “culture-related” aid in order to examine “the degree of accommodation of cultural considerations in the implementation of the EU state aid rules” requires examination of the decisional practice of the Commission.⁴⁰

On the issue of recipients of culture and heritage-related aid, and before the adoption of the 2016 Notice, the Commission had found, *inter alia*, in the context of a 2005 case (SA.18656 – Poland) that aid granted to natural persons and various institutions (such as religious organizations or authorities of local government), in the form of direct grants for renovation, conservation, or other construction works for objects of national heritage that require renovation does not fall within Article 107(1) TFEU as its recipients are not undertakings.⁴¹ However, this original position of the Commission appears to have changed diametrically over time. Since that decision, 16 other reported cases (i.e. 17 in total) have been found not to involve State aid (before or after a formal investigation procedure)⁴² in the area of culture and heritage conservation. As of the time of this writing, there have been 299 total reported cases involving Article 107(3)(d) TFEU, or 432 culture-related

³⁹ T. Scharf, *The Notion of State Aid Term in the Sectors of Culture, Sports, and Tourism*, in: F. Säcker, F. Montag (eds.), *European State Aid Law: A Commentary*, Beck, München 2016, p. 1491. The scholarship further noted that the earlier Commission cases did say that museums were not undertakings (cf. H. Hofmann, C. Micheau (eds.), *State Aid Law of the European Union*, Oxford University Press, Oxford 2016, p. 302).

⁴⁰ D. Ferri, *Cultural Diversity and State Aids to the Cultural Sector*, in: E. Psychogiopoulou (ed.), *Cultural Governance and the European Union: Protecting and Promoting Cultural Diversity in Europe*, Springer, Maastricht–London 2015, p. 121. While I agree with this sentiment by that Author as regards the previous GBER (i.e. the repealed Regulation no. 800/2008), I cannot currently agree with her in that “both the *de minimis* Regulation and the GBER do not include specific provisions on cultural industries or services, but they can be used by member states to promote the cultural sector” (p. 121). Among other things, as the law stands, Article 53(5)(f) of the current GBER relates to costs for advisory and support services provided by outside consultants and service providers, incurred directly as a result of the project, and thus it cannot be said that the GBER does not include “specific provisions” on cultural services.

⁴¹ Decision in original Polish (not available in English): Komisja Europejska, *Pomoc Państwa NN 55/2005 (ex N 595/2004) – Polska: Zachowanie dziedzictwa kulturowego*, 20 July 2005, K(2005) 2714 wersja ostateczna, para. (6), https://ec.europa.eu/competition/state_aid/cases/199545/199545_516648_24_2.pdf [accessed: 11.10.2022].

⁴² See the Commission’s State aid register: <https://ec.europa.eu/competition/elojade/isef/index.cfm>, with keywords “Culture” and “Decision finding that the measures do not constitute aid”.

cases in total.⁴³ It would specifically follow from those 17 “no-aid” decisions that the Commission is now prepared to find various cultural institutions – including public museums – to be undertakings.

For an early case involving the Commission’s approach, in SA.36361 (2013/N) – Czech Republic, the Commission found that it cannot be excluded that bodies such as institutions set up and managed by the state, regional and municipal administrations, churches and religious organizations, non-governmental non-profit organizations, and other legal entities managing cultural heritage would act as undertakings.⁴⁴ This case is notable for *assuming* that bodies managing cultural heritage are *capable* of engaging in economic activities, and that such capability (and not the actual performance thereof, viz. “[...] may use the building [...]”) makes them “undertakings”.

The matter at hand has also shown up in a Polish context. In SA.38122 (2014/N) – Poland,⁴⁵ a case which involved a public museum operated by the local government, the Commission found that

the beneficiary of the measure, the Museum, is involved in economic activities since it commercially exploits the heritage site through the sale of souvenirs or by renting some of the Museum’s facilities that are currently not in use. Moreover, the support notified under these measures will maintain and improve the possibility to use the heritage commercially.⁴⁶

The Commission has made no effort to elaborate on the status of the body, and has not elaborated upon the fact that any revenues gained from commercial activities have been used for the Museum’s primary remit, something the Commission noted but apparently did not act upon.⁴⁷

Further on, the Commission has found that local governments carrying out cultural activities may also be deemed “undertakings”. In N-SA.33433 – Czech Republic, a municipality (Town of Bystřice nad Pernštejnem) has been found to be an undertaking when operating a cultural site; according to the Commission,

⁴³ GBER objective excluded, keywords set to EU Primary Legal Basis: “Art. 107(3)(d) TFEU – Culture and heritage”; for culture in general, set keywords in “Primary Objective (Main)” to “Culture”.

