



Neutral citation [2020] CAT 11

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1335/5/7/19

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

17 April 2020

Before:

THE HONOURABLE LORD DOHERTY
(Chairman)
PETER ANDERSON
PROFESSOR DAVID ULPH CBE

Sitting as a Tribunal in Scotland

BETWEEN:

STRIDENT PUBLISHING LIMITED

Pursuer

- v -

CREATIVE SCOTLAND

Defender

Heard at the Court of Session, Edinburgh, on 2 March 2020

JUDGMENT (PRELIMINARY ISSUE)

APPEARANCES

Mr Keith Charters appeared in person on behalf of the Pursuer.

Ms Morag Ross QC and Ms Julianne Kerr Morrison (instructed by Harper Macleod LLP) appeared on behalf of the Defender.

A. INTRODUCTION

1. This is the judgment of the Tribunal on the preliminary issue of whether the Defender, Creative Scotland (“CS”), is an undertaking for the purposes of the Competition Act 1998 (“CA 98”) in respect of the activity of which the pursuer complains. If the pursuer is not an undertaking in respect of that activity, the conduct of which the pursuer complains is not conduct prohibited by the Chapter II prohibition, and the Tribunal would not have jurisdiction (CA 98 section 47A).

B. THE PARTIES

2. The Pursuer, Strident Publishing Limited (“Strident”), is a small independent book publisher based in East Kilbride. It is a private company limited by shares. Mr Charters is the sole director of the company.
3. CS is the principal public-sector arts funder in Scotland. It was established on 1 July 2010 under section 36 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”). Section 37 of the 2010 Act sets out CS’s general functions:

“37 General functions of Creative Scotland

(1) Creative Scotland has the general functions of—

(a) identifying, supporting and developing quality and excellence in the arts and culture from those engaged in artistic and other creative endeavours,

(b) promoting understanding, appreciation and enjoyment of the arts and culture,

(c) encouraging as many people as possible to access and participate in the arts and culture,

(d) realising, as far as reasonably practicable to do so, the value and benefits (in particular, the national and international value and benefits) of the arts and culture,

(e) encouraging and supporting artistic and other creative endeavours which contribute to an understanding of Scotland's national culture in its broad sense as a way of life,

(f) promoting and supporting industries and other commercial activity the primary focus of which is the application of creative skills.

(2) In exercising the function mentioned in subsection (1)(c), Creative Scotland must do so with a view to increasing the diversity of people who access and participate in the arts and culture.

(3) Creative Scotland may encourage and support such persons as it considers appropriate in the exercise by those persons of any of the functions mentioned in paragraphs (a) to (f) of subsection (1) (or functions similar to those).

(4) In subsection (3), “persons” includes groups of persons.”

4. Section 39 of the 2010 Act empowers the Scottish Ministers to make grants to CS subject to such terms and conditions as the Scottish Ministers may determine (subsections (1) to (3)). Subsection (4) empowers CS to make grants and loans “to such persons as it considers appropriate for the purpose of, in connection with, or where it appears conducive to, the exercise of its functions”. In terms of subsection (5) a grant or loan is subject to such terms and conditions (including conditions as to repayment) as CS may determine. Section 40 of the 2010 Act provides:

“40 Directions and guidance

(1) The Scottish Ministers may give Creative Scotland directions (of a general or specific nature) as to the exercise of its functions.

(2) But the Scottish Ministers may not give directions so far as relating to artistic or cultural judgement in respect of the exercise of Creative Scotland's functions under section 37(1) or (3), 38(3) or 39(4).

(3) Creative Scotland must—

(a) comply with any directions given to it by the Scottish Ministers under this Part,

(b) have regard to any guidance issued by the Scottish Ministers in relation to the exercise of its functions.

(4) Subject to subsection (2), the Scottish Ministers may vary or revoke any direction given by them under this part.”

C. STRIDENT’S CLAIM

5. In its claim as originally filed on 5 November 2019, Strident alleged that CS had provided “investment finance” to three publishers of literary works (“the publishers”) through a funding programme known as the Open Project Fund (“OPF”), and had thereby acted in breach of the Chapter I prohibition contained in section 2 CA 98.

