Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

24 September 2020*

(Reference for a preliminary ruling – State aid – Articles 107 and 108 TFEU – Regulation (EU) No 651/2014 – Exemption of certain categories of aid compatible with the internal market – Annex I – Small and medium-sized enterprises (SMEs) – Definition – Independence test – Article 3(1) – Autonomous enterprise – Article 3(4) – Not included – Indirect control of 25% of the capital or voting rights by public bodies – Concepts of 'control' and 'public bodies')

In Case C-516/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany), made by decision of 17 June 2019, received at the Court on 9 July 2019, in the proceedings

NMI Technologietransfer GmbH

v

EuroNorm GmbH,

THE COURT (Tenth Chamber),

composed of I. Jarukaitis, President of the Chamber, E. Regan (Rapporteur), President of the Fifth Chamber, and C. Lycourgos, Judge,

Advocate General: M. Szpunar,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 10 June 2020,

after considering the observations submitted on behalf of:

– NMI Technologietransfer GmbH, by A. Holle and C. Lindemann, Rechtsanwälte,

– EuroNorm GmbH, by A. Fuchs and by M. Netzel and G. Saremba,

– the European Commission, by K. Blanck and V. Bottka, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(4) of Annex I to 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 [TFEU] (OJ 2014 L 187, p. 1).

2 The request has been made in proceedings between NMI Technologietransfer GmbH ('NMI TT') and EuroNorm GmbH concerning the latter's refusal to give NMI TT a grant to finance a research and development project for small and medium-sized enterprises (SMEs).

Legal context

EU law

Recommendation 2003/361/EC

3 Recitals 9 and 13 of Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ 2003 L 124, p. 36; 'the 2003 Recommendation') state as follows:

'(9) To gain a better understanding of the real economic position of SMEs and to remove from that category groups of enterprises whose economic power may exceed that of genuine SMEs, a distinction should be made between various types of enterprises, depending on whether they are autonomous, whether they have holdings which do not entail a controlling position (partner enterprises), or whether they are linked to other enterprises. The current limit shown in [Commission] Recommendation 96/280/EC [of 3 April 1996 concerning the definition of small and medium-sized enterprises (OJ 1996 L 107, p. 4)], of a 25% holding below which an enterprise is considered autonomous, is maintained.

…

(13) In order to avoid arbitrary distinctions between different public bodies of a Member State, and given the need for legal certainty, it is considered necessary to confirm that an enterprise with 25% or more of its capital or voting rights controlled by a public body is not an SME.'

Regulation No 651/2014

4 Recitals 30 and 40 of Regulation No 651/2014 are worded as follows:

'(30) To eliminate differences that might give rise to distortions of competition and to facilitate coordination between different Union and national initiatives concerning SMEs, as well as for reasons of administrative clarity and legal certainty, the definition of SME used for the purpose of this Regulation should be based on the definition in … [the 2003] Recommendation.

…

(40) SMEs play a decisive role in job creation and, more generally, act as a factor of social stability and economic development. However, their development may be hampered by market failures, leading to these SMEs suffering from the following typical handicaps. SMEs often have difficulties in obtaining capital or loans, given the risk-averse nature of certain financial markets

and the limited collateral that they may be able to offer. Their limited resources may also restrict their access to information, notably regarding new technology and potential markets. To facilitate the development of the economic activities of SMEs, this Regulation should therefore exempt certain categories of aid when they are granted in favour of SMEs. …'

5 Article 1 of that regulation, entitled 'Scope', provides in paragraph 1:

'This Regulation shall apply to the following categories of aid:

…

(b) aid to SMEs in the form of investment aid, operating aid and SMEs' access to finance;

…'

6 Article 2 of that regulation provides:

'For the purposes of this Regulation, the following definitions shall apply:

…

2. "small and medium-sized enterprises" or "SMEs" means undertakings fulfilling the criteria laid down in Annex I;

…'

7 Article 2 of Annex I to Regulation No 651/2014, entitled 'SME Definition', is worded as follows:

'1. The category of micro, small and medium-sized enterprises ("SMEs") is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

2. Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.

