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The application of competition law to non-profit organizations: Aspects of cartel law and state aid law of the European Union and Switzerland

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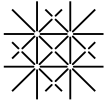
The application of competition law to non-profit organizations: Aspects of cartel law and state aid law of the European Union and Switzerland

Damian Schweighauser
Research Assistant
Center for Philanthropy Studies (CEPS), University of Basel
ceps@unibas.ch

Citation:

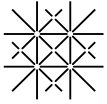
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1 Introduction

This paper addresses the question whether non-profit organizations (NPOs) are covered by the respective competition laws of the European Union and Switzerland. I discuss this question based on a recent judgment of the General Court of the European Union on the admissibility of state aid to an NPO (with a charitable purpose), which was presumably in competition with a company with an economic purpose. The judgment allows some conclusions to be drawn as to whether charitable NPOs can fall within the scope of EU competition law, i.e. EU antitrust and EU state aid law. Subsequently this paper is structured as follows: After elaborating the implications of this judgment, it will be examined in the sense of a legal comparison whether the applicability of antitrust law to NPOs would also be conceivable in Switzerland. Subsequently, the applicability of Swiss subsidy law to NPOs is briefly touched. However, a more detailed analysis of Swiss subsidy law and considerations of its compatibility with EU subsidy law is out of scope. This is also because Swiss subsidy law is not part of Swiss competition law in the present sense. This article will conclude with a summary.

EU legislation does not define the term *non-profit organization*. There are also various, sometimes divergent, definitions of NPO in German and Swiss literature and jurisdiction.¹ For NPOs in the sense of the present contribution, an orientation along the definition of organizations in the sense of tax law of Switzerland (Art. 56 lit. g DBG/LIFD)² or Germany (§§ 51 et seq. AO)³ is appropriate: In addition to the prerequisite of organizations having no profit motive, it is essential that they selflessly pursue an objective of general interest.⁴ Professional or trade associations, for instance, often have no intention of making a profit, but pursue member-specific goals and thus no objective of general interest. They are therefore not addressed here, just as little as, for example, political or sports associations, which promote the interests of members (also: lack of selflessness due to the pursuit of particular interests) or public organizations.⁵ Thus, the paper at hand refers to NPOs whose activities in the public interest benefit an open circle of beneficiaries, without pursuing an economic motive. Examples include nature conservation organizations, contact points for drug addicts, foundations to support destitute students, etc.

The term NPO in this article therefore only covers *non-governmental NPOs* with a *charitable* purpose (according to Swiss tax law. In German tax law: *public benefit purpose* [§ 52 AO], not to be mistaken with

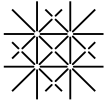
¹ RIEMER HANS MICHAEL, Nonprofit-Organisationen aus der Sicht der Rechtswissenschaft, Beitrag zur Begriffsbildung und Abgrenzung, in: Schauer/Anheier/Blümle (Ed.): Der Nonprofit-Sektor im Aufwind – zur wachsenden Bedeutung von Nonprofit-Organisationen auf nationaler und internationaler Ebene, Linz 1997, pp. 239-244, p. 239 et seq.; RIEMER HANS MICHAEL, in: Berner Kommentar Band/Nr. I/3/2, Die Vereine, Systematischer Teil und Kommentar zu Art. 60-79 ZGB, 3rd edition., Bern 1990, Art. 60 ZGB para 48; HELMIG BERND / BÄRLOCHER CHRISTOPH / VON SCHNURBEIN GEORG, in: Helmig/Lichtsteiner/Gmür (Ed.), Der Dritte Sektor der Schweiz, Grundlagen und Abgrenzungen, Bern 2006, pp. 15-40, p. 26 et seq.; regarding German law: VON HIPPEL THOMAS, Begriffsbildung und Problemkreise der Nonprofit-Organisationen aus juristischer Sicht, in: Hopt/von Hippel/Walz (Ed.), Nonprofit-Organisationen in Recht, Wirtschaft und Gesellschaft – Theorien – Analysen – Corporate Governance, Tübingen 2005, pp. 35-46, p. 36 et seq.

² Bundesgesetz über die direkte Bundessteuer vom 14. Dezember 1990 (DBG)/Loi fédérale sur l'impôt fédérale direct (LIFD), SR 642.11.

³ Fiscal Code of Germany (AO) in the version promulgated on 1 October 2002 (Federal Law Gazette [Bundesgesetzblatt] I p. 3866; 2003 I p. 61), last amended by Art. 17 of the Act of 17 July 2017 (Federal Law Gazette I p. 2541).

⁴ In terms of the Swiss DBG/LIFD: requirement of «general interest» and «altruistic activity» according to the Circular Letter No. 12 of the tax period 1995/96 of 8 July 1994 of the Swiss Federal Tax Administration, p. 2 et seq.; in terms of the German AO: «promotion of public interests» and «altruistic activity» to §§ 52 et seq., 55 AO.

⁵ GRETER MARCO / GRETER ALEXANDER, in: Zweifel/Beusch (Ed.), Bundesgesetz über die direkte Bundessteuer, Kommentar zum Schweizerischen Steuerrecht, 3rd edition, Art. 56 DBG para 25a, 32; GERSCH EVA-MARIA, in: Klein (Ed.), Abgabenordnung einschliesslich Steuerstrafrecht, Kommentar, 15th edition, Munich 2020, § 52 AO para 2, 3a et seq.



public service purposes here). In this contribution, the term EU competition law refers to the European Union's state aid law and EU antitrust law.

