State Aid and Public Funding for Universities and other Research Organisations

Bernhard von Wendland (1)

Introduction

This paper discusses the relation between public funding for research organisations (hereinafter ‘ROs’) (2) and State aid rules. That relation is determined by two key principles. On the one hand, strengthening R&D is one of the Union’s objectives, and the Commission takes a favourable stance towards fostering research, development and innovation (R&D&I) (3). On the other hand, any funding that meets the criteria of Article 107(1) TFEU will be considered to be State aid (4), regardless of its possibly laudable objectives (5). While Article 107(1) TFEU in principle prohibits State aid, such aid may however be compatible with the common market on the basis of Article 107(2) and (3) TFEU (6). In order to ensure the compatibility of State aid, it shall either be notified to the Commission, pursuant to Article 108 (3) TFEU or it shall meet all the criteria for exemption from notification (7).

In short, public funding for ROs may contain State aid, which will be compatible with the internal market if it is in line with State aid rules. The Commission applies specific criteria to assess the State aid character of public funding for ROs. These criteria are set forth in the Community framework for state aid for research and development and innovation (hereinafter ‘the framework’). Experience in implementing the framework so far has shown that its criteria for ROs do not need material review. However, communication with Member States’ authorities and other stakeholders has shown that several issues need discussing and clarifying.

In particular, the following issues have arisen when applying the framework:

- When is an RO an ‘undertaking’ and thus a potential beneficiary of State aid? What is the definition of ‘economic activity’?
- How to conform with the definition of ‘RO’ for state-aid purposes? In particular, are an RO’s ‘primary activities’ necessarily non-economic?
- State aid rules require profits to be reinvested in the RO’s ‘primary activities’. Does this mean that no reinvestment can be made in ‘economic activities’?

(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the author.
(2) The broad term ‘ROs’ embraces entities such as universities or research institutes, whatever their legal status (organised under public or private law) or ways of financing, as defined by EU State aid rules.
(3) Pursuant to Article 179 TFEU, one of the Union’s objectives is to strengthen its scientific and technological bases, by achieving a European research area in which researchers, scientific knowledge and technology circulate freely and by encouraging it to become more competitive, including in its industry. In the Lisbon Strategy context, the Commission’s favourable stance on more public and private-sector investment in R&D, is set out in the Communication from the Commission, ‘Investing in research: an action plan for Europe’, 4.6.2003, COM(2003) 226 final/2, p. 11 et seq; and, most recently, in the Communication from the Commission, ‘Europe 2020’, 3.3.2010, COM(2010) 2020, p. 8 et seq.
(4) Pursuant to Article 107 (1) TFEU, 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.
(5) In its judgment in Case 173/73 Italy v Commission [1974] ECR 709, paragraph 20, the Court held that Article 92 of the EC Treaty [Article 107(1) TFEU] does not distinguish between the measures of State intervention concerned by reference to their causes or aims, but defines them in relation to their effects. This was confirmed most recently in case C-487/06 P, British Aggregates Association vs. Commission, not yet reported in the ECR.
(6) State aid rules are an instrument for fostering the Union’s objectives and are implemented within the limits of appreciation set by Article 107 TFEU; (see EU rules on State aid for R&D&I ‘…State aid for R&D&I shall be compatible if the aid can be expected to lead to additional R&D&I and if the distortion of competition is not considered to be contrary to the common interest, which the Commission equates for the purposes of this framework with economic efficiency’, Point 1.1 of the Community framework for state aid for research and development and innovation, OJ C 323 , 30.12.2006, p. 1).
(7) For example, in accordance with 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. OJ, 2008 No. L 214 p. 3).
- How to separate economic from non-economic activities and thus prevent any spill-over of public funding of non-economic activities into economic activities?
- How to assess if there is any State aid element in technology transfer and licensing?
- Is State aid involved in funding for private universities?
- What are the options when public funding is granted for the economic activities of an RO?