6. On 29 November 2019 CS filed an application for an order pursuant to Rule 34 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the “Tribunal Rules”) that the Tribunal does not have jurisdiction to hear the claim; or, alternatively, striking

out the claim pursuant to Rule 41 of the Tribunal Rules on the ground that CS is not an undertaking.

7. At a case management conference on 16 December 2019 the Tribunal directed that CS's application be heard as a preliminary issue. The Tribunal also granted permission to Strident to amend its claim form to substitute the Chapter I claim with an allegation of abuse of a dominant position contrary to the Chapter II prohibition contained in section 18 CA 98. Strident filed its amended claim form on 30 December 2019.

D. THE EVIDENCE

8. Mr Ian Stevenson has been CS's Finance Director since April 2013. CS served a witness statement from him, together with 9 appendices *viz.* App 1, Open Project Fund Guidance August 2019; App 2, Framework Document between Scottish Government and Creative Scotland; App 3, Creative Scotland Standard Terms and Conditions; App 4, Scottish Government guidance letter dated 19 December 2017; App 5, Open Project Funding Programme Template Agreement; App 6, CS Staff Handbook; App 7, Open Project Fund over £15K Application Form; App 8, End of Project Monitoring Report; App 9, Assessment of Sandstone Funding Application 2019. We have had regard to that material. We have also taken account of other information given to us by the parties at the hearing where there did not appear to be any material dispute in relation to it.
9. In the exercise of its functions CS distributes approximately £90 million of funding each year. Approximately two-thirds of that funding comes direct from the Scottish Government and about one-third is distributed to it by the government from the National Lottery distribution fund.
10. The Scottish Ministers have exercised their power to give CS directions as to the exercise of its functions. The directions relate to broad policy priorities for CS's core funding. They do not impinge upon CS's artistic and cultural judgement. Appendix 4 is the most recent guidance letter from the Scottish Ministers. It provides:

“... It is for Creative Scotland to decide which specific organisations are supported through the funding programme. I acknowledge the independent role you have in decision making, particularly as regards your organisation's expertise in artistic and creative programmes and the overall development needs of the sectors you support. Your decisions, however, need to be within the policy framework set by the Ministers for which both you and I account to the public ...”

11. While CS has power to make either loans or grants, in fact it seldom makes loans. It has only made loans on 4 occasions, once in 2011, once in 2013, and twice in 2017. On each occasion the loans have been interest free. None of them have been to publishers.
12. One way in which CS exercises its statutory powers under section 39(4) of the 2010 Act is through the OPF. The OPF has been operated since 2014. It supports projects across the whole range of the arts, including craft, dance, design, digital literature, multi-arts, music, screen, theatre, visual arts and the creative industries.
13. The monies distributed through the OPF come mostly from the National Lottery Distribution Fund (“the Fund”). In respect of monies from the Fund CS is subject to the directions to distributing bodies given by the Secretary of State in terms of section 26A of the National Lottery Act 1993. Those directions provide that grants must be provided for activities which promote the public good and are not intended primarily for private gain.
14. The annual budget of the OPF is around £8.5 million. The OPF supports artistic projects of no more than 2 years in duration. The maximum amount awarded for any individual project is £150,000. CS considers applications for OPF funding on the basis of the following criteria: (a) the artistic and creative quality of the ideas underpinning the project, the applicant’s skills, experience, work to date and the project’s contribution to their artistic development; (b) reaching people: who (in terms of different backgrounds) and how many people are planned to be reached by the project; (c) effective project management: the reasonableness of the plan for the activity, track record of delivery, risk management, incorporating feedback and managing success; (d) financial management: the reasonableness of project income and cost estimates, track record of managing project finances and ensuring fair rates of pay for participants; costs may include overheads related to the delivery of the project.
15. In paragraph 14 of his witness statement Mr Stevenson explained:

“The criteria above are focussed solely on the proposed activity and do not consider the applicant’s overall financial position or need for funding as the project is not intended to be for financial gain. Thus, the development of the applicant from the project activity is only related to their artistic, creative and project management skills and experience and not financial aspects. Also, in publishing there is potential for a book to create income outside of the project period, although initial sales (which are

usually the majority of a print-run's sales) are usually within the project period. CS takes the view that sales outwith the project period are not material and for the purposes of efficient grant management and data collection it is preferable for the period to be on this basis rather than waiting 4 or 5 years after publication to capture an immaterial level of sales.”

