

Anonymised version

Translation

C-164/21 – 1

Case C-164/21

Request for a preliminary ruling

Date lodged:

12 March 2021

Referring court:

Administratīvā rajona tiesa (District Administrative Court, Latvia)

Date of the decision to refer:

12 March 2021

Applicant:

SIA BALTIJAS STARPTAUTISKĀ AKADĒMIJA

Defendant:

Latvijas Zinātnes padome (Latvian Science Council)

ADMINISTRATĪVĀ RAJONA TIESA

RĪGAS TIESU NAMS (District Administrative Court, Riga Section)

DECISION

Riga, 12 March 2021

The District Administrative Court [...]

[...] [composition of the court]

on the basis of written submissions, has examined the administrative proceedings commenced by means of the action lodged by SIA BALTIJAS STARPTAUTISKĀ AKADĒMIJA seeking to have the decision of the Latvian Science Council of 14 April 2020 declared unlawful [...].

Subject matter and relevant facts of the main proceedings

[1] The applicant, SIA BALTIJAS STARPTAUTISKĀ AKADĒMIJA, is a commercial company registered in the Republic of Latvia whose business consists in providing academic and non-academic higher education services. The applicant is an accredited higher education institution — that is, one that is recognised by the State — which operates in accordance with the Komerclikums (Commercial Code) in so far as the latter is not contrary to the Augstskolu likums (Law on Higher Education Institutions).

Under the regulatory provisions governing the applicant's activities, namely the statutes of Baltijas Starptautiskā akadēmija [approved by the Ministru kabineta 2014. gada 18. jūnija rīkojums Nr. 297 (Order No 297 of the Council of Ministers of 18 June 2014)] and the Methodology for the Keeping and Organisation of Accounts (approved by resolution No 141 of the general meeting of SIA BALTIJAS STARPTAUTISKĀ AKADĒMIJA of 19 December 2019, 'the Methodology'), one of the applicant's defined areas of activity is scientific activities. The applicant is registered in the Register of Scientific Institutions.

[2] The Latvian Science Council is an authority of the direct administration under the supervision of the izglītības un zinātnes ministrs (Minister for Education and Science) whose purpose is to implement State science and technology development policy and, through delegation by regulatory enactments, to ensure expertise and the implementation and supervision of scientific research programmes and projects financed from the State budget, as well as from European Union structural funds and other foreign financial instruments.

[3] By decision [...] of 23 January 2020, the Latvian Science Council approved the 'Regulation governing the general call for fundamental and applied research projects for 2020' ('the Call Regulation'), which was drawn up in accordance with the Ministru kabineta 2017. gada 12. decembra noteikumi Nr. 725 'Fundamentālo un lietišķo pētījumu projektu izvērtēšanas un finansējuma administrēšanas kārtība' (Decree No 725 of the Council of Ministers of 12 December 2017 on the procedures for evaluating fundamental and applied research projects and administering the financing thereof ('Council of Ministers Decree No 725')).

Under the eligibility criteria listed in paragraph 12(5) of Council of Ministers Decree No 725, to be eligible for funding for fundamental and applied research intended to generate new knowledge and technological discoveries in all branches of science, the project must be undertaken by a scientific institution that meets the requirements laid down in the decree.

Paragraph 2(7) of Council of Ministers Decree No 725 defines the institution submitting the project proposal as a scientific institution registered in the Register of Scientific Institutions which, irrespective of its legal status (organised under public or private law) or way of funding under the legal provisions governing its activities (statutes, internal regulations or constituent instrument), pursues mainly

activities that are non-economic in nature and satisfies the definition of research organisation in Article 2(83) 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.

The applicant, SIA BALTIJAS STARPTAUTISKĀ AKADĒMIJA submitted a project proposal [...] in response to the call.

[4] By decision [...] of 14 April 2020, the Latvian Science Council rejected the applicant's project proposal on the grounds that it did not satisfy one of the administrative eligibility criteria, since the applicant could not be considered to be a scientific institution within the meaning of Council of Ministers Decree No 725.