⁴⁴ European Commission, *State Aid SA.36361 (2013/N) – Czech Republic: Cultural Heritage and Contemporary Art*, 19 December 2013, C(2013) 9670 final, para. (16), https://ec.europa.eu/competition/state_aid/cases/248052/248052_1518409_105_2.pdf [accessed: 11.10.2022]; see also para. (48): “[...] organization of cultural events, festivals and shows, the performance of cultural activities may be considered economic activities on a competitive market [...]”, and that in “[...] the case of renovation of monuments, a beneficiary may use the building for the operation of an economic activity [...]”.

⁴⁵ European Commission, *SA.38122 (2014/N) – Poland: Aid to Promote Heritage Conservation in the “Guido” and “Królowa Luiza” Coal Mines*, 10 June 2014, C(2014) 3910 final, paras. (8) and (45), https://ec.europa.eu/competition/state_aid/cases/251375/251375_1575089_99_2.pdf [accessed: 11.10.2022].

⁴⁶ It should be added here that aid to which the case at issue referred has been granted for none of those; instead, it has been granted for the Museum’s primary remit such as securing monumental parts (ibidem, para. 16).

⁴⁷ See ibidem, para. (9).

State Aid to Promote Culture and Heritage Conservation: Museums and Other Cultural Institutions as Recipients of EU State Aid

while museum related activities carried out in local/regional dimensions could be considered as not being economic activities, the municipality will also be engaged in activities such as the occasional sale of the products produced at the museum and the rental of premises to external operators, which can be considered as economic activities.⁴⁸

On the issue of the alleged substitutability of “cultural services”, in SA.38391 (2014/N) – Estonia, insofar as regards state museums and/or museums using a state-owned museum collection the Commission found that

other operators than the beneficiaries of the measure, like for example, municipal museums, exhibition agencies or private initiatives may offer similar and substitutable services of organizing international exhibitions, confirming the existence of a market. The beneficiaries of the measure (see section 2.3 above) qualify therefore as undertakings for the purposes of EU State aid rules.⁴⁹

No mention is made of the objective non-substitutability of cultural activities (see Paragraph 36 of the 2016 Notice).

At other times, the Commission apparently abandons the effort to make a genuine distinction between non-economic and economic recipients of “cultural” aid. For example in SA.34462 (2012/NN) – Latvia, insofar as regards beneficiaries that were public bodies (such as municipalities and their institutions, cultural institutions: museums, theatres, archives, libraries, civic centres, cultural education institutions), non-profit organizations (NGOs), and private persons (who have cultural objects in their ownership, use, or management), the Commission found that, beyond entities not engaged in economic activity there are “other beneficiaries whose activities include commercial exploitation [who] are likely to qualify as undertakings as confirmed by the Commission in previous decisions on aid to culture and heritage”.⁵⁰ The Commission did not engage in discerning which beneficiaries had been genuine undertakings. Instead, it opted for an aggregate decision on the matter.⁵¹ However, the criterion of being an undertaking is an essential prerequisite for Article 107(1) TFEU to apply, and there cannot be any State aid measures where there are no undertakings. This is explicitly set out in, *inter alia*, the Commis-

⁴⁸ European Commission, *State Aid N-SA.33433 – Czech Republic: Green Knowledge Centre/Open-Air Museum, Town of Bystřice nad Pernštejnem*, 22 December 2011, C(2011) 9912 final, paras. (23) and (24), https://ec.europa.eu/competition/state_aid/cases/241540/241540_1283816_79_2.pdf [accessed: 11.10.2022].

⁴⁹ European Commission, *SA.38391 (2014/N) – Estonia...*, para. (29).

