STATE AIDS FOR RESEARCH AND TECHNOLOGICAL DEVELOPMENT IN THE EU: TOWARDS A STRONGER INVOLVEMENT OF THE COURT OF JUSTICE OF THE EU?

Jan Malíř*

Abstract: *In the context of the debate on the role which EU State aid law can have with regard to shaping the policies of research and technological development on the level of the EU Member States, the present article highlights the growing involvement of the Court of Justice of the EU with issues related to the application of EU State aid law in the area of research and technological development. In particular, the present article analyses the recent ruling of the CJEU concerning the definition of research organization and, in this light, explores how far the potential for judicial involvement in this important and sensitive area has materialized so far.*

Keywords: *EU law, State aids, research and technological development, research organization, Court of Justice of the EU*

INTRODUCTION

Research, and technological development have always been perceived as one of the key elements underlying the competitiveness of the EU and its Member States. In the recent years, however, the debate on how to trigger further expansion of research and technological development in the EU has gained in urgency, not least because of such challenges as restoring "strategic autonomy" of the EU and its Member States in many sensitive areas. It has also become vital to redefine what the respective roles of the EU and its Member States with respect to policy of research and technological development should be.

As for the role of the EU, while the promotion of "scientific and technological advance" has been officially proclaimed as one of the principal aims the EU should achieve[1] and, moreover, the EU has been conferred direct powers in the area of research and technological development,[2] in particular for purposes of attaining the European Research Area,[3] its role, as based on these powers, is far from being limitless. From legal perspective, it matters that the direct powers the EU possesses in the area of research and technological development appear as parallel powers rather than shared ones.[4] As a result, Member

* JUDr. Jan Malíř, Ph.D., Institute of State and Law, Czech Academy of Sciences, Prague, Czech Republic. ORCID: 0000-0001-9861-4876. The present article was made possible thanks to funding provided by the Academy of Sciences of the Czech Republic (RVO: 68378122).

[1] See Article 3(3) TEU; on the interpretation of aims contained in Article 3 TEU and its nature, see, eg, KLAMERT, M. 'Article 3 TEU'. In: Manuel Kellerbauer – Marcus Klamert – Jonathan Tomkin (eds.). *The EU Treaties and the Charter of Fundamental Rights. A Commentary.* Oxford: Oxford University Press, 2019, p. 32.

[2] See Article 179 et seq. TFEU.

[3] See Article 179(1) TFEU; on the notion of the ERA, see, eg, GARBEN, S. 'Article 179 TFEU'. In: Manuel Kellerbauer – Marcus Klamert – Jonathan Tomkin (eds.). *The EU Treaties and the Charter of Fundamental Rights. A Commentary.* pp. 1494–1496 or GOODWIN, M. 'Research and Technology'. In: Pieter Jan Kuijper et al. *The Law of the European Union.* Deventer: Wolters Kluwer, 2018, pp. 1191–1193.

[4] See Article 4(3) TFEU, in conjunction with Declaration 34 on Article 179 of the Treaty on the Functioning of the European Union, annexed to the TFEU; in doctrine, see, eg, Goodwin (n 3) 1186 or BLANQUET, M. *Droit general de l'Union européenne.* 11th edition. Paris: Sirey, 2018, pp. 103–104.

States continue to be legitimate players with respect to policies of research and technological development and are entitled to develop these policies grossly in line with their own priorities. From factual perspective, although the expenditures on research and technological development financed through the EU's budget have steadily grown, they still represent only a smaller part of the total costs spent on research and technological development in the EU.[5] That means the EU has definitely not become the exclusive player, when it comes to financing and, thus, to guiding research and technological development in the EU.

Importantly enough, however, the EU can contribute to shaping policies of research and technological development indirectly, using the powers it possesses in other areas. This is notably the case of powers the EU has with respect to the control of State aids.[6] This is no surprise, taking into account the fact the notion of State aid has been traditionally understood extensively in the EU.[7] Moreover, the impact the EU State aid law can have with regard to policies of research and technological development in the Member States is further extended by the processes of commercialization and corporatization of education and research which[8] which imply that, ever more frequently, many research organizations may classify as undertakings under the EU State aid law.[9]

These facts have led to a kind of "existential tension" between the aim of promoting research and technological development on one hand and that of respecting imperatives stemming from the EU State aid law on the other.[10] In order to reconcile the both aims, the EU has gradually laid down the specific legal arrangements intended to minimize potential conflicts (A). Yet, the fact that some of the elements of this framework remain unclear has recently led to the involvement of the Court of Justice of the European Union (CJEU) (B). This has also been the case of the elements which can be viewed as fundamental ones, such as the notion of research organization (C). As in other areas of the EU law, thus, even State aid law in the area of research and tech-

[5] The total expenditures spent on research and technological development in the EU-27 were estimated at € 328 billion in 2021 (the equivalent of 2.27% of Member States' GDP); for comparison, the Horizon Europe, the key EU scheme for supporting research and technological development in 2021-2027 period, should reach € 95,5 billion; see, eg, Eurostat, R&D expenditure. In: *Eurostat Statistics Explained* [online]. [2023-08-01]. Available at: <https://ec.europa.eu/eurostat/statisticsexplained/index.php?title=R%26D_expenditure&oldid=590306#R.26D_expenditure_by_source_of_funds>; on the preceding trends, see, eg, AMBROZIAK, A. A. 'Recent Changes and Developments in State Aid for Research, Development and Innovation in the European Union'. *Studia Europejskie – Studies in European Affairs*. 2016, Vol. 20, No. 4, pp. 73–94.