3. Within the SME category, a micro-enterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.'

8 Article 3 of that annex, entitled 'Types of enterprise taken into consideration in calculating staff numbers and financial amounts', is worded as follows:

'1. An "autonomous enterprise" is any enterprise which is not classified as a partner enterprise within the meaning of paragraph 2 or as a linked enterprise within the meaning of paragraph 3.

2. "Partner enterprises" are all enterprises which are not classified as linked enterprises within the meaning of paragraph 3 and between which there is the following relationship: an enterprise (upstream enterprise) holds, either solely or jointly with one or more linked enterprises within the meaning of paragraph 3, 25% or more of the capital or voting rights of another enterprise (downstream enterprise).

However, an enterprise may be ranked as autonomous, and thus as not having any partner enterprises, even if this 25% threshold is reached or exceeded by the following investors, provided that those investors are not linked, within the meaning of paragraph 3, either individually or jointly to the enterprise in question:

…

(b) universities or non-profit research centres;

…

(d) autonomous local authorities with an annual budget of less than EUR 10 million and less than 5 000 inhabitants.

3. "Linked enterprises" are enterprises which have any of the following relationships with each other:

(a) an enterprise has a majority of the shareholders' or members' voting rights in another enterprise;

(b) an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;

(c) an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;

(d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise.

There is a presumption that no dominant influence exists if the investors listed in the second subparagraph of paragraph 2 are not involving themselves directly or indirectly in the management of the enterprise in question, without prejudice to their rights as shareholders.

Enterprises having any of the relationships described in the first subparagraph through one or more other enterprises, or any one of the investors mentioned in paragraph 2, are also considered to be linked.

Enterprises which have one or other of such relationships through a natural person or group of natural persons acting jointly are also considered linked enterprises if they engage in their activity or in part of their activity in the same relevant market or in adjacent markets.

…

4. Except in the cases set out in paragraph 2, second subparagraph, an enterprise cannot be considered an SME if 25% or more of the capital or voting rights are directly or indirectly controlled, jointly or individually, by one or more public bodies.

…'

Directive 2006/111/EC

9 Article 2 of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ 2006 L 318, p. 17) provides:

'For the purpose of this Directive:

(a) "public authorities" means all public authorities, including the State and regional, local and all other territorial authorities;

…'

German law

The Central Innovation Programme for SMEs Guidelines

10 Under Paragraph 3.1.1(a) of the Richtlinie 'Zentrales Innovationsprogramm Mittelstand' (The Central Innovation Programme for SMEs Guidelines) of the Federal Ministry of Economic Affairs and Energy, in the version of 15 April 2015, SMEs with an establishment in Germany are eligible for research and development projects.

11 Note 3 of those guidelines states that the provisions of Annex I to Regulation No 651/2014 are applicable when determining whether an enterprise is an SME.

The Statutes of the NMI-Institut

12 Article 2 of the Statutes of the NMI Naturwissenschaftliches und Medizinisches Institut an der Universität Tübingen ('the NMI-Institut'), in the version approved on 11 August 2015 by the Regierungspräsidium Tübingen (Regional Council of Tübingen, Germany) ('the Statutes of the NMI-Institut'), provides:

'The objective of the Foundation shall be to promote science and research. That objective shall be achieved in particular by:

– the exploitation of the results of basic research in the field of natural sciences and medicine and their further development to a level that allows their implementation in industrial practice;

– the implementation of research and development projects on behalf of the Federal Government, the *Länder* and research institutions;

– the planning, implementation and evaluation of research projects in close cooperation between public contracting authorities, other research organisations and commercial enterprises;

– the appropriate provision of the knowledge acquired to the specialised public, to companies and to other research organisations;

– the organisation of scientific events.'

