

Case C-516/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

9 July 2019

Referring court:

Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany)

Date of the decision to refer:

17 June 2019

Applicant:

NMI Technologietransfer GmbH

Defendant:

EuroNorm GmbH

Subject matter of the main proceedings

Compatibility of aid with the internal market; definition of an SME; undertaking controlled by public bodies

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU, in particular

Interpretation of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (OJ 2014 L 187, p. 1) ('Regulation No 651/2014')

Questions referred

1. Can a limited liability company which carries out an economic activity not be regarded as a small and medium-sized enterprise ('SME') pursuant to

Article 3(4) of Annex I to Regulation No 651/2014 on the ground that 90% of its share capital is held by a foundation established under civil law in whose Board of Trustees of 17 members, which is not empowered to manage the foundation, two of the members are representatives of ministries, one is the mayor of a city, one is the rector of a university, three are professors of that university, one is the president of a separate institute of higher education and one is the director of a chamber of commerce and industry?

2. Are State universities, institutes of higher education and German chambers of commerce and industry public bodies within the meaning of Article 3(4) of Annex I to Regulation No 651/2014?

3. Are persons who work on the board of trustees of a foundation on a voluntary basis public bodies within the meaning of Article 3(4) of Annex I to Regulation No 651/2014 for the sole reason that they work in a public body as their main profession?

4. Does the control exercised by public bodies within the meaning of Article 3(4) of Annex I to Regulation No 651/2014 require that the organs of the public bodies are able to instruct the voluntary members of a board of trustees to vote in a specific way on the board of trustees on the basis of a legal relationship?

5. Does indirect control of voting rights by public bodies require that it be established that the public bodies influence members of a board of trustees in such a way that they exercise their voting rights in the manner specified by the public bodies?

6. Does indirect control of voting rights by public bodies exist merely if there is a possibility that voluntary members of a board of trustees will take account of interests of their public organisations of origin when carrying out their activity on the board of trustees?

7. Does the term ‘are [...] controlled, jointly’ within the meaning of Article 3(4) of Annex I to Regulation No 651/2014 require that it can be established that the public bodies form a common policy in relation to the voting rights?

8. Does the term ‘are [...] controlled’ within the meaning of Article 3(4) of Annex I to Regulation No 651/2014 depend on the actual application of the statutes by the foundation or on a possible understanding of the wording of the statutes?

Provisions of EU law cited

Regulation No 651/2014, in particular

Article 3(4) of Annex I to Regulation No 651/2014 (‘the provision at issue’)

Provisions of national law and contractual provisions cited

Gesetz zur vorläufigen Regelung des Rechts der Industrie- und Handelskammern (Law provisionally regulating the law pertaining to the chambers of commerce and industry), in the version of 29 March 2017 ('the IHKG')

The 'Zentrales Innovationsprogramm Mittelstand' (Central Innovation Programme for SMEs; 'ZIM') Guidelines of the Federal Ministry of Economic Affairs and Energy ('the ZIM Guidelines'), which are not legislative in nature

Statutes of the foundation NMI Naturwissenschaftliches und Medizinisches Institut an der Universität Tübingen (Natural and Medical Sciences Institute at the University of Tübingen), in the version approved by the Regional Council of Tübingen on 11 August 2015 ('the statutes')

Cooperation agreement between the NMI Institute and the State University of Tübingen, which was renewed in 2009 ('the cooperation agreement')

Facts and procedure

- 1 The parties are in dispute regarding the funding for a research and development project of the applicant under the ZIM Guidelines.
- 2 The defendant is a limited liability company, on which powers of a public authority to carry out administrative tasks under public law, including in the area of funding allocations, have been conferred.
- 3 The applicant's share capital is EUR 27 800. Of this, the research institute 'NMI Naturwissenschaftliches und Medizinisches Institut an der Universität Tübingen' ('the NMI Institute') holds EUR 25 000. The remaining share capital is held by a holding company.
- 4 The NMI Institute is a foundation with legal personality under civil law. The purpose of this charitable foundation consists in promoting science and research. The applicant was founded with the intention of, inter alia, putting the research results obtained there into practice for financial gain. The capital of the foundation was raised by 13 companies and, to a minor extent, by the City of Reutlingen. The statutes do not contain any provisions governing the exercise of the shareholder rights held by the NMI Institute in the applicant.
- 5 Until April 2018, the applicant's managing director was both Chairman of the Executive Board and Head of the NMI Institute. The applicant and the NMI Institute have their registered office in the same building in Reutlingen.
- 6 According to its statutes, the NMI Institute has two organs, namely the Board of Trustees and the Executive Board. The Executive Board manages the operations of the foundation and handles all of its affairs. The Executive Board requires the

prior consent of the Board of Trustees for a number of operations, for example land transactions and borrowing.