[6] On EU State aid law, see, ia, QUIGLEY, C. *European State Aid Law and Policy (and UK Subsidy Control). 4th edition*. London: Bloomsbury, 2022 or VOGEL, L. *European State Aid Law*. Bruxelles: Bruylant, 2020.

[7] See, eg, Case C 933/19 P Autostrada Wielkopolska S.A. v. European Commission EU:C:2021:905, para 104.

[8] On these processes in a comparative perspective, see, eg, HAO, Z. 'Commercialization and Corporatization vs. Professorial Roles and Academic Freedom in the USA and Greater China'. In: Zhidong Hao – Peter Zabielskis (eds.). *Academic Freedom Under Siege Higher Education in East Asia, the U.S. and Australia*. New York: Springer, 2020.

[9] On the notion of undertaking, see, recently, eg, Case C 262/18 P and C 271/18 P European Commission v Dôvera zdravotná poist'ovňa a.s. EU:C:2020:450, paras 27-29.

[10] While, even in the past, the European Commission was reported to take a rather favourable attitude towards State aid for research and technological development, adjustments of the measures taken by the Member States were not uncommon, in particular, as far as the intensity of aid was concerned, see, D'SA, R. M. *European Community Law on State Aid*. Mytholmroyd: Sweet and Maxwell, 1998, p. 248.

nological development seems to demonstrate the potential the CJEU possesses with regard to the expansion of the EU law and that, in particular, where the EU legislator omits to provide more detailed definitions of notions which are relevant to the application of EU law in the given area.

I. STATE AIDS TO RESEARCH AND TECHNOLOGICAL DEVELOPMENT IN EU SECONDARY LAW

Since the mid-1980s, acts – originally of soft-law nature – have been adopted at EU level, which have aimed at minimizing the potential tension between the promotion of research and technological development from the Member States' resources and EU State aid law, while, simultaneously, encouraging the support for research and technological development projects and, also, reducing the administrative burden imposed on both the Member States and the European Commission ("Commission").[11] This burden primarily stems, from the perspective of the Member States, from the requirement to notify the Commission any plans to grant a new State aid, under Article 108(3) TFEU, and, from the perspective of the Commission, from its duty to assess the compatibility of the plans notified by the Member States with the internal market.[12]

By adopting those acts and, also, by taking individual decisions on the compatibility of the Member States' measures, taken to promote research and technological development, with internal market, however, the EU institutions, primarily the Commission, have become necessarily involved in the process of shaping the contours of public policies in the area of research and technological development in the Member States. This involvement have been quite considerable and, to some extent, it has gone beyond what provisions on the direct EU powers in the area of research and technological development would have led to believe prima facie.

A significant milestone was achieved with the adoption of Commission Regulation 800/2008.[13] This Regulation was the very first binding act of EU secondary law which, although emphasizing that "[a]id for research, development and innovation can contribute to economic growth, strengthening competitiveness and boosting employment" and, also, the existence of market failures,[14] provided for the block exemptions from the notification requirements under Article 108(3) TFEU and, also, established the presumption of compatibility with the internal market in favour of those aids for research, development or innovation which met the requirements laid down in its provisions.[15]

[11] The very first of these acts was Community framework for State aids for research and development [1986] OJ 1986 C 83/2; for an overview of the successive acts, see Quigley (n 16) 424–425.

[12] On the scope of the duty of notification and the precise role of the European Commission see, eg, Quigley (n 6) 605–703.

[13] Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) [2008] OJ L 214.

[14] Commission Regulation No 800/2008, recital 57.

[15] Commission Regulation No 800/2008, notably Section 7.

This approach to aids for research and technological development was further elaborated in the process of the modernization of EU State aid law.[16] The modernization process resulted in the adoption of Regulation No 651/2014 ("Regulation No 651/2014"),[17] the key EU secondary law act that currently deals with State aids for research and technological developments or, more specifically, for "research, development and innovation". Regulation No 651/2014 was further complemented by the Framework for State aid for research, development and innovation,[18] the purpose of which has been to clarify the approach to take with respect to those measures which fail to meet conditions contained in the Commission Regulation No 651/2014 and, thus, continue to be subject to the notification requirement and assessment under the normal TFEU rules.[19]

In the light of these developments, it might seem that the tensions between EU State aid law and measures taken to promote research and technological development have been largely eliminated and there is little space for doubts over how to apply EU rules on State aid in the area of research and technological development. At closer look, however, this assumption is not completely true.

