The Internal Perspective

A Study of the Role of Cultural Policy Considerations in EC Competition Law
15.1 Introductory remarks

Cultural considerations have always been a sensitive area in the process of integration. Indeed, the topicality of the cultural considerations and competition law already became clear at the very inception of EC competition. The Dutch system of fixed book prices, for example, was notified to the Commission back in 1962.\(^7\) The Single European Act and Maastricht and Amsterdam Treaties have resulted in the insertion into the EC Treaty of a number of cultural clauses none of which, however, have been conducive to solving the riddle of cultural considerations and competition law. Below we will first address the issue of comparability. For that we will need to analyse what exactly cultural policy is about and the relation between cultural policy and competition law. Moreover, we will need to examine how these findings relate to the mutually reinforcing relation that we have seen to exist between competition and environmental protection. In the second part we will look at the European cases that concern the role of cultural considerations and competition law. For reasons of practicability, we will concentrate on Article 81, 86 and 87 EC. There are essentially three reasons for this. Firstly, the overwhelming majority of the competition case law involving environmental concerns concerns these provisions. Secondly, other areas of competition law (notably Merger Control) have been shown to be of limited interest as regards the integration of environmental and competition concerns in that little or no case law exists.\(^8\) Below, we will therefore concentrate on three areas where cultural considerations have played a role in EC competition law. These are: book price fixing (Article 81 EC), state aids for cultural purposes (Article 87 EC) and exclusive rights for cultural reasons (Article 86 EC).

15.2 Relevance

The protection of culture, just as the protection of the environment, is a diffuse interest and as a concept 'culture' is difficult if not impossible to define accurately. The EC Treaty, for example, does not define the concept of culture or cultural policy. If cultural policy is taken to consist of the maintenance and furthering of culture, the definitional uncertainty surrounding the term culture will immediately result in definitional uncertainties surrounding the concept of cultural policy. However, this uncertainty should not stand in the way of this research as it in no way contradicts the existence of culture or cul-

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\(^8\) See, however, case IV/M.423, Newspaper Publishing, supra chapter 5.3, that lead to a so-called Article 21(3) case under the Merger Regulation.
Cultural policy and the fact that cultural considerations may conflict with competition law objectives.⁹

What, then, appears to be the basic idea underlying cultural policy? In general it can be said that is about maintaining or developing a certain culture. As culture is closely connected with identity, the culture that is the object of cultural policy will vary with the different identities that certain groups of people have identified for themselves. The general theme throughout all these different cultural policies, if we focus on the effects that they have or seek to have on the market, is that cultural policy aims to increase the supply of cultural services or goods. Be it through ensuring sufficient income for the artists, ascertaining attractive prices, direct subsidisation or facilitating cross-subsidisation, the result of cultural policies is supply-oriented in that it aims to have, for example, more books being published, more bookstores that carry a wider range of books, more theatre companies or more newspapers with independent editorial boards. Cultural policy does not aim so much at an increase of supply as such but also wants to increase diversity of supply. In short, the aim of cultural policy is to increase or maintain availability and pluriformity on the supply side of culture.¹⁰ In terms of competition, this effectively means that competitors are protected, rather than competition. Unmitigated competition on the market for cultural goods or services would undoubtedly result in less operas being broadcasted whereas soap operas would probably be televised just as much for the simple reason that operas are a relatively unattractive product for a large group of consumers. So the aim of maintaining pluriformity can actually be said to be primarily directed at what may be called 'high culture': poetry, experimental dance, and classic music. These are the classic merit goods that the market would not bring about by itself.

The relation vis a vis competition is therefore fundamentally different for cultural and environmental policy. Whereas environmental policy may in the short-term conflict with competition, both are ultimately mutually reinforcing according to the model of integration. By contrast, cultural policy will, always have to keep the supply and diversity of producers of high culture at a level that would not come about if the market forces were released.¹¹ Ultimately, competition and culture are antagonistic. How does this relate to the comparability of cultural considerations and competition policy with environmental considerations and competition? A first argument in favour of comparability or relevance is the fact that cultural and competition policies are ultimately irreconcilable.

¹⁰ This is reflected in the text of the cultural integration provision Article 151(4), infra. See furthermore, fourth consideration of the Council Resolution on the application of national fixed book-price systems, OJ 2001 C 73/5.
¹¹ Unless, of course, a larger group of consumers would develop a liking for high culture or the concept of high culture would be abandoned.
Article 81 prohibits and will always stand in the way of certain agreements that are considered necessary from a cultural perspective. Similarly, certain broadcasters may be unable to survive and are therefore aided by the state for cultural reasons whereas Article 87 actually prohibits such aids. The relation between cultural considerations and competition law should therefore be fundamentally different from that between competition and environmental protection.

A second argument in favour of the relevance of cultural policy for this research is the fact that the EC Treaty also contains an integration clause with regard to cultural policy. According to Article \(151(4)\) EC

\[ \text{The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures}. \]

Does this, however, immediately render cultural policy and its relation with competition of interest for the purpose of this research? The answer must be: to a certain extent. In our opinion, the relation between environmental concerns and competition law is unique because of the polluter pays principle. Through this principle, as was shown in chapter four, the competition mechanism and environmental protection requirements can stand in a mutually reinforcing relation. Such a relation is not easily conceivable for cultural policy and competition as both are, as we have seen above, ultimately contradictory with regard to their objectives.