16. In making grants CS's aim is to support the arts, not to generate profits for it or for the applicant. The OPF funding must be used only for the project. It can be used for time-limited overheads relating to the delivery of the project. It cannot be used to support ongoing running and overhead costs not related to the project. Applicants require to demonstrate that the project “will promote the public good and will not be for private or commercial gain” or that it is “for public benefit and not for private or commercial gain” (depending upon whether the applicant is a company limited by guarantee or shares). Applications must show that no profit is to be made over the project period. 25% of the grant is withheld until the project is complete and the applicant has submitted an end of project report. If, contrary to the budget submitted in the application, the financial summary for the project period in the report shows that the project has made a profit, the final instalment of the grant is reduced by the profit amount multiplied by the proportion that the grant forms of the total budgeted income of the activity. If that proportionate share of the profit exceeds the final instalment the applicant is bound to enter into negotiations with CS with a view to further recoupment of an appropriate proportion of the grant. In practice, of the 500 OPF awards made each year only approximately 15 recoupments take place. Recoupments are usually small in amount (less than £5,000).
17. The average yearly cumulative total of OPF grants made to publishing projects in each year between 2014 and 2018 was £158,076. Those grants were all made from monies distributed to CS from the Fund. Mr Stevenson observed in relation to publishing (para 10 of his witness statement):

“The purpose of CS's support for publishing is as a key ‘building block’ of the literature sector. Grants to publishers relate to specific titles and publishing programmes and the associated costs of marketing, design and printing. Grants usually relate to titles reliant on grant support to come to the market. These are sometimes an author's first title which enables them to begin their career. This approach of supporting early stage artists mirrors the way theatre, music, dance and film are supported via grants from CS, although the operating mechanisms of each sector vary. Other funded activity in the literature sector includes: book festivals to stimulate the market; support for authors to develop their skills; celebrations of Scottish authors, for example Muriel Spark; and the promotion of Gaelic and Scots literature...”

18. Between 2016 and 2018 Strident made five applications for OPF funding. All five were unsuccessful. One application was not assessed because it was ineligible. Of the four which were assessed, three received an assessment score of 6 out of 12 and one received an assessment score of 5 out of 12. All four were assessed as being of low strategic importance.
19. Sandstone Press Limited (“Sandstone”) is a private company limited by shares. It is a literary publisher based in Inverness. It publishes fiction and non-fiction (especially outdoor, biography and memoir). Between 2015 and 2019 Sandstone made five applications for OPF funding. Two were unsuccessful. One application was not assessed because it was ineligible. Of the four which were assessed, one (a project to train 2 graduate editors/assistant publishers) received an assessment score of 11 out of 12, one (a one year funding project to enable publication of 25 new titles) scored 10 out of 12, and two scored 9 out of 12. The two highest scored applications and one of the applications which scored 9 (a project to launch a debut Scottish novelist and run campaigns for emerging talent) were assessed as being of high strategic importance. Those applications were successful. The application which scored 9 out of 12 was assessed as being of medium strategic importance. It was unsuccessful.
20. Floris Books Trust Limited (“Floris”) is a company limited by guarantee based in Edinburgh. It is a charity. It publishes adult non-fiction and children’s fiction. Between 2015 and 2018 Floris made four applications for OPF funding. In each case an award was made. One application (a project for publication in 2016 of Scottish books for children) received an assessment score of 11 out of 12 and was classed as being of high strategic importance; two (a project for publication in 2017 of Scottish books for children and a project for publication in 2018 of Scottish books for children) scored 10 out of 12 and were classed as being of medium strategic importance; and one (a project for publication in 2019 of Scottish books for children) scored 9 out of 12 and was classed as being of high strategic importance.
21. Birlinn Limited (“Birlinn”) is a private company limited by shares. It is a literary publisher based in Edinburgh. Between 2015 and 2018 Birlinn made four applications for OPF funding. In each case an award was made. One application (a project for 3 ambitious illustrated children’s books) received an assessment score of 10 out of 12 and was classed as being of high strategic importance. Another (a poetry project involving

two anthologies of Scottish poetry, a Gaelic anthology, and a series of pamphlets to publish new poets) scored 9 out of 12 and was classed as being of medium strategic importance. The other two were applications for less than £15,000 (and so did not receive strategic comment and prioritisation) which scored 11 out of 12 (a project seeking support towards the publication of 3 books - a title on the work of installation artist George Wyllie, a collection of Scottish First World War poetry, and a collection of poems on ageing) and 10 out of 12 (a project publishing all of Muriel Spark's novels in a collectable centenary hardback edition).