The Latvian Science Council stated that the documents submitted by the applicant did not contain any information on whether the applicant's primary goal is to conduct independent research. According to the project proposal, in 2019, the proportion of turnover accounted for by non-economic activities as compared with economic activities was 95% as against 5%. However, 84% of turnover comprises fees for academic activities which, given the nature of the activities pursued by the applicant (a limited liability company whose primary goal is to make a profit), constitute economic activities. The applicant's principal activities are therefore commercial. Moreover, the documents supplied by the applicant do not contain any information to show that undertakings that can exert a decisive influence upon the applicant, in the quality of, for example, shareholders or members, may not enjoy preferential access to the applicant's research capability or to the results generated by its research. The applicant cannot therefore guarantee that the project will be undertaken and the share of the funding used in accordance with Article 6 of Council of Ministers Decree No 725, which establishes that the institution submitting the project proposal must undertake a project that is non-economic in nature and must ensure a clear separation between those principal activities that are non-economic in nature (and the associated cash flows) and those activities that are deemed to be economic.

[5] Since it did not agree with the contested decision, the applicant lodged an action with the [district administrative] court. Its action is founded on the following grounds.

[5.1] It can be seen from paragraphs 1(1), 1(2) and 2(1) of the Methodology submitted by the applicant that the conduct of independent research constitutes its principal activity. This is also demonstrated by the fact that TK (a lecturer working for the applicant) and other members of the research staff are listed in the *Nacionālā enciklopēdija* (National Encyclopaedia) as leading researchers. In addition, the applicant publishes the journal *Administratīvā un Kriminālā Justīcija* (Administrative and criminal justice), which featured in the list of peer-reviewed scientific publications recognised by the Council in Council Decision No 1-2-1 of 23 January 2007.

[5.2] Neither Regulation No 651/2014 nor the Call Regulation stipulates that the applicant may not carry on economic activities and make a profit from them; nor do they establish what proportion of activities should be economic and what proportion non-economic.

[5.3] The applicant makes a clear separation between those principal activities that are non-economic in nature (and the associated cash flows) and those activities that are deemed to be economic, that is activities undertaken on behalf of a business, the leasing of research infrastructure, and consultancy services. Conversely, where the scientific institution also undertakes other economic activities that are not the same as its principal non-economic activities, it separates its principal activities and the associated cash flows from its other activities and their associated cash flows.

[5.4] The applicant establishes separate accounting for each project and opens a current bank account for the project that is separate from its other activities and revenues.

[5.5] The applicant is involved in several ERASMUS+ projects (for which it has received grants), scientific projects and ERDF projects in which it has been deemed to satisfy the requirements set out above.

[5.6] Imposing restrictions on the form of ownership of higher education institutions without undertaking a substantive evaluation of applications introduces a de facto prohibition on the conduct of research by private higher education institutions and institutions of higher technical and vocational education; however, Articles 3, 21, 22 and 23 of the Law on Higher Education Institutions preclude a (dual-level) system of teaching and scientific activities which entails restrictions on the scientific elements of the activities of higher education institutions.

[5.7] The applicant's project proposal contains a sworn declaration stating that its members, in their capacity as such, do not enjoy preferential access to the research capability of the institution submitting the project proposal or to the results generated by its research.

Applicable law

EU law

[6] Article 107(1) of the Treaty on the Functioning of the European Union provides that 'save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

[7] Article 2(83) of Regulation No 651/2014 defines a ‘research and knowledge-dissemination organisation’ as ‘an entity (such as universities or research institutes, technology transfer agencies, innovation intermediaries, research-oriented physical or virtual collaborative entities), irrespective of its legal status (organised under public or private law) or way of financing, whose primary goal is to independently conduct fundamental research, industrial research or experimental development or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer. Where such entity also pursues economic activities the financing, the costs and the revenues of those economic activities must be accounted for separately. Undertakings that can exert a decisive influence upon such an entity, in the quality of, for example, shareholders or members, [may not] enjoy preferential access to the results generated by it’.

Recital 49 of Regulation No 651/2014 states that ‘research infrastructures may perform both economic and non-economic activities. In order to avoid granting State aid to economic activities through public funding of non-economic activities, the costs and financing of economic and non-economic activities should be clearly separated. Where an infrastructure is used for both economic and non-economic activities, the funding through State resources of the costs linked to the non-economic activities of the infrastructure does not constitute State aid. Public funding falls under State aid rules only in so far as it covers costs linked to the economic activities. Only the latter should be taken into account with a view to ensuring compliance with the notification thresholds and maximum aid intensities. If the infrastructure is used almost exclusively for a non-economic activity, its funding may fall outside State aid rules in its entirety, provided that the economic use remains purely ancillary, that is to say, an activity which is directly related to and necessary for the operation of the infrastructure or intrinsically linked to its main non-economic use, and is limited in scope. This should be considered to be the case when the economic activities consume the same inputs (such as material, equipment, labour and fixed capital) as the non-economic activities and the capacity allocated each year to such economic activity does not exceed 20% of the research infrastructure’s overall annual capacity.’