II. TOWARDS A MORE VISIBLE INVOLVEMENT OF THE CJEU

Even with the existence of legal acts addressing State aids for research and technological development, application of EU rules on State aids for research and technological development raises a number of open questions. They are due not only to the variability of modalities under which research and technological research is supported in individual Member States but, also, to ambiguities contained in the very text of EU acts on State aid law in the area of research and technological development.[20]

The existence of these open questions is the principal reason why the CJEU has recently become involved in the area, in particular, via references for preliminary rulings from national courts under Article 267 TFEU. Although the case-law of the CJEU on the relationship between EU State Aid law and measures to promote research and technological development financed through the Member States' resources is far from being robust and is, at best, only in a *"statu nascendi"*, its existence confirms the existence of difficulties to which application of EU State aid law can give rise to in practice. Interestingly, disputes over the interpretation and application of EU rules on State aids to research and tech-

[16] See, eg, VON WENDLAND, B. 'New Rules for State Aid for Research, Development and Innovation: "Not a Revolution but a Silent Reform"'. *European State Aid Law Quarterly.* 2015, Vol. 14, No. 1, pp. 25–50.

[17] 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 [2014] OJ L 187/1; this Regulation should continue to apply until 31 December 2026, based on Commission Regulation (EU) 2023/1315 of 23 June 2023 amending Regulation (EU) No 651/2014 [2023] OJ L 167.

[18] Communication from the Commission – Framework for State aid for research and development and innovation [2014] OJ C 198/1 ("Framework 2014"); Framework 2014 has been recently replaced with the new Framework for State aid for research and development and innovation [2022] OJ C 414/1 ("Framework 2022"); see also the press release of 19 October 2022. In: *European Commission* [online]. 19. 10. 2022 [2023-08-01]. Available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6233>.

[19] Framework 2014, points 13 and 14; Framework 2022, points 14-15.

[20] BUTS, C., NICOLAIDES, P., PIRLET, H. 'Puzzles of the State Aid Rules on RDI'. *European State Aid Law Quarterly.* 2019, Vol. 18, No. 4, pp. 489–509.

nological development once again demonstrate how the CJEU can be transformed into an actor which can have an impact on the area where, a priori, no important space for judicial intervention would have been predicted to exist.

In 2017, thus, the CJEU seized the opportunity provided by a reference from a Spanish court and ruled that, even in the area of education, a pre-condition for qualifying a Member State measure a State aid is that an entity which is to benefit from the measure can be qualified as an undertaking. That qualification, in turn, presupposes the entity is engaged in an economic activity[21] consisting in offering goods or services on a given market,[22] whether for remuneration or not,[23] regardless of its legal status and the way in which the measure is financed.[24] As the CJEU further clarified, it may well be that an entity simultaneously carries on a number of activities, both of economic and non-economic nature.[25] This fact implies that, where national courts deals with the issues related to State aids, they have to verify which of the given entity's activities are economic and which are non-economic in nature.[26] Most significantly, however, in these cases, the entity may benefit from advantages the Member State grants in order to support its non-economic activities only as long as the entity keeps separate accounts for the different funds it receives so as to exclude any risk of cross-subsidisation of its economic activities by means of public funds received for its non-economic activities.[27] Although the case, strictly speaking, concerned advantages granted by the Spanish State to a Catholic Congregation which provided mostly educational services, there was no reason to believe that the CJEU's conclusions would have been different if research or technological development institutions were directly at stake as they now frequently carry out both non-economic and economic activities.

In 2018, the CJEU dealt with the question whether the transformation of an entity responsible for research and development in the field of oil and gas prospecting into a publicly owned industrial and commercial establishment under French law, a step involving the introduction of the unlimited State guarantees for the entity's debts, may constitute State aid.[28] Importantly, the CJEU notably held that "the mere fact that the beneficiary of […] a guarantee in the past derived no real economic advantage from its […] status does not suffice, in itself, to rebut the presumption of the existence of an advantage".[29]

In 2020, the CJEU was invited to pronounce on the interpretation of the notion of small and medium-sized enterprises (SMEs) under Regulation No 651/2014[30] in a case where a limited liability company – the purpose of which was to develop know-how, provide consulting services and carry out contract research in the fields of engineering,

[21] Case C 74/16 Congregación de Escuelas Pías Provincia Betania EU:C:2017:496.
[22] Ibid, para 41.
[23] Ibid, paras 46-47.
[24] Ibid, para 41.
[25] Ibid, para 51.
[26] Ibid, para 54.
[27] Ibid, para 51.
[28] Case C 438/16 P European Commission v. France and IFP Énergies nouvelles EU:C:2018:737.
[29] Ibid, para 118.
[30] Case C 516/19 NMI Technologietransfer GmbH EU:C:2020:754.

science and medicine and the capital of which was held by a foundation serving the public interest – sought to benefit from more favourable rules on State aids applicable to SMEs in order to profit from public support for the financing of a research and development project under the German Central Innovation Programme for SMEs.[31] Significantly, the CJEU reached the conclusion that "the concept of 'public body' [as laid down in Article 3(4) of Annex I to Regulation No 651/2014 – added by the author of the present article] is intended to include entities, such as universities and higher education establishments and a chamber of commerce and industry, where those entities are set up specifically to meet needs in the general interest, have legal personality and are either financed for the most part or controlled directly or indirectly by the State, by regional or local authorities or by other public bodies".[32] That implied Member States cannot a priori exclude entities which meet those conditions from the scope of application of rules on SMES.