2 Judgment of the General Court of the European Union '*a&o hostel and hotel Berlin GmbH v European Commission*'

The judgment of the General Court of the European Union (informally known as European General Court, formerly known as Court of First Instance, hereinafter referred to as General Court) is essentially based on the following factual situation: The non-profit association «Deutsches Jugendherbergswerk» (DJH) had founded a *gGmbH* (nonprofit limited liability company under German law) to operate a youth hostel in Berlin («Jugendherberge Berlin Ostkreuz», JBO). Both are recognized as NPOs under German tax law.⁶ The JBO had received various tax benefits and had concluded a lease agreement with the federal state of Berlin, according to which no interest was owed for the provision of the land for the construction of the youth hostel. Against this, the «A&O Hotel and Hostel Friedrichshain GmbH» (A&O GmbH), a profit oriented company, had initiated proceedings before the European Commission, essentially claiming⁷ that the DJH and JBO were receiving illegal state aid within the meaning of the Treaty on the Functioning of the European Union (TFEU)⁸ through the lease agreement in question.⁹ Their main argument was that the non-profit JBO would be able to offer much cheaper services due to the aid granted and that other providers in the market for low budget accommodation therefore could not compete. Thus, the A&O GmbH claimed that the measures distorted competition.¹⁰ In its decision (being contested in the present case before the General Court), the EU Commission had come to the conclusion that these measures of granting aid were permissible, among other things on the grounds that JBO, as a NPO within the meaning of German law, had no profit motive and supported youth interests. Consequently, it claimed, an aid – if there even was one – was justified because it falls within the scope of the exception in Art. 107(3)(c) TFEU.¹¹ The A&O GmbH brought an action before the General Court for the annulment of this decision, generally restating the arguments advanced at first instance (the formal applicant was the legal successor of the A&O GmbH, «a&o hostel and hotel Berlin GmbH», hereinafter referred to as A&O GmbH as well in the interest of readability).¹²

⁶ According to the Decision of the European Commission contested in the present case, *Deutschland v A&O Hotel and Hostel* (Case SA.41345) Commission Decision C 3220 [2017], OJ 2017 C 193/1, para 15.

⁷ For the distinct objections see the Judgment of the General Court itself: Judgment of the General Court of 20 June 2019, *a&o hostel and hotel Berlin GmbH v European Commission*, Case T-578/17, EU:T:2019:437, paras 29, 55.

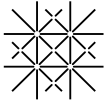
⁸ Treaty on the functioning of the European Union, consolidated version, OJ 2016 C 202 of 7 June 2016, p. 47 (CELEX-No 12016E/TXT).

⁹ For the argued substantive support of their objections in detail see the Decision of the European Commission contested in the present case, *Deutschland v A&O Hotel and Hostel* (Case SA.41345) Commission Decision C 3220 [2017], OJ 2017 C 193/1, para 20 et seq.

¹⁰ Decision of the European Commission contested in the present case, *Deutschland v A&O Hotel and Hostel* (Case SA.41345) Commission Decision C 3220 [2017], OJ 2017 C 193/1, para 50.

¹¹ Judgment of the General Court of 20 June 2019, *a&o hostel and hotel Berlin GmbH v European Commission*, Case T-578/17, EU:T:2019:437, paras 13 et seq., 122; see also Decision of the European Commission contested in the present case, *Deutschland v A&O Hotel and Hostel* (Case SA.41345) Commission Decision C 3220 [2017], OJ 2017 C 193/1, paras 75 et seq., particularly para 90: «There is no indication, that the conditions of the lease contract would lead to excessive profits, - which would indicate that the aid is not proportionate – and in an event, in view of the specific non-profit status of DJH and the youth hostel Ostkreuz, any profits would have to be reinvested for their statutory purpose of youth welfare.».

¹² Judgment of the General Court of 20 June 2019, *a&o hostel and hotel Berlin GmbH v European Commission*, Case T-578/17, EU:T:2019:437, paras 1 et seq.



The General Court annulled the Commission's decision, ruling in favor of A&O GmbH.¹³ Within the context of the paper at hand, one statement is of particular interest: The General Court states that, in order to achieve its statutory objectives, the JBO carries on an economic activity which competes with the services of other market participants (such as the A&O GmbH in this case). This, it considers, applies regardless of the fact that the JBO pursues a charitable purpose and has no primary profit motive:¹⁴

«The JBO, even if it is a charitable legal person within the meaning of German law and even if it has no profit motive, is an undertaking which carries out an economic activity consisting in offering services in competition with the services of other economic operators such as the applicant in order to achieve its statutory objectives.»¹⁵ [translated by the author]

With the annulment, the EU Commission is obliged to take a new decision in consideration of the General Courts judgment.¹⁶ It will have to focus particularly on the question whether the aid granted can be classified as a measure being exempt from the ban on state aid (in particular as aid for services of general economic interest, SGEI). The General Court has considered this as conceivable but insufficiently proven.¹⁷

3 Main implications of the judgment for NPOs under EU competition law

3.1 Preface

In the present context, the question of whether NPOs are enterprises (hereinafter referred to as *undertakings*, according to the wording of the TFEU, see below) within the meaning of EU competition law is of interest. Here, the majority view held in literature and case law is followed, according to which the term *undertaking* is a uniform term for the entire European competition law (EU state aid rules, EU antitrust rules).¹⁸

3.2 Uniform definition of undertakings for the entire EU competition law

EU antitrust law essentially regulates the conduct of undertakings among themselves. With regard to its personal scope of application, EU antitrust law is targeted at undertakings (cf. the cartel prohibition within the meaning of Art. 101 TFEU: «The following shall be prohibited as incompatible with the internal market [...] agreements between *undertakings*, decisions by *associations of undertakings* [...] which may affect

¹³ Judgment of the General Court of 20 June 2019, *a&o hostel and hotel Berlin GmbH v European Commission*, Case T-578/17, EU:T:2019:437, para 132.

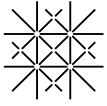
¹⁴ Judgment of the General Court of 20 June 2019, *a&o hostel and hotel Berlin GmbH v European Commission*, Case T-578/17, EU:T:2019:437, paras 110, 116.

¹⁵ Original text in the Judgment of the General Court of 20 June 2019, *a&o hostel and hotel Berlin GmbH v European Commission*, Case T-578/17, EU:T:2019:437, para 110: «Die JBO ist nämlich, auch wenn es sich bei ihr um eine gemeinnützige juristische Person im Sinne des deutschen Rechts handelt und auch wenn sie keine Gewinnerzielungsabsicht hat, ein Unternehmen, das eine wirtschaftliche Tätigkeit ausübt, die darin besteht, zur Verwirklichung ihrer satzungsmässig bestimmten Ziele Dienstleistungen anzubieten, die mit den Dienstleistungen anderer Wirtschaftsteilnehmer wie der Klägerin im Wettbewerb stehen.»