Contrary to this, environmental policy does in the end not have to be incompatible with competition policy, as was shown in Part One. Conflicts between competition and environmental policy are likely to arise only during the transitory phase during which the polluter pays principle is being implemented. Once it is fully implemented, distortions of competition no longer necessarily follow from environmental law and offsetting restrictions may very well even be counterproductive precisely because of this polluter pays principle. No such principle easily springs to mind for cultural policy. With regard to cultural policy one could only just begin to imagine a 'culture-barbarian-pays-principle' according to which, for example, those who love soap operas should pay whereas the aficionados of operas do not have to pay. To take the example even further, imagine a scheme whereby TV broadcasters have privately set up a fund in which they collect 'soap opera fees' from the consumers which they then distribute over opera houses. However far-fetched and improbable, this is at least possible. The trick is of course in distinguishing high from low culture; the barbarians from the aficionados.

\[^{12}\] Technically, this should not be impossible with pay per view technology.
With these remarks in mind we must come to the conclusion that the role of cultural policy considerations in EC competition is of relevance for the purpose of this research because we can compare the way in which competition law deals with conflicting objectives in cultural cases with the way in which it deals with conflicts between environmental and competition policy. The lack of a principle that functions analogously to the polluter-pays-principle should, however, lead to a different stance on the part of the authorities in charge of competition policy. Precisely because of the absence of such a principle and the fact that in the end competition policy and cultural and industrial policy collide with one another there should be no integration at all. In other words, cultural policy considerations cannot be integrated and can only either take precedence over competition law or be considered of secondary importance to competition considerations. Let us now turn our attention to a study of the Commission decision-making practice and Court case law with regard to cultural policy considerations in EC competition law.

15.3 The role of cultural policy considerations in EC competition law

As has been mentioned in paragraph 9.1 above, there have been conflicts between competition law and cultural policy primarily with regard to Articles 81, 86 and 87 of the EC Treaty. In particular, these cases have concerned fixed book prices (relevant with regard to Article 81 EC) and the funding of public television and books (relevant with regard to Articles 86 and 87 EC).

Below, we shall be investigating the role that cultural policy considerations have played in Commission practice and case law in these areas of competition law with regard to the broad areas outlined above. As an intermezzo we shall also be looking shortly at the decisions taken pursuant to the Netherlands competition act with regard to cultural cartels and the system for book price fixing in Germany. Because much has already been said on the general principles underlying EC competition law in Part Two, we shall not be paying any attention to these general principles in this chapter and concentrate on the conflicts.

15.3.1 Fixed book prices

In the introduction to this chapter we have seen that fixed book prices have presented a problem for European competition law from its inception onwards. Essentially two systems of book price fixing can be discerned: those set up privately and those set up by the state. With regard to the latter type, the French system of regulatory prescribed fixed prices has been chal-
lenged several times but the Court has consistently held that as Community law stand now, it does not oppose such legislation. With regard to private systems, there have been three major cases involving the Dutch, German and English book price fixing schemes. Despite differences in the specificities of the price fixing (individual or collective vertical price fixing) all schemes have in common that they allow a publisher to fix a price that must then be observed in all sales to final consumers, this in order to prevent 'ruinous competition'. Furthermore, the basic cultural rationale behind this appears to be twofold: to ensure pluriformity and availability of books. Moreover, the application of EC competition law has been limited to the cross-border effects of such systems. The Commission therefore does not deal with the purely national implications of fixed book price systems. This may be deemed an application of the integration principle in connection with the subsidiarity principle. It is submitted that this territorial demarcation flows from the system of EC competition law and is, if at all, the result of only the subsidiarity principle in that the Commission effectively leaves the appraisal of such national schemes to national competition authorities.

In the cases where a cross-border element was present, the agreement had effects in one language area that covered several member states. The agreements thus scrutinised all served to make the national systems 'watertight' in that they sought to prevent 'U-turns' or established collective exclusive dealing systems.

The first such case to be examined by the Commission was the VBBB/VBVB case that concerned the agreement between the Belgian and Netherlands association of booksellers. This agreement set up a collective exclusive dealing