Most recently, in October 2022, the CJEU dealt with two references for preliminary rulings made by the Latvian courts[33] which raised the issue how the notion of "research and knowledge dissemination organisations", grounded in Article 2(83) of Regulation No 651/2014,[34] should be understood and applied.[35] While, as it will be further shown, the role of this notion is relatively limited in the economy of Regulation No 651/2014, it is one of the fundamental notions employed in the context of the Framework for State aid for research, development and innovation and, thus, its relevance in the context State aids for research and technological development is non-negligible.[36] On factual level, the significance of this notion is intensified by the fact it is used to designate to designate a wide range of rather traditional actors in research and technological development, such as universities or research institutes, technology transfer agencies, innovation intermediaries, research-oriented physical or virtual collaborative entities, most of which are now frequently involved in both non-economic, and economic activities.

Although the context under which the both Latvian references were made were rather country-specific, the two references provided the CJEU with the occasion to analyse more in-depth how to tackle one of the important issues which lie at the intersection of State aid rules and promotion of research and technological development.

[31] Ibid, paras 17-20.
[32] Case C 516/19 NMI Technologietransfer GmbH (n 38) para 58.
[33] Joined Cases C-164/21 and C-318/21 Baltijas Starptautiskā Akadēmija SIA and Stockholm School of Economics in Riga EU:C:2022:785.
[34] It should be pointed out that this notion did not appear in EU law upon the adoption of Regulation No 651/2014 for the very first time as it had been already contained in in the preceding Regulation No 800/2008 (essentially, in the identical version); its "precursors" can be traced back to communications which had historically preceded the Regulations in question. However, EU secondary law has never contained any definition of the notion which could be considered analytical in the true sense of the word.
[35] Joined Cases C 164/21 and C 318/21 (n 33).
[36] See supra n 18.

III. IN SEARCH OF THE MEANING OF RESEARCH ORGANIZATION

III.1 Background to the Latvian references for a preliminary ruling to the CJEU

The circumstances in which the Latvian courts made their requests for preliminary ruling were relatively simple. In the both cases, these requests arose in the context of proceedings in which the applicants sought the annulment of decisions rendered by the Latvian Science Council, an institution responsible for the implementation and supervision of research programmes and projects financed from the budget of the Latvian State.[37] In those decisions, the Latvian Science Council found that two projects the applicants had submitted in the context of competitions for research support in 2019 and 2020 were not eligible for funding. In the both cases, the ineligibility stemmed from the fact that the applicant entities could not have been qualified as research and knowledge dissemination organisations within the meaning of Article 2(83) of Regulation No 651/2014. This fact mattered because, under the Latvian law, eligibility to participate in competitions for support for research projects depended, firstly, on the applicants being registered in the Latvian register of scientific institutions and, secondly, on the applicants meeting the characteristics of a research and knowledge dissemination organisation as laid down in Article 2(83) of Regulation No 651/2014. While the both applicant entities were registered in the Latvian register of scientific institutions, under the Latvian Science Council's view, they did not meet the characteristics of a research and knowledge dissemination organisation within the meaning of EU law to which national legislation expressly referred to.

In case of the first entity, which had the form of a limited liability company, 84 % of the entity's turnover came from tuition fees paid by students who were studying in programmes of higher education the entity provided. This fact, under the Latvian Science Council's opinion, meant the primary activity of the entity was not to conduct research as non-economic activity but, rather, to provide higher education privately financed by students, i. e. to carry out economic activity.[38] The Latvian Science Council also entertained doubts over whether the entity's shareholders or members did not have privileged access to its research capacity or to its research results[39] and, also, whether the entity's income originating from economic activities was adequately accounted for separately from the income originating from non-economic activities.[40]

Similarly, in case of the second entity, which was also a limited liability company, the Latvian Science Council took into account that 66% of its turnover originated from dispensing higher education and vocational training to students who paid fees, i. e. from economic activity, while only 34% of the entity's turnover came from its non-economic activities, including research.[41] Comparably to the first case, the Latvian Science Council concluded the entity's primary activity did not consist in carrying out research as non-economic activity. In addition, the Latvian Science Council criticized the fact the entity in

[37] For a brief description – Latvian Council of Science [online]. 20. 2. 2023 [2023-08-01]. Available at: <https://www.lzp.gov.lv/en/about-us>.
[38] Joined Cases C 164/21 and C 318/21 (n 33) para 15.
[39] Ibid, para 16.
[40] Ibid.
[41] Joined Cases C 164/21 and C 318/21 (n 33) para 23.

question did not invest the income generated from its primary, economic activity in its non-economic activities.