[8] The European Commission has launched initiatives to modernise State aid; these include its Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (*Official Journal of the European Union*, 19 July 2016, C 262, p. 1) (‘the Commission Notice’). According to paragraphs 28 to 30 of the Commission Notice, education funded or co-funded by the State (more than 50%) may be deemed a non-economic activity. Such public education services must be distinguished from services financed predominantly by parents or pupils or commercial revenues. For example, higher education financed entirely by students clearly falls within the latter category. In certain Member States public entities can also offer educational services which, due to their nature, financing structure and the existence of competing private entities, are to be regarded as economic.

*Latvian law**Directly applicable provisions*

[9] Paragraph 2(7) of Council of Ministers Decree No 725 defines ‘the institution submitting the project proposal’ as ‘a scientific institution registered in the Register of Scientific Institutions which, irrespective of its legal status (organised under public or private law) or way of funding under the legal provisions governing its activities (statutes, internal regulations or constituent instrument) pursues activities that are mainly non-economic in nature and satisfies the definition of research organisation in Article 2(83) 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’.

According to the regulatory impact assessment for Council of Ministers Decree No 725, paragraph 2(7) of the decree corresponds to Article 2(83) of Regulation No 651/2014 and does not establish stricter requirements.

Paragraph 6 of Council of Ministers Decree No 725 establishes that ‘the institution submitting the project proposal must undertake a project that is non-economic in nature. That institution must ensure a clear separation between those principal activities that are non-economic in nature (and the associated cash flows) and those activities that are deemed to be economic. Economic activities shall mean activities undertaken on behalf of a business, the leasing of research infrastructure, and consultancy services. Where the scientific institution also undertakes other economic activities that are not the same as its principal non-economic activities, it must separate its principal activities and the associated cash flows from its other activities and their associated cash flows.’

Relevant legal framework

[10] Article 1(2) of the Commercial Code establishes that commercial activity is an open economic activity which is performed by an economic operator on its own account for profit. By virtue of Article 134(1) and (2) of the Commercial Code, a limited liability company is a commercial company.

[11] Article 3(1) of the Law on Higher Education Institutions provides that higher education institutions are higher education and science institutions which provide academic and vocational study programmes and which are engaged in science, research and artistic creation. In higher education institutions at least 40% of persons selected for academic positions must have a doctorate. In academies at least 50% of persons selected for academic positions must have a doctorate.

Article 7(3) of the Law on Higher Education Institutions provides that higher education institutions and institutions of higher technical and vocational education founded by private persons are commercial companies or foundations which operate in accordance with the Commercial Code or the Biedrību un

nodibinājumu likums (Law on Associations and Foundations) in so far as these do not conflict with the Law on Higher Education Institutions.

Article 10(1) of the Law on Higher Education Institutions provides that higher education institutions must operate in accordance with the Latvijas Republikas Satversme (Constitution of the Republic of Latvia), the Izglītības likums (Law on Education), the Zinātniskās darbības likums (Law on Scientific Activities), the Law on Higher Education Institutions itself, other legislative provisions and the statutes of the higher education institution in question.

Under Article 22 of the Law on Higher Education Institutions, higher education institutions are authorised to found scientific institutes. Higher education institutions may also create scientific institutes as structural units within those institutions.

Article 77(1) of the Law on Higher Education Institutions provides that higher education institutions are to be financed by their founders. A founder of a higher education institution must provide the financial resources needed to ensure the continuing operation of the institution and also to carry out tasks determined by the founder, and must also ensure oversight of the use of the funds. Public higher education institutions are to be funded out of the general State budget and from other revenues earned by the institutions from activities undertaken in pursuit of the objectives established in their statutes. Higher education institutions must manage those revenues in accordance with the legislation governing non-profit organisations. Higher education institutions may receive and use donations and gifts from banks, other credit institutions, organisations and individuals. They may receive and use loans from banks and other credit institutions. The structure of a higher education institution's financial resources is to be determined by its governing council. The vice-chancellor must present an annual report on the implementation of the budget to the governing council, the Minister for Education and Science and the minister for the relevant sector or the higher education institution's founder, and must publish the report on the institution's website.

Article 77(2) of the Law on Higher Education Institutions establishes that financial resources designated by natural and legal persons to fund specific programmes and measures are to be transferred by the higher education institution directly to the structural unit or natural or legal person carrying out the programmes or measures in question.