⁵⁰ European Commission, *Case SA.34462 (2012/NN) – Latvia: Programme “Culture”*, 2 May 2013, C(2013) 2379 final, paras. (18) and (50), https://ec.europa.eu/competition/state_aid/cases/246755/246755_1428594_85_2.pdf [accessed: 11.10.2022].

⁵¹ This is in contrast to para. (50) of the decision (“[...] cannot exclude that an economic advantage is provided to undertakings”), and to para. (59), wherein it is stated, *inter alia*, that “most cultural activities supported under this scheme are not profit-seeking and revenues often do not cover the costs related to such activities. The beneficiaries targeted by the scheme are mostly institutions lacking capital, for which the resources provided by State aid are indispensable”. If most recipients were non-profit seeking and had to be financed by the Member State, the Commission should have reasoned its decision differently.

sion's own 2016 Notice, wherein it is plainly stated that the State aid rules only apply where the beneficiary of a measure is an "undertaking".⁵² Thus the Commission should not have limited itself to stating that the recipients are merely "likely" to be undertakings, as that institution only has power to apply substantive⁵³ State aid rules against genuine undertakings that fall within the scope of Article 107(1) TFEU. As such, it should have discerned whether the recipients of aid were, in fact, undertakings. Applying Article 107(1) TFEU to recipients that are "mostly", or "likely to be" undertakings would amount to going beyond the scope of Article 107(1) TFEU.

Lastly, and perhaps most glaringly, in its 2013 State aid case SA.36581 (2013/NN) – Greece, concerning the construction of an Archaeological Museum in Messara, Crete, the Commission found that a public museum qualified as an undertaking, as "it cannot be excluded that the activity of the museum is of an economic nature, since it provides a service against remuneration". The Commission did not identify what kind of "service against remuneration" such a museum might provide,⁵⁴ or what kind of "market alternative" there might be for ancient Minoan artifacts. This case is especially worrying in that there is no alternative to certain unique items of heritage, of which such artifacts are arguably an example. This is something that the Commission admitted later in Paragraph 36 of the 2016 Notice.

After the 2016 Notice was adopted by the Commission, two "no State aid" cases decided post-2016 Commission Notice did not mention it, despite involving State aid for culture,⁵⁵ with the Commission instead opting for a "purely local" approach. Specifically, no mention was made of the concept of cultural or heritage conservation activities that would be objectively non-substitutable. At the same time, the trend of ignoring the 2016 Notice was followed in a 2021 case of cultural aid to entities operating not for profit, i.e. SA.60697 (2020/N) – Slovakia, which concerned a State aid scheme to support the culture of national minorities in Slovakia. Despite noting that "the beneficiaries are active in publishing in the language of national minorities and are generally not profit making. A part of them provides the publications free of charge, others for a symbolic (non-commercial) price", and that "these are projects that, by their very nature, are not commercially interesting, but

⁵² See para. 6 of the 2016 Notice.

⁵³ This is without prejudice to the Commission's *procedural* investigative powers pursuant to the Procedural Regulation against associations of undertakings or Member States, which are not necessarily undertakings themselves. See Article 7(1) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), OJ L 248, 24.09.2015, p. 9.

⁵⁴ European Commission, *State Aid SA.36581 (2013/NN) – Greece: Construction of Archaeological Museum Messara Crete*, 6 November 2013, C(2013) 7038 final, para. (42), https://ec.europa.eu/competition/state_aid/cases/250254/250254_1484489_76_2.pdf [accessed: 11.10.2022].

⁵⁵ European Commission, *State Aid SA.47448 (2017/N) – Spain: Promotion of the Basque Language in Digital News Media*, 17 May 2017, C(2017) 3161 final, https://ec.europa.eu/competition/state_aid/cases/267998/267998_1907403_128_2.pdf [accessed: 11.10.2022]; European Commission, *State Aid SA.45512 (2016/N) – Spain...*

are of particular importance in terms of their contribution and the promotion of national and cultural diversity”, the Commission made no mention of the 2016 Notice (including the concept of non-substitutability in Paragraph 36 of the Notice), and undertook no assessment of the two “no aid” scenarios.⁵⁶ This case is also notable for stating – post-2016 Notice – that Article 107(3)(d) TFEU “should be limited to measures for specific projects that are related to the *national* notion of culture”,⁵⁷ implicitly excluding any *supra*-national notions of culture from the scope of Article 107(3)(d) TFEU.

