

# The premise of the effect on trade among EU member states in projects concerning culture and heritage conservation within the framework of the implementation of the projects from EU funds – recommendations for judicial decisions

**Jarosław ODACHOWSKI**

**WSB University in Wrocław, Poland**

**Abstract:**

**Aim:** Public aid can be involved even in such peculiar public activity sector as culture and heritage conservation. Hence, the EU projects implemented in this area may be subject to legal restrictions on state aid. In this respect, particular legal doubts concerning state aid arise in the context of “impact on trade” premise. This situation is a consequence of both lack of clear definition thereof and the peculiar nature of culture projects. The present paper is aimed at identifying particular issues that ought to be taken into account when determining the possible impact on trade (recommendations for judicature). These issues aren’t actually defined in law, but only in few judgments and literature. Hence, there is a necessity to make further researches.

**Design / Research methods:** Analysis of legal provisions, judgments and literature.

**Conclusions / findings:** 1) It is practically impossible for relevant legal acts to encompass all possible instances of public aid in culture projects. Undoubtedly, judicature (both, of the ECJ and Polish administrative courts) attempts to fill in this peculiar gap by examining and resolving individual cases. 2) Nonetheless, the judicature is not able to account for all possible situations that can be encountered when implementing projects co-financed by the EU, either 3) due to the specific nature of this project category, all the above-mentioned aspects and possible interrelations among them need to be considered in great detail. Therefore, each and every case has to be examined separately and individually 4) each of the elements should be examined in detail at every stage of determining whether public aid is granted in a given case (here: from the perspective of possible impact on trade) – both by beneficiaries of the EU funds as well as by institutions involved in management and control system and by administrative courts 5) in individual situations, the sequence of occurrence and intensity of individual elements may differ, which means that each and every case needs to be examined and resolved separately as regards the possible impact on trade and, consequently, the presence of public aid.

**Originality / value of the article:** Contemplated problems are a subject of few judgments and literature. Value of this article is a scientific deepening of all discussed issues. This one is addressed to beneficiaries of the EU funds as well as to institutions involved in management and control system and administrative courts.

**Implications of the research:** This article will enable beneficiaries and mentioned institutions and courts to interpret occurrence of public aid in above-mentioned projects in the appropriate way.

*Keywords:* European funds, financial perspective 2007–2013, project, culture, public aid, aid to promote culture and heritage conservation, trading conditions.

JEL: K23, K29

## 1. Introduction

The process of implementation of projects co-financed by the EU is not only an economic challenge (preparation of financial montage or feasibility study as part of the application process), but also a legal one. With respect to the latter, particularly problematic is the determination whether these projects involve public aid (or *de minimis* aid, respectively).

It should be emphasised that all elements constituting public aid can be found in the EU projects with respect to the following premises: aid, state and state resources, selective nature, impact on competition, and impact on trade. Public aid can be involved even in such peculiar public activity sector as culture and heritage conservation. Hence, the EU projects implemented in this area may be subject to legal restrictions on state aid (cf. *Poradnik* 2008). The above statement is derived, *inter alia*, directly from art. 107 clause 3 of the Treaty on the Functioning of the European Union (O.J. EU 2012 C 326, p. 1; hereinafter: TFEU): “The following shall be compatible with the internal market: [...] d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest”.

The specific nature of culture and heritage conservation projects varies: they may be related to development and improvement of culture infrastructure, e.g. construction and modification of culture facilities (concert halls, amphitheatres), protection and conservation of cultural heritage, e.g. revitalisation, conservation, or restoration of listed objects or buildings (*Poradnik* 2008: 70–71). Implementation of such projects enables organisation of various culture events.

In this respect, particular legal doubts concerning state aid arise in the context of “impact on trade” premise. This situation is a consequence of both lack of clear definition thereof and the

peculiar nature of culture projects. The present paper is aimed at identifying all particular issues that ought to be taken into account when determining the possible impact on trade (recommendations for judicature) – Attracting Power, Cultural Event Venue (including the size of the city/town/village, its actual significance, the aspirations of a given place, the geographic location of the planned cultural event and the infrastructure), Uniqueness of the Cultural Event (including the language of the event and the nationality/citizenship of artists participating in a given cultural event), Participants of Culture Events (Tourists) and Announcement/Information Flow (including the language of the announcement, the reach of the announcement and the identification of addressees).

## 2. Possible impact of public aid on trade

The concept of public aid is defined in art. 107 clause 1 TFEU. Based on rather extensive literature and judicature on the issue (Cf. e.g.: Barcz 2006; Dudzik 2002; Lasok 1998; Marquardt 2007; Nykiel-Mateo 2009; Postuła, Werner 2006; Sobczak 2002; Wróbel 2008; Kowalik-Bańczyk 2008: 24ff; Szydło 2006: p. 2ff; Skowron 2007: 2ff; 173/73: *Italy v. Commission* (1974) ECR 709 (718–719); *Fourth survey from the Commission on state aid in the European Union in the manufacturing and certain other sectors*. COM (95) 365 final, 26 July 1995; Opinion of A.G. Capotorti on the case no. 82/77, *Openbar Ministerie v. Jacobus Philippus Van Tiggelle*, [1978] ECR p. 25; judgement of ECJ of February 24, 1987 in the case no. 310/85 *Deufil v. Commission*, [1987] ECR p. 901; judgement of TPICE of September 1, 1995 in the case T-471/93 *Tierce Ladbroke SA v. Commission*, [1995] ECR p. II-2537; judgement of the ECJ of July 11, 1996 in the case C-39/94 *Syndicat français de l'Express international (SFEI) et autres v. La Poste et autres*, [1996] ECR p. I-3547; judgement of ECJ of April 29, 1999 in the case C-342/96: *Spain v. Commission*, [1999] p. I-2459), it should be emphasised that the state aid covers the following elements: aid, state and state resources, selective nature as well as impact on competition.