**Relevant State aid rules**

State aid for R&D&I can primarily be justified on the basis of Article 107(3)(b) and 107(3)(c) TFEU. Both the framework and a specific section in the General Block Exemption Regulation (hereinafter GBER) apply to R&D&I State aid. This article will not, however, deal with the many legal differences between the framework and the Regulation.

Chapter 3 of the framework provides guidance as to whether or not State aid is present in R&D&I related situations where ROs are involved. In particular, the framework addresses public funding for ROs and innovation intermediaries, contract research or research services on behalf of undertakings, technology transfer, and collaboration of undertakings and ROs. The framework’s other chapters set out the rules which the Commission will apply in assessing R&D&I State aid. The assessment of whether or not financing for ROs contains State aid in the first place is therefore ‘upstream’ of the actual compatibility assessment of State aid.

Contrary to the framework, the GBER does not provide for such ‘upstream’ guidance. Rather, that Regulation applies to situations where State aid is certainly present, but can be exempt from the requirement of prior notification and Commission approval.

**When is a research organisation an ‘undertaking’ and thus a potential beneficiary of State aid? What is the definition of ‘economic activity’?**

State aid is selective in that it favours ‘undertakings’. Hence it is vital to determine whether or not an RO acts as an undertaking.

The framework answers this question ‘in accordance with general State aid principles’. Consequently, and in line with Article 107(1) TFEU and the case-law of the Court, a research organisation might qualify as an undertaking if it carries out an economic activity, which is an activity whereby goods and/or services are offered on a given market. This does not depend on the RO’s legal status (organised under public or private law) or economic nature (profit making or not).

The framework provides a definition of an ‘RO’ for its purposes. However, the definition is neutral with respect to the economic character of activities:

‘RO’ means an entity, such as a university or a research institute, irrespective of its legal status (organised under public or private law) or ways of financing, whose primary goal is to conduct fundamental research, industrial research or experimental development and to disseminate their results by way of teaching, publication or technology transfer; all profits are reinvested in these activities, the dissemination of their results or teaching; undertakings that can exert influence upon such an entity, in the quality of shareholders or members for example, shall enjoy no preferential access to the research capacities of such an entity or to the research results generated by it.

As well as its definition of ‘RO’, the framework stipulates that the primary activities of ROs are ‘normally’ non-economic and include: education for more and better skilled human resources; the conduct of independent R&D for more knowledge and better understanding including collaborative R&D; and the dissemination of research results. Moreover, the framework gives a broad outline of economic activities: ‘in particular research carried out under contract with industry, the renting out of research infrastructure and consultancy work’.

‘Secondary’ activities do not pursue the primary goals and may be of an economic nature.

In summary, the framework establishes the definition of ‘RO’ for State aid purposes. That definition lays down certain ‘primary’ activities that an entity must pursue, in principle irrespective of the economic.
nomic character of these activities. The framework, however, provides guidance as to which activities are ‘normally’ non-economic.

Are ‘not-for-profit’ and/or public research organisations exempt from the concept of ‘undertaking’ and thus in a ‘privileged’ position compared to profit-making entities?

Insofar as the legal status of ROs (public, private), their ways of financing (entirely state-funded, mixed funding, entirely private), or their economic nature (not-for-profit, profit-seeking) are immaterial in assessing whether or not they are beneficiaries of State aid, the framework does away with any (mis)perception that not-for-profit (e.g. public) ROs are ‘privileged’ and thus to a large extent exempt from Article 108 (1) TFEU (16). In fact, universities and other ROs have never benefited from any ‘university privilege’ under Treaty rules (17).

How to conform to the definition of ‘research organisation’ for State aid purposes?

The framework contains special criteria that apply to ROs. Knowing whether or not an entity conforms to the framework’s definition of ‘RO’ is decisive, first and foremost because funding for non-economic primary activities does not constitute State aid at all, and secondly because other rules of the framework require ‘research-organisation’ status (18).

How to delimit genuine research organisations from industry research?