¹⁶ For procedural aspects: BUNDI LIVIO, System und wirtschaftsverfassungsrechtliche Zulässigkeit von Subventionen in der Schweiz und von Beihilfen in der EU, Zurich 2016, p. 239.

¹⁷ Judgment of the General Court of 20 June 2019, *a&o hostel and hotel Berlin GmbH v European Commission*, Case T-578/17, EU:T:2019:437, paras 122 et seq.

¹⁸ SÄCKER FRANZ-JÜRGEN / STEFFENS JULIANE, in: Säcker/Meier-Beck/Bien/Montag (Ed.), Münchner Kommentar zum Wettbewerbsrecht, Band I, Europäisches Wettbewerbsrecht, 3rd edition, Munich 2020, Art. 101 AEUV para 3 with further references to jurisdiction; VON WALLENBERG GABRIELA / SCHÜTTE MICHAEL, in: Grabith/Hilf/Nettesheim (Ed.), Das Recht der Europäischen Union: EUV/AEUV, 70th edition, Munich 2020, Art. 107 AEUV para 39.



trade between Member States [...]» etc.).¹⁹ This is an essential systematic difference to EU state aid rules, which are primarily directed at the Member States. State aid rules examine whether Member States benefit certain undertakings or the production of certain goods, and if these benefits are compatible with principles of free competition in the internal market of the EU (in detail, see below). If the opening of the area of application is affirmed in this examination, the *undertakings* concerned are the ones that suffer as well (equal to EU antitrust law), as they lose their entitlement to the aid (although the Member State granting the aid is the norm addressee). Thus in both sections of EU competition law undertakings are affected of negative decisions of the judicial bodies of the European Union: Either they lose their financial advantages granted by the state, as these are found not to be justified under EU state aid law, or they are sanctioned for their practices as an undertaking under EU antitrust law.²⁰

Consequently, the EU uses only one definition of undertakings throughout the competition law: The judicial bodies define undertakings on the basis of their activities and therefore use a *functional concept (i.e. definition) of undertakings*.²¹ The reason why the functional concept of undertakings and therefore a single definition of undertakings applies to both areas of law, is that the scope of protection for EU state aid and antitrust law is the same: securing undistorted competition between undertakings.²²

The application of the functional concept of undertakings specifically means that the EU jurisdiction, since its landmark ruling in 1979 (*settled case law*), states that an enterprise should be considered to be any entity *engaged in economic activities*, regardless of the legal status or the way in which it is financed.²³ Thus, the functional concept of undertakings manifests itself in the fact, that the term *undertaking* is based on the activity of an organization rather than its statutory objectives (or: purpose). The focus on the *activity* of an entity differs from the former concept of competition law: defining enterprises according to their organization, legal form, and therefore also their purpose (*institutional concept of undertakings*). The introduction of the *functional concept of undertakings* serves the goal of covering *any* market behavior that is capable of affecting relations between competitors and therefore distort competition. Thus, it extends the application of EU competition law (compared to the *institutional concept of undertakings*).²⁴

Accordingly can be noted: Where goods or services are offered or demanded, an economic activity takes place and markets are created. Whoever acts in these markets may compete with other market participants and is therefore an undertaking which is covered by EU competition law.²⁵ Whether it primarily seeks to make profit or not is explicitly irrelevant.²⁶ A charitable *purpose* therefore does not protect against being considered an undertaking in terms of EU competition law, as long as the *activity* carried out is in competition with other undertakings (also if they have an economic purpose, as in the case concerning A&O Hostel).²⁷

¹⁹ Emphasis added by the author.

²⁰ Art. 4 et seq. of the Council Regulation 1/2003 on the implementation of the rules on competition laid down in Art. 81 und 82 of the Treaty, OJ 2003 L 001 of 4 January 2003, p. 1 et seq (CELEX-No. 32003R0001).

²¹ SÄCKER/STEFFENS (n 18), Art. 101 AEUV para 3 with further references to jurisdiction; VON WALLENBERG/SCHÜTTE (n 18), Art. 107 AEUV para 39.

²² SÄCKER/STEFFENS (n 18), Art. 101 AEUV, paras 3, 6.

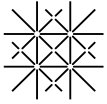
²³ According to the well-established case law of the European Court of Justice: Judgment of the European Court of Justice of 23 April 1991, *Klaus Höfner and Fritz Elser v Macotron GmbH*, Case. C-41/90, EU:C:1991:161, para 21.

²⁴ SÄCKER/STEFFENS (n 18), Art. 101 paras 5 et seq.; critical view: MESTMÄCKER ERNST JOACHIM / SCHWEITZER HEIKE, *Europäisches Wettbewerbsrecht*, 3rd edition, Munich 2014, § 9 para 13.

²⁵ MESTMÄCKER/SCHWEITZER (n 24), §9 para 6.

²⁶ MESTMÄCKER/SCHWEITZER (n 24), § 9 para 32; SÄCKER/STEFFENS (n 18), Art. 101 AEUV para 11.

²⁷ SÄCKER/STEFFENS (n 18), Art. 101 AEUV para 12.



Beyond the judgment discussed in this paper, this applies not only to EU state aid law,²⁸ but explicitly also to EU antitrust law.²⁹ Moreover, the European Courts also refer to the definition of undertakings in their state aid jurisprudence when ruling antitrust law cases,³⁰ which also serves as evidence of the uniformity of the *functional concept of undertakings*. The judgments cited in this chapter and the uniformity of the term *undertaking* for the EU competition law in general show, that NPOs can be covered by EU antitrust law as well if they carry out an economic *activity*.

3.3 Scope of EU state aid law in particular

Art. 107 (1) TFEU lays down a general prohibition on state aid to undertakings within the internal market of the EU but does not provide a separate definition of state aid. Broadly speaking, state aid is considered any aid (1) granted through state resources (2) for certain undertakings or the production of certain goods (3) which distorts or threatens to distort competition (4) in so far as it affects trade between Member States (5).³¹ In order to answer the initial question presented in this paper, the criteria of financial advantage from state resources and that of the undertaking must be examined more closely.