State aid to entities is also prohibited under art. 107 clause 1 TFEU when it affects trade among Member States. It should be noted that “it is rather difficult to separate impact on intra-EU trade from impact on competition, referred to in art. 107 clause 1 TFEU” (Marquardt 2007: 79). “Therefore, in order to encompass the whole meaning of the term ‘impact on trade’, the word

‘rules’ is needed. Consequently, the meaning of the term becomes much broader than ‘adverse impact on competition’, as it covers not only the rules on (fair) competition but also the whole set of rules governing intra-Community trade (such as *pacta sunt servanda* rule). Yet, it is hard to ignore the fact that both terms have rather similar meanings, although they should not be perceived as tantamount” (Marquardt 2007: 79; cf. also: Dudzik 2002: 48ff; judgement of ECJ of September 17, 1980 in the case 730/79 Philip Morris, [1980] ECR p. 2671; judgement of ECJ of July 13, 1988 in the case 102/87, France v. Commission, [1988] ECR p. 4067).

The following should be also taken into account: the issue of impact of aid on trade rules is not only related to the adverse impact on competition (despite the difference mentioned above), but also allows for defining a relationship between the EU and domestic legislations on subsidies. Competition law applicable mainly to individual businesses can be divided into two categories, based on the place where consequences occur – competition law contained in TFEU (art. 101–106) and domestic competition regulations (Cf. art. 1 clause 2 of the Polish Act of February 16, 2007 on Competition and Consumer Protection).

The analysed premise in the context of regulations on subsidies allows for conclusion that public aid laws, including prohibition on providing such aid laid down in art. 107 clause 1 TFEU, do not apply to situations where its consequences affect the territory of a single state. Hence, it can be said that – unlike in the case of competition law – the division into EU and domestic regulations on subsidies is irrelevant here. The role of domestic legislation is to detail the provisions of substantive and procedural EU legislation. The example of the regulations which develops the substantive EU legislation could be the Regulation of the Minister of Infrastructure and Development of March 19, 2015 on extending *de minimis* aid under 2014–2020 regional operational programmes (Dz.U. [Journal of Laws] of 2015, item 488), while the Act of April 30, 2004 on Procedures to be Followed in Matters Concerning Public Aid (consolidated text: Dz.U. [Journal of Laws] of 2007, item 404, as amended) is an example of the regulation detailing the EU procedural legislation.

### 3. Public aid in projects co-financed by EU

In practice, there are three different variants of public aid associated with deployment of EU funds. In some projects, the provision of public assistance was automatic due to their specific nature (Cf. e.g. Priority No. 1 "Enterprises and Innovation" (Measures: 1.1, 1.2 and 1.4 of the Lower Silesia Province [Województwo Dolnośląskie] Regional Operational Programme for 2007–2013). On the other hand, there are also groups of projects where, by principle, the institution of public aid was not present at all – such as road projects where the aspect of natural monopoly excluded the possibility of adverse impact on competition (cf. *Poradnik* 2008: 14–18).

The third and last group are the projects where it is impossible to establish *prima facie* whether public aid will be involved or not. This necessitates individual assessment of the nature and characteristics of a given project and determination whether all elements forming the legal structure of public aid are present there (public aid test). Even in similar projects, public aid will be involved in some of them while not in others, depending on the presence of individual relevant features and their intensity or interdependencies among them. This group includes culture projects.

In order to establish whether public aid is extended under a specific project it is necessary to define the legal framework for extension of such aid. In practice, two methodologies have been applied for that purpose in the course of implementation of projects co-financed by the EU. Firstly, there has been a legal possibility to notify the European Commission on provision of public aid in order to obtain the Commission's approval. Yet, due to uncertainty as to positive decision of the Commission as well as expected lengthy duration of the whole procedure, in practice the institutions managing operational programmes quite frequently exercised their right to exclude the possibility to apply for financing of projects which would require initiation of the above-mentioned procedure.

Secondly, a classic example was to apply to a given culture project the provisions of a specific assistance programme (public aid scheme) laying down the detailed requirements to be satisfied (e.g. concerning the purpose of the EU financial assistance, categories of beneficiaries, catalogue of eligible expenditures, and finally the intensity of aid understood as "percentage of eligible expenditures covered by public aid": *Poradnik* 2008: 28), in order to consider the funds obtained from the EU by a given entity lawful. Worth mentioning is also the fact that quite often the managing authorities suggested lawful ways to modify projects so that they do not satisfy all

criteria of public aid and, consequently, are not subject to state aid restrictions.