Pursuant to the framework, an RO’s primary goal is to carry out R&D and to disseminate R&D results by way of teaching, publication or technology transfer. The framework also requires that undertakings that can exert influence upon a RO do not enjoy preferential access to its R&D capacities and results. Hence, an entity that pursues R&D exclusively without disseminating its results (e.g. a (joint) research institute catering to industry, or an R&D department in an enterprise) would not meet that criterion.

Must a research organisation’s ‘primary activities’ be non-economic?

While there is no reference in the framework’s definition to the economic or non-economic character of ‘primary activities’ (19), some of these primary activities are considered as ‘normally’ non-economic, among them ‘independent R&D’. It is obvious that contract R&D on behalf of industry is a) economic and b) dependent. However, in the framework’s logic, the carrying out of such economic and dependent activities should not jeopardise the status of an RO as such, provided all the other criteria set out in the definition are met. Consequently, while an RO maintains its status, it might act as an undertaking in certain situations, for instance when carrying out contract research on behalf of industry.

In this context, one further criterion of the said definition is crucial, namely that all profits are reinvested in the RO’s primary activities (20).

Does the requirement to reinvest profits in the research organisation’s ‘primary activities’ mean that reinvestment in ‘economic activities’ is not allowed?

Given the definition’s neutrality with respect to the economic nature of primary activities, reinvestment can be made in both non-economic as well as economic primary activities. Reinvestment in primary activities is necessary to maintain RO status within the meaning of the framework.

(16) This perception seems to have been common when the preceding Community framework for State aid for research and development (OJ C 45, 17.2.1996, p. 5) was in force, especially in view of the rather vague wording of its point 2.4. For a discussion of the notion of ‘privilege’ in the light of the new framework’s approach see: Thibaut Kleiner, The New framework for Research, Development and Innovation, 2007-2013, in European State Aid Law Quarterly (ESAlQ) 2/2007, p. 238.


(18) This article does not cover the rules on indirect aid via ROs to industry (point 3.2), on basic aid intensities (point 5.1.2), on bonuses for collaboration with ROs (point 5.1.3. b ii), and on highly-qualified personnel (point 5.7).

(19) For instance, industrial research carried out under contract with industry still qualifies, in the literal sense, as ‘conducting industrial research’ as defined by point 2.2 d) of the framework. In particular, when performing such research, teaching, publication and technology transfer may take place. Such a research contract might be part of the strategy and research path pursued by the organisation and it may even be necessary to comply with the organisation’s statutes.

(20) ‘All profits are reinvested in these activities, the dissemination of their results or teaching.’ In this passage of the definition in point 2.2 d) of the framework, ‘activity’ refers to the activities previously mentioned in the definition, namely ‘to conduct fundamental research, industrial research or experimental development’; by ‘dissemination of results’ any activity referred to in the previous clause.
One common misunderstanding should, however, be clarified. The fact that profits generated by economic activities are duly reinvested does not ‘neutralise’ the economic character of the ‘profit-generating’ activity as such.

In addition to ‘primary activities’ there may well be ‘secondary’ activities, such as canteens and cafeterias, student apartments, student theatres, university bookshops, etc. These activities are certainly not linked to the primary goals and may be of an economic nature. The wording of the framework’s reinvestment clause implies that only profits generated by primary activities are concerned. ‘Closed-cycle’ reinvestment of profits from ‘secondary’ economic activities in those same activities does not jeopardise the status of the ROs if the financing and costs of such secondary activities are clearly separate from the university’s primary activities (both economic and non-economic).

While the reinvestment of profits from ‘secondary’ economic activities into non-economic primary activities does not raise State aid concerns, reinvestment into economic primary activities could lead to the continuous extension of a research organisation’s economic divisions (20). However, responsibility for categorising an entity as an ‘RO’ for State aid purposes and monitoring compliance with that concept lies first and foremost with the Member State.

Keeping clear of State aid: separation of economic from non-economic activities and prevention of cross-subsidisation

As already discussed, an RO can maintain its status but still act as an undertaking in situations of economic activity. This raises the issue of separating economic from non-economic activities.