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14 The VBBB/VBVB system that had lead to decision 82/123, VBBB/VBVB, OJ 1982 L 54/36, upheld in joined cases 43/82 and 63/82, VBVB and VBBB v. Commission, [1984] ECR 19.
15 The Sammelrevers and Einzelrevers-system, notice pursuant to Article 19(3) of Reg. 17, OJ 2000 C 162/25 and Commission press releases IP/01/1035 and IP/02/461.
18 CPB/SCP 2002, p. 25 et seq.
20 A U-turn situation exists where something, for example a book, is exported solely for the purpose of avoiding the effects of national laws or, in the case of the fixed book prices, collective price fixing schemes.
system between the two associations and obliged both associations to respect the prices fixed by the other. The associations had argued before the Commission that the agreement was necessary for the working of the internal system of vertically fixed prices. Furthermore, the fixed prices were considered by the parties to lead to better production and distribution because they would allow the publisher to cross-subsidise the less popular titles with the more popular ones. The Commission refused to accept this reasoning holding that collective vertical price fixing was not necessary to ensure cross-subsidisation so that the proportionality test under Article 81(3) was not satisfied. Moreover, the Commission considered that consumers would not receive a benefit from the agreement in that the fixed price in no way contributes to lower prices while consumers are made to pay (in part) for unpopular books. The Commission's critical attitude towards the cultural objectives of these private agreements can probably best be seen where it holds that:22

'[I]t is not for undertakings or associations of undertakings to conclude agreements on cultural questions, which are principally a matter for government (although the Commission recognizes that undertakings can also play a valuable part in the dissemination of culture)'.

This consideration as part of the Commissions appraisal of the indispensability criterion for an exemption could be taken to mean that it will never consider a private agreement to be necessary for the attainment of cultural goals for the simple reason that these matters belong to the imperium. The Court of Justice, after having indicated that it concerns the cross-border aspects only, upheld this decision by stating that the Commission had not manifestly exceeded the boundaries of its discretion.23

The later Net Books and Sammelrevers cases confirm this approach by the Commission. It must, however, be taken into account that those cases were also confined to the cross-border effects of those systems and did not address the validity of the pluriformity/availability arguments directly. The Publishers Association applied for annulment of the Commission's decision in the Net Books case to deny an exemption. The Publishers Association argued, inter alia, that the Commission had failed to take account of a ruling by the British Restrictive Trade Practices Court in which the Net Book system was considered not to be contrary to the public interest and the existence of an English-Irish single language area.24 The Court of First Instance rejected the application for annul-

22 Ibid., para. 60.
ment but the Court of Justice set this aside. The rejection by the Court of First Instance of the arguments regarding the failure to take account of the ruling of the Restrictive Trade Practices Court was set aside primarily because of procedural reasons. However, the failure to take account of the single Irish-English language area has been taken to be a start of an application of the cultural integration clause.  

The VBBB/VBVB, Net Books and, to a lesser extent, Leclerc cases have resulted in a number of public political statements by the Council and European Parliament with regard to the application of Community competition law to national systems of book price fixing. In 1997 the Council adopted a Decision where it recalled that fact that Article 151(4) (then Article 128(4) EC) had been included in the Treaty and asked the Commission to examine whether and to what extent that provision may alter the compatibility with competition of fixed book prices. In a 1999 Resolution that Council called upon the Commission to take account of the integration provision and the special cultural consideration surrounding books while applying EC competition law. Furthermore, the European Parliament adopted a Resolution that follows much the same lines in 1998. Most recently, in its 2001 Resolution on the application of national fixed book-price systems, the Council notes the existence of (now) Article 151 EC and calls upon the Commission to take account of the dual nature of books as both tradable goods as well as carriers of cultural identities.

What we see happening here is the Community legislator becoming active in a way that falls short of actual legislative action. Now that the Commission has been granted the sole power to grant exemptions pursuant to Article 81(3), the Council has only two methods left if it wants to ascertain a larger role for cultural considerations. First, it may issue legislation prescribing such a larger role. Second, it may choose to exert political pressure on the Commission to take cultural considerations into account to a larger extent. As we will see below, the Community legislature has used its legislative powers to increase the role of cultural considerations with regard to state aid law. Differences of opinion as to the usefulness and necessity of book prices fixing as a means of cultural policy have probably kept it from acting in the same manner with regard to Article 81. We will see these differences when we examine the situation with regard to book price fixing in a number of member states.

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Since the Commission does not consider itself empowered to examine national systems of book price fixing, it will be interesting to look at the practices in a number of member states. In this respect there are some notable differences. Germany, for one, explicitly allows vertical fixing of book prices ("Verlagserzeugnisse", published products) in Section 15 of its Gesetz gegen Wettbewerbsbeschrankungen (Act Against Restrictions of Competition, hereafter referred to as GWB). Moreover, several German Courts have upheld the legality of these price fixing agreements.\(^{31}\) The German Parliament is currently preparing legislation that may prescribe book price fixing for Germany.\(^{32}\)

As we have seen above when we looked at the Leclerc cases, the French government actually prescribes book price fixing in its legislation.\(^{33}\) In the UK, the Net Book System has been abolished in 1995 partly as a result of the advent of large book retailing chains that breached the Net Book Agreements by granting rebates. Currently, book prices are completely free. This, it has been observed, did not lead to decreased pluriformity (number of published titles) or large decreases in availability (number of bookstores) but did result in higher prices.\(^{34}\) Similarly, Sweden abolished its book price fixing system in 1970 with further liberalisation in 1992. The resulting free market has led to such a decrease in the availability of books (number of bookstores) that the Dutch secretary of state for culture has indicated that he would like to first examine the Swedish experiences before deciding on the fate of book price fixing in the Netherlands.\(^{35}\)