13 Article 5 of those statutes provides:

‘The organs of the Foundation shall be:

1. The Board of Trustees,

2. The Executive Board.’

14 Under Article 6 of those statutes:

‘(1) The following shall, in their capacity as members, serve on the Board of Trustees:

(a) a representative of the Ministerium für Finanzen und Wirtschaft Baden-Württemberg (Ministry of Finance and Economics of the State of Baden-Württemberg);

(b) a representative of the Ministerium für Wissenschaft, Forschung und Kunst Baden-Württemberg (Ministry of Science, Research and Art of the State of Baden-Württemberg);

(c) the mayor of the city of Reutlingen;

(d) the rector of the University of Tübingen;

(e) three professors of the University of Tübingen;

(f) the president of the Hochschule Reutlingen (Reutlingen Institute of Higher Education);

(g) a representative of an institute of the Fraunhofer-Gesellschaft zur Förderung der angewandten Forschung eV;

(h) six business people.

The members referred to under points (e) to (h) shall be appointed by the Ministry of Finance and Economics of the State of Baden-Württemberg, the members referred to under points (e) and (f) in agreement with the Ministry of Science, Research and Art of the State of Baden-Württemberg and at the proposal of the University of Tübingen or the Reutlingen Institute of Higher Education; the member referred to in (g) shall be appointed in agreement with the Fraunhofer-Gesellschaft zur Förderung der angewandten Forschung eV. The members referred to under point (h) shall be appointed in agreement with the Board of Trustees, one of whom is nominated by the Baden-Württemberg Chamber of Commerce and Industry and one by the Landesverband der baden-württembergischen Industrie eV (Association of Industry of the State of Baden-Württemberg, Germany).

(2) The Ministry of Finance and Economics may appoint to the Board of Trustees two persons involved in the work of the Foundation.

…

(5) Activity on the Board of Trustees is voluntary.’

15 Article 7 of the Statutes of the NMI-Institut reads as follows:

‘(1) The Board of Trustees shall define the principles governing the work of the Foundation within the scope of the tasks referred to in Article 2 and shall ensure their observance.

(2) The Board of Trustees shall establish after deliberation:

(a) the long-term planning of the Foundation in the areas of research, development and expansion;

(b) the medium- and long-term financial planning as well as the preparation of the business plan and the staffing table;

(c) the appointment and dismissal of the Executive Board;

(d) the discharge of the Executive Board;

(e) the appointment of the auditor;

(f) the approval of legal acts …;

(g) the amendment of the statutes of association of the Foundation and the dissolution of the Foundation.'

…'

16 Article 13 of those statutes provides:

'(1) The statutes may be amended and the Foundation may be dissolved by a resolution of the Board of Trustees. The Executive Board must be heard beforehand. Resolutions require a two-thirds majority of the members of the Board of Trustees.

(2) In the event of the voluntary or forced dissolution of the Foundation or in the event of the lapsing of the tax-relief purposes, the assets of the Foundation will be transferred to the State of Baden-Württemberg.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 The NMI-Institut is a foundation serving the public interest with legal personality under civil law, with its registered office in Reutlingen (Germany), whose purpose is the promotion of science and research.

18 NMI TT is a limited liability company established at the same address as the NMI-Institut, 90% of the capital of which is held by the NMI-Institut and whose purpose is to develop know-how, provide consulting services and carry out contract research in the fields of engineering, science and medicine. In particular, NMI TT, some of whose research areas are also the same as those of the NMI-Institut, aims to put into practice, with a financial benefit, the research results obtained by the latter.

19 The capital of the NMI-Institut is mainly held by private companies, with the city of Reutlingen owning approximately 6%. The Board of Trustees of the NMI-Institut ('the Board of Trustees'), whose decisions are, in principle, taken by simple majority, consists of 17 members, including a representative of the Ministry of Finance and Economics of the State of Baden-Württemberg, a representative of the Ministry of Science, Research and Art of that State, the mayor of the city of Reutlingen, the rector and three professors of the University of Tübingen, the president of the Reutlingen Institute of Higher Education and the managing director of the Reutlingen Chamber of Commerce and Industry.