«Aid» is defined as granting a financial advantage to an undertaking (in the sense of the functional concept mentioned above) without any financial compensation in return. This financial advantage can take various forms, e.g. benefits provided in cash or kind (classically: subsidies). The advantage can also take the form of measures that reduce the financial burden of the undertaking.³² Typical examples of this second category are tax reliefs or tax reductions.³³ By granting such financial advantages, Member States regularly pursue the goal of encouraging the recipients of the aid (the undertakings) to behave in a certain way (*incentive system*).³⁴ In the present case for example, the federal state of Berlin used the financial incentives to encourage JBO to the promotion of youth and development of cultural and historical awareness activities. Among other things, this should be done by integrating a youth education center into the JBO.³⁵ With regard to the motives of Member States for such behavioral animations through financial incentives, it should be noted that the ban on state aid is not absolute: The control mechanism of the EU state aid law stipulates that the first step is to examine whether a prohibited aid measure in terms of Art. 107 (1) TFEU is involved. In a second step, it is examined whether the objective of the aid is amongst those which could qualify for exemption from the ban on aid laid down in Art. 107 (2), 107 (3), or 106 (2) TFEU.³⁶ The motives pursued by the Member States granting aid may therefore justify the financial advantage. Accordingly, aid for «classic

²⁸ Similar: Judgment of the European Court of Justice of 10 January 2006, *Ministero dell'Economia e delle Finanze/Cassa di Risparmio di Firenze et al.*, Case C-222/04, EU:C:2006:8, para 123; see also: Judgment of the General Court of 12 September 2013, *Federal Republic of Germany v European Commission*, Case T-347/09, EU:T:2013:418, para 48.

²⁹ In that sense the European Court of Justice in its antitrust jurisprudence, regarding another organization without a purpose of making profit: Judgment of the European Court of Justice of 1 July 2008, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, Case C-49/07, EU:C:2008:376, para 27, however the judgment has the particularity that it referred to an enterprise which, in addition to its economic activity (not: economic purpose), had powers of a public authority (para 26) and consequently a dominant position on the market (paras 35 et seq., 50).

³⁰ Judgment of the European Court of Justice of 1 July 2008, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, Case C-49/07, EU:C:2008:376, para 27.

³¹ BUNDI (n 16), p. 149 et seq.; VON WALLENBERG/SCHÜTTE (n 18), Art. 107 AEUV paras 24 et seq.

³² BUNDI (n 16), p. 150, 152; VON WALLENBERG/SCHÜTTE (n 18), Art. 107 para 28.

³³ BUNDI (n 16), p. 152; VON WALLENBERG/SCHÜTTE (n 18), Art. 107 AEUV para 47; referring to the illustrative Judgment of the European Court of Justice of 15 March 1994, *Banco de Crédito Industrial SA, now Banco Exterior de España SA v Ayuntamiento de Valencia* Case C-387/92, EU:C:1994:100, para 14.

³⁴ LIDEIKYTE HUBER GIEDRE / PETER HENRY, Encouraging Sustainable Investments through Direct Tax Relief: Swiss and EU State Aid Legal Framework, in: IFF Forum für Steuerrecht 2020/3; pp. 207-221, p. 209 et seq., 212.

³⁵ Judgment of the General Court of 20 June 2019, *a&o hostel and hotel Berlin GmbH v European Commission*, Case T-578/17, EU:T:2019:437, paras 13, 29.

³⁶ BUNDI (n 16), p. 173 et seq.



nonprofit or public interest purposes» (such as aid for accessing and promoting culture,³⁷ aid to assist the recruitment of disabled workers,³⁸ aid for environmental protection or aid to promote nature conservation projects,³⁹ etc.) regularly fall within these exceptions and can be justified.⁴⁰

However, the exceptions are still irrelevant for meeting the definition of an undertaking when assessing whether aid is involved (first step): Here the *functional concept of undertakings* is the relevant term (as mentioned) in state aid law as well. This concept is simply interested in the following questions: Does the undertaking carry out an *economic activity*? Does it operate in a market with competitors who pursue a profit-oriented purpose? In short, does the NPO pursue a commercial *activity*? If these questions can be answered with yes, the status as an undertaking can be confirmed.⁴¹ The charitable *purpose* may become significant again at a later point, when the question is examined of whether the aid is justified (examination of the above-mentioned exceptions). For example, with regard to the judgment discussed here, the EU Commission had considered JBO's activities of operating a youth hostel including an education center as falling within the exceptional area of state aid law, arguing (as mentioned) that this activity would promote the purpose of youth services and thus an objective of general interest within the European Internal Market according to Art. 107 (3) (c) TFEU. However, in the opinion of the General Court, the Commission had not sufficiently proven that the relevant conditions had been met.⁴² Thus, the judgment under discussion states that state aid measures for NPOs may also fall within the scope of EU state aid law. Just because the recipient is an NPO, aid is not treated differently *per se*. Rather this judgment illustrates that the decisive factor is primarily (as in EU antitrust law) whether an *economic activity* is carried out. If this is the case, the NPO can meet the definition of an undertaking within the meaning of state aid law. However, the non-profit purpose can become relevant again in a second step for the fulfillment of an exceptional circumstance.

Particularly noteworthy in the judgment under discussion is the clear distinction between *purpose* (charitable purpose) and *methods* (commercial) and the stronger weighting of the latter, which is exemplary for an orientation towards the functional concept of undertakings. Furthermore, the judgement deals with the application of state aid law to an NPO in terms of German tax law, which is similar to Swiss tax law with regard to the permissibility of economic activities by NPOs (although it has a significantly higher density of regulations).⁴³

³⁷ Wording of Art. 107 (3)(d) TFEU; also KÜHLING JÜRGEN / RÜCHARDT CORINNE in: Streinz (Ed.), *Becksche Kurzkommentare, Band 57, EUV/AEUV – Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, Charta der Grundrechte der Europäischen Union, 3rd edition, Munich 2018, Art. 107 para 147, referring to Decisions of the European Commission according to which promotion of Theater or Museums and NPOs can be covered under Art. 107 (3)(d) TFEU.*

³⁸ CREMER HANS JOACHIM, in: Callies/Ruffert (Ed.), *EUV/AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtscharta, 5th edition, Munich 2020, Art. 107 AEUV para 77.*

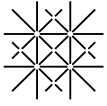
³⁹ CREMER (n 38), Art. 107 AEUV para 68; Judgment of the General Court of 12 September 2013, *Federal Republic of Germany v European Commission*, Case T-347/09, EU:T:2013:418, paras 54, 75 et seq. (in casu the requirements for application of the exception were rejected).