In the Netherlands the KVB system for Dutch language books has been granted immunity from the Mededingingswet (Netherlands Competition Act) through an exemption granted by the government.\(^{36}\) The reasons for this exemption appear to have been primarily procedural and not primarily related to any cultural objectives.\(^{37}\) An evaluation of the system concludes that the KVB system is not the best instrument to achieve the cultural objectives sought. Nevertheless, the conclusion is that some correction of the market mechanism (subsid-
disation) is needed to attain the cultural objectives. With regard to non-Dutch (imported) books, the Nederlandse Mededingingsautoriteit (NMa; Netherlands Competition Authority) has held that the price fixing does violate the cartel prohibition of the Netherlands Competition Act and, moreover, has refused to grant an exemption.\textsuperscript{38} The reasons for this refusal correspond largely to the Commission's findings and the conclusions of the CPB/SCP evaluation report. More specifically, the NMa considers that book price fixing for imported books does not lead to the maintenance of a fine meshed distribution systems for books.\textsuperscript{39} Moreover, retail price maintenance means that prices are at a level that is higher than would come about under market conditions so that there is no fair share for consumers.\textsuperscript{40} Similarly, retail price maintenance makes the advent of more efficient forms of book distribution more difficult resulting, again, in the absence of a fair share for consumers.\textsuperscript{41} Finally, the NMa considers that the vertical price fixing is not indispensable to achieve the cultural objectives of ensuring availability.\textsuperscript{42}

As an interim conclusion with regard to book price fixing it may be said that the role that cultural considerations have played in European competition policy is in conformity with the model of integration developed in Part One as well as the remarks with regard to the relevance made above in paragraph 9.2. The mutually irreconcilable nature of cultural policy and competition law are reflected in the case law of the Commission, Court and national competition authorities in that there are no attempts to achieve integration within the meaning of the model of integration. The role of cultural considerations in the application of competition laws is confined to the standard application of exemption clauses or legislative action by the governments of the member states that serves to remove book price fixing from the scope of the competition laws. The competition laws cannot and are not simply applied or interpreted in such a way as to allow for an integration of cultural concerns. As regards the exemption clause the following may be said. Better availability and more pluriformity of books mean better distribution and production, which means that the first requirement for an exemption is fulfilled. At first sight, this would also seem to

\textsuperscript{38} NMa Decision in Case 227, Nilsson \& Lamm. In the decision of 16 December 1998, the NMa considered that the prohibition on cartels was applicable and that no exemption could be granted. In a decision of 22 August 2000 the NMa rejected the administrative appeal (bezwaar) against the original decision. The Nilsson \& Lamm case contains references to similar systems of price fixing for foreign books (para. 3).

\textsuperscript{39} NMa Decision of 16 December 1998, paras. 37-44.

\textsuperscript{40} Ibid., paras. 46-48.

\textsuperscript{41} Ibid., para. 49.

\textsuperscript{42} Ibid., para. 50. Because none of the first three cumulative requirements for an exemption have been fulfilled, the NMa does not address the fourth requirement (sufficient residual competition).
mean that there is a fair share for consumers in this benefit. On the other hand, the Commission's reasoning in the VBBB/VBVB case in this respect also has something to be said for it: essentially fixed book prices and cross-subsidisation mean that everyone is paying for the 'high culture' pleasures of some. It must, however, also be pointed out that this does not mean that the second requirement for an exemption is impossible to be met for book price fixing schemes. In Part Two it has been shown that the purpose of this requirement is only to exclude the exemption of those agreements that confer an advantage on the parties to the agreement only.\textsuperscript{43} Even though a fixed book price does indeed primarily benefit the publishers and booksellers, it still benefits a group of consumers as well. The bottleneck, however, is the indispensability of the fixed book prices to bring about the increased availability and pluriformity. Without wanting to pass judgment on the necessity of fixed book prices as an instrument to ensure pluriformity and availability it can be said that the evidence in this respect is inconclusive. The CPB/SCP, for example, have noted in their evaluation of the fixed book price in the Netherlands that this has not kept the availability as well as pluriformity from decreasing.

All in all, practice with regard to fixed book prices and competition law shows that an \textit{a priori} exception or exemption as part of the application or interpretation of EC competition law by the Commission or Court is out of the question. The role of cultural considerations within Article 81 is thus – and, it is submitted, rightly so – left up to the legislator. As will be seen in the next paragraph, the legislator has indeed provided for a role for cultural considerations with regard to Article 87 EC.

### 15.3.2 State funding of books, films and public television

Funding can be provided though a private scheme (such as the fixed book prices) or by the government. In the latter case, the prohibition on state aids, Article 87 EC, may very well apply. Prior to the amendments made to the EC Treaty by the Treaty on European Union ('Maastricht'), it was uncertain whether and on what legal ground cultural subsidies could be exempted.\textsuperscript{44} The Treaty on European Union changed all this by including letter (d) in Article 87(3) EC according to which:

\begin{quote}
'(3) The following may be considered compatible with the common market:

[...]