20 On 26 July 2016, EuroNorm, a project development company, within the meaning of the Central Innovation Programme for SMEs Guidelines, in the version of 15 April 2015, which was authorised by the Federal Republic of Germany, represented by the Federal Ministry of Economics and Energy, to carry out administrative tasks in the field of grants in its own name and in accordance with the terms

of public law, received from NMI TT an application for a grant for the financing of a research and development project for the period from 1 September 2016 to 31 August 2018, under the terms of those guidelines.

21 By decision of 28 February 2017, EuroNorm rejected that application on the ground that NMI TT could not be classified as an SME within the meaning of Annex I to Regulation No 651/2014, since, under Article 3(4) of that annex, such classification is excluded where 25% or more of the capital or voting rights of the enterprise concerned are directly or indirectly controlled, jointly or individually, by one or more public bodies. Admittedly, according to EuroNorm, direct control of NMI TT by public bodies is excluded, since 90% of its capital is held by a civil law foundation, in the present case the NMI-Institut. However, indirect control by public bodies could be presumed as the majority of the members of the Board of Trustees are representatives of a State, a city, a university and an institution of higher education and a chamber of commerce and industry, which also has the status of public body under German law. Furthermore, since the NMI-Institut and NMI TT are linked enterprises within the meaning of Article 3(3)(a) of that annex, the exception laid down in points (a) to (d) of the second subparagraph of Article 3(2) of that annex is not applicable.

22 NMI TT submitted a complaint against that decision, in support of which it claimed that EuroNorm had incorrectly assessed the influence exercised by public bodies on the NMI-Institut and, therefore, on itself. According to NMI TT, unlike an association or a limited liability company whose operations are determined by the decisions taken by the majority of its members or associates, the activities of a civil law foundation is based solely on the will of its founders. Thus, in the present case, the Board of Trustees cannot influence either the decisions of the NMI-Institut or those of NMI TT. Rather, the Board of Trustees should be regarded as a specialised advisory body. Furthermore, the members of the Board of Trustees serve on a voluntary basis and its meetings are held only once a year.

23 By decision of 12 June 2017, EuroNorm rejected that complaint, stating that the Board of Trustees was guiding the NMI-Institut in the light of the tasks assigned to it by its statutes. Furthermore, since NMI TT's the area of activity is also part of the NMI-Institut's objectives, the existence of sufficient influence exerted by public bodies on that company can be presumed.

24 NMI TT brought an action against that decision before the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany), in which it drew attention to the extensive powers enjoyed, in general, by the Executive Board of a foundation. Thus, in the present case, within the NMI-Institut, the Board of Trustees could not issue any instructions to the Executive Board, including with regard to the exercise by the NMI-Institut of its social rights in NMI TT. For its part, Euron EuroNorm orm reiterates that, in view of the powers conferred on it by the Statutes of the NMI-Institut, the Board of Trustees, the majority of whose members represent public bodies, exercises a dominant influence on the NMI-Institut and thus on NMI TT.

25 The referring court is of the view that the outcome of the dispute depends on whether EuroNorm was correct in finding that NMI TT could not, pursuant to Article 3(4) of Annex I to Regulation No 651/2014, be classified as an SME within the meaning of that annex and, accordingly, was correct to reject its application for a grant, since EuroNorm had, moreover, taken the view that the research and development project at issue in the main proceedings was, as such, eligible for the financing applied for. That court therefore asks whether it is appropriate, in the circumstances of the main proceedings, to presume the existence of indirect control exercised over NMI TT by public bodies through the NMI-Institut.

26 In those circumstances, the Verwaltungsgericht Berlin (Administrative Court, Berlin) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Can a limited liability company which carries out an economic activity not be regarded as a small and medium-sized enterprise (“SME”) pursuant to Article 3(4) of Annex I to Regulation No 651/2014 on the ground that 90% of its share capital is held by a foundation established under civil law in whose Board of Trustees of 17 members, which is not empowered to manage the foundation, two of the members are representatives of ministries, one is the mayor of a city, one is the rector of a university, three are professors of that university, one is the president of a separate institute of higher education and one is the director of a chamber of commerce and industry?

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

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

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

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

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

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

(8) Does the term “are … controlled” within the meaning of Article 3(4) of Annex I to Regulation No 651/2014 depend on the actual application of the [Statutes of the NMI-Institut] or on a possible understanding of the wording of the statutes?’