⁴⁰ For detailed information: CREMER (n 38), Art. 107 AEUV, paras 1 et seq.

⁴¹ MESTMÄCKER ERNST JOACHIM / SCHWEITZER HEIKE, in: Immenga/Mestmäcker/Körber (Ed.), *Kommentar zum Deutschen und Europäischen Kartellrecht, Band III Beihilfenrecht/Sonderbereiche, 5th edition, Munich 2016 (hereinafter: IMMENGA/MESTMÄCKER/SCHWEITZER), Art. 107 AEUV paras 10 et seq.; VON WALLENBERG/SCHÜTTE (n 18), Art. 107 AEUV para 39.*

⁴² Judgment of the General Court of 20 June 2019, *a&o hostel and hotel Berlin GmbH v European Commission*, Case T-578/17, EU:T:2019:437, paras 91 et seq.; referring to the Decision of the European Commission contested in the present case, *Deutschland v A&O Hotel and Hostel (Case SA.41345) Commission Decision C 3220 [2017], OJ 2017 C 193/1, paras 76 et seq.*

⁴³ For Swiss tax law: KOLLER THOMAS, *Gemeinnützigkeits- und Spendenrecht in der Schweiz*, in: Walz/von Auer/von Hippel (Ed.), *Spenden und Gemeinnützigkeitsrecht in Europa, Tübingen 2007, pp. 441-482, p. 464 et seq.*; for German tax law: VON HIPPEL THOMAS / WALZ RAINER W., *Rechtspolitische Optionen zum deutschen Gemeinnützigkeits- und*



Not a new finding of this judgment is the fact that the intention to make a profit is irrelevant for the concept of an undertaking. This had already been established in earlier judgments of European courts.⁴⁴ However, the absence of a profit motive opens the scope of application beyond charitable NPOs and is not in itself meaningful in relation to NPOs with *charitable* purposes. A trade or a professional association may also have no primary profit motive,⁴⁵ but it is not an NPO with a charitable purpose in the present sense. It is true that European case law has already established the irrelevance of the intention to make a profit in earlier stated aid judgments concerning organizations of a non-profit nature. However, the cases involved were of a different character: In its judgment on *Ministero dell' Economia e delle Finanze v Cassa di Risparmio di Firenze et al.*, the European Court of Justice (ECJ) dealt with a banking foundation, which managed a profit-oriented banking company through shareholding (*controlling interest*). For this reason, the commercial activities of the profit-oriented banking company were attributed to it as its own.⁴⁶ Thus, in that judgment, the activities of an economically oriented organization and those of an NPO were to a certain extent intermingled. In contrast, the context of the judgment of the General Court on *Federal Republic of Germany v European Commission* (applicability of state aid rules to nature conservation organizations) was more comparable to the ruling presented here, but in that judgment the court mainly expressed its opinion on the distinction between economic activities and powers of an authority.⁴⁷ The only recipient undertaking mentioned by name⁴⁸ in the ruling was a foundation established by law and funded by state resources. Although the aid was also intended to benefit other NPOs,⁴⁹ no information on their legal nature is apparent from the judgment.⁵⁰ Nevertheless, this judgment also applies the functional understanding of *undertakings*⁵¹ by emphasizing that the pursuit of charitable *purposes* through commercial *activities* does not protect against the application of state aid law.⁵²

3.4 Interim conclusion

Thus, in the sense of an interim conclusion, it can be stated that charitable NPOs may be considered undertakings within the meaning of EU competition law, provided they perform a commercial activity. The ruling discussed in this article shows exemplarily that also charitable NPOs without the primary intention of

Spendenrecht von A bis Z, in: Walz/von Auer/von Hippel (Ed.), *Spenden und Gemeinnützigkeitsrecht in Europa*, Tübingen 2007, pp. 215-280, p. 241 et seq.

⁴⁴ Cf. the references in SÄCKER/STEFFENS (n 18), Art. 101 AEUV para 11.

⁴⁵ Judgment of the European Court of Justice of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, Case C-1/12, EU:C:2013:127, para 57.

⁴⁶ Judgment of the European Court of Justice of 10 January 2006, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze et al.*, Case C-222/04, EU:C:2006:8, paras 109 et seq.

⁴⁷ Judgment of the General Court of 12 September 2013, *Federal Republic of Germany v European Commission*, Case T-347/09, EU:T:2013:418, paras 27 et seq., 37.

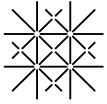
⁴⁸ Judgment of the General Court of 12 September 2013, *Federal Republic of Germany v European Commission*, Case T-347/09, EU:T:2013:418, paras 3 et seq.

⁴⁹ Judgment of the General Court of 12 September 2013, *Federal Republic of Germany v European Commission*, Case T-347/09, EU:T:2013:418, paras 3, 37 et seq.

⁵⁰ Judgment of the General Court of 12 September 2013, *Federal Republic of Germany v European Commission*, Case T-347/09, EU:T:2013:418, para 36.

⁵¹ Incidentally, it is interesting to note the explanations in terms of the (parallel to the functional) dominant «relative» concept of undertakings according to which, based on the functional view, there can also be only partial undertaking character (this view is therefore relative, since the concept of enterprise is only fulfilled with regard to commercial, profit-oriented activities): Judgment of the General Court of 12 September 2013, *Federal Republic of Germany v European Commission*, Case T-347/09, EU:T:2013:418, para 28.; for detailed information on this concept: SÄCKER/STEFFENS (n 18), Art. 101 AEUV para 41.

⁵² Judgment of the General Court of 12 September 2013, *Federal Republic of Germany v European Commission*, Case T-347/09, EU:T:2013:418, para 36.



making a profit open the scope of application of EU competition law, as soon as they operate on a market with competitors who pursue profit-making purposes.