22. The OPF funding to Sandstone, Floris and Birlinn was by way of grants. There was no suggestion that any of the publishers had become obliged to repay any of the grants.

E. SUBMISSIONS

CS

23. Ms Ross submitted that CS is a public body exercising public functions and that it is accountable to the Scottish Ministers. The focus of OPF funding was not on the commercial viability or development of those it funds but on the artistic value of the projects. In making the payments it had to the publishers CS had been making grants to support literary activity. It had not been engaging in economic activity providing "investment finance". In making grants CS was not making a commercial investment for a financial return. The distinction which Strident sought to draw between OPF grants for one-off arts projects and OPF grants for funding literary works was not a relevant one. In each case the nature of the activity was the same. In each case the grant was made to support an artistic project and there was no financial return to CS. That was not something that could be done commercially by a private body seeking to make a profit from the activity (Cases C-180-184/98 *Pavlov and Others v Stichting Pensionenfonds Medische Specialisten* EU:C:2000:428, [2000] E.C.R. I-6451, [75]; C-475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz* EU:C:2001:284, [2001] E.C.R. I-8089, | Opinion of AG Jacobs [67]; C-205/03P *FENIN v Commission* EU:C:2005:666, [2006] E.C.R. I-6295, Opinion of AG Maduro [11]-[13]) because a body would obtain no financial return from making grants. Only a philanthropist or a charity or the like might make grants on such a basis. That would not be a commercial provision of funding, and such providers would not be undertakings in respect of that activity.

24. CS was not an undertaking because the exercise of its power to make grants was the exercise of a public power typical of the public powers exercised by public authorities, rather than economic activity (C-364/92 *SAT Fluggesellschaft v Eurocontrol* EU:C:1994:7, [1994] E.C.R. I-43, (“*Eurocontrol P*”), at [30]; C-343/95 *Diego Cali & Figli Srl v Servizi Ecologici Porto di Genova SpA (SEPG)* EU:C:1997:160 [1997] E.C.R. I-1547, [23]; C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* EU:C:2002:98, [2002] E.C.R. I-1577, [57]; *UKRS Training Limited v NSAR Limited* [2017] CAT 14, [2017] Comp. A.R. 368, [67]). CS’s aim was to promote and support the arts and creative industries across Scotland using public funds. That was typically a function of the State. Public funding of the arts and creative industries has been one of the functions of the State since at least 1946 when the Arts Council of Great Britain was established. A public body which distributes public money to support projects purely on artistic merit was not engaged in economic activity as an undertaking.
25. On a proper application of the guidance summarised at [67] of *UKRS Training Limited v NSAR Limited* (see para 39 below) CS had not been engaged in economic activity as an undertaking when it made the OPF grants to the publishers. In relation to [67] (1), there was no discrete function of providing investment finance here. The awards had simply been grants like any other OPF grant. So far as [67](2) was concerned, the provision of grant funding for the publishing projects was public funding of the creative arts by a public authority. Such funding was typical of the public funding powers exercised by public authorities. Whether it was a *core* public function might be more moot. The Scottish Parliament had certainly regarded it as very important - though doubtless there were other public functions which might be considered to be more indispensable. While not decisive, the fact that CS did not operate for profit was relevant and was a factor in favour of the conclusion that it was not engaged in economic activity as an undertaking ([67](3)). Grant making activity has not been (and is not) carried out by a private body on a commercial basis ([67](4)). [67](5) was not relevant. [67](6) was relevant and strongly suggested that CS was not an undertaking. The power being exercised derived directly from sections 37 and 39 of the 2010 Act. While it was clear from the 2010 Act that CS is not an agent of the Crown, it is undoubtedly a public authority. In making the grants to the publishers CS exercised its statutory powers as a public authority.

26. In the circumstances CS was not an undertaking in terms of the CA 98 in respect of the making of grants to the publishers. It followed that the Tribunal did not have jurisdiction.