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.'
\end{quote}

\textsuperscript{43} \textit{Supra}, paragraph 3.7.3.

\textsuperscript{44} \textit{Cf.} Albers 1999, p. 276 \textit{et seq.}
The application of this provision in practice can be seen in the **CELF saga**. This line of cases can in many ways be said to have been started by the consideration that literature must not only be read to further culture in the homeland but it needs also to be read abroad. For this reason, the French government has decided to fund the *Coopérative d'Exportation du Livre Français* (Centre for the exportation of French books, **CELF**). The CELF received an export subsidy for small orders by foreign booksellers. This was allowed because it served a cultural purpose in that it improved the availability abroad of French literature. Furthermore, CELF administered three aid schemes for exports to non-member states. Whilst recognising that books 'are an exceptional product in competition terms' the Commission could not rule out the possibility of a distortion of competition and an effect on trade because of the export aid granted through CELF. In order to determine whether such effects were likely, the Commission wanted to know whether only publishers established in France could join CELF and whether the aid was granted for the export of all French language books or only for books of a certain cultural value. Apparently, the answer by the French government that CELF was open to any French-language publisher wherever it is established while the aid was granted irrespective of the cultural value satisfied the Commission. The Commission thus exempted the aid on the basis of Article 87(3)(c) EC. Because the decision dates from 18 May 1993 and the amendments to the EC Treaty by the Treaty on European Union entered into force on 1 November 1993, the Commission was unable to apply the cultural exemption to be found in Article 87(3)(d). In case T-49/93, the applicant, SIDE, argued that the Commission should have opened the Article 88(2) procedure and could not restrict itself to the preliminary procedure laid down in Article 88(3). Thus, the Court needed to examine whether the Commission could have come to the conclusion that the aid was compatible with the common market so that the Article 88(2) procedure needed not to be opened. In particular, the Court considered whether, firstly, the Commission could conclude that CELF's objective was cultural and, secondly, conditions of competition could indeed be said not to have been affected to an extent contrary to the public interest.

As to the cultural objective, the Court holds that:

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48 Ibid., para. 61.

49 Ibid., para. 62.
‘it is common ground that the aim of the French government is the spread of the French language and French literature [...] Accordingly, the Court must conclude that determining the aim of the aids at issue did not pose any particular difficulties for the Commission [...].’

With regard to the requirement that the effect on competition and intra-community trade must not be such as to be contrary to the public interest, the Court came to the conclusion that the Commission could not have come to a positive outcome. In particular, the weight attached by the Commission to the fact that all French language publishers could join CELF and the corresponding failure to take into account the effects on the market for the export of books (on which SIDE is active together with CELF) showed that the Commission’s decision not to open the Article 88(2) procedure was not warranted by the facts.\(^50\)

The decision thus annulled was replaced with Decision 1999/133. In this decision the Commission sets out exactly what it meant with the statement that books are ‘an exceptional product in competition terms’. The Commission recognises that competition with regard to books is limited by language and culture but this does not completely rule out the existence of competition.\(^51\) Whilst acknowledging that the aid may also benefit the publishers and consumers of books, the Commission is of the opinion that CELF itself is the main beneficiary. After having ruled out the applicability of the exemptions listed in Article 87(2) and those mentioned in Article 87(3)(a), (b) and (c), the Commission is thus left with the cultural exemption listed in Article 87(3)(d) EC. With regard to this exemption the Commission first sets out to analyse the market and comes to the conclusion that the reference market must be that for the export of French language books in general.\(^52\) Furthermore, the Commission considers the scheme to be proportionate in that the aid is limited to cover only the extra costs and not exclusively reserved to CELF.\(^53\) As regards the cultural justification, the Commission refers to the Court’s judgment in the first SIDE case. Moreover, the Commission gives two further reasons to show that the measure indeed serves a cultural objective. Firstly, the scheme only applies to books published in the French language so that only that language is promoted. Secondly, CELF only subsides small orders that, according to the Commission, can be for specialised works of literature again exemplifying the cultural nature of the scheme.\(^54\) The Commission adds that textbooks for educational purposes are ordered in large quantities and therefore fall outside the scheme. Finally, the Commission addresses the question of whether competition and intra-commu-

\(^{50}\) Ibid., paras. 74 & 75.
\(^{51}\) Decision 1999/133, CELF, OJ 1999 L 44/37, chapter IX.
\(^{52}\) Ibid., chapter X.
\(^{53}\) Ibid., chapter XI.
nity trade are affected to such an extent as would be contrary to the common interest. Because of CELF's small share on the market for the export of French language books, the Commission considers that the effects are not such as to be contrary to the common interest.