When discussing culture projects it should be mentioned that in 2007–2013 perspective, there was no separate aid programme focussed specifically on culture. The following normative acts were applicable (Cf. e.g. Szczegółowy Opis Priorytetów Regionalnego Programu Operacyjnego dla Województwa Dolnośląskiego na lata 2007–2013 (Uszczegółowienie RPO WD) [Detailed Description of Priorities of Regional Operational Programme for Lower Silesia Province in 2007–2013]):

- Regulation of the Minister of Regional Development of December 15, 2010 on granting regional investment assistance under regional operational programmes (Dz.U. [Journal of Laws] No. 239, item 1599);
- Regulation of the Minister of Regional Development of December 7, 2009 on granting regional investment assistance as regards: power generation, telecommunication infrastructure, R&D infrastructure, and health-resort treatment under regional operational programmes (Dz.U. [Journal of Laws] No. 214, item 1661);

#### **4. Attracting power**

The issue of “impact on trade” in culture projects is usually considered in the context of the so called “attracting power” (cf. *Poradnik* 2008). The attracting power describes the possibility that a given cultural event will be attended by citizens of other Members States. Since participation of foreigners means their actual physical presence (e.g. in a theatre) – what is crucial in the case of such cultural events – the “attracting power” mentioned above becomes of key importance here (cf. judgement of Regional Administration Court in Wrocław, dated October 21, 2010, case no. III SA/Wr 466/10).

It seems that the main issue in legal disputes between beneficiaries of the projects co-financed from the EU funds and institutions granting the funds is the determination of this attracting power. The heart of the matter is to establish whether a given cultural event affects intra-Community trade or has only regional or local reach (Cf. Commission Decision of April 20, 2005, in the case no. N 106/2005 concerning aid for Hala Ludowa [Centennial Hall] in Wrocław, Commission Decision of November 28, 2007, in the case no. N 377/2007 concerning aid for

Bataviawerf – the Netherlands; Commission Decision of October 13, 1999 in the case no. N 530/99 – Restoration of Santa Maria de Retuerta Monastery; Commission Decision of December 21, 2000, in the case no. N 258/2000 concerning the aid for Leisure Pool Dorsten – Germany; Commission Decision of April 30, 2008, in the case no. N 704/2007 concerning aid programme for a theatre production in the Basque Country; Commission Decision of January 21, 2003, in the case no. NN 136/A/2002 concerning the funds for l’Ecomusée d’Alsace – France, Commission Decision of October 10, 2007, in the case no. NN 50/2007 concerning the Austria Indemnity Scheme for Federal Museums; judgement of the Regional Administration Court in Bydgoszcz, dated June 15, 2011, case no. II SA/Bd 492/11; judgements of Regional Administrative Court in Wrocław: dated October 13, 2011, case no. III SA/Wr 701/10; dated October 21, 2010, case no. III SA/Wr 466/10; dated October 13, 2011, case no. III SA/Wr 404/11; dated February 2, 2011, case no. III SA/Wr 664/10; dated May 18, 2010, case no. III SA/Wr 40/10). Hence, it is crucial to analyse individual elements that will help to place a given event in the above-mentioned context.

## 5. Cultural event venue

In order to establish whether the “attracting power” exists, it is necessary to analyse the characteristic features of the venue where a given cultural event is to take place (recommendation for judicature). The venue is a specific city, town, or village. Therefore, it is necessary to assess the “attracting power” of this particular place alone, leaving aside the event).

The first issue to consider is the size of the city/town/village. It is established (cf. *Poradnik* 2008: 18–19) that this feature is not decisive when judging about the existence of the attracting power: a cultural event in a small town may attract a large number of people from other EU states, while big cities may host events of purely local reach. However, this feature may gain importance in the context of other elements.

When assessing the “attracting power” of a place (town/city/village) its actual significance needs to be taken into consideration, which stems from its size, but also history or infrastructure (here: job market, greenery, sports events, trade and services, etc.). One could say that the more significant is the place, the greater is its “attracting power”. Hence, it can be concluded that organisation of a cultural event in a big city is likely to attract relatively higher number of people

from other EU states than the one hosted by a small town or village.

The significance of a given town/city (or village) to a considerable degree is determined by its history. For instance, the fact that before the WW2 Wrocław was a major German City (Breslau) may be a source of “attracting power” (for Germans). Other elements likely to influence the importance of a given place include: being a university town/city or being entered in the UNESCO List of World Heritage (Cf. judgement of the Regional Administration Court in Bydgoszcz, dated June 15, 2011, case no. II SA/Bd 492/11).

Another issue requiring examination is the aspirations of a given place (Cf. Commission Decision of April 20, 2005 in the case no. N 106/2005 concerning aid for Hala Ludowa in Wrocław; judgement of Regional Administration Court in Bydgoszcz dated June 15, 2011, case no. II SA/Bd 492/11; judgement of Regional Administrative Court in Wrocław dated October 13, 2011, case no. II SA/Bd 404/11; judgement of Regional Administrative Court in Wrocław dated February 2, 2011, case no. III SA/Wr 664/10), which should be understood as all activities aimed at increasing its significance or reputation. While significance refers to the current reputation of the place in Europe, the aspirations refer to the specific future outlook.