Strident

27. Mr Charters submitted that while some of CS's funding of the arts had not involved it engaging in economic activity as an undertaking, some had. For the purposes of the CA 98 each activity had to be examined separately. The making of the OPF grants to the publishers was a different activity from the provision of grants for creative projects generally. With ordinary project funding of the latter sort the grant supported the project, but by the end of the project the applicant had not created an income producing asset. By contrast, here the grants to the publishers had been used by them to publish books which became income producing assets for them. It followed that in providing the grants to the publishers CS had provided investment finance and had engaged in economic activity as an undertaking. It had been arbitrary of CS to require only that the applicant ought not to profit during the project period, since profit could be generated from titles after the end of that period.
28. By making the grants which it had, CS had helped Sandstone - a loss-making publisher - to continue in business; and it had financed projects which Floris and Birlinn - both successful publishers - ought to have been able to finance from their own resources.
29. On the correct application of the guidance in *UKRS Training Limited v NSAR Limited* the conclusion ought to be that CS had engaged in economic activity as an undertaking in making the grants to the publishers. On a proper analysis it had carried out a discrete function of providing investment finance ([67](1)). The provision of investment finance was not of its nature a core function of the State ([67](2)). Trusts, charities, and local authorities carry out similar functions to CS's grant function. While it was accepted that CS did not operate for profit, that was not decisive against it being an undertaking ([67](3)). The provision of investment finance was an activity which was carried out by private bodies on a commercial basis. It was an economic activity, and that pointed to the provider being an undertaking ([67](4)). It was accepted that the activity here "had some social benefits", but it was primarily commercial rather than social. [67](5) was inapplicable. So far as [67](6) was concerned, the grant making power exercised by CS

did not derive directly from legislation. For a power to derive directly from legislation the legislation must *require* the exercise of the power (OFT1389 – *Public Bodies and Competition Law: A Guide to the Application of the Competition Act 1998* (“the Guide”), para 3.4). Nor had CS exercised the power on behalf of the State or a public authority, because CS “does not carry out its functions on behalf of the Crown” (App 2, Framework Document between the Scottish Government and Creative Scotland, para 8).

30. In the circumstances CS was an undertaking in terms of the CA 98 in respect of the provision of investment finance. It followed that the Tribunal has jurisdiction.

F. THE LAW

31. Section 18 of the CA 98 provides:

“(1) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.

...

(4) The prohibition imposed by subsection (1) is referred to in this Act as “the Chapter II prohibition”.”

32. The Chapter II prohibition on abuse of a dominant position set out in section 18 CA 98 applies only to “one or more undertakings”. The Chapter I prohibition in section 2 CA 98 applies to agreements between “undertakings” and decisions by “associations of undertakings”. The Chapter I and Chapter II prohibitions in the CA 98 follow what are now articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”). The Chapter I and Chapter II prohibitions are to be interpreted consistently with the analogous provisions of EU law (sect 60 CA 98). Neither the CA 98 nor the TFEU defines “undertaking”, but guidance is to be found in the jurisprudence of the Court of Justice (“the Court”) and national courts.

33. In *C-41/90 Höfner and Elser v Macrotron* EU:C:1991:161, [1991] E.C.R. I-1979, the Court stated at [21] that:

“...the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed...”

34. In *Eurocontrol I* the Court observed at [30]:

“Taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority. They are not of an economic nature justifying the application of the Treaty rules of competition.”

35. In *Pavlov and Others* the Court further stated at [75]:

“It has also been consistently held that any activity consisting in offering goods and services on a given market is an economic activity (Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7 and Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36)”.

36. In *Ambulanz Glöckner AG* Jacobs opined at [67]:

“The basic test is whether the entity in question is engaged in an activity which consists in offering goods and services on a given market and which could, at least in principle, be carried out by a private actor in order to make profits”.

In its judgment, at [20], the Court applied the same approach.

37. In *Diego Cali & Figli v SEPG* SEPG was an independent company who had been granted exclusive rights by the public authority managing the oil port of Genoa to conduct anti-pollution surveillance operations. A shipping company disputed charges levied on it by SEPG. The charges were calculated according to a tariff fixed by the port authority. The Court held that SEPG was not acting as an undertaking. It observed:

“22. The anti-pollution surveillance for which SEPG was responsible in the oil port of Genoa is a task in the public interest which forms part of the essential functions of the State as regards protection of the environment in maritime areas.