[12] The dispute to be resolved in these administrative-law proceedings concerns whether the applicant fails to satisfy the definition of research organisation in Article 2(83) of Regulation No 651/2014.

Under a literal interpretation of Article 2(83) of Regulation No 651/2014, a research and knowledge-dissemination organisation is an entity whose primary goal or principal activity is to independently conduct fundamental research or

experimental development or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer.

That is how the Latvian Science Council has applied the provision. Specifically, the Latvian Science Council has examined whether the applicant's principal activity is research and knowledge transfer, whether the applicant's principal non-economic activity is the primary goal of the institution that submitted the project proposal, and whether the applicant separates financing of economic from non-economic activities, having regard to recital 49 of Regulation No 651/2014, which establishes that the objective of clearly separating the costs and financing of economic and non-economic activities is to avoid granting State aid to economic activities through public funding of non-economic activities.

In the present case, the Latvian Science Council concluded that the applicant's principal activity includes an economic activity — the provision of educational services for consideration — and that 84% of the turnover of the institution that submitted the project proposal comprises fees received for academic activities and that, given the nature of the activities pursued by that institution (a limited liability company whose main aim is to make a profit), these constitute economic activities. In view of the foregoing, the Latvian Science Council concluded that the principal activity of the institution that submitted the project proposal is a commercial one. In this regard, the Latvian Science Council noted that the determining characteristic is not whether the institution that submitted the project proposal is organised under public or private law, but the proportion of its economic activities as compared with its non-economic activities. In the opinion of the Latvian Science Council, it is justified to use the proportion of revenues in order to determine whether the institution that submitted the project proposal satisfies the requirement in Regulation No 651/2014 concerning the research organisation's primary goal. Moreover, in the view of the Latvian Science Council, it is essential that the revenues from the principal non-economic activities should be re-invested in the principal non-economic activities of the institution that submitted the project proposal, to avoid cross-subsidising the applicant's economic activities.

Consequently, the question that arises in this case is whether, for the purposes of paragraph 2(7) of Council of Ministers Decree No 725 in conjunction with Article 2(83) of Regulation No 651/2014, it is possible for the majority of own funding obtained by a scientific institution — an entity that provides educational services — to be revenues from economic activities.

Operative part

Pursuant to Article 267 of the Treaty on the Functioning of the European Union, [...] the District Administrative Court

has decided

to refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

- (1) Can a (private law) organisation which has various principal activities, including research, but most of whose revenue comes from providing educational services for consideration, be classed as an entity within the meaning of Article 2(83) of Regulation No 651/2014?
- (2) Is it justified to apply a requirement regarding the proportion of financing (revenues and costs) obtained from economic and non-economic activities in order to determine whether the entity satisfies the requirement in Article 2(83) of Regulation No 651/2014 that the primary goal of the entity's activities must be to independently conduct fundamental research, industrial research or experimental development or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer? If the answer is that it is justified, what would be an appropriate proportion of financing from economic and non-economic activities to use in determining the primary goal of the entity's activities?
- (3) Is it justified, pursuant to Article 2(83) of Regulation No 651/2014, to apply a requirement that the revenues obtained from the principal activity should be re-invested in the principal activities of the entity in question, and must other aspects be assessed in order to determine properly the primary goal of the activities of the institution submitting the project proposal? Would the use made of the revenues obtained (whether they are reinvested in the principal activities or, for example, in the case of a private founder, paid out as dividends to the shareholders) alter that assessment, even in a situation in which most of the revenues come from fees for educational services?
- (4) Is the legal status of the members of the institution submitting the project proposal — that is to say, whether it is a company formed under commercial law in order to carry on an economic activity (an activity for consideration) with the objective of making a profit [Article 1 of the Komerclikums (Commercial Code)] or whether its members or shareholders are natural or legal persons whose objective is to make a profit (including through the provision of educational services for consideration) or were founded for non-profit purposes (in the case of an association or foundation, for example) — decisive in determining whether the institution satisfies the definition in Article 2(83) of Regulation No 651/2014?
- (5) Are the proportion of domestic students and students from EU Member States as compared with the proportion of foreign students (from third States) and the fact that the goal of the principal activity pursued by the institution submitting the project proposal is to provide students with higher education and qualifications that are competitive in the international labour market in accordance with current international requirements (paragraph 5

of the applicant's statutes) decisive in assessing whether the activities of the institution submitting the project proposal are economic in nature?

To stay proceedings until the Court of Justice of the European Union issues a decision.

There is no right of appeal against this decision.

[...]

[signatures and formalities]

WORKING DOCUMENT