Also important is the geographic location of the planned cultural event. If a place is situated near a border with another country (or countries), it is likely to “attract” many foreigners. In this respect, a town/city situated in central Poland will not have considerable "attracting power" due to geographic constraints (cf. Commission Decision of April 30, 2008 in the case no. N 704/2007 concerning aid programme for a theatre production in the Basque Country; judgement of Regional Administrative Court in Bydgoszcz dated June 15, 2011, case no. II SA/Bd 492/11; judgement of Regional Administrative Court in Wrocław dated February 2, 2011, case no. III SA/Wr 664/10).

An element strongly affecting the “attracting power” and, at the same time, capable of being an obstacle, is the infrastructure existing in the place concerned. Judgements issued by administrative courts highlight, in particular, the issues such as motorways or airports (Cf. judgement of Regional Administrative Court in Bydgoszcz, dated June 15, 2011, case no. II SA/Bd 492/11). Since the participation in a cultural event requires actual physical presence, very important problem is the distance – sometimes considerable – that needs to be travelled to attend the event. In the case of total absence of (or totally insufficient) infrastructure, the very existence of “attracting power” can be questioned.



## **6. Uniqueness of the cultural event**

Another element to be considered when assessing “the attracting power” is the uniqueness of the cultural event itself. Here, again, several issues need to be taken into account (recommendation for judicature).

Worth mentioning is the language of the event (cf. Commission Decision of April 30, 2008, in the case no. N 704/2007 concerning aid programme for a theatre production in the Basque Country; judgement of Regional Administrative Court in Bydgoszcz dated June 15, 2011, case no. II SA/Bd 492/11; judgement of Regional Administrative Court in Wrocław dated October 13, 2011, case no. II SA/Bd 701/10; judgement of Regional Administrative Court in Wrocław dated October 21, 2010, case no. II SA/Bd 466/10; judgement of Regional Administrative Court in Wrocław dated February 2, 2011, case no. III SA/Wr 664/10). It can be assumed that when the language of the event is the language of prospective participants, the event has the “attracting power”. Therefore, the use of a language spoken by a considerable number of the EU citizens (e.g. German spoken by citizens of Germany which is a big country, and also of Switzerland and Austria) will enhance “the attracting power”. On the other hand, the use of a language of minor importance in the EU context (e.g. Latvian) may be a sign of absence of “the attracting power”.

Nonetheless, it should be remembered that this particular aspect should not be considered very strictly and is not decisive. When it comes to cultural events, the language should be considered only as one of the features of this event along with others (e.g. opera); there are also cultural events where this aspect is totally irrelevant (e.g. pantomime). With respect to the first example it can be concluded that a citizen of a given country may participate in the event despite the language barrier (there are other merits to appreciate). In the second situation, the language is of no importance at all. If the content of a given cultural event is translated/interpreted to a foreign language or languages (provided that the form and character of the event allows for it, e.g. subtitles to a film in the cinema), “the attracting power” of the event will be greater (cf. judgement of Regional Administrative Court in Bydgoszcz, dated June 15, 2011, case no. II SA/Bd 492/11).

A separate issue is the nationality (citizenship) of artists participating in a given cultural event, e.g. Polish artists (cf. judgement of Regional Administrative Court in Bydgoszcz dated June 15, 2011, case no. II SA/Bd 492/11). This issue may be important for the analysis of “the attracting power” (e.g. German tourists may not be interested in the performance by Polish artists), however

this factor is not decisive, either. It should be remembered that the nationality (citizenship) of the persons taking part in a performance does not have to determine the language of the performance (Polish artists may perform, e.g. in English), which takes us back to deliberations on the language of the performance.

Other features of culture events to be analysed each time by a beneficiary, institutions determining the presence of public aid, and ultimately also by administrative courts include: international reputation of culture institutions organising or managing cultural events (cf. judgement of Regional Administrative Court in Bydgoszcz dated June 15, 2011, case no. II SA/Bd 492/11; judgement of Regional Administrative Court in Wrocław dated October 13, 2011, case no. II SA/Bd 701/10; judgement of Regional Administrative Court in Wrocław dated February 2, 2011, case no. II SA/Bd 664/10); esteem and prestige of performers or artists (cf. judgement of Regional Administrative Court in Bydgoszcz dated June 15, 2011, case no. II SA/Bd 492/11), international recognition of a given culture project (cf. Commission Decision of November 28, 2007 in the case no. N 377/2007 concerning aid for Bataviawerf – the Netherlands); increase of cultural potential of institutions having pan-European reach (Cf.. judgement of Regional Administrative Court in Wrocław dated February 2, 2011, case no. III SA/Wr 664/10); or the probability that a given performance will be staged abroad (cf. judgement of Regional Administrative Court in Wrocław dated February 2, 2011, case no. III SA/Wr 664/10).

Finally, the scope of a culture project – number and variety of individual events – should be mentioned here (cf. judgement of Regional Administrative Court in Bydgoszcz dated June 15, 2011, case no. II SA/Bd 492/11). It ought to be remembered that a culture project does not necessarily is a single performance or event, just the contrary – it may comprise a number of similar (e.g. several concerts, one after another) or varied events (e.g. concert, pantomime). Therefore, each of the issues discussed above should be considered separately for each individual event. If a project is comprised of a larger number of events, its “attracting power” may be greater.