As the Latvian Science Council's conclusions were challenged by the applicants in the national proceedings, the Latvian courts referred several questions concerning the interpretation of the notion of a research and knowledge dissemination organisation under Article 2(83) Regulation No. 651/2014 to the CJEU. Most essentially, they asked whether an entity can be qualified as a research and knowledge dissemination organisation where it pursues various economic and non-economic activities, including research, while it generates most of its revenue from economic activities, such as provision of higher education for remuneration. In extension, the Latvian courts enquired which other criteria might be relevant with respect to qualifying an entity as research and knowledge dissemination organisation under Article 2(83) Regulation No. 651/2014.

III.2 Controversy over admissibility of the Latvian references for a preliminary ruling

Prior to analysing the preliminary questions referred by the Latvian courts, however, the CJEU had to determine whether these questions were admissible or not.

In this regard, the Advocate General (AG) argued in her opinion, the CJEU did not have jurisdiction to deal with them.[42] In line with provisions of the EU legislation and the CJEU's case-law, the AG emphasized that "public funding falls under State aid rules only in so far as it covers the costs linked to the economic activities"[43] which the given entity conducts. As a result, whether an aid granted to entity which conducts research amounts to State aid or not, basically "depends on the qualification of the funded activity as economic or non-economic."[44] In the AG's view, therefore, the notion of a research and knowledge dissemination organisation under Article 2(83) Regulation No. 651/2014 itself had "no relevance for the applicability of State aid rules to research grants awarded to research institutions."[45] Even more significantly, the AG observed the notion of research and knowledge dissemination organisation was relevant in the both cases not as a matter of EU law but, rather, due to the choice made by the Latvian Legislator who linked the eligibility requirements for participation in domestic competitions for support for research with the notion contained in the EU legislation.[46] In this respect, the AG reminded the argument made by the Dutch Government under which the competence to lay down eligibility requirements in domestic competitions for support for research projects continues to rest with the Member States which implies that it is not up to EU law whether and how eligibility for participation in the competitions will be restricted.[47] Last but not least, the AG claimed the questions were not admissible even under the Dzodzi line of the CJEU's case-law.[48]

[42] Opinion of Advocate General Ćapeta delivered on 28 April 2022, ECLI:EU:C:2022:333.
[43] Ibid, para 52.
[44] Opinion of Advocate General Ćapeta (n 42) para 54.
[45] Ibid, para 55.
[46] Ibid, para 29.
[47] Ibid, para 41.
[48] Ibid, para 68.

The CJEU, however, disagreed with the arguments over inadmissibility of the preliminary questions referred although it departed from similar positions. Notably, the CJEU identified itself with the position that the restriction of eligibility requirements to entities qualifiable as research and knowledge dissemination organisations resulted from the Latvian legislation which, in this regard, "clearly and unconditionally" referred to Article 2(83) of Regulation No 651/2014.[49] Unlike the AG, however, the CJEU took view that, under such circumstances, "the outcome of the disputes in the main proceedings depends on the interpretation of that provision of Regulation No 651/2014" and "the Court's answers to the questions referred for a preliminary ruling appear necessary for the referring courts to be able to give their judgment."[50] As the CJEU stressed, in its settled case-law, it has recognised as admissible requests for a preliminary ruling concerning provisions of EU law in situations "where the facts of the case in the main proceedings fell outside the scope of EU law but where those provisions, without amending their purpose or scope, had been rendered applicable by national law due to a direct and unconditional reference made by that law to the content of those provisions."[51] Citing, ia, the Dzodzi case, the CJEU explained that such approach is justified by the fact "it is manifestly in the interest of the EU legal order that, in order to forestall future differences of interpretation, the provisions taken from EU law should be interpreted uniformly."[52] Taking the view that, through a reference to the notion of research organisation under Article 2(83) of Regulation No. 651/2014, the Latvian authorities "wished to ensure consistency between national law and the relevant EU law and to ensure the compatibility of their system for the public financing of fundamental public research with the rules of EU law on State aid, with the result that that reference alters neither the purpose nor the scope of that provision",[53] the CJEU concluded the questions referred by the Latvian courts were broadly admissible.[54]

III.3 What a Research and Knowledge Dissemination Organisation Is

Turning then to the crucial question how the notion of a research and knowledge dissemination organisation should be understood, the CJEU stressed at the outset that "in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part."[55] In spite of that position, when tackling with the definition itself, the CJEU has heavily leaned on a literal interpretation of Article 2(83) of Regulation No 651/2014, read in conjunction with the Framework for State aid for research, development and innovation.[56]

In the light of the wording of Article 2(83), the CJEU firstly ruled that "the key criterion for the classification of an entity as a research and knowledge-dissemination organisation

[49] Joined Cases C 164/21 and C 318/21 (n 33) para 34.
[50] Ibid.
[51] Joined Cases C 164/21 and C 318/21 (n 33) para 35.
[52] Ibid.
[53] Joined Cases C 164/21 and C 318/21 (n 33) para 36.
[54] Except for the one which concerned the relevance of the proportion of the students from Latvia and the EU Member States which an entity hosts and the type of education which it provides as criteria for the purposes of classifying the given entities as a research and knowledge-dissemination organisations, see ibid., paras 37-39.
[55] Joined Cases C 164/21 and C 318/21 (n 33) para 42.
[56] Due to the time when facts of the case occurred, Framework 2014 was applicable to the case.