In a 2017 case where the Notice is mentioned, SA.42545 (2015/N) – Germany, the Commission recalls the Notice at Paragraph (26), where it states that “the public funding of cultural activities may be organised in a non-commercial way and thus public funding thereof does not constitute State aid”. It further provides that

public funding of a cultural or heritage conservation activity accessible to the general public, free of charge, fulfils a purely social and cultural purpose which is non-economic in nature. In the same vein, the fact that the visitors pay a monetary contribution that only covers a fraction of the true costs is equally unlikely to be economic in nature.⁵⁸

In Paragraph (27) of that decision, the Commission concluded that a ticket price of 10-20% of the actual cost that would have been paid by the visitors suggests that infrastructure is not meant to be commercially exploited, and thus falls outside State aid rules, potentially setting a “safe-harbour” threshold for culture-related cases.

Nevertheless, in 2017 (i.e. post-2016 Notice) the Commission followed its 2013 reasoning in SA.49411 (2017/N) – the Netherlands, building upon SA.34357 (2012/NN) – the Netherlands,⁵⁹ to find that “museums, theatres, and operas etc., although established on a non-profit basis, normally offer their services on a market, as outlined under Paragraph (27)⁶⁰ and compete with other EU undertakings

⁵⁶ European Commission, *State Aid SA.60697 (2020/N) – Slovakia...*

⁵⁷ Para. (31), apart from stating that “the cultural derogation provided for in Article 107(3)(d) TFEU must be interpreted restrictively” and “it is considered that the notion of culture must be applied to the content and nature of the cultural projects”.

⁵⁸ European Commission, *State Aid SA.42545 (2015/N) – Germany: Revitalisation of the Hamburg Congress Centre (CCH)*, 7 April 2017, C(2017) 2202 final, para. (26), https://ec.europa.eu/competition/state_aid/cases/259545/259545_1894651_204_2.pdf [accessed: 11.10.2022].

⁵⁹ European Commission, *SA.34357 (2012/NN) – Netherlands: Multiplier Giftenaftrek*, 20 March 2013, C(2013)1502 final, para.(41), https://ec.europa.eu/competition/state_aid/cases/246177/246177_1418793_56_2.pdf [accessed: 11.10.2022]; followed by European Commission, *State Aid SA.49411 (2017/N) – Netherlands: Multiplied Gift Deduction – Prolongation*, 12 December 2017, C(2017) 8591 final, para. (5), https://ec.europa.eu/competition/state_aid/cases/271681/271681_1955136_63_2.pdf [accessed: 11.10.2022].

⁶⁰ Which only reproduces the contents of Article 107(1) TFEU. The Commission continues by stating that “other cultural institutions such as libraries or charitable foundations may not be considered as undertakings within the meaning of Article 107(1) TFEU, as they do not carry out normally an economic activity consisting in offering goods or services on a given market. However, to the extent that such institutions are

that are also active in the same market. Therefore, they must be considered to be involved in an economic activity”. Thus, even post-2016 the approach to cultural bodies that operate as not-for-profit entities (i.e. that they are allegedly undertakings) continues, and there is no in-depth analysis being reported in the Commission decisions as to precisely why, *inter alia*, public museums that operate not for profit and which often possess unique objects of heritage (making them and their collections not substitutable) are to be deemed “undertakings”.

It thus must be checked whether this approach of the Commission is in line with Article 107(1) TFEU as interpreted by the Court. This appears to be now even more pressing because, as of the time of preparing this paper for publication, the Commission has published its decision concerning Poland in SA.101365 (2021/N). That decision pertains to compensation vis-à-vis costs incurred for the provision of services statutorily exempted from postage fees (2022-2025).⁶¹ In the context of the issue at hand, those costs related to, *inter alia*, “an exemption from postage fees of items containing ‘compulsory library copies’ sent to the libraries entitled to receive them”.⁶² This measure had been recognized by the Commission to have a “cultural” dimension. According to the Commission’s decision, the compulsory library copies are copies of specific publications that are delivered, free of charge, to 17 libraries in order to “facilitate the keeping of archives”. The objective of maintaining such archives is to support culture and preserve cultural heritage.⁶³ It must be emphasized here that according to Paragraph 36 of the 2016 Notice, keeping public archives holding unique documents is an explicit example of objectively non-substitutable cultural or heritage conservation activities that ought to make such activities fall outside Article 107(1) TFEU. However, the Commission’s decision makes no mention of the 2016 Notice, instead limiting itself to reiterating its prior decisional practice.⁶⁴ No analysis of uniqueness and substitutability as regards the cultural activities at issue can be found in the decision. Rather, the Commission simply applied Article 107(3)(d) TFEU, which presupposes that such measures are State aid measures, and that recipients of such measures are undertakings. This decision constitutes further evidence of the worrying trend on the part of the Commission to stretch the limits of what is an “economic activity”, despite its own *soft law*.