In fact, many ROs rely on economic activities such as contract research and thus may act on markets and compete with other enterprises. According to a project report by the European University Association (EUA), ‘national private funds are the second most important source of university funds. (…) Private funds may reach the institution from students and their families or entities with a different legal status but still act as an undertaking in situations of economic activity. The wording of the framework’s reinvestment clause implies that only profits generated by primary activities are concerned. ‘Closed-cycle’ reinvestment of profits from ‘secondary’ economic activities in those same activities does not jeopardise the status of the ROs if the financing and costs of such secondary activities are clearly separate from the university’s primary activities (both economic and non-economic).

While the reinvestment of profits from ‘secondary’ economic activities into non-economic primary activities does not raise State aid concerns, reinvestment into economic primary activities could lead to the continuous extension of a research organisation’s economic divisions (20). However, responsibility for categorising an entity as an ‘RO’ for State aid purposes and monitoring compliance with that concept lies first and foremost with the Member State.

Keeping clear of State aid: separation of economic from non-economic activities and prevention of cross-subsidisation

As already discussed, an RO can maintain its status but still act as an undertaking in situations of economic activity. This raises the issue of separating economic from non-economic activities.

In fact, many ROs rely on economic activities such as contract research and thus may act on markets and compete with other enterprises. According to a project report by the European University Association (EUA), ‘national private funds are the second most important source of university funds. (…) Private funds may reach the institution from students and their families or entities with a different legal status operating in the private sector (…). Income from individuals usually comes in the form of tuition, academic or registration fees, but also as payment for student accommodation and meals, or as a fee for services not only to students but also to the general public — museums, souvenir shops, etc. Income from companies takes the form either of fees charged for R&D contracts and other services or of endowments (20). For example, Fraunhofer-Gesellschaft, a large German RO that promotes and undertakes applied research, receives funding both from the public sector (approximately 40%) and through contract research earnings (roughly 60%) (20).

Contract research and consultancy for industry are not solely for generating income, but may be part of an RO’s or a Member State’s policy to promote knowledge transfer and to gear R&D capabilities towards the needs of industry (20).

The framework provides guidance as to the State aid implications of pursuing both kinds of activities:

‘If the same entity carries out activities of both an economic and non-economic nature, in order to avoid cross-subsidisation of the economic activity, the public funding of the non-economic activities will not fall under Art. 107 (1) TFEU [Art. 87 EC-Treaty], if the two kinds of activities and their costs and funding can be clearly separated. Evidence that the costs have been allocated correctly can consist of annual financial statements of the universities and ROs (20).

As a result, there is a legal presumption of spill-over of public funding into economic activities if the two types of activities cannot be properly separated. In this case, the entire RO and its funding are subject to State aid rules, just as any undertaking. Spill-over

(20) European University Association, Financially Sustainable Universities — Towards Full Costing in European Universities; Brussels, 2008, p. 23. The project provided an analysis of the current state of both the understanding and development of ‘full costing’ in higher education institutions in selected European universities and countries and identified the drivers, benefits and obstacles in this process.


(22) With its ‘research bonus scheme’, for example, Germany aims to increase the standard of R&D activities in publicly funded research organisations (‘Forschungsfreiräume’ and ‘Forschungsprämie zwei’). The research bonus is a grant for new, additional activities (primarily for structural improvements in the transfer of knowledge and technology), for a stronger orientation towards industry and commercial exploitation, and for the development of competences for better cooperation with industry, in particular with SMEs. The interesting point here is that, as a necessary condition for receiving the grant, a research organisation has to have concluded an R&D related service contract with an enterprise at market price and provided the service. The funding must be used to improve R&D, knowledge transfer, education and collaboration; http://www.ideen-zuenden.de/en/131.php.

(23) Point 3.1.1 of the framework.
from economic activities into non-economic activities does not raise any State aid concerns.