23. Such surveillance is connected by its nature, its aim and the rules to which it is subject with the exercise of powers relating to the protection of the environment which are typically those of a public authority. It is not of an economic nature justifying the application of the Treaty rules on competition (Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43, paragraph 30).”

38. In C-205/03P *FENIN v Commission*, AG Maduro observed:

“10. ...In order to differentiate between economic and non-economic activity the case-law relies on concurrent criteria, which are either used cumulatively or alternatively...”

At [11] he explained that the first criterion was “a comparative criterion” – whether the activity in question could only be carried on by a public body. He continued:

“13. The second criterion developed by case-law for the purposes of classifying an activity as economic in nature is that of participation in a market or the carrying on of an activity in a market context... It is not the mere fact that the activity may, in theory, be carried on by private operators which is decisive, but the fact that the activity is carried on under market conditions. Those conditions are distinguished by conduct which is undertaken with the objective of capitalisation, which is incompatible with the principle of solidarity. That allows it to be determined whether a market exists or not, even if the legislation in force prevents genuine competition emerging on that market...”

39. *UKRS Training Limited v NSAR Limited* contains a valuable discussion by the Tribunal (at [57] to [66]) of many of the leading authorities, and at [67] the Tribunal sets out the guidance and considerations which it derived from them:

- “(1) A functional approach is appropriate: where a body carries out several activities it is necessary to consider whether the activity in question can properly be regarded as a discrete function: *Aéroports de Paris; Eurocontrol I and II*.
- (2) Where the activity is of its nature a core function of the State, the body will not be an undertaking: *Port of Genoa; Eurocontrol I; cp Höfner and Elser*.
- (3) The fact that the body does not operate for profit is relevant but by no means decisive: *Ambulanz Glöckner; Höfner and Elser; Eurocontrol II*.
- (4) Where the activity in question has been (or is also) carried out by a private body on a commercial basis, that indicates that it is to be regarded as an economic activity such that the body carrying it out is an undertaking: *Höfner and Elser; Ambulanz Glöckner*.
- (5) Where the charges levied by the body are determined not by it but by a public authority, that indicates that it is not an undertaking: *Port of Genoa; Eurocontrol I; cp Aéroports de Paris*.
- (6) Where the power exercised by the body derives directly from legislation or is exercised on behalf of the State or a public authority, that indicates that it is not an undertaking: *Eurocontrol I and II; Port of Genoa; and cp GISC*.”

G. DECISION AND REASONS

40. We observe at the outset that we are not persuaded by Mr Charters’ assertion that the Floris and Birlinn projects would have gone ahead anyway even had the grants not been made. A criterion of funding was that, even with grant funding, the projects would not return a profit to applicants during the project period. Without grant funding it seems to us more likely than not that the projects would not have proceeded, and that Floris and Birlinn would have focussed on activities or projects which were financially viable without grant support.

41. Both parties focussed their submissions on the guidance and considerations set out at [67] of *UKRS Training Limited v NSAR Limited*. We found that helpful, and we propose to consider each of those matters in turn.
42. We begin with the guidance in [67](1). We accept that, to greater or lesser extents, the grants made supported the publishing of books and that there may be (or may have been) at least the possibility that some of those books might produce profits for the publishers after the relevant grant project period had ended. However, in our opinion the existence of that possibility is not a critical factor when it comes to analysing the activity which CS carried out. We understand and accept that there are good practical operational reasons for assessing profitability over the project period rather than any longer period. In any case, and even more importantly, we think that the correct analysis is that the essential nature of CS's activity was the awarding of grants from public funds to support creative activity for the public benefit. The grant awards to the publishers appear to us to have been awarded on the same terms, and on the basis of the same award criteria, as OPF grants to other applicants. We are not persuaded that in awarding them CS engaged in a discrete activity different from the activity carried on when OPF grants were awarded to other applicants. In particular, we do not accept the suggestion that CS provided "investment finance" to the publishers. In our view the distribution of public monies as grants, with no financial gain or return obtained or expected by CS, does not fall to be characterised as the provision of investment finance.
43. That takes us to the guidance in [67](2). We recognise that there are public functions which would be regarded by most people as being more indispensable than funding for the arts, and that such other functions are indubitably "core" public functions. Nevertheless, while we consider that grant funding for the arts is not as "core" or as "essential" as some public functions, we incline to the view that it is of sufficient importance to make such descriptions of it apposite. In any case, whether or not we are right about that, in our opinion the function of providing public funding to the arts certainly involves the exercise of powers "which are typically those of a public authority" (*Eurocontrol I*, para 30; *Diego Cali & Figli v SEPG*, para 23). Such funding has been an established way of supporting the arts since 1940, when the Council for the Encouragement of Music and the Arts (CEMA) was formed. CEMA was replaced in 1946 by the Arts Council for Great Britain; which in turn was replaced in 1994 by the