As was already indicated above, there was a second SIDE case in which the second CELF decision was also annulled.\(^{54}\) Basically, the Commission was considered by the Court to have committed a manifest error of assessment as regards the market definition. SIDE had argued that the effects of the aid scheme needed to be investigated not on the market for the export of French books in general but on the sub-market of export agencies.\(^{55}\) It was on this sub-market that CELF competed with, among others, SIDE. The Court agreed with SIDE that the Commission should have examined the effects of the aid measure on competition and trade between other companies that are active on the market for the export of small orders of French books.\(^{56}\)

What, then, is the lesson to be learned from the CELF saga? Apparently, establishing the cultural objective of an aid scheme does not present any particular difficulties for the Commission or Court. The bottleneck has rather proven to be the final criterion pursuant to which the cultural objective is balanced with the common interest in having an undistorted market. In particular, the CELF decisions appear to be hampered by the Commission's wish to exempt the French aid scheme even when this may not have been appropriate from a competition perspective. Even though a role for cultural concerns has been ascertained by the legislator through the addition of Article 87(3)(d), the Commission wanted to further increase this role. In doing so, it stretched the limits of its discretion under Article 87 more than was allowed by that provision.

CELF involved the dissemination of literature. Even though the governments may prefer the general public to read literature, it has also recognised that watching television and films are far more popular than reading books as a means of consuming culture. As a means to ensure that television broadcasts are 'sufficiently cultural', media content has been regulated to a large extent. Furthermore, this state intervention in the market for the provision of television services has been cleared by the Court as a mandatory requirement with regard to Article 49 EC.\(^{57}\) Moreover, governments have subsidised the production of cultural as opposed to mainstream ('Hollywood') films. With regard to state aid to the film sector, the Commission has had to make a distinction between state aid for cultural purposes and state aid for the furthering of the industry. According to the Commission state aid for film production may serve a cultural objective and can thus be exempted under Article 87(3)(c). However, such aid


\(^{55}\) Ibid., para. 46.

\(^{56}\) Ibid., para. 71.

schemes may never violate the basic prohibitions enshrined in the Treaty such as the prohibition on discrimination on the basis of nationality.\textsuperscript{58} This reasoning has kept the Commission from declaring compatible with the common market a Greek aid scheme that subsided only films that are, \textit{inter alia}, produced by Greeks, with a Greek director and with three-quarters of the personnel having Greek nationality.\textsuperscript{59} This direct discrimination on the basis of nationality prevented an exemption. In other cases, the Commission similarly prevented other member states from confusing the nationality of the film crew with the cultural identity.\textsuperscript{60} Currently, the Commission allows for a 50\% subsidy for films that have a 'cultural impact' (\textit{i.e.} excluding commercial productions) subject to the requirement that the producer must be free to spend at least 20\% of the budget in other member states. For 'esoteric low budget movies' a higher aid intensity is allowed.\textsuperscript{61}

On average, Europeans went to the cinema 2.03 times in the year 2001.\textsuperscript{62} Of the same Europeans 97.6\% watch television.\textsuperscript{63} Although, of course, it does not follow from these statistics, they do indicate that there is a good chance that, on average, Europeans will watch television more frequently than they go to the cinema. This was and continues to be recognised by both member state governments as well as the Community institutions. This has resulted in, among others, a protocol on the system of public broadcasting in the Member States annexed to the EC Treaty by the Treaty of Amsterdam. Furthermore, the liberalisation of the broadcasting industry has resulted in a number of commercial entrants on the market. These private companies have complained with the Commission about distortions of competition arising from the funding of public broadcasters.

Among others, this has resulted in the \textit{RTP (Radiotelevisão Portuguesa)} case concerning the funding of the Portuguese public broadcaster.\textsuperscript{64} In its decision, the Commission concluded on the basis of the findings in the preliminary Article 88(3) investigation that there was no state aid since the funding was provided in a transparent manner and did not exceed the extra costs arising from the public service obligation. Accordingly, the Commission considered that there was no advantage conferred on RTP so that it was not necessary to open the Arti-

\textsuperscript{59} Decision 89/441, Greek Films, OJ 1989 L 208/38.
\textsuperscript{60} E.g. the French and German schemes mentioned in the XXIIInd. Competition Report (1992), paras. 442-444.
\textsuperscript{61} See answer by Monti to written question E-1568/00, OJ 2001 C 113E/27. See for an application of these rules: Decision 380/00/COL of the EFTA Surveillance Authority with regard to a film subsidisation scheme in Iceland, OJ 2001 L 89/37.
\textsuperscript{62} Eurostat, Eurobarometer ‘Europeans’ participation in cultural activities’, April 2001, p. 9.
\textsuperscript{63} Ibid., p. 2.
\textsuperscript{64} Case T-46/97, Sociedade Independente de Comunicação (SIC) v. Commission, [2000] ECR II-2125.
article 88(2) full investigation procedure. Commercial Television Company SIC applied for annulment of this decision with the Court of First Instance on the grounds that the Commission should have opened the Article 88(2)-investigation procedure. Just as in the CELF case, the Court set out to ascertain whether the facts indeed warranted the decision by the Commission that there was no *prima facie* state aid. The Court considered that

> 'In order to determine whether a state measure constitutes aid, [...] it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions.

> [...] the grants paid [...] by way of compensation have the result of giving that undertaking a financial advantage.

> The fact that [...] the grants were merely intended to offset the additional cost of the public service tasks [...] cannot prevent them from being classified as aid within the meaning of Article [87] of the Treaty.'