engaged in economic activities such as the exploitation of a cafeteria or a museum shop, they also qualify as undertakings in the meaning of Article 107 (1) TFEU”.

⁶¹ See European Commission, *State Aid SA.101365 (2021/N) – Poland: Compensation of Costs Incurred for the Provision of Services Statutorily Exempted from Postage Fees (2022-2025)*, 29 July 2022, C(2022) 5578 final, https://ec.europa.eu/competition/state_aid/cases1/202238/SA_101365_50FA3A83-0100-C062-8F64-E19671CC2460_38_1.pdf [accessed: 11.10.2022].

⁶² See *ibidem*, para. 14.

⁶³ See *ibidem*, para. 16.

⁶⁴ See *ibidem*, paras. 16 and 34, wherein the Commission refers to its previous decisions.

Case-law of the Court of Justice of the EU: Cultural Institutions as Undertakings?

While the CJEU has not yet issued an express judicial decision on Article 107(3)(d) TFEU with respect to the dividing line for the issue of when a cultural institution qualifies as an “undertaking”,⁶⁵ one may refer to the cases the Commission relied on in its decisions, including in particular the most recent one invoked in SA.36581 (2013/NN) – Greece (*Messara*), that being the *MOTOE* decision.⁶⁶ In that decision the CJEU found, among other things, that a motorcycling association that operates non-profit is an undertaking for certain purposes.⁶⁷ The *MOTOE* decision has generated significant comment, both supportive and critical.⁶⁸ As it is an Article 102 TFEU case not related to the area of culture, it is sufficient to say here that the Court in *MOTOE* did not elaborate on whether its reasoning should apply to the entire breadth of competition law, including to State aid cases. In this respect it is posited here that *MOTOE* is not (or at least, no longer as of the time of writing) relevant for such purposes by virtue of the Court’s later case-law. It is worth recalling that here because the Commission refers to *MOTOE* in cultural aid cases, e.g. in SA.36581 (2013/NN) – Greece.⁶⁹

The Court had the occasion to revisit *MOTOE* in *C74/16 Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe*,⁷⁰ a preliminary ruling case concerning the provision of educational courses by religious bodies. This case is rel-

⁶⁵ There is, however, the *CELF v. SIDE* line of cases referred to above, confirming that an undertaking operating a business involving cultural activities indeed may be a recipient of State aid. The existence of Article 53 GBER further corroborates that cultural institutions, when engaged in genuine economic activity, may be undertakings.

⁶⁶ Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio*, Judgment of the Court (Grand Chamber) of 1 July 2008, ECLI:EU:C:2008:376, para. (47) of the *Messara* decision.

⁶⁷ At para. (28): “First, it is not inconceivable that, in Greece, there exist, in addition to the associations whose activities consist in organising and commercially exploiting motorcycling events without seeking to make a profit, associations which are engaged in that activity and do seek to make a profit and which are thus in competition with ELPA. Second, non-profit-making associations which offer goods or services on a given market may find themselves in competition with one another. The success or economic survival of such associations depends ultimately on their being able to impose, on the relevant market, their services to the detriment of those offered by the other operators”. How it is that the Commission has considered motoring associations similar to, or in any way relevant for classifying cultural bodies, such as a public museum concerning the period of Antiquity, is not explained in the *Messara* decision.