is the primary goal it pursues."[57] This goal must "consist of either conducting, in complete independence, activities of fundamental research, industrial research or experimental development, or widely disseminating the results of such activities by way of teaching, publication or knowledge transfer."[58] As the CJEU further clarified, where an entity pursues several goals, the pursuit of independent research activities or the wide dissemination of the results from those activities can be deemed to constitute its primary activity on condition that it is the entity's "primary objective" which simultaneously "prevails over any other objectives pursued by that organisation."[59] Nonetheless, the CJEU felt it urgent to add that such interpretation does not preclude an entity in question "from also carrying out other activities, which may be of an economic nature, such as educational activities for consideration" provided that "those activities retain a secondary, non-preponderant nature in relation to the primary activities, generally non-economic, of independent research or of dissemination of the results of that research."[60]

Secondly, the CJEU paid attention to whether, in order to be qualified as a research and knowledge-dissemination organisation, an entity must simultaneously carry out both research activities and widely disseminate the result of those research activities, as the wording of Article of 2(83) suggests. As the CJEU held, the given entity must basically "conduct independent research activities, possibly supplemented by activities for the dissemination of the results of those research activities."[61] In other words, in spite of the use of a conjunction "or" in Article 2(83), which might signify the both conditions are not cumulative, research activities and dissemination of the results from research activities are not completely separable from each other, when it comes to defining research and knowledge-dissemination organisation. Moreover, as the CJEU specifically indicated, activities which are "devoted exclusively to teaching and training activities which disseminate generally the current state of science" do not come within the ambit of the notion of a research and knowledge-dissemination organisation.[62] On the other hand, as it is clear from the CJEU's pronouncement, the dissemination of results does not have to be apparently as intense as research activities themselves so that the given entity could be qualified as as research and knowledge-dissemination organisation.

Thirdly, the CJEU analysed the particular criteria which should serve for purposes of assessing what the primary objective of an entity is and to what extent the nature of this primary objective is economic or non-economic.

As the CEJU observed, these criteria are not expressly laid down in Article 2(83). Consequently, the CJEU took a recourse to a somewhat "holistic" approach when it ruled "all relevant criteria" should be taken into account, including "the applicable regulatory framework or the statutes of the entity in question."[63] Simultaneously, however, the CJEU noted that "the criterion of the structure of an entity's turnover and of the proportion of

[57] Joined Cases C 164/21 and C 318/21 (n 33) para 45.
[58] Ibid, para 45.
[59] Ibid, para 47.
[60] Ibid, para 48.
[61] Ibid, para 50.
[62] Joined Cases C 164/21 and C 318/21 (n 33) para 51.
[63] Ibid, para 52.

that turnover represented by the revenue from its economic activities cannot be used as the sole decisive criterion for assessing the primary goal of that entity for the purposes of the possible classification of that entity as a research and knowledge-dissemination organisation."[64] Under the CJEU's opinion, this is because Article 2(83) puts an emphasize on the fact the qualification of a research and knowledge-dissemination organisation is to be applied without the necessity to have regard to the way in which the entity is financed or to its legal status.[65] Moreover, by providing for separate accounting, the Regulation No 651/2014 expressly permits that, in addition to its non-economic activities, a research and knowledge-dissemination organisation may pursue activities of an economic nature which generate revenue.[66] On the other hand, the CJEU also made it clear that the criterion of the structure of an entity's turnover – and of the proportion of that turnover represented by the revenue from the entity's economic activities – should not be completely neglected as it should "be taken into account, in the wider context of an analysis of all the relevant circumstances, as one indication among others of an entity's primary goal."[67] As apparent, in the CJEU's view, the proportion of revenue generated from economic and non-economic activities can thus play a role in qualifying an entity as a research and knowledge-dissemination organisation, however, that role of this criterion is not exclusive. That means attention should be paid to any other relevant criteria which may characterize the objective of the entity in question.

Subsequently, the CJEU responded to the other questions referred by the Latvian courts.

Significantly, the CJEU, dealt with whether, in order to be qualified as research and knowledge-dissemination organisation, an entity must reinvest the revenue generated by its primary activity in that same activity. In this regard, the CJEU laconically observed that, although such requirement existed under Regulation No 800/2008,[68] this is not the case under Regulation No 651/2014.[69] Within the ambit of Regulation No 651/2014, thus, "it is not necessary that that entity reinvests the revenue generated by its primary activity in that same primary activity."[70]

In addition, the CJEU analysed whether the legal status of shareholders or members of an entity or the economic character of activities these shareholders or members carry out can be relevant with respect to defining the given entity as research and knowledge-dissemination organisation. The CJEU conceded Regulation No 651/2014 expressly prohibits that undertakings, which may exercise decisive influence over a research and knowledge-dissemination organisation in their capacity of shareholders or members i should enjoy privileged access to the results of the organisation. This prohibition, however, "does not entail any restriction as to the legal status of any shareholders or members of a research