According to the Court of First Instance such compensatory grants must, contrary to the Commission's appraisal, be considered state aid. The fact that they merely compensate the extra costs arising from the public service obligation can only be taken into account under Article 86(2). This leads us to the interesting question to what extent a public service obligation can remove a certain activity from the scope of Article 87 altogether.

In his recent opinion in the GEMO case, Advocate-General Jacobs has set out the discussion with regard to this question in discerning two basic approaches which he calls the state aid and the compensation approach. Under the state aid approach any government funding will constitute state aid and only Article 86(2) or one of the exemptions listed in Article 87(2) or (3) can save such grants from the prohibition of Article 87(1). However, the compensation approach means that only overcompensation of the public service costs will constitute state aid. It may be recalled that the Court's case law in this respect has not been entirely consistent but that in the recent Ferring case the Court clearly adopted the compensation approach. If this case law is upheld, the Commission may

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65 Ibid., paras. 22-24.
66 Ibid., paras. 70 et seq.
67 Ibid., paras. 78, 79 and 82.
68 Ibid., para. 84.
69 Case C-126/01, Ministre de l'économie, des finances et de l'industrie v. GEMO, n.y.r., paras. 93-95.
70 Cf. ibid. para. 96.
71 Supra, chapter 8.2.3.
72 Whether the Court will continue to apply the compensation approach can probably be seen in the GEMO case referred to in footnote 68 supra and in case C-280/00, *Altmark Trans v. Nahverkehrsgesellschaft Altmark* both of which have not been decided by the Court at the time of writing.
have to change the approach it adopted in the Communication on the application of State aid rules to public service broadcasting. In this document the Commission considers that government funding constitutes state aid (irrespective of whether it is compensatory or not) and can be exempted pursuant to Article 87(3)(d) or justified on the basis of Article 86(2) EC. As far as the adoption of the state aid approach is concerned, the commission will then have to change its approach. This would in turn mean that Article 87(3)(d) and 86(2) have lost much of their significance as well. This is so because it will be nigh impossible to argue that overcompensation is necessary to achieve a cultural objective or to ensure the fulfilment of a task of general economic interest.

This uncertainty does not detract from the fact that it is still interesting to examine the general demarcation between Article 87(3)(d) on the one hand and Article 86(2), on the other, proposed by the Commission. This demarcation follows, firstly, from the fact that, as an exemption from the general rule, Article 87(3)(d) is to be interpreted narrowly. Since that provision refers only to aid to promote culture, other considerations such as to provide education to ensure democracy are considered to be distinct. In this respect the Commission refers to the Protocol that distinguishes between the democratic, social and cultural needs of a society. On this basis the Commission comes to the conclusion that Article 87(3)(d) is applicable only when the aid is separately granted for cultural purposes. Aid that is granted to public broadcasters without differentiation between the three objectives mentioned in the Protocol can nevertheless be justified with recourse to Article 86(2) EC. The Commission appears to have applied this reasoning avant le lettre in the BBC News 24 decision. That case involved state aid for a dedicated 24-hour advertising-free news channel. Apparently, the UK authorities had not invoked Article 87(3)(d) whilst the Commission did not appear to consider that exemption applicable either. As a result, the Commission used the Article 86(2) justification for public undertakings to consider the aid compatible with the common market. It is at the application of Article 86(1) and (2) in the cultural sector that we will be looking in the next paragraph.

73 OJ 2001 C 320/5.
74 Indeed, in its report of 30 May 2002 to the Seville European Council the Commission addresses this point and signals the change in the Court's approach and indicates that it considers it advisable to wait for the judgments in GEMO and Altmark Trans cases, referred to in footnote 71 supra, before coming to a final position.
76 Commission Communication on the application of State aid rules to public service broadcasting. OJ 2001 C 320/5, paras. 26, 27.
77 Interpretative protocol on the system of public service broadcasting, referred to ibid, at para. 15.
78 Decision of 14 December 1999 in case NN 88/98, para. 36.
However, before we move on to this issue, the interim conclusion with regard to the application of the state aid rules in the cultural sector must be that there is no integration of cultural and competition that corresponds with the model of integration. This is best shown by the cases that involve direct state funding of daily running costs. These aids must be characterised as operating aids, yet the conditions for compatibility with the common market differ markedly from those imposed on environmental operating aids. It may be recalled that the Commission requires environmental operating aids to be of a limited duration and possibly degressive. The rationale behind this, as we saw above in paragraph 8.5.4 is identical to the basic idea underlying the model of integration – in the end subsidisation of environmentally friendly products and production methods should no longer be necessary. With regard to cultural operating aids the implicit idea appears to be that such aids will always remain necessary precisely because an internalisation of cultural costs is impossible.