Nonetheless, charitable NPOs are expected to benefit from the fact that their purposes should regularly fall within the scope of exceptions of EU state aid law (as mentioned above). Due to the variety of different purposes, it would go beyond the scope of this paper to examine this separately and will not be further discussed here. As mentioned, the applicability of the exceptions would also be conceivable in the discussed Judgment *a&o hostel and hotel Berlin GmbH v European Commission*. In the opinion of the General Court, the requirements for this had simply not been sufficiently examined and proven. The fact that the benefits (interest-free leases), which remained ultimately the subject of the judgement, were *operating aid* also makes it difficult to generalize the findings of this judgment. The admissibility of operating aid is subject to particularly strict criteria.⁵³

4 Comparative legal analysis of the judgment of the General Court of the EU regarding NPOs under Swiss competition law

4.1 Personal scope of application of Swiss antitrust law

Since its creation in 1962, the Swiss Cartel Act (KG/LCart)⁵⁴ has considerably converged with that of the European Union in terms of substantive law (so-called «autonomous implementation»⁵⁵). In Switzerland, too, a *functional concept of undertakings* is applicable in the sense that a commercial, entrepreneurial activity is decisive for the opening of the personal scope of application (see the wording of Art. 2 para 1^{bis} KG/LCart). The Swiss concept of undertakings also does not require the intention to make a profit.⁵⁶

In literature, which is still scarce regarding this question, the majority opinion states that NPOs too, fall within the personal scope of application of the KG/LCart. The same arguments are brought forward as in European competition law. Consequently, any economic activity of an organization with charitable status is also likely to distort competition.⁵⁷ HEIZMANN excludes «[...] sporting, artistic, and musical, scientific, caring or political activities» [translated by the author] from the scope.⁵⁸ The fact that such *activities* do not represent economic *purposes*, however, speaks for the relevance of the functional concept of undertakings: after all, it does not say anything about whether the pursuit of such *purposes* through economic *activities* is covered.

As far as can be seen, Swiss case law has not yet ruled on the applicability of antitrust law to charitable NPOs in the present sense.⁵⁹ However, it has also been established at the Swiss jurisdictional level that a profit-making intent is not required for being considered an undertaking.⁶⁰

⁵³ BUNDI (n 16), p. 199; Judgment of the General Court of 20 June 2019, *a&o hostel and hotel Berlin GmbH v European Commission*, Case T-578/17, EU:T:2019:437, paras 69 et seq.

⁵⁴ Bundesgesetz über Kartelle und andere Wettbewerbsabreden vom 6. Oktober 1995 (KG)/Loi fédérale sur les cartels et autres restrictions à la concurrence du 6 octobre 1995 (LCart), SR 251.1.

⁵⁵ STURNY MONIQUE, *Der Einfluss des europäischen Kartellrechts auf das schweizerische Kartellrecht*, in: Cottier (Ed.) *Die Europakompatibilität des schweizerischen Wirtschaftsrechts: Konvergenz und Divergenz*, Basel 2012, pp. 107-128, p. 107, 109.

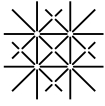
⁵⁶ For detailed information on the term *functionality* HEIZMANN RETO, *Der Begriff des marktbeherrschenden Unternehmens im Sinne von Art. 4 Abs. 2 in Verbindung mit Art. 7 KG*, Basel 2005, para 122; JUNG PETER, *Anwendbarkeit des Wettbewerbsrechts auf gemeinnützige Organisationen*, in: *recht* 2019, pp. 127-137, p. 129.

⁵⁷ JUNG (n 56), p. 130; with further references to STÖCKLI HUBERT, *Ansprüche aus Wettbewerbsbehinderung*, Ein Beitrag zum Kartellzivilrecht, Freiburg 1999, paras 45 et seq.

⁵⁸ HEIZMANN (n 56), para 123; as quoted by JUNG (n 56), p. 130.

⁵⁹ The situation is different in procurement law, for example: BGer 2C_861/2017 of 12 October 2018.

⁶⁰ With further references to judgments: JUNG (n 56), fn. 19.



However, statements regarding the charitable status of organizations within the framework of antitrust law were only made *obiter dicta* or were the subject of decisions outside of antitrust law: The organizations affected in the respective judgements were, for example, either entrusted with public service purposes,⁶¹ or the economic activity of an NPO was confirmed, but merely in the sense of commercial register law (the respective judgement was made before antitrust law came into existence).⁶² In another case, the judgment concerned an association which, despite being a charitable NPO to its statutory wording, provided services in return for a fee to its members, which pursued economic purposes.⁶³ Its activity therefore does not correspond to a charitable non-profit status under tax law: Due to the lack of an open circle of beneficiaries, the activity lacks the promotion of the common good, which means that the tax law requirement of acting in the general interest⁶⁴ is not fulfilled, according to the view expressed here (see 1. Introduction). Thus, if at all, the association provided at most partially charitable services.

In summary, the current legal situation under Swiss antitrust law does not exclude the possibility that NPOs in Switzerland may also fall within the personal scope of antitrust law. So far, however, restraint in jurisdiction seems to prevail.

4.2 State aid aspects in the Swiss legal system

4.2.1 State aid components of the Swiss legal system

In principle, Switzerland does not have regulations equivalent to the EU state aid law in the area of public subsidies.⁶⁵ For subsidies at the federal level, the Swiss Federal Act on Subsidies (SuG/LSu)⁶⁶ must be considered, which, however, only regulates the *principles* with regard to the material requirements for granting subsidies (Art. 6, 9 SuG/LSu). Thus, the SuG/LSu itself does not provide an autonomous legal basis for granting subsidies in individual cases. Due to the principle of legality, an additional legal basis for individual grants of subsidies is necessary, which has led to various individual regulations at the federal level.⁶⁷ The law on subsidies distinguishes between financial aid (direct subsidies) and compensation (indirect subsidies).⁶⁸

It is particularly worth mentioning that, on the federal level according to Art. 7 lit. a SuG/LSu, the state waives indirect subsidies in the form of tax benefits as far as possible. Due to practical difficulties in granting and measuring such subsidies, tax concessions within the framework of the subsidy law would be made and reviewed with restraint. This, it is argued, corresponds also to the fact that the review (and impact measurement) of such subsidies is only possible with difficulty and is rarely carried out.⁶⁹ In addition to the lower regulatory density within the SuG/LSu, the remaining legal bases for tax subsidies are rare in Switzerland as well: Next to constitutional principles, only the Swiss Federal Tax Harmonization Act

⁶¹ RPW 1998/2, pp. 198-203, p. 203 («Ärztliche Notfalldienste in der Stadt Zürich»).