⁶⁸ See e.g. S. Weatherill, *European Sports Law: Collected Papers*, 2nd ed., T.M.C. Asser Press, The Hague 2014, p. 474; J. Sierra, *Article 106 – Exclusive or Special Rights and Other Anti-Competitive State Measures*, in: J. Faull, A. Nikpay (eds.), *The EU Law of Competition*, 3rd ed., Oxford University Press, Oxford 2014, p. 816.

⁶⁹ On the issue why the Commission would pick, in the first place, a case related to motoring associations to corroborate its findings in a cultural context, the author cannot say. In itself, picking a general competition law case in order to justify why e.g. a museum ought to be deemed an undertaking is not explained by the Commission, and the link appears to be very tenuous, if there at all.

⁷⁰ Case C74/16, *Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe*, Judgment of the Court (Grand Chamber) of 27 June 2017, ECLI:EU:C:2017:496.

evant for the purposes of this paper because it offers the Court's input as regards the concept of "undertaking" with respect to "the sphere of EU competition law", which necessarily includes Articles 107(1) TFEU and 107(3)(d) TFEU.⁷¹ The Court recalled *MOTOE* by stating that the fact that the offer of goods or services is made on a not-for-profit basis does not prevent the entity which carries out those operations on the market from being considered an undertaking, since that offer exists in competition with that of other operators which do seek to make a profit.⁷² However, the findings in *MOTOE* have been followed by dicta that services normally provided for remuneration are services that may be classified as "economic activities"; according to the Court, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question.

Pursuant to the dictum (in Paragraph 50) of the Court's decision with respect to courses provided by certain establishments which are integrated into a system of public education and financed, entirely or mainly, by public funds, "the State is not seeking to engage in gainful activity, but is fulfilling its social, *cultural* [emphasis added – Ł.S.] and educational obligations towards its population".⁷³ It would thus follow that fulfilling genuinely cultural activities does not constitute "economic" activity, and that a genuinely economic activity requires remuneration, i.e. consideration for the service in question. On the issue of multiple types of activities, the Court found that it is possible that a single establishment may carry on a number of activities, both economic and non-economic, provided that it keeps separate accounts for the different funds that it receives so as to exclude any risk of cross-subsidization of its economic activities by means of public funds received for its non-economic activities.⁷⁴ This ruling from the Court is notable in that it precludes the logic of making a cultural institution completely an "undertaking" when it performs some ancillary commercial activities, something the Commission engaged in SA.36361 (2013/N) – Czech Republic and still does, as its post-2016 Notice practice now stands (cf. SA.49411 (2017/N) – the Netherlands).

Further on, *MOTOE* has been featured in Joined Cases C-262/18 P and C-271/18 P *European Commission and Slovak Republic v. Dôvera zdravotná poisťovňa, a.s.*, a later case expanding upon *MOTOE*.⁷⁵ Again, this case is relevant for this paper as it contains the Court's position "in the context of EU competition law", which includes State aid law.⁷⁶ In Paragraphs 49-52 thereunder, the Court of Justice has overruled the General Court in instances where the latter had based its decision

⁷¹ *Ibidem*, paras. 41-45.

⁷² *Ibidem*, para. 46.

⁷³ *Ibidem*, para. 50.

⁷⁴ *Ibidem*, para. 51.

⁷⁵ Joined Cases C-262/18 P and C-271/18 P, *European Commission and Slovak Republic v. Dôvera zdravotná poisťovňa, a.s.*, Judgment of the Court (Grand Chamber) of 11 June 2020, ECLI:EU:C:2020:450.

⁷⁶ See *ibidem*, para. 28.

on *MOTOE*, to the effect that the fact that other bodies that – in contrast to the non-profit-making beneficiary – are operating in the context of the same scheme and are actually seeking to make a profit does not make said beneficiary an “undertaking” in the context of a body involved in the management of a scheme, where such a scheme has a social objective and applies the principle of solidarity under State supervision. In my view, the Court has thus tacitly confirmed that the GC (and by extension, the Commission) should have engaged in comparing the factual and legal position of such bodies to check whether they were comparable. A negative result of such an exercise should lead to a finding that such bodies are not competing with one another, and to a finding that the body at issue had not been acting as an undertaking. Despite the fact that the Court ruled on the applicability of *MOTOE* in a wider context, the same reasoning may be generally used outside the facts of that case. Thus, cultural institutions that exclusively or mainly engage in cultural activities should not be deemed to be “in competition” with “other bodies” that operate for profit and do not engage in comparable activities, especially where the existence of such bodies is only surmised by the Commission, without any genuine examples thereof.