There is, however, no clear guidance on what is proper evidence of cost allocation. This is no doubt due to the limitation of the Union’s competence in education, as set out in Article 165 (1) of the TFEU (25). Rather, the framework attempts firstly to take into account the diverse legal situation in 27 Member States, secondly to respect the limits of this competence and thirdly to ensure a clear separation between economic and non-economic activities.

Nonetheless, the framework hints at ‘annual financial statements’. Using such statements to demonstrate proper cost allocation is a recommended option but is not obligatory. If spill-over of state funding from non-economic activities into economic activities is to be avoided there will have to be adequate appraisal methods, market prices and a clear allocation of costs and revenues for both type of activities. Unless ROs (probably universities in the majority of cases) keep their own balance sheets and profit-and-loss accounts, an annual compilation of the proceeds, profits and costs of economic activities (on a project base) appears to be sufficient.

**Decision practice: Assessment of the proper separation of economic and non-economic activities**

Decision practice shows that the Commission has assessed the effective prevention of spill-over on a case-by-case basis. Such assessment was primarily based on information provided by the Member State concerned, relating to the control and accounting systems that apply to the notified measure. As the examples below show, the Commission concluded that the accounting practices in place prevent any possible spill-over of public funding into potential economic activities, so that the support granted to ROs does not constitute State aid.

Approximately 40 ROs were expected to participate in State aid scheme N 112/2007 (Germany) (26). During the assessment process, Germany informed the Commission that these institutions might carry out activities of an economic nature. However, only the non-economic activities of such institutions were eligible under the scheme. The funding provisions required annual controls, and any undue appropriation would result in a revocation of the grant.

In the case of beneficiary institutes with separate accounting for economic and non-economic activities in place, the documentation relating to due separation would be checked at the time of the audit of the research institutes’ annual financial statements.

Research institutes which had not yet adopted and implemented separate accounts would be obliged to confirm in writing that, in so far as they pursue both types of activities, these would be carried out separately. Furthermore, these institutes would be obliged to submit adequate financial statements until such time as they too had separate cost accounting in place. The Commission found that accounting practices or compulsory declarations by the beneficiaries would prevent any possible spill-over of public funding into potential economic activities.

In the R&D&I scheme ‘Guidelines for R&D&I Promotion’, N 667/2007 (Germany) (27), eligible ROs were also not excluded from pursuing economic activities. In the notification process, Germany provided information on the precautions taken in order to prevent any possible spill-over of public funding into potential economic activities. In its decision, the Commission noted that:

‘Firstly, ROs will be obliged to declare whether or not they pursue economic as well as non-economic activities. Secondly, they must provide corresponding confirmation by the German fiscal authorities. Where an RO pursues both kinds of activities, it must provide proof that both activities are clearly separate. In that context, a detailed and verifiable work-time and cost plan, which unequivocally distinguishes between economic and non-economic activities, must be submitted. Moreover, grant decisions will stipulate that ROs demonstrate due separation of said activities in their annual financial statements, upon verification of due allocation of the aid. Such evidence will have to be confirmed by an independent chartered accountant/tax accountant or other auditor approved by the German authorities’.

On that basis, the Commission considered that any possible spill-over would be prevented. Thus, support granted to ROs under that scheme did not constitute State aid.

Individual aid N 365/2007 (Germany) was notified as a measure to fund the setting up, construction and equipment of the Fraunhofer Center for Silicon Photovoltaics (hereinafter CSP) (28). CSP is an affiliate institute of the Fraunhofer Association for the Promotion of Applied Research (Fraunhofer Gesellschaft zur Förderung der angewandten Forschung)

---


25 Pursuant to Article 165 (1) TFEU, the Union shall fully respect the responsibility of the Member States for inter alia the organisation of education systems.

26 Decision of 17.7.2007, case No 112/2007 THESEUS.
e.V; hereinafter FHG). According to the Commission’s decision, the primary activity of FHG and its affiliates is to conduct independent fundamental research, industrial research and experimental development, with a focus on applied research.