[64] Ibid, para 57.
[65] Ibid, para 54.
[66] Ibid, para 55.
[67] Ibid, para 58.
[68] Ibid, para 62.
[69] Ibid, para 61.
[70] Joined Cases C 164/21 and C 318/21 (n 33) para 64. The duty to reinvest all the profits in non-economic activities, namely research, dissemination of results or teaching, was expressly grounded in Article 30(1) of Regulation No 800/2008; no specific explanation for the abandonment of this requirement is contained in the recitals of Regulation No 651/2014.

and knowledge-dissemination organisation or the profit-making nature, or otherwise, of the activities carried out by those shareholders or members and the objectives which they pursue."[71] In support of this conclusion, the CJEU drew attention to the fact Article 2(83) is worded so that the formal criteria linked to the legal status and internal organisation of the entity in question are irrelevant.[72] This basically implies that an entity cannot be denied qualification of research and knowledge-dissemination organisation merely on account of the fact its members or shareholders pursue economic activities (unlike the existence of privileged access to results of the entity in question).[73]

CONCLUSION

In the light of the judgement rendered in Autumn 2022 it is clear enough that, the CJEU has a non-negligible potential even with respect to influencing the contours of the application of State aid law to measures taken in the area research and technological development. Moreover, due to the urgency of the expansion of research and technological development in the political agenda of these days, it cannot be excluded that other issues would be referred to the CJEU in this area. To what extent has this potential materialized in the most recent judgement and what impact this judgement can have?

At the very first sight, in line with the opinion voiced by the AG, the applicability of State aid law to an entity which is involved in research or technological development primarily depends on whether such an entity can be qualified as an undertaking which takes part in the market, not on whether it is as a research and knowledge-dissemination organisation or not. Such a qualification is, in turn, related to whether the given entity carries out at least some activities which can be characterized as economic or not. Consequently, legal status of the entity in question, including its qualification as a research and knowledge-dissemination organisation, is irrelevant.

Moreover, viewed from the perspective of Regulation No 651/2014 per se, the notion of a research and knowledge-dissemination organisation appears to be decisive when it comes to determining the intensity of aid which may be granted by the Member States for some categories of research and development projects without the need for the prior notification to the Commission under Article 108(3) of the TFEU,[74] not when it comes to the assessing eligibility for such aid.

Under these circumstances, there might have been legitimate doubts over the admissibility of questions referred by the Latvian courts. At closer look, however, the fact the CJEU found the preliminary questions admissible and dealt with them does not appear as erroneous.

The truth is that the restriction of the eligibility to participate in the Latvian competitions to entities, which met the characteristics of research and knowledge-dissemination organisations, primarily stemmed from the sovereign choice by the Latvian authorities,

[71] Ibid, para 68.
[72] Ibid, para 67.
[73] Ibid, para 69.
[74] See, in particular, Regulation No 651/2014, Article 3, in conjunction with Article 25(6) (b) sub i) second indent.

not from the commitments under EU Law. In this regard, it is beyond doubt that EU rules on State aids per se do not preclude the Member States from supporting research or technological development in the way they deem the most appropriate.[75] This is all the more so that the TFEU, as mentioned supra, builds on the principle that, in the area of research and technological development, powers of the EU and those of the Member States are basically parallel.[76]

On the other hand, however, when granting advantages to entities in the area of research or technological development, Member States are obliged to fully respect EU rules on State Aids.[77] In other words, they cannot grant such advantages where these would be incompatible with the internal market. This, in turn, entails that the Member States should carefully verify whether the beneficiary of the given advantage carries out economic activities and, also, whether these economic activities are ancillary to no-economic activities, or not. This may be the reason why Latvia chose to relate the eligibility for participation in competitions for support from the Latvian Research Council with the qualification of a research and knowledge-dissemination organisation, building on the assumption that, in these organisations, non-economic activities related to research or technological development should prevail over economic activities which, in turn, should minimize the risks that Latvia would overstep EU rules on State aid. In this regard, thus, the CJEU was basically right when it held that, by relating the eligibility for participation in competitions to the notion of a research and knowledge-dissemination organisation, the Latvian authorities "wished to ensure consistency between national law and the relevant EU law and to ensure the compatibility of their system for the public financing of fundamental public research with the rules of EU law on State aid."[78] As the reference to the notion in the Latvian law altered neither the purpose nor the scope of Article 2(83) of Regulation No 651/2014, it was also logic enough to find the reference for preliminary ruling admissible although, prima facie, the facts of the case in the main proceedings might have appeared as falling outside the scope of EU law.