- 7 The Board of Trustees is tasked with laying down the principles for the foundation's work in line with its purpose and with monitoring compliance with those principles. According to the statutes, it has, among others, the following powers: decision-making on the research and financial planning of the foundation, appointment and dismissal of members of the Executive Board, and amendment of the statutes. Its decisions are adopted by simple majority, by two-thirds majority in the case of amendments to the statutes.
- 8 The members of the Board of Trustees carry out their activities on a voluntary basis. In accordance with the statutes, the Board of Trustees has a total of 17 members at present. For the exact composition of the board, reference is made to the first question referred. The majority of the members come from public bodies within the meaning of the provision at issue.
- 9 The members of the Board of Trustees include the Director of the Chamber of Commerce and Industry of the City of Reutlingen. Pursuant to the IHKG, the chambers of industry and commerce, which are public-law bodies, represent the interests of traders in their district and promote the interests of trade and industry.
- 10 Furthermore, the NMI Institute and the State University of Tübingen work together on the basis of their cooperation agreement. This makes provision for, inter alia:
 - cooperation as equal partners and the equivalence of the mutually provided benefits
 - planning and implementation of research projects
 - cooperation in work and qualification opportunities
 - placing of professors in institutes of the foundation

The cooperation agreement also lays down provisions regarding the distribution of exploitation proceeds resulting from joint inventions between the University of Tübingen and the NMI Institute.

- 11 In July 2016, the applicant applied to the defendant for funding for its research projects. Although the defendant considered the research projects to be eligible for funding, it refused the application in February 2017. It based this on the ground that the applicant could not be regarded as an SME, as it is controlled by a public body.
- 12 The applicant filed an appeal against that decision, which was dismissed by the defendant in June 2017. The applicant is pursuing its requests by way of its action.

Grounds for the order for reference

- 13 The outcome of the dispute depends on a decision of the Court of Justice on the interpretation of the Treaties.
- 14 The decisive question in the dispute is whether, on the basis of the provision at issue, the defendant was right to reject the classification of the applicant as an SME and was permitted to refuse funding.
- 15 According to the ZIM Guidelines, SMEs with business operations in Germany are eligible to apply for funding. Regarding the definition of an SME, those guidelines refer to Regulation No 651/2014 and the provision at issue.
- 16 According to the provision at issue, an enterprise cannot be regarded as an SME if 25% or more of the capital or voting rights are directly or indirectly controlled, jointly or individually, by one or more public bodies.
- 17 The defendant puts forward the following arguments to demonstrate that the applicant is controlled by public bodies and therefore cannot be classified as an SME:
 - The NMI Institute and the applicant are linked enterprises within the meaning of Article 3(3)(a) of [Annex I to] Regulation No 651/2014.
 - It is true that the NMI institute does not exercise any direct control over the applicant.
 - However, public bodies do exercise indirect control over the applicant via the Board of Trustees, the majority of which comprises representatives of public bodies.
 - Having regard to the tasks assigned to it under the statutes of the foundation as a whole, the Board of Trustees steers the foundation.
 - The applicant's field of activity is in line with the purpose of the foundation, with the result that it can be assumed that public bodies also exert sufficient influence over the applicant.
- 18 The applicant puts forward the following arguments to demonstrate that the applicant is not controlled by public bodies and can therefore be classified as an SME:
 - The foundation is guided exclusively by the objective purpose of the foundation. No policy formation takes place beyond this.
 - The Board of Trustees does not influence the policy of the foundation, that is to say, that of the other organs of the foundation, and does not interfere with the manner in which the foundation adopts decisions in the applicant's general meetings of shareholders.

- The Board of Trustees is comparable to a specialist advisory committee that cannot exert any influence on decisions relating to the applicant.
- The executive board of a foundation generally has extensive powers.
- The Board of Trustees of the NMI Institute cannot issue instructions to the Executive Board. This also applies in regard to the question of how the Executive Board exercises the shareholder rights held by the NMI Institute in the applicant.

WORKING DOCUMENT