Arts Council of England, the Scottish Arts Council (CS's predecessor), and the Arts Council of Wales. Similar public funding of the arts takes place in many other EU countries. In our judgment the fact that the making of grants to fund the arts involves the exercise of powers which are typically those of a public authority is significant. It is a factor which tends to point to the activity not being an economic activity carried on by an undertaking.

44. The guidance in [67](3) can be dealt with briefly. CS does not operate for profit. While that is not decisive, it is a further factor which tends to point towards the activity complained of not being an economic activity carried on by an undertaking.
45. The guidance in [67](4) merits greater discussion. In our opinion the making of grants to those involved in the arts has not been (and is not) carried out by a private body on a commercial basis. As already discussed, the making of grants is the relevant activity which CS engages in. It does not provide "investment finance" in the sense of an investment that provides a commercial return to the investor. As such, it is not something which would have been done by a private body on a commercial basis for profit (as opposed to on a philanthropic basis). There was no commercial "participation in the market" by CS and no "objective of capitalisation"; nor in our view would a private body have been able to carry out the same activity by participating commercially in the market for profit with the objective of capitalisation (*C-205/03P FENIN v Commission*, AG Maduro at para 13). It follows that we think that this factor also tends to indicate that the relevant activity is not an economic activity carried on by an undertaking.
46. It is common ground that the guidance in [67](5) has no bearing on the question before the Tribunal since CS does not levy charges.
47. We turn lastly to the guidance in [67](6). We shall examine separately whether the power to make grants which CS exercised derives from legislation, and whether the power was exercised on behalf of the State or a public authority.
48. In our opinion it is beyond argument that the power to make grants which CS exercised is a power which derives directly from legislation, *viz.* from sections 37 and 39(4) of

the 2010 Act. Mr Charters' submission that a power derives directly from legislation only if the legislation requires that the power be exercised in the way which it has been is misconceived in our view. He maintained that paragraph 3.4 of the Guide supports his proposition. We disagree. Paragraph 3.4 is part of Section 3 of the Guide. Section 3 is headed "Specific Exclusions from Competition Law". Paragraph 3.1 explains:

"3.1 Where public bodies **do** act as undertakings, there may be certain limited circumstances in which their conduct may fall within the scope of a specific exclusion from competition law provided for in the relevant UK and/or EU legislation."

Paragraph 3.4 discusses one such specific exclusion, namely the exclusion contained in paragraph 5 of Schedule 3 to the CA 98. That provision provides:

"Compliance with legal requirements

5.—

- (1) The Chapter I prohibition does not apply to an agreement to the extent to which it is made in order to comply with a legal requirement.
- (2) The Chapter II prohibition does not apply to conduct to the extent to which it is engaged in an order to comply with a legal requirement.
- (3) In this paragraph "legal requirement" means a requirement—
 - (a) imposed by or under any enactment in force in the United Kingdom;
 - (b) imposed by or under the Treaty or the EEA Agreement and having legal effect in the United Kingdom without further enactment; or
 - (c) imposed by or under the law in force in another Member State and having legal effect in the United Kingdom."

However, the question before the Tribunal is not whether an activity of an undertaking falls within that exclusion. The Tribunal requires to address a prior question - whether in engaging in the activity of making grants to publishers CS is engaging in economic activity as an undertaking? In answering that question a factor which is relevant is that the power to make grants which CS exercised is a power which derives directly from legislation. The Schedule 3, paragraph 5 exclusion has no bearing on that factor.