15.3.3 Public broadcasters as public undertakings

On the basis of what has been said above it can be concluded that Article 86(2) is available to save public broadcasters from the wrath of the market. This conclusion, however, should not make us forget that in the first instance Article 86(1) EC applies. An interesting case concerning the grant of a culturally motivated exclusive right is the VTM case. Again, the story starts with a decision by the Commission. In this decision the Commission considers the statutory monopoly for the broadcasting of television advertising given to VTM to infringe Community law, in particular Articles 86(1) in conjunction with Article 43 EC.79 The Flemish legislation at issue in this case moreover demanded that the beneficiary of this exclusive right must be a private company of which at least 51% of the shares must be held by Dutch language newspapers and magazines established in Flanders. This latter requirement, imposing a link between the broadcaster and written media, was the result of cultural considerations. Apparently, the Flemish government noticed the popularity of TV and the accompanying fact that advertising revenue was transferred from the written media to the television broadcasters. To ensure sufficient income for the written media and thus to ensure their survival and the maintenance of pluralism in the press, the exclusive right was granted in this form so as to ascertain that part of the advertising income would be transferred back to the written media.80 The underlying idea was therefore one of cross-subsidisation between television advertising income and written media.

79 Decision 97/606, Exclusive right to broadcast television advertising in Flanders (VTM), OJ 1997 L 244/18.
80 Ibid., para. 2.
The Commission qualifies VTM’s monopoly over television advertising as applying without distinction but ‘incontestably protectionist’.
The Commission then states that a restriction on the freedom of establishment would have to be accepted if it was shown to be necessary in the light of an imperative requirements in the public interest. Indeed, the Commission states that the Flemish government initially invoked a cultural justification of the monopoly. However, in the light of developments in the media sector, the Flemish government no longer relied on this argument during the further proceedings. The monopolist itself, VTM, did seek to invoke cultural objectives and the need to ensure pluralism as imperative requirements. According to the Commission, cultural policy and pluralism are indeed imperative requirements. However, in this case they do not justify setting Article 43 EC aside as that would deprive that provision of any effect whatsoever. Moreover, the Commission considers that there is no necessary relationship between the statutory monopoly and the cultural objectives and the preservation of pluralism. It then sets out to substantiate this conclusion with the following reasons. Firstly, there is no guarantee that all members of the written media in Flanders can become shareholders in VTM and thus receive a share in the advertising profits. Secondly, the Commission notes that there is no guarantee that the shareholders will actually use the advertising revenue to overcome the financial difficulties and thus actually preserve pluralism. Finally, the Commission points out that the 51% share may very well end up being held by one company thus having no effect on pluralism at all. This reasoning is in fact quite similar to that employed with regard to book price fixing where the Commission – and, in the Dutch cases, the Netherlands Competition Authority – have held that increasing income does not necessarily result in cross-subsidisation and consequently, pluralism.

The Commission considers that Article 86(2) cannot be relied upon in this case because, firstly, VTM does not appear to have been entrusted within the meaning of that provision. Secondly, the Commission considers that the exclusive rights for VTM are disproportionate. The Court of First Instance upheld the decision in the VTM case.

Whilst the Commission ruled out the application of Article 86(2) in VTM, this provision, as we have seen above, has played a major role in the Commission’s practice with regard to the funding of public broadcasting. In the BBC News 24 case, the Commission applied the test that it would codify in the Communication on the application of State aid rules to public service broad-

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81 Ibid., para. 12.
82 Ibid., para. 13.
83 Ibid., para. 14.
85 Decision of 14 December 1999 in case NN 88/98, para. 38.
According to this test the member state must first define the public service remit. Secondly the member state must entrust the performance of the special task to an undertaking. Finally, the application of the rules in the Treaty (i.e. notably Article 87) may not obstruct the performance of the special task (proportionality). This application of Article 86(2) to cultural considerations is in fact identical to the application of Article 86(2) in general.

15.4 Interim conclusion with regard to the internal perspective

This chapter has shown that the role of cultural considerations and (EC) competition law does not amount to integration in the meaning of the model of integration developed in the first part. With regard to Article 81, the experiences gathered in applying that provision to book price fixing schemes show that it is impossible to integrate cultural concerns for the simple reason that the cultural objectives and the objectives of competition law are and remain ultimately antagonistic. The role for cultural considerations is therefore limited to legislative action. Similarly, the application of Article 87 to cultural aid schemes shows that the role for cultural considerations in particular only came about after the Treaty had been amended. The mere fact that cultural considerations are explicitly mentioned as a ground for an exemption from Article 87(1) and the fact that provision (Article 87(3)(d) EC) entails a similar balancing exercise as the provision used to allow environmental state aids, does not mean that an integration has in fact taken place.

This is exemplified by a comparison of the regime in place with regard to operating aid. With regard to environmental operating aid, the Commission is right to state that such aid must be of limited duration and degressive precisely to bring about an integration of environmental concerns and competition law through an internalisation of environmental costs. This approach is completely in line with the model of integration developed in Part One. To cultural operating aid no such logic applies. The production of ‘high culture’ books, films and television will always require funding in order to compete with commercial productions. The Commission, therefore, imposes no time limits or degressivity requirements on the member states when they grant aids for cultural purposes.

86 Commission Communication on the application of State aid rules to public service broadcasting, Of 2001 C 320/5.

87 Ibid., para. 29.