## **7. Participants of culture events (tourists)**

Tourists – understood as participants of culture projects – are another issue to be analysed in the context of possible involvement of public aid in cultural projects (cf. judgement of Regional Administration Court in Wrocław, dated October 13, 2011, case no. III SA/Wr 404/11). The relation between a given cultural event (organised with the assistance of EU funds) and the participation of tourists – audience – is also helpful in assessing “the attracting power” (recommendation for judicature).

Since the analysed premise of public aid – the impact on trade – is connected with the institution of the EU internal market, the issue of tourists should be examined in the context of citizens of the EU Member States. It is useful from the perspective of the present discussion to consider the issue of tourists coming to places hosting cultural events. However, tourists cannot be automatically equated with audience of a cultural event. Therefore, when assessing whether public aid is involved in a given EU-funded project, a question needs to be asked about the purpose of a tourist’s visit in a given town or city. If they come in order to take part in the event concerned, this information may be relevant for establishing whether public aid has been granted, as it is related to the “impact on trade” premise. But if they come to sightsee, to visit restaurants, attend sports and cultural events (but not the one concerned), their presence is not relevant for the public aid issue in the project (cf. judgement of the Regional Administration Court in Bydgoszcz, dated June 15, 2011, case no. II SA/Bd 492/11; judgement of Regional Administration Court in Wrocław, dated February 2, 2011, case no. III SA/Wr 664/10).

When it is established that there is a relation between coming of tourists to a given place and the specific cultural event, suggesting the existence of “the attracting power”, than the question of attracting “a substantial number” of people needs to be analysed (cf. Commission Decision of November 28, 2007, in the case no. N 377/2007 concerning aid for Bataviawerf – the Netherlands; judgement of Regional Administration Court in Wrocław, dated October 13, 2011, case no. III SA/Wr 701/10; judgement of Regional Administration Court in Wrocław, dated October 21, 2010, case no. III SA/Wr 466/10). Therefore, the very fact that a given cultural event is attended by foreigners does not necessarily mean any impact on trade. A small number of such people cannot be reasonably considered as having such effect and consequently excludes the conclusion that public aid is involved in the project in question. Therefore, in each individual case it has to be

established how many foreigners participated in the relevant cultural event and whether that number was “substantial”.

When considering the issue of tourists participating in a given cultural event, such participation should be understood as actual physical presence in the event venue. Therefore, the issue should be analysed from three perspectives:

- physical presence of the EU citizens,
- physical presence of a “substantial” number of people, and
- physical participation of people in a specific event.

### **8. Announcement (information flow)**

The existence of a relation between a given cultural project held in a specific place and the appearance of a “substantial” number of people from other places (given the physical presence requirement) must be connected with a specific method of informing these people about the event – information flow. If we assume that the event venue is not the regular place of residence for at least a part (or sometimes even majority) of the audience, it should be concluded that the way of informing citizens of other EU Member States is all the more important. The information is disseminated in the form of an announcement (cf. judgement of the Regional Administration Court in Bydgoszcz, dated June 15, 2011, case no. II SA/Bd 492/11), containing details of a specific cultural event (recommendation for judicature).

In this respect, the beneficiaries, institutions examining the existence of public aid in a project, and then administrative courts reviewing lawfulness of such actions should, first of all, check the language of the announcement (cf. judgement of the Regional Administration Court in Bydgoszcz, dated June 15, 2011, case no. II SA/Bd 492/11). If the language of the announcement is a language used by specific citizens of the EU Members States, it will be possible to establish the existence of “the attracting power” understood as the possibility to effectively inform the people interested about a given cultural initiative.

It should be noted that on some occasions the use of a given language may result in greater “attracting power” than of others. On the one hand, one needs to consider the population of a given country where the language is spoken (e.g. residents of Germany). On the other, taken into account

should be also the number of countries where the language concerned has a status of official language (e.g. German is the official language of Germany, Austria, Liechtenstein, and Switzerland). Finally, it must be remembered that there are languages popular and commonly spoken in various EU countries, such as English. Therefore, it would be erroneous to identify a given language (here: the language of the announcement) with one country (here: citizens or residents of that country).

The issue of the language of the announcement should be also analysed from the perspective of the contents of the announcement in the language “attracting” foreigners. When the whole announcement is in such a language, it can be said – taking into account other aspects – that the “attracting power” exists. But even if only a part of the announcement was written in the language concerned, the analysed criterion could be considered satisfied. In such case it would have to be established whether the key elements of the announcement, such as name of the culture project, its character, scope, time and venue, etc., were in the language concerned.

Apart from the language of the announcement, one also needs to examine its reach, which is an important factor affecting “the attracting power”. In the context of the present analysis, the reach of the disseminated information is likely to affect the number of people – citizens of other Member States – who can be interested in a given cultural event. Hence, the first fact to determine is the manner the announcement is disseminated. If IT tools are deployed (websites, e-mails), the reach may be sufficiently extensive to affect “the attracting power”. However, the use of other means of communication, such as national or local TV and/or radio stations, and press (some of which can be also bought abroad) – will reduce the reach, although not necessarily eliminate it. If the announcement is disseminated only in traditional way – posters, announcements, local papers – then it could be concluded that the announcement in question has no “attracting power” (cf. judgement of the Regional Administration Court in Bydgoszcz, dated June 15, 2011, Case No. II SA/Bd 492/11; judgement of Regional Administration Court in Wrocław, dated October 13, 2011, case no. III SA/Wr 404/11).