What’s more, the Court has retroactively classified *MOTOE* as involving “services linked to the organisation of sporting competitions based on sponsorship, advertising and insurance contracts for the commercial exploitation of those competitions – in a market environment of competition with other operators which are seeking to make a profit”,⁷⁷ whereas the main thrust of *MOTOE* had been that a body was *non-commercially* providing a “service”, and that such bodies could “compete” with one another as undertakings. Therefore, in my view – and especially since the decision in *C-271/18 P European Commission and Slovak Republic v. Dôvera zdravotná poisťovňa, a.s.* – it should be considered that *MOTOE* is no longer good law, having been tacitly reduced to its facts. It has also been suggested in the scholarship, with which I agree, that it is generally a very tenuous assumption to claim that a cultural institution, as a public body, would “compete” with any private, commercial operators (e.g. private museums) that purportedly seek to gain a profit, much less with public bodies.⁷⁸ As such, the Commission ought not to continue its pre-2016 approach denying a non-economic character to certain bodies.

Final Remarks

In my view, the net effect of the above should be that the approach of the Commission to the effect that certain public bodies operating in the field of culture and heritage conservation are, or are likely to be, “undertakings” for the purposes of Article 107(1) TFEU, is not in line with Article 107(1) TFEU as it is currently interpreted

⁷⁷ *Ibidem*, para. 49.

⁷⁸ On this point see also A. Held, in: N. Pesaresi et al. (eds.), *op. cit.*, pp. 926 and 927.

by the CJEU. Specifically, continuing reliance on *MOTOE* as the authoritative case to justify the position that certain bodies are “undertakings” – a stance which continues to this day,⁷⁹ – is not reasonable. The Commission should always, on pain of breach of Article 107(1) TFEU and of the general principles of EU law (in particular those of the protection of legitimate expectations raised by its 2016 Notice), carry out a detailed study as to whether the body at issue in a given case is actually engaged in economic activities that are genuinely carried out for remuneration, i.e. for a genuine consideration. To avoid classifying unique heritage sites as “undertakings”, viz. the *Messara* decision, the Commission should respect its own 2016 Notice, as well as genuinely take note of the CJEU decision in *C74/16 Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe* that economic activities require genuine consideration. Specifically, selling souvenirs as a side activity in a museum shop which does not supersede the main activity of a heritage site (neither in scope or financially), does not alter the fact that the heritage site involved *is not meant to be a business operation operating for genuine consideration*, and thus is not an undertaking. Since at least *C-271/18 P European Commission and Slovak Republic v. Dôvera zdravotná poisťovňa, a.s.*, the Commission should not have treated non-economic bodies engaged in a given activity as being in the same position as bodies operating for profit within the scope of that activity, especially where such profit-driven bodies are only hypothetical (e.g. viz. SA.60697 (2020/N) – Slovakia). For the purposes of providing a “safe harbour” for cultural bodies, the Commission should follow up on its findings from SA.42545 (2015/N) – Germany, where aid up to 20% of the actual cost of operation that would have been paid by the visitors in ticket prices did not alter the fact that a body is not carrying out an economic activity. Such a specific threshold does not follow from the Commission’s practice under the 2016 Notice as it stands now. In other words, there should be clear-cut guidance from the Commission on how and when to regard such activities as “ancillary” to a body’s cultural functions, and thus still non-economic.⁸⁰ In this regard the 2016 Notice likely would have to be updated to reflect the current state of the case-law of the CJEU. However, cases like the SA.101365 (2021/N) – Poland make this unlikely without an explicit intervention by the Court.

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⁷⁹ See most recently, Commission Decision (EU) 2021/1757 of 4 December 2020 on the aid scheme SA.38399 – 2019/C (ex 2018/E) which Italy implemented – Corporate Taxation of Ports in Italy, OJ L 354, 6.10.2021, p. 1, para. 86, with *MOTOE* as the allegedly most up-to-date authority.

⁸⁰ See K. Bacon, *European Union Law of State Aid*, Oxford University Press, Oxford 2017, p. 25.

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