Germany pointed out that the funding will not defray any operations or project-related costs and provided supplementary information on the economic and non-economic activities pursued by FHG and CSP. According to information provided by Germany, FHG would demonstrate that no undue cross-subsidisation would occur. This would be achieved by separate accounting for economic and non-economic activities, their costs and financing. Such separate accounting would be applied throughout the entire FHG structure, including all its affiliate institutes.

The Commission further noted that FHG has been implementing industry-standard cost accounting since 1970, while constantly amplifying and refining it. Germany confirmed that FHG applied the full costs method, at the level of each institute. The German authorities further argued that, since FHG’s cost accounting system was detailed and project-based, all activities could be identified according to their specific costs and financing. On that basis, the German authorities found that the system in place prevented any cross-subsidisation of economic activities from funding for non-economic activities. The Commission decided that the funding in question did not constitute State aid.

Full costing in research organisations

Full costing would be an ideal tool for separating economic and non-economic activities and their costs and funding, and for delivering evidence that the relevant costs have been correctly allocated. In general terms, ‘full costing’ can be defined as the ability to identify and calculate all direct and indirect costs per activity and/or project that need to be considered in carrying out these activities (28).

According to the abovementioned EUA project report, there are wide differences in the status of full costing at both national and institutional levels. The study excludes universities which have not started to look at full costing. When the study was carried out, universities seemed to be in the process of developing, implementing or running their full costing systems. Development efforts ranged from the very early stages of discussion to the design of the desired system. Implementation measures included the setting up of a project management structure as well as a communication strategy, while systems in operation enabled universities to identify effectively the direct and indirect costs of their activities. However, even at that stage, the features of the costing systems varied considerably (29). In summary, national costing systems seem to be diverse. There is no black and white guidance on how to ensure proper allocation of costs and funding. It is therefore up to Member States to identify possible State aid issues in public funding for ROs in the first place. In case of doubt, legal certainty can be sought by pre-notifying or notifying the aid measure to the Commission (30).

Technology transfer and State aid

One of the primary goals of an RO is the dissemination of results, namely through technology transfer (TT) (31). The framework defines TT as ‘licensing, spin-off creation or other forms of management of knowledge created by the RO’ (32). The framework’s concept of TT relates to ‘the management of knowledge’ and is narrower than the concept of ‘knowledge transfer’ which, according to the Commission, ‘involves the processes for capturing, collecting and sharing explicit and tacit knowledge, including skills and competence. Knowledge transfer includes both commercial and non-commercial activities such as research collaborations, consultancy, licensing, spin-off creation, researcher mobility, publication, etc. While the emphasis is on scientific and technological knowledge, other forms such as technology-enabled business processes are also concerned’ (33).

However, the framework’s definition of TT does not include just ‘technology’, but also ‘knowledge created by the RO’. TT, as ‘knowledge management’, is thus a distinct activity within the broader activity of ‘knowledge dissemination’. Experts noticed that there is no universally accepted definition

(28) The EUA defines the term but also points to the differences in terminology and concepts that influence the understanding of full costing in Europe. Definition according to the European University Association, Financially Sustainable Universities — Towards Full Costing in European Universities, Brussels, 2008, p. 17; discussion of terminology ibid, p. 18 et seq.

(29) ibid, p. 28.


(31) Point 2.2.2.d) of the framework.

(32) Point 3.1.1 of the framework.

of knowledge (34); they did, however, identify ‘major forms in which knowledge can be carried and hence transferred:

- as codified knowledge, expressed through language (including mathematics), for example as scientific literature or patents;
- as internalised by people who have acquired codified knowledge and knowhow through study, instruction, and experience, for example graduates or experienced researchers leaving their institutions to work in an enterprise that they may (but need not) have set up themselves;
- as embedded in artefacts more or less ‘ready to use’ such as machinery or software or new materials or modified organisms, often called ‘technology’ (35).