The third issue that may be of some importance in the context of announcement structure is the identification of addressees. Therefore, also this aspect of the announcement needs to be analysed. Broad identification of addressees of a specific announcement, understood as prospective participants of the cultural event (e.g. addressing an announcement to “all” citizens of given countries, adults) may suggest the existence of “the attracting power”. However, if the

announcement is addressed only to the citizens of the country hosting the cultural event or to the people living in the region (excluding the citizens living in other regions in neighbouring countries), it can be said that the announcement has no “attracting power” (cf. judgement of the Regional Administration Court in Bydgoszcz, dated June 15, 2011, case no. II SA/Bd 492/11).

Also the time of publication of the announcement needs to be discussed. Even in the cases when the announcement is published on a website or disseminated via other means of fast communication and information – if it is published shortly before the event, it is unlikely to “attract” a substantial number of people.

When analysing the impact of form or content of an announcement in the context of “attracting power”, it should be remembered that although the announcement as such is important in determining whether the “attracting power” exists in a given situation or not, it does not guarantee that foreigners will come, e.g. to Poland, to participate in a given cultural event. The role of the announcement is to enable physical participation of these people, but it does not determine the final result.

## **9. Conclusions**

To conclude the above discussion, it should be highlighted that it is practically impossible for relevant legal acts to encompass all possible instances of public aid in culture projects. Undoubtedly, judicature (both, of the ECJ and Polish administrative courts) attempts to fill in this peculiar gap by examining and resolving individual cases. Nonetheless, the judicature is not able to account for all possible situations that can be encountered when implementing projects co-financed by the EU, either. It should be remembered that due to the specific nature of this project category, all the above-mentioned aspects and possible interrelations among them need to be considered in great detail. Therefore, each and every case has to be examined separately and individually.

Another important conclusion derived from the above analysis is connected with the presence of a number of elements, such as specific features of the place, specific features of the event, event participants, or even the contents and form of the announcement (the extent of aid needs also to be taken into account) (cf. judgement of the Regional Administration Court in

Bydgoszcz, dated June 15, 2011, case no. II SA/Bd 492/11; judgement of Regional Administration Court in Wrocław, dated February 2, 2011, case no. III SA/Wr 664/10). It is assumed that each of the elements should be examined in detail at every stage of determining whether public aid is granted in a given case (here: from the perspective of possible impact on trade) – both by beneficiaries of the EU funds as well as by institutions involved in management and control system and by administrative courts.

In individual situations, the sequence of occurrence and intensity of individual elements may differ, which means that each and every case needs to be examined and resolved separately as regards the possible impact on trade and, consequently, the presence of public aid. In some situations the occurrence of only one element may be indicative of “the attracting power”. However, quite frequent will be also situations where it will not be possible to assume the existence of the “attracting power” despite the presence of even several of them.

Hence, it is reasonable on the part of courts to highlight the need to exercise extreme care and diligence in comparing the facts and the relevant legal findings concerning various EU projects (cf. judgement of Regional Administrative Court in Wrocław dated February 2, 2011, case no. II SA/Bd 492/11). Their quite frequent apparent similarity can be very misleading. For instance, from the perspective of possible impact on trade the status of a big city situated near a border with other countries may be totally different than of a small town in the centre of Poland, even despite a number of similarities between the projects (e.g. concerning the announcement or the event).

## **Bibliography**

Barcz J. (ed.) (2006), *European Union Law. Systemic issues. Material law and the policies*, The Law and the Business Practice, Warszawa.

Dudzik S. (2002), *State aid for public enterprises in the European Community Law. Between neutrality and commitment*, Zakamycze, Kraków.

Fourth survey from the Commission on state aid in the European Union in the manufacturing and certain other sectors. COM (95) 365 final, July 26, 1995, <http://aei.pitt.edu/3097/> [7.11.2015].

Kowalik-Bańczyk K. (2008), Pojęcie „wpływu na handel” jako kryterium stosowania przez sądy krajowe wspólnotowego prawa konkurencji (Concept ‘Impact on Trade’ as a criterion of applying by national courts of the Community Law of Competition), *Przegląd Ustawodawstwa Gospodarczego*, no. 2, pp. 24ff.

Lasok D. (1998), *Overview of the European Union Law. Part 2. Business Law*, Scientific Society of the Organisation and Leadership „House of the Organiser”, Toruń.

Marquardt P. (2007), *Public Aid for small and medium traders*, Lexis Nexis, Warszawa.

Nykiel-Mateo A. (2009), *Public Aid and general measures of intervention in the European Community Law*, House Wolters Kluwer, Warszawa.

The Guide (2008): *Public Aid in the operational programmes 2007–2013. The Guide for public administration with commentaries to regulations of the Minister of Regional Development concerning provide public aid in the regional operational programmes*, Ministry of Regional Development, Warszawa.

Postuła I., Werner A. (2006), *Public Aid*, Nexis Nexis, Warszawa.

