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PUBLIC VERSION

WORKING LANGUAGE

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**Subject: State aid NN50/2007 (ex CP206/2005) — Austria
Indemnity scheme for federal museums**

Madame,

The Commission wishes to inform Austria that, having examined the information supplied by your authorities on the measure referred to above, it has decided that the indemnity scheme for the Austrian federal museums as laid out in this decision constitutes State aid compatible with the common market under the culture derogation of Article 87(3)(d) of the EC Treaty.

I. Procedure

1. By letter dated 1 June 2005 the Austrian law firm Freimüller/Noll/Obereder/Pilz on behalf of a not mentioned confidential complainant¹ sent a complaint to the Commission concerning an indemnity scheme to the Austrian federal museums.
2. By communication of 7 July 2005 the law firm has been asked to reveal the name of the complainant. The law firm responded by letter of 7 July 2005 that the complainants are six non-federal museums located in Austria.

¹ The complainants asked to remain undisclosed.

Ihrer Exzellenz Frau Dr. Ursula PLASSNIK
Bundesminister für auswärtige Angelegenheiten
Ballhausplatz 2
A - 1014 Wien

3. On 20 September 2005 the Commission sent a letter to the complainant. By letter of 25 October 2005 the complainants replied to the letter.
4. On 19 January and 24 April 2006 the Commission sent requests for information to Austria. Austria replied by letters of 7 March and 7 July 2006.

II. Description of the measure

National legal basis

5. The indemnity scheme under assessment is a clause (Article IX, paragraph 1) in the Federal Finance Act (hereafter “BFG”). The clause was for the first time introduced by amendment in the 2003 BFG and is since annually reintroduced in identically wording. The clause provides the Austrian Minister of Finance the opportunity to assume the liability for loss or damages to exhibition objects borrowed by the federal museums from third parties. A special regulation, in the form of a letter of indemnity including further details for the application of the indemnity scheme, was published in April 2004. The Austrian Minister of Finance continuously assumed this liability since 2004 on the basis of individual requests by the federal museums.

Beneficiary

6. The beneficiary of the aid scheme is a group of eight Austrian federal museums situated in Vienna² and ruled by public law.

Objective

7. According to Austria, the aim of the indemnity scheme is the protection of national cultural heritage in promoting the circulation of art works within Austria and the EU.

Form of financial support, budget and duration

8. The provision of financial compensation directly to the lender is limited to €100 million per exhibition project and the total value of the works covered by state indemnity cannot exceed €1.0 billion per year. The economic value of the guarantee is estimated by Austria at €3.9 – 6.8 million in 2004 and €5.2 – 9.1 million in 2005³.

Own contribution of the beneficiary

9. The federal museums do not pay a remuneration for the guarantee.

The Austrian indemnity scheme in the European context

10. According to a survey carried out by DG EAC in 2004, 16 of 31 countries examined have State indemnity scheme for museums⁴.

III. Assessment of the measure

1 Article 87 (1) EC Treaty

11. The Commission has first examined whether the measure can be characterised as State aid within the meaning of Article 87 (1) EC, according to which “*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of*

² Kunsthistorisches Museum, Albertina, MAK, Galerie Belvedere, Museum Moderner Kunst Stiftung Ludwig, Naturhistorisches Museum Wien, Technisches Museum Wien, Nationalbibliothek

³ The state assumed the liability for damages to exhibition objects borrowed from third parties of a total value of €0.97 billion in 2004 and €1.3 billion in 2005. The insurance premium to be paid to a private insurance company is estimated by Austria in a range of 0.4 – 0.7% of the value of the lent objects.

⁴ Study n° 2003-4879 - An inventory of national systems of public guarantees in 31 European countries (June 2004), see http://ec.europa.eu/culture/eac/sources_info/studies/garanti_en.html

certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.”

12. In order to be classified as State aid the measure must fulfil the following cumulative conditions: 1) the measure must be granted through State resources; 2) it has to confer an economic advantage to undertakings; 3) this advantage must be selective and distort or threaten to distort competition; and 4) the measure must affect Intra-Community trade.

Presence of State resources

13. The guarantee is granted by the Austrian federal law (“BFG”). The granting authority is the Austrian federal State. The resources involved are the revenues foregone by the State as a result of not charging a premium for the guarantee. They correspond to the premium which a private insurance company would have charged to assume the risk concerned. The financial resources foregone constitute public funds in the meaning of Article 87 (1) EC and have to be regarded as State resources.