Pursuant to the framework, TT can be deemed to be non-economic ‘…if these activities are of an internal nature and all income from these activities is reinvested in the primary activities of the ROs’ (36). The framework explains what the Commission means by ‘internal nature’ (37):

‘By internal nature, the Commission means a situation where the management of the knowledge of the RO(s) is conducted either by a department or a subsidiary of the RO or jointly with other ROs. Contracting the provision of specific services to third parties by way of open tenders does not jeopardise the internal nature of such activities’.

The framework concedes, however, that ‘For all remaining kinds of technology transfer receiving State funding, the Commission does not consider itself in a position, on the basis of its current knowledge, to decide in a general manner upon the State aid character of the funding of such activities. It underlines the obligation of the Member States under Article 108(3) TFEU to assess the character of such measures in each case and to notify them to the Commission, in case they consider them to represent State aid’ (38).

It is therefore vital to determine whether or not the dissemination of knowledge through TT is an economic activity. In this context, it is important to note firstly, that TT only falls within the primary goals if it exclusively concerns ‘knowledge’ that was created by the RO concerned. Secondly, if ‘TT is conducted by the RO concerned, or jointly with other ROs, it is of an ‘internal nature’, and thus ‘non-economic’. Thirdly, outsourcing TT activities by public tender, thus guaranteeing that the TT-service is delivered at market prices, does not affect the ‘internal-nature’ assumption either. Fourthly, reinvesting the income deriving from TT in primary activities ensures that TT is non-economic, as it allows maintaining overall research organisation status.

TT as defined by the framework means the transfer as such (e.g. the granting of a licence). The framework’s concept of TT does not include the subsequent commercial use of the knowledge transferred. As such commercial use is an economic activity in its own right, the issue is not dealt with in this article.

Is State aid involved in funding for private universities, business schools etc?

There still seems to be some uncertainty among stakeholders regarding the State aid implications of funding, in particular for investments or personnel costs of private universities, business schools, technical academies and the like (hereinafter referred to as ‘private universities’).

With respect to national education, the European Court of Justice ruled that the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duty towards its own population in the social, cultural and educational field. Moreover, according to the Court, ‘courses taught in a technical institute which form part of the secondary education provided under the national education system cannot be regarded as services within the meaning of Article 59 of the EEC Treaty [now Article 49 EC Treaty], properly construed’ (39).

The Commission reflected case law and decision practice in its 2007 Communication on services of general interest, as well as in a staff working paper that is dedicated to State aid issues in that area. The Communication states that education is a service of general interest ‘that can be defined as a service, both economic and non-economic, which the public authorities classify as being of general interest and subject to specific public service obligations. This means that it is essentially the responsibility of public authorities, at the relevant level, to decide on the nature and scope of a service of general interest. Public authorities can decide to carry out the services themselves or they can decide to entrust them to other entities, which can be public or private, and can act either for-profit

38) Point 3.1.1 of the framework.
or not for-profit"\(^{(40)}\). According to the staff working paper, the provision of public education financed as a general rule by the public budget and carrying out a State task in the social, cultural and educational fields towards the population is an example of a non-economic activity of a purely social nature\(^{(41)}\).

In a specific Decision the Commission dealt with a subsidy for a publicly funded Hungarian College to develop a Service Centre which provided for training programmes, established a Virtual Campus with traditional and remote training methods and set up a Cooperative R&D Centre to improve innovation and competitiveness through PPP. The College made a clear distinction between any economic activities and non-economic activities and their costs and funding in the annual financial statements. The Commission decided that the subsidy was not State aid, as the College was an RO in the meaning of the framework and only its non-economic activities received State support. In particular, the Commission established firstly that the services rendered by the Service Centre were available to anyone free of charge, secondly that the training activities provided by the Virtual Campus were aimed exclusively at individuals, and thirdly that the activities of the College’s Cooperative R&D Centre were non-economic in compliance with point 3.1.1, paragraphs 2 and 3, of the framework\(^{(42)}\).