Secondly, while the notion of a research and knowledge-dissemination organisation is attributed a relatively circumscribed role in the economy of the Regulation No. 651/2004, it is simultaneously one of the important notions employed in the Framework (both in its 2014 and 2022 version).[79] This Framework was adopted with the goal to lay down "the compatibility conditions … based on … common approach" under its 2014 version[80] or, in 2022 version, to provide "guidance on the basis of a compatibility assessment conducted by the Commission regarding aid to promote research, development and innovation"[81], which

[75] The prohibition to grant State aids incompatible with the internal market does not per se restrict the exercise of powers which Member States hold in other areas.
[76] See supra, p. 1.
[77] As a result of the general duty of loyalty imposed on the Member States under Article 4(3) TEU; in procedural terms, the respect for this duty in the area of State aids may be enforced, ia, through "simplified" infringement procedure, in line with Article 108(2) TFEU.
[78] Joined Cases C 164/21 and C 318/21 (n 33) para 36.
[79] For a definition of the notion, see Framework 2014, point 15 (ff); Framework 2022, point 16 ff); the definition contained in the Framework is identical with the definition of the notion, as it is laid down in Article 2(83) of Regulation No 651/2014.
[80] Framework 2014, point 7.
[81] Framework 2022, point 2.

does not come under the scope of the block exemption Regulation No 651/2014. Under both the Framework 2014 and Framework 2022, where an entity can be qualified as a research and knowledge-dissemination organisation and where it is used for both economic and non-economic activities, public funding of that organisation "falls under State aid rules only insofar as it covers costs linked to the economic activities."[82] The public funding of such entities may even totally fall outside state aid rules where "research infrastructure is used almost exclusively for a non-economic activity … provided that the economic use remains purely ancillary", where the conditions further specified in the Framework are met.[83] Thus, from a legal policy perspective, it was not definitely unsubstantiated for the CJEU to seize the occasion and to shed more light on how the notion of a research and knowledge-dissemination organisation should be read by both the Commission and the Member States as it has its legal significance.

Yet, the question arises as to whether the recent judgement of the CJEU suffices to provide the complete legal certainty when it comes to determining whether an entity is a research and knowledge-dissemination organisation, or not.

It is no doubt significant that the CJEU confirms the qualification of any entity as a research and knowledge-dissemination organisation depends, in principle, on whether its primary objective consists in pursuing independent research activities or in the wide dissemination of the results of those activities, irrespective of legal status the given entity has or the relationship which exist between the entity and its members or shareholders. At the same time, this position implies as well that the given entity does not have to deal exclusively with research as non-economic activity but it can simultaneously pursue different objectives and, thus, parallely exercise several activities, including those of economic nature. However, it is now clear too that the pursuit of independent research activities or the wide dissemination of the results of those activities must constitute the primary objective of the given entity which must prevail over any other objectives that entity pursues.

It is no less significant that the CJEU takes the view that, in order to be qualified as a research and knowledge-dissemination organisation, the given entity does not have to cumulatively carry out research and disseminate the results of this research in the same intensity but, rather, the entity "must conduct independent research activities, possibly supplemented by activities for the dissemination of the results of those research activities."[84] In other words, while the core of the activities of the entity must consist in conducting research, when it comes to dissemination of results, it suffices that the dissemination has supplementary character with regard to research a such. Conversely, it stems from the CJEU's judgement that an entity cannot be qualified as a research and knowledge-dissemination organisation where it merely disseminates results attained by others but itself does not carry out its own research activities.

It is, however, far less certain that the CJEU has sufficiently clarified which criteria should actually play the decisive role when verifying whether the pursuit of independent

[82] Framework 2014, point 20; Framework 2022, point 21.
[83] Ibid.
[84] See supra, n 61.

research activities (and the wide dissemination of the results of those activities) constitutes the primary objective of the given entity. In the light of the CJEU's recent judgement, the criterion of the structure of an entity's turnover, including criterion of the respective proportion of that turnover represented by the revenue from its economic activities and those from the non-economic activities of research and dissemination of the results of that research, cannot be viewed as the sole criterion. When it comes to the other criteria which should be applied, however, the CJEU limited itself to he referring to "all the relevant circumstances",[85] such as "the applicable regulatory framework or the statutes" of the entity in question, without providing any further indications in this sense, in particular, as far as factual criteria are concerned. As far as these factual criteria are concerned, however, in the context of State aid law, it is quite difficult to conceive which criteria other than financial ones (such as precisely the structure of the turnover of the entity in question) should be taken seriously when determining whether, in case of the specific entity, research constitutes its primary objective or not. In holding that the structure of the entity's turnover is only one of the several relevant criteria, the CJEU echoed arguments made by the Latvian and the Dutch governments which opined that, if taken in isolation, the structure of the turnover can "give a distorted picture of an entity's actual activities and of its primary goal, for example by underestimating the real importance of an activity which generates only a small amount of revenue."[86] Then, however, any independent company which, under its statues, is entitled to carry out, at least occasionally, some form of fundamental research and to disseminate its research results, may claim to be viewed as a research and knowledge-dissemination organisation although, in economic and financial terms, it is prevailingly dependent on its other activities which are economic in nature. This aspect obliges to ask whether, in the light of the risks stemming from the cross-subsidisation of economic activities through aids granted to support non-economic activities in the area of research or technological development, such approach is prudent enough.

This aspect also leads to conclude that the potential the CJEU posseses with respect to the application of State aid law to measures taken by the Member States in the area research and technological development has not been, so far, fully exploited yet and it is to be expected that, in future, this potential may further materialize.

[85] See supra, n 63.
[86] Joined Cases C 164/21 and C 318/21 (n 33) para 56.