Economic advantage to an undertaking

14. In order to determine whether the indemnity scheme implemented by Austria favours an undertaking it must be established (i) whether the indemnity scheme confers an economic advantage to the museums and (ii) whether those federal museums constitute undertakings when they organise exhibitions.
15. As regards the first of those points, the Austrian indemnity scheme relieves the eight Austrian federal museums from insurance costs that they normally have to bear, when they organise art exhibitions with objects borrowed from third parties and it thus constitutes an advantage. This coverage should normally be remunerated by an appropriate premium which would consist in the market price for the indemnity scheme. The market price reflects amongst others the value of the borrowed objects, the damage rates, the security standards in the museums and the duration of the exhibitions. The insurance premium to be paid to a private insurance company is estimated by Austria to be in a range of 0.4 – 0.7% of the value of the objects lent.
16. As regards the second point, it should be recalled that the concept of an undertaking in the context of competition law covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed⁵. Any activity consisting in offering goods and services on a given market is an economic activity⁶. As a consequence the legal status of the entity, its profit orientation and the way in which it is financed are not in itself decisive criteria⁷.
17. The complainant argued that the Austrian federal museums do constitute undertakings. It submitted that the purpose of the federal museums would be the preservation, scientific development, exhibition and administration of entrusted and purchased own collections. In addition to this principal activity some of the federal museums would be active in organising national and international exhibitions including objects borrowed from third parties. This activity would be in direct competition with exhibitions of other private

⁵ Joined Cases C-180/98 to C-184/98 Pavlov and Others [2000] ECR I-6451, paragraph 74; Case C-475/99 Ambulanz Klöckner [2001] ECR I-8089, paragraph 19;

⁶ Joined Cases C-180/98 to C-184/98 Pavlov and Others [2000] ECR I-6451, paragraph 75; Case C-475/99 Ambulanz Klöckner [2001] ECR I-8089, paragraph 19;

⁷ Case C 41/90 Höfner and Elser [1991] ECR I-1979 in case, paragraph 21-22
Case C 364/92 Eurocontrol [1994] ECR I-43, paragraph 18

Joined cases C 159/91 and C 160/91 Poucet and Pistre [1993] ECR I-637, paragraph 17

exhibitors which dispose neither of own collections nor of the indemnity scheme. The federal museums would seek to engage in gainful activity and compete for paying visitors and sponsors, and thus compete for providing the highest possible budget to obtain the most attractive collections. The fact that the federal museums are not profit seeking would not be relevant for the assessment of the effects of the aid on trade and competition as long as the federal museums are competing on a market with profit seeking entities.

18. Information submitted by Austria shows that the Austrian federal museums carry out tasks, in the interest of the Austrian state, aimed at promoting and making accessible to the public national but also European and worldwide cultural heritage. To organise exhibitions of the own collection is an important part of the public mission. However, in order to attract an even wider public and to complement the own collection, special exhibitions partially based on borrowed objects from third parties are frequently organised in some of the federal museums. Such special exhibitions are of high importance for the federal museums in order to offer an attractive and diversified exhibition program and generally generate significant revenues. When seeking to attract famous national and international objects of art for an exhibition the federal museums are in direct competition with other private and public museums in Austria and Europe. Owners of precious art collections may decide to exhibit them in other museums in or outside Austria, depending on the conditions offered by the museums. The presence of a solvent guarantor for potential damages or loss is certainly an important asset in this respect.
19. Information submitted by Austria shows that in addition to the public subsidies the federal museums generate significant revenues from admission fees and other commercial activities such as sponsoring, the museums shop and the museums café or restaurant. These commercial activities are competing on a local market with profit seeking entities. While for some museums the revenues from admission fees and commercial activities are of an ancillary nature in the total revenues, for others they are substantial. The organisation of exhibitions plays a major role for generating such revenues, e.g. admission fees are generally higher for exhibitions, merchandising allows significant revenues for the museums shop.
20. In the light of the above the Commission concluded that the organisation of exhibitions by the Austrian federal museums concerned is to be considered as an economic activity. Therefore, and irrespective of whether all activities of the Austrian federal museums are of a commercial nature, it is concluded that the Austrian federal museums are to be considered as undertakings when they organise exhibitions.

Selectivity and distortion of competition

21. Other national and international actors in the field of art exhibitions and cultural activities competing with the Austrian federal museums are excluded from the indemnity scheme. Therefore the measure is selective and may distort competition in these sectors.

Effect on Community trade

22. The federal museums host exhibitions of international importance, which may also be organised in other international museums in other Member States. The organisation of exhibitions by the Austrian federal museums is an important element for the city of Vienna for the purpose of attracting tourists from all over the world. Indeed, considering

the world-famous prestige of the museums concerned, they are in a position to set up reputable exhibitions, attracting an international public. The presence of an important exhibition may be a decisive argument for the decision of foreign tourists to visit Vienna. Since the indemnity scheme allows the museums concerned to offer wider or more important exhibitions than without such guarantee, it may have an effect on tourism to Vienna. Therefore it can be considered that an impact on intra-community trade of the measure under review cannot be excluded⁸.