As a result the concept of ‘normally non-economic primary activities’ (education, R&D etc.) can be applied regardless of a university’s legal form (public or private) or source of funding. Consequently, State funding for private universities, colleges etc. does not amount to State aid under certain conditions. On the one hand, activities eligible for State subsidies must either be conducted within the national educational system or conform to ‘normally non-economic activities’ as defined by the framework. On the other hand, under either approach, clear separation of economic and non-economic activities is a necessary precondition.

\(^{(40)}\) Commission Communication on Services of general interest, including social services of general interest; 20.11.2007, COM(2007) 725 final, p. 3-4.


\(^{(42)}\) Commission Decision of 26.11.2008, case No 343/2008 Partium Knowledge Centre (PKC) - Individual aid to the College of Nyíregyháza for the development of a Service Centre which then became the beneficiary, albeit only as regards the specific economic activity (e.g. a research service that was provided by using a publicly funded laboratory and its staff). Under these circumstances, the framework’s or the GBER’s compatibility criteria apply at the level of the RO.

How to deal with situations where State aid is involved in funding for research organisations?

When State funding for an RO is granted for an economic activity that is identifiable and separable, the framework provides for two main options.

One option is that the RO could act as a mere ‘intermediary’, passing on the advantage of State funding to the enterprise to which it delivers a service.

‘However, if the RO or not-for-profit innovation intermediary can prove that the totality of the State funding that it received to provide certain services has been passed on to the final recipient, and that there is no advantage granted to the intermediary, the intermediary organisation may not be recipient of State aid’\(^{(43)}\).

In that case, State aid rules (either the framework’s or the GBER’s compatibility criteria) apply to the enterprise in question. The RO is not a beneficiary of aid.

A second option is that the RO does not act as an intermediary, but charges market prices for its services. Thus, no State aid is passed on to the enterprise. Rather, it is retained in the sphere of the RO, which then becomes the beneficiary, albeit only as regards the specific economic activity (e.g. a research service that was provided by using a publicly funded laboratory and its staff). Under these circumstances, normal market conditions (e.g. market-based ‘lease’ or other form of compensation fee to the State for the use of the laboratory or compensation for man-hours accounted for). However, it would be difficult to establish ‘normal market conditions’ as, in the context of R&D and education, the State ‘investor’ may be in a situation which is very different from that of a private undertaking acting under normal market conditions. It is doubtful whether a private undertaking would invest in fundamental research infrastructure, for example. In such cases, normal market conditions, which are necessarily hypothetical, must be assessed with reference to the objective and verifiable elements that are available\(^{(45)}\). The pre-condition is, however, that

\(^{(43)}\) Point 3.1.2 of the framework.


\(^{(45)}\) Joined Cases C-83/01 P, C-93/01 P and C-94/01 P Chronopost SA, La Poste and French Republic vs Union française de l’express (Ufex) and Others [2003] ECR I-6993, paragraph 38.
the market price for such compensation can be calculated with full-cost accounting\(^{(46)}\).

**General conclusion**

Universities and other ROs may be subject to State aid rules. The economic character of their activities is decisive. In order to avoid the most difficult of all scenarios, namely that all public funding to such organisations is deemed to be State aid, economic and non-economic activities must be separated. There are no comprehensive and uniform rules that can be applied to ensure proper separation of economic and non-economic activities for State aid purposes. The burden of proof is on the Member State. So far the Commission has not assessed the actual principle of funding public research institutions by Member States. However, there is decision practice that can provide guidance on a case-by-case basis.

On the one hand, State aid practice and discussions with Member States show that there is still some diversity as regards due cost separation and the understanding of economic and non-economic activities. On the other hand, there is some pressure to conform to State aid rules in that regard. The framework entered into force on 1 January 2007. The Commission proposed, and Member States agreed, *inter alia* that existing R&D aid schemes should be amended, where necessary, to bring them into line with the provisions laid down in point 3.1.1 of the framework, namely due separation of costs and financing and non-economic primary activities\(^{(47)}\). The Member States have had 24 months to do so.


\(^{(47)}\) Point 10.2 of the framework lays down certain appropriate measures as proposed by the Commission, pursuant to Article 108 (1) TFEU.