⁶² BGE 63 I 95, 98 et seq.

⁶³ RPW 1997/2, pp. 142-145, p. 143 («Swico Recycling»), Swico specifically organized the disposal of IT and office electronics equipment for its affiliated manufacturers and importers for a disposal fee; also about this organization: RPW 2002/2, pp. 246-275, p. 247, 253.

⁶⁴ Cf. Circular Letter No. 12 of the tax period 1995/96 of 8 July 1994 of the Swiss Federal Tax Administration, p. 2 et seq.

⁶⁵ OESCH MATTHIAS / BURGHARTZ NINA, Die fehlende Disziplinierung staatlicher Beihilfen in der Schweiz, in: Die Volkswirtschaft 5/2018, pp. 26-29, p. 28.

⁶⁶ Bundesgesetz über Finanzhilfen und Abgeltungen vom 5. Oktober 1990 (SuG)/Loi fédérale sur les aides financières et les indemnités du 5 octobre 1990 (LSu), SR 616.1.

⁶⁷ SEITZ CLAUDIA / BREITENMOSER STEPHAN, Das Subventionsrecht der Schweiz im Lichte des Beihilferechts der EU und des Subventionsrechts der WTO, in: Schweizerisches Jahrbuch für Europarecht – Annuaire suisse de droit européen, 2009/2010, pp. 139-165, p. 150.

⁶⁸ SEITZ/BREITENMOSER (n 67), p. 149; BUNDI (n 16), p. 40 et seq.

⁶⁹ BUNDI, (n 16), p. 45 et seq.



(StHG/LHID)⁷⁰ provides a legal basis. In the absence of transparent information on subsidies granted at the cantonal level, however, it is difficult to assess whether subsidies are in line with competition law principles, according to LIDEIKYTE HUBER/PETER.⁷¹

Concerning the constitutional principles, the *principle of competition neutrality* (itself part of the *economic freedom* according to Art. 27 Federal Constitution of the Swiss Confederation, BV/Cst.)⁷² must also be observed with regard to indirect subsidies, such as tax relief.⁷³ Its partial content *competitive neutrality of taxation* is of interest here in relation to the tax exemption of charitable NPOs. According to this principle, all companies must be placed on the same competitive basis for taxation purposes (*principle of equality of arms*). The Federal Supreme Court pays special attention to this when assessing the tax law justification of economic activities of charitable NPOs, especially those operating businesses.⁷⁴ Accordingly, for the exemption of NPOs from direct tax liability within the meaning of Art. 56 lit. g DBG/LIFD, a commercial *activity* by an NPO can be justified, but not a profit-making *purpose*.⁷⁵ Consequently, when assessing a tax exemption from the point of view of *competitive neutrality of taxation*, a similar distinction is made between means and ends as is applied in EU competition law between commercial activities and charitable purposes. However, Swiss tax Law seems to be less rigid: Charitable NPOs may operate a business and generate income from it as long as the business is merely an instrument to the charitable purpose of the legal entity, does not constitute its sole economic basis, and is of a subordinate nature in relation to the overall activities of the organization (similar, by the way, to German tax law).⁷⁶ It is questionable whether this «proportional reduction» of income from economic activity in relation to the NPOs other sources of income constitutes an effective difference for the NPOs' direct competitors (pursuing an economic purpose). The General Court of the European Union, for example, does not accept such statement of grounds.⁷⁷ The Federal Supreme Court then also recognizes that any tax exemption conflicts with the principle of equality of arms. However, the charitable goal could make it more difficult for the charitable organization to act in line with the market, which means that it would not be able to compete with comparable competitors on equal terms, according to the Federal Supreme Court.⁷⁸ A further limitation for the implementation of state aid law in Switzerland through jurisdiction is that, according to the case law of the Federal Supreme Court, the exemption from general taxes cannot result in an impairment of economic freedom within the meaning of Art. 27 BV/Cst.⁷⁹

⁷⁰ Bundesgesetz über die Harmonisierung der direkten Steuern der Kantone und Gemeinden vom 14. Dezember 1990 (StHG)/Loi fédérale sur l'harmonisation des impôts directs des cantons et des communes du 14 décembre 1990 (LHID), SR 642.14.

⁷¹ LIDEIKYTE HUBER/PETER (n 34), p. 217.

⁷² Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999 (BV)/Constitution fédérale de la Confédération Suisse du 18 avril 1999 (Cst.), SR 101.

⁷³ OESCH/BURGHARTZ (n 65), p. 28; REICH MARKUS, Gemeinnützigkeit als Steuerbefreiungsgrund, ASA 58/1989/1990, pp. 465-508, p. 488.

⁷⁴ BGer 2C_251/2012 of 17 August 2012 E. 3.2.; REICH MARKUS (n 73), p. 489; with an overview of the current case law LOCHER PETER, Kommentar zum Bundesgesetz über die direkte Bundessteuer, II. Teil (Art. 49-101 DBG), Basel 2004, Art. 56 DBG paras 92 et seq.; GRETER/GRETER (n 5), Art. 56 DBG para 33.

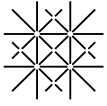
⁷⁵ LOCHER (n 74), Art. 56 DBG para 91; BRUGGER LUKAS, Die gemischte Stiftung, Basel 2019, p. 284.

⁷⁶ LOCHER (n 74), Art. 56 DBG para 90; GRETER/GRETER (n 5), Art. 56 DBG para 91; KOLLER (n 43), p. 464 et seq.; regarding German tax law VON HIPPEL / WALZ (n 43), p. 225 et seq., 241 et seq.; cf. §§ 64 et seq. AO.