Conclusion

23. According to Article 88(3) EC, the Commission should be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. The Member States should not put the proposed measures to effect until this procedure has resulted in a final decision. The indemnity scheme for the Austrian federal museums became first effective in 2003 and remained effective since 2003. As mentioned above the Austrian Minister of Finance continuously assumed the liability for loss or damages to exhibition objects borrowed from third parties to the federal museums since 2004. The economic value of the guarantee is estimated by Austria at €3.9 – 6.8 million in 2004 and € 5.2 – 9.1 million in 2005. The indemnity scheme constitutes State aid in the meaning of Article 87 (1) EC and it is necessary to assess its compatibility under the provisions of Article 87(3) of the Treaty.

2 Compatibility

Applicability of Article 87(3)(d) of the Treaty

24. Aid which fulfils the conditions set out in Articles 87 (3) EC can be found to be compatible with the common market. The measure under assessment aims at promoting culture and protecting cultural heritage. According to Article 87(3)(d) EC, aid to promote culture and heritage conservation where such an aid does not affect trading conditions and competition in the Community to the extent that is contrary to the common interest, may be considered to be compatible with the Common Market.

The Austrian federal museums pursue a genuine cultural objective

25. The Austrian federal museums are non-profit making, permanent institutions in the service of the Austrian society and open to the public. They acquire, conserve, research, communicate and exhibit of art work, for purposes of study, education and enjoyment. Despite the importance of their permanent collections and in order to remain attractive to the public, the federal museums are also expected to organise temporary exhibitions, an indispensable complement if museums are to continue to exist and if knowledge of art is to be acquired. These exhibitions make it possible for a wide audience to see works of art that are usually scattered all over the world, both in museums and private collections. The duty to educate is thus upheld as these exhibitions enable, for instance, the entire work of an artist, movement or period to be shown.
26. Information submitted by Austria shows that the Austrian federal museums are of outstanding significance for the Austrian cultural heritage, particularly in the field of art

⁸ See Commission decisions of
- 21 January 2003, NN136/A/2002 "Ecomusée d'Alsace" (France) section 3, OJ C 97 of 24 April 2003, p. 10
- 18 February 2004, N 630/2003 "Local museums Region of Sardinia" (Italy) section 3, OJ C 275 of 8 November 2005, p. 3

exhibitions. In 2004 more than 3.5 million people visited the federal museums. The two most frequented museums in Austria, Albertina and the Kunsthistorisches Museum are federal museums. International cooperation and in particular the exchange of art collections between museums are of increasing importance for these museums.

27. The indemnity scheme reduces the costs of the museums to insure objects borrowed from third parties. This costs savings can be reflected not only in the price of entrance tickets but in organising more or larger exhibitions of higher quality. In this sense, the scheme also promotes culture, as more people can see more and larger exhibitions.
28. The measure can therefore be considered to aim at preserving the cultural heritage and promotes cultural exchanges and cultural representation at regional and national level.

The Austrian federal museums do not affect trading conditions and competition to an extent that is contrary to the common interest

29. The federal museums are predominantly financed by the public budget regulated by federal law. The part of public financing of the total budget of the eight federal museums represented approximately 75% in 2004. Public funding of the federal museums amounted to € 89 million in 2004. State indemnity is the most significant way of economising on insurance costs. Without the indemnity scheme the federal museums would have to bear the additional costs for the insurance fees, which would again increase the part of the proportion of the public budget by about 2%.
30. Given the poor economic viability of the exhibition activity of the federal museums, no private investor would accept to run the federal museums without public support. However the activity of the federal museums has a strong beneficial aspect for various areas of life and these benefits for the public cannot be measured in financial terms. Moreover, the conservation of cultural heritage is a recognised area of mutual benefit for all European citizens under Art. 151 of the EC Treaty.
31. The presence of an important exhibition may be an additional argument for the city of Vienna in order to attract international tourists, but its overall effect can be considered as minor. The measure therefore does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.
32. On the basis of the above, the Commission has concluded that the measure at hand promotes culture and preserves national cultural heritage without adversely affecting trading conditions and competition in the Community to an extent contrary to the common interest.

IV. Decision

33. In the light of the foregoing, the Commission has found that the indemnity scheme for the Austrian federal museums constitutes State aid in the meaning of Article 87(1) of the EC Treaty.
34. The Commission finds that Austria has unlawfully implemented the indemnity scheme in breach of Article 88(3) of the Treaty. However, the Commission has decided, on the basis of the foregoing assessment, not to raise any objection to the measure at issue, considering that it constitutes State aid compatible with the common market under the culture derogation of Article 87(3)(d) of the EC Treaty.
35. If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt.

If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: http://europa.eu.int/comm/sg/sgb/state_aids/. Your request should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State aid Greffe
B-1049 Brussels
Fax No: + 32-2-296.12.42

Yours faithfully,
For the Commission

Neelie KROES
Member of the Commission