Skowron M. (2007), *Regulacja pomocy publicznej w Polsce po akcesji do Unii Europejskiej (Regulation of public aid in Poland after the accession to EU)*, *Przegląd Ustawodawstwa Gospodarczego*, no. 6, pp. 2ff.

Sobczak K. (ed.) (2002), *European Business Law in an activity of enterprises*, Difin, Warszawa.

Szczegółowy Opis Priorytetów Regionalnego Programu Operacyjnego dla Województwa Dolnośląskiego na lata 2007–2013 (Detailed Description of Priorities of Regional Operational Programme for Lower Silesia Province in 2007–2013), [http://old.rpo.dolnyslask.pl/pliki/opis\\_priorytetow/URPO\\_19\\_12\\_07\\_czyste.pdf](http://old.rpo.dolnyslask.pl/pliki/opis_priorytetow/URPO_19_12_07_czyste.pdf) [7.11.2015].

Szydło M. (2006), *Pomoc państwa na ratowanie i restrukturyzację przedsiębiorstw zagrożonych w prawie wspólnotowym (Public aid on saving and restructuring threatened enterprises in the Community Law)*, *Przegląd Ustawodawstwa Gospodarczego*, no. 2, pp. 2ff.

Wróbel A. (ed.) (2008), *Treaty establishing the European Community. Commentary, Vol. I*, Wolters Kluwer Polska, Warszawa.

#### **Legal acts**

Rozporządzenie Ministra Rozwoju Regionalnego z dnia 7 grudnia 2009 r. w sprawie udzielania pomocy na inwestycje w zakresie: energetyki, infrastruktury telekomunikacyjnej, infrastruktury sfery badawczo-rozwojowej, lecznictwa uzdrowiskowego w ramach regionalnych programów operacyjnych, Dz.U. nr 214, poz. 1661 (Regulation of the Minister of Regional Development of December 7, 2009 on granting regional investment assistance as regards: power generation, telecommunication infrastructure, R&D infrastructure, and health-resort treatment under regional operational programmes (Dz.U. [Journal of Laws] No. 214, item 1661).

Rozporządzenie Ministra Rozwoju Regionalnego z dnia 15 grudnia 2010 r. w sprawie udzielania regionalnej pomocy inwestycyjnej w ramach regionalnych programów operacyjnych, Dz.U. nr 239, poz. 1599 (Regulation of the Minister of Regional Development of December 15, 2010 on granting regional investment assistance under regional operational programmes, Dz.U. [Journal of Laws] No. 239, item 1599).

Rozporządzenie Ministra Infrastruktury i Rozwoju z dnia 19 marca 2015 r. w sprawie udzielania pomocy *de minimis* w ramach regionalnych programów operacyjnych na lata 2014–2020, Dz.U. z 2015 r., poz. 488 (Regulation of the Minister of Infrastructure and Development dated 19th March 2015 on extending *de minimis* aid under 2014–2020 regional operational programmes, Dz.U. [Journal of Laws] of 2015, item 488).

Treaty on the Functioning of the European Union, O.J. EU 2012 C 326, p. 1.

Ustawa z dnia 30 kwietnia 2004 r. o postępowaniu w sprawach dotyczących pomocy publicznej, t.j. Dz.U. z 2007 r., nr 59, poz. 404 z późn. zm. (Act of April 30, 2004 on Procedures to be Followed in Matters Concerning Public Aid (consolidated text: Dz.U. [Journal of Laws] of 2007, item 404, as amended).

Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów, Dz.U. nr 50, poz. 331 z późn. zm. (Act of February 16, 2007 on Competition and Consumer Protection, Dz.U. [Journal of Laws] No. 59, item 404, as amended).

#### **Judgements and decisions**

Commission Decision of October 13, 1999 in the case no. N 530/99 – Restoration of Santa Maria de Retuerta



Monastery.

Commission Decision of December 21, 2000, in the case no. N 258/2000 concerning the aid for Leisure Pool Dorsten – Germany.

Commission Decision of January 21, 2003, in the case no. NN 136/A/2002 concerning the funds for l'Ecomusée d'Alsace – France.

Commission Decision of April 20, 2005, in the case no. N 106/2005 concerning aid for Hala Ludowa (Centennial Hall) in Wrocław.

Commission Decision of November 28, 2007, in the case no. N 377/2007 concerning aid for Bataviawerf – the Netherlands.

Commission Decision of April 30, 2008, in the case no. N 704/2007 concerning aid programme for a theatre production in the Basque Country.

Commission Decision of October 10, 2007, in the case no. NN 50/2007 concerning the Austria Indemnity Scheme for Federal Museums.

Judgement of the Regional Administration Court (WSA) in Bydgoszcz, dated June 15, 2011, case no. II SA/Bd 492/11.

Judgement of Regional Administration Court (WSA) in Wrocław, dated May 18, 2010, case no. III SA/Wr 40/10.

Judgement of Regional Administration Court (WSA) in Wrocław, dated October 13, 2011, case no. III SA/Wr 404/11.

Judgement of Regional Administration Court (WSA) in Wrocław, dated October 13, 2011, case no. III SA/Wr 701/10.

Judgement of Regional Administration Court (WSA) in Wrocław, dated October 21, 2010, case no. III SA/Wr 466/10.