⁷⁷ Judgment of the General Court of 12 September 2013, *Federal Republic of Germany v European Commission*, Case T-347/09, EU:T:2013:418, para 44: «Zwar können die erbrachten Dienstleistungen [der Naturschutzorganisation] aufgrund [...] der Satzungen der Naturschutzorganisationen [wonach keine Gewinnerzielungsabsicht vorliegt] weniger wettbewerbsfähig sein als vergleichbare Dienstleistungen, die von den anderen, solchen Verpflichtungen nicht unterliegenden Wirtschaftsteilnehmern erbracht werden. Dieser Umstand kann jedoch nichts daran ändern, dass die Nebentätigkeit als wirtschaftliche Tätigkeiten anzusehen ist.» (emphasis added).

⁷⁸ BGer 2C_251/2012 of 17 August 2012 E. 3.2.

⁷⁹ LIDEIKYTE HUBER/PETER (n 34), p. 216 referring to BGE 135 I 130, E. 4.2.; similar: BGE 125 I 182 E. 5b.



Altogether the following can be stated: In the case of direct subsidies, the fact that there is generally little case law and that subsidies are ultimately granted on the bases of individual regulations naturally means that no NPO-specific statements of a general nature can be made. This also applies in principle to indirect subsidies. There is, after all, a rich body of case law on tax exemption based on non-profit status within the meaning of Art. 56 lit. g DBG/LIFD. Considerations of competitive neutrality also play a role here. However, this should not hide the fact that, according to Swiss legal understanding, this is tax law and formally speaking not competition law in the true sense.

4.2.2 Considerations with regard to a possible implementation of EU state aid law

There is still no agreement between the EU and Switzerland on the extent to which Switzerland is covered by the EU ban on state aid under the bilateral agreements, in particular the Free Trade Agreement.⁸⁰ At this point, it is also not possible to estimate whether large parts of the Swiss economy will be subject to the EU's ban on state aid when the Framework Agreement between EU and Switzerland is concluded or whether concessions by Switzerland will be necessary, respectively.⁸¹ Eventually, however, Switzerland's access to the EU's internal market could be made dependent on some alignment with the regulations in the area of state aid law. In this case, tax relief is also likely to be affected.⁸² Such considerations are excluded from the paper at hand. In this respect, reference is made to the relevant literature.⁸³

However, the doubts of OESCH/BURGHARTZ as to whether economic freedom is at all capable of disciplining Switzerland by the realization of fundamental rights through jurisdiction are to be addressed here with regard to a possible adjustment of Swiss law to EU State Aid law, which may become necessary.⁸⁴ If need be, the gradual adoption of new provisions in the area of state aid law will thus be necessary. These concerns are all the more deserving of mention in the present context, since according to the current view of the Federal Supreme Court, the privileging of enterprises with regard to general taxation does not affect competition between direct competitors at all (see above).⁸⁵ In this sense, without a change in practice, the Federal Supreme Court will probably not be able to take action, which will increase such doubts.

5 Conclusion

EU competition law is based on the functional concept of undertakings (i.e. enterprises in the cases discussed in the paper at hand). This extends the scope of protection of competition law due to the connection to the *activity* of an enterprise (not to its purpose). Thus, NPOs which pursue commercial activities in the sense of European antitrust and state aid law may also fall within the scope of application of these provisions, regardless of their non-profit purpose. This has been firmly established by the European General Court's judgment on non-profit youth hostels discussed here. Although the judgment is a state aid ruling, the conclusions are also applicable to EU antitrust law due to the uniformity of the (functional) concept of an enterprise/undertaking and in the sense of the cited case law.

⁸⁰ LIDEIKYTE HUBER/PETER (n 34), p. 217 et seq.

⁸¹ Cf. BREITENMOSER STEPHAN / HIRSBRUNNER SIMON, in: NZZ of 29th of March 2019, p. 10.

⁸² BREITENMOSER/HIRSBRUNNER (n 81), p. 10 et seq.; OESCH/BURGHARTZ (n 65), p. 28; LIDEIKYTE HUBER/PETER (n 34), p. 217 et seq.

⁸³ OESCH/BURGHARTZ (n 65), p. 26 et seq.; LIDEIKYTE HUBER/PETER (n 34), p. 217 et seq.; ZURKINDEN PHILIPP, Institutionelles Abkommen – Rechtsgutachten zuhanden der WAK-N; Fragen zu Staatsbeihilfen und zum Freihandelsabkommen CH-EU sowie zu weiteren Fragen, abrufbar unter: <https://www.parlament.ch/centers/documents/de/rechtsgutachten-professor-philipp-zurkinder-teil-1.pdf>, p. 2 et seq.; SEITZ/BREITENMOSER (n 67), p. 139 et seq.; BREITENMOSER/HIRSBRUNNER (n 81), p. 10.

⁸⁴ OESCH/BURGHARTZ (n 65), p. 29.

⁸⁵ LIDEIKYTE HUBER/PETER (n 34), p. 216 referring to BGE 135 I 130, E. 4.2.; see also BGE 125 I 182 E. 5b.



Consequently, charitable organizations in member states of the European Union are also increasingly exposed to the harsh winds of competition law due to strict European jurisdiction. Regardless of the question of the definition of an undertaking, however, many NPOs are often likely to meet the exceptional provisions of European competition law, in particular EU state aid law.

Just like the EU, Switzerland relies on the functional concept of undertakings for the personal scope of application of antitrust law. To the extent that is evident, though, there is no case law in Switzerland regarding the scope of application of the KG/LCart to NPOs according to the present definition. However, there is a tendency that currently there appears to be no exception for charitable organizations in the personal scope of application of Swiss antitrust law. This is also the predominant opinion in the literature. In this respect, charitable NPOs under Swiss law are also threatened with the application of antitrust law when carrying out an economic activity.

Specific statements regarding the scope of application of «Swiss state aid law» are not possible in the present case. This is mainly due to the described lack of regulation of the subsidy law. Regarding indirect subsidies, it should be noted that tax exemptions for Swiss NPOs are covered by the competitive neutrality of taxation and are examined from their point of view. However, should the Framework Agreement be extended to include subsidies according to the European Union's understanding of the term, effects on NPOs are conceivable. In this context, it should be noted that the domestic tax law status as a charitable organization according to the ECJ is of minor importance for the assessment of the admissibility of a subsidy.