49. In our view it is also plain that the power to make grants to publishers which CS used was a power exercised on behalf of a public authority. In this connection Mr Charters placed great store in the submission that CS is a body which is distinct from “the Crown”. As the authors of *Bennion on Statutory Interpretation* (7th ed.) observe (at Section 4.14 (p 141)):

“Under the best modern drafting practice an Act setting up a new public authority makes clear whether or not it is to be treated as acting on behalf of the Crown.

Many bodies are nowadays constituted by statute for public purposes. If largely autonomous, even though under some degree of public control, such bodies are not treated as acting on behalf of the Crown (ie the government or executive).”

Here, Sched 9, para 1 of the 2010 Act makes the position clear:

“...

(2) Creative Scotland is not to be regarded as a servant or agent of the Crown, or as having any status, immunity or privilege of the Crown, nor are its members or its employees to be regarded as civil servants.

(3) Creative Scotland’s property is not to be regarded as property of, or held on behalf of, the Crown.”

Accordingly, we agree with Mr Charters that when it exercises its powers CS does not act as an agent of government, and that its powers do not fall within the province of government. However, in our opinion that is not of any great significance here, because it is clear that CS is a public authority, and it is also clear that in making the grants to the publishers it was exercising public powers (cf. *Tamlin v Hannaford* [1950] 1 KB 18, per Denning LJ at p 24).

50. CS is a statutory public body constituted by the 2010 Act. Its functions are statutory functions. It is plain that CS is accountable to the Scottish Ministers and that the Scottish Ministers exercise significant control over CS’s activities. They may give CS directions as to the exercise of its functions in relation to all matters other than questions of artistic and cultural judgement. They appoint CS’s chair and members (Sched 9, para 2), and they determine the period of members’ appointments (Sched 9, para 3) and their remuneration and allowances (Sched 9, para 4). Their approval to the appointment and terms and conditions of a chief executive is required (Sched 9, para 7(5)), and they may give directions as to the appointment and terms and conditions of other employees

(Sched 9, para 7(7)). Their approval is needed for arrangements concerning employees' pensions, allowances and gratuities (Sched 9, para 7(8)). Members of the Scottish Executive and persons authorised by the Scottish Ministers are entitled to attend and take part in meetings of CS or any of its committees, but are not entitled to vote at such meetings (Sched 9, para 9(3)). In terms of Sched 9, para 13(1) CS must (a) keep proper accounts and accounting records, (b) prepare in respect of each financial year a statement of accounts, and (c) send a copy of the Statement to the Scottish Ministers, and must do all of that in accordance with any directions the Scottish Ministers may give. In terms of para 13(2) CS must send the statement of accounts to the Auditor General for Scotland for auditing. Each year CS must prepare a report which provides information on the discharge of its functions and which includes its audited accounts (Sched 9, para 14(1)); it must publish the report, lay a copy of it before the Scottish Parliament, and send a copy to the Scottish Ministers (Sched 9, para 14(2)). CS is a devolved public body for the purposes of the Ethical Standards in Public Life etc. (Scotland) Act 2000. It is a listed authority for the purposes of the Scottish Public Services Ombudsman Act 2002. It is a Scottish public authority for the purposes of the Freedom of Information (Scotland) Act 2002. It is a specified authority for the purposes of the Public Appointments and Public Bodies etc. (Scotland) Act 2003. In our opinion it could hardly be clearer that CS is a public authority.

51. Accordingly, the power to make grants which CS exercised derives from legislation, and it was exercised on behalf of a public authority. In short, application of the guidance in [67](6) suggests that the making of the grants to the publishers was not an economic activity carried on by an undertaking.
52. In the whole circumstances, applying the guidance in *UKRS Training Limited v NSAR Limited* at [67], we are satisfied that the pursuer's provision of grants to the publishers was not an economic activity carried on by an undertaking. It follows that the activity complained of is not conduct prohibited by the Chapter II prohibition, and that the Tribunal does not have jurisdiction.

H. CONCLUSION

53. For the foregoing reasons we hold unanimously that CS does not constitute an undertaking for the purposes of the claim in the present proceedings, and that the Tribunal does not have jurisdiction. We determine the preliminary issue accordingly.

The Honourable Lord Doherty
Chairman

Peter Anderson

Professor David Ulph CBE

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 17 April 2020