Judgement of Regional Administrative Court (WSA) in Wrocław, dated February 2, 2011, case no. II SA/Bd 492/11.

Judgement of Regional Administration Court (WSA) in Wrocław, dated February 2, 2011, case no. III SA/Wr 664/10.

Judgment of ECJ of July 2, 1974 in the case 173/73 Italy v. Commission [1974] ECR 709.

Judgement of ECJ of September 17, 1980 in the case 730/79 Philip Morris, [1980] ECR p. 2671.

Judgement of ECJ of February 24, 1987 in the case No. 310/85 Deufil v. Commission, [1987] ECR p. 901.

Judgement of ECJ of July 13, 1988 in the case 102/87 France v. Commission, [1988] ECR p. 4067.

Judgement of the ECJ of July 11, 1996 in the case C-39/94 *Syndicat français de l'Express international (SFEI) et autres v. La Poste et autres*, [1996] ECR p. I-3547.

Judgement of ECJ of April 29, 1999 in the case C-342/96 Spain v. Commission, [1999] p. I-2459.

Judgement of TPICE of September 1, 1995 in the case T-471/93 Tierce Ladbroke SA v. Commission, [1995] ECR p. II-2537.

Opinion of A.G. Capotorti on the case no. 82/77, Openbar Ministerie v. Jacobus Philippus Van Tiggelle, [1978] ECR.

***Przesłanka wpływu na wymianę handlową między państwami członkowskimi UE w projektach dotyczących kultury i ochrony dziedzictwa kulturowego w ramach systemu realizacji projektów ze środków UE – rekomendacje dla orzecznictwa sądowego***

***Streszczenie:***

**Cel:** Instytucja pomocy publicznej może wystąpić nawet w tak specyficznym sektorze aktywności publicznej, jakim jest dziedzina kultury i ochrony dziedzictwa kulturowego. Stąd też projekty unijne dotyczące tej sfery mogą być objęte reżimem prawnym pomocy państwa. W rozważanym zakresie szczególne wątpliwości prawne budzi badanie występowania pomocy publicznej odnośnie przesłanki wpływu na wymianę handlową – co jest wynikiem zarówno swoistej „nieostrości” wspomnianej przesłanki, jak też specyficznego charakteru projektów dotyczących dziedziny kultury. Niniejszy artykuł ma za zadanie wskazanie poszczególnych zagadnień, jakie muszą zostać uwzględnione przy badaniu istnienia aspektu wpływu na wymianę handlową (rekomendacje dla orzecznictwa). Nie są one w zasadzie zdefiniowane w przepisach prawa, a jedynie w nielicznych orzeczeniach czy literaturze. Stąd pojawia się konieczność dalszego rozwijania rozważań.

**Metody badawcze:** Przyjęto metodę badawczą polegającą na analizie źródeł prawa, orzecznictwa i literatury.

**Wnioski:** 1) w omawianym zakresie nie istnieje praktyczna możliwość uregulowania w treści poszczególnych aktów prawnych wszystkich możliwych przypadków związanych z występowaniem pomocy publicznej w projektach dotyczących kultury. Niewątpliwie tę swoistą „lukę” stara się zapęłnić orzecznictwo (biorąc pod uwagę zarówno TSUE, jak też polskie sądownictwo administracyjne), rozpoznając i rozstrzygając konkretne przypadki 2) również orzecznictwo nie jest w stanie dać precyzyjnych odpowiedzi w zakresie wszelkich możliwych sytuacji, jakie mogą wystąpić w ramach realizacji projektów współfinansowanych ze środków UE 3) specyfika tej kategorii projektów wymaga precyzyjnego uwzględnienia analizowanych elementów i ustalenia występujących pomiędzy nimi relacji. Uznać zatem trzeba konieczność odrębnego rozpatrywania każdego przypadku z osobna 4) każdy z tych elementów winien być precyzyjnie rozważony – na każdym etapie badania i ustalania występowania pomocy publicznej (tu: pod postacią przesłanki wpływu na wymianę handlową) – zarówno przez beneficjentów środków unijnych, instytucje uczestniczące w systemie zarządzania i kontroli, jak też sądy administracyjne 5) w konkretnym wypadku może zaistnieć różna sekwencja i nasilenie poszczególnych elementów, co oznacza konieczność dokonywania indywidualnych rozstrzygnięć odnośnie wpływu na wymianę handlową, a co za tym idzie: wystąpienia pomocy publicznej.

**Wartość artykułu:** Rozważana problematyka jest przedmiotem nielicznego orzecznictwa oraz literatury. Wartością publikacji jest pogłębienie wszystkich omawianych elementów. Artykuł adresowany jest do beneficjentów projektów unijnych, instytucji uczestniczących w systemie zarządzania i kontroli środkami UE oraz sądów administracyjnych.

**Wpływ badań:** Publikacja pozwoli beneficjentom, ww. instytucjom oraz sądom we właściwy sposób interpretować występowanie pomocy publicznej w omawianej grupie projektów.

*Słowa kluczowe: fundusze unijne, projekty dotyczące kultury, pomoc publiczna, wpływ na wymianę handlową, „siła przyciągania”.*

JEL: K23, K29