Consideration of the questions referred

Preliminary observations

27 By its eight questions, which it is appropriate to examine together, the referring court seeks, in essence, to ascertain, as is apparent, more specifically, from the wording of the first of those questions, whether Article 3(4) of Annex I to Regulation No 651/2014 must be interpreted as precluding national legislation which excludes an enterprise from being regarded as an SME, where the organ of the enterprise which holds the main part of its capital, although it is not authorised to ensure its day-to-day management, is composed for the most part of members representing public bodies, within the meaning of that provision, so that the latter jointly exercise, by that sole fact, indirect control, within the meaning of that provision, over the former enterprise.

28 To that end, the referring court seeks to determine, first, as is apparent from its second and third questions, whether the concept of 'public body' is intended to include entities such as universities and institutions of higher education as well as a chamber of commerce and industry, it being irrelevant in that respect that the persons appointed by those bodies serve on a voluntary basis in the enterprise concerned.

29 Second, by its fourth to eighth questions, the referring court asks, in essence, whether, for the purposes of the existence of control within the meaning of Article 3(4) of Annex I to Regulation No 651/2014, it is sufficient for public bodies to hold jointly, albeit indirectly, at least 25% of the capital or voting rights of the enterprise concerned, in accordance with the terms of the statutes of the enterprise which exercises direct control over it, without it being necessary to examine, moreover, whether those bodies are able to influence and coordinate the effective exercise by their representatives of their voting rights or whether the latter actually take account of the interests of those bodies.

30 It is apparent from the evidence before the Court that those questions are raised in the context of an application for a grant made by an enterprise, NMI TT, which constitutes a spin-off of a civil law foundation, the NMI-Institut, which holds 90% of the capital and 88.8% of the voting rights of that enterprise and whose Board of Trustees is composed, inter alia, of two representatives of State ministries, the mayor of a city, the rector and three professors of a university, as well as the president of a higher education institution in that city and the director of a chamber of commerce and industry in that city, who form a majority on that board of trustees.

31 With a view to examining those questions, it should be recalled that, as is apparent, in particular, from recital 40 of Regulation No 651/2014, the purpose of which is to declare certain categories of State aid compatible with the internal market pursuant to Articles 107 and 108 TFEU, the Commission takes a favourable approach to State aid to SMEs on account of the market failures which result in those undertakings having to contend with a number of handicaps which limit their socially and economically desirable development.

32 In accordance with Articles 2 and 3 of Annex I to Regulation No 651/2014, an enterprise may be classified as an SME, within the meaning of that regulation, if it satisfies three tests: number of persons employed, the financial test relating to the annual turnover or the annual balance sheet total, and an independence test (see, by analogy, judgment of 29 April 2004, *Italy* v *Commission*, C-91/01, EU:C:2004:244, paragraph 47).

33 As regards the latter test, which is the only test at issue in the main proceedings, the Court has held that it seeks to ensure that the measures intended for SMEs genuinely benefit the enterprises for which size represents a handicap and not enterprises belonging to a large group which have access to funds and assistance not available to competitors of equal size (see, by analogy, judgment of 29 April 2004, *Italy* v *Commission*, C-91/01, EU:C:2004:244, paragraph 50).

34 That test is thus intended to gain a better understanding, as is apparent, inter alia, from recital 9 of the 2003 Recommendation, on which, as stated in recital 30 of Regulation No 651/2014, the concept of 'SME' defined in Annex I to that regulation is based, of the economic position of SMEs and to remove from that qualification of SMEs groups of enterprises whose economic power may exceed that of genuine SMEs, with a view to ensuring that only those enterprises which really need the advantages accruing to the category of SMEs from the different rules or measures in their favour actually benefit from them (see, by analogy, judgment of 27 February 2014, *HaTeFo*, C-110/13, EU:C:2014:114, paragraph 31).

35 From that point of view, under Article 3(1) of Annex I to Regulation No 651/2014, any enterprise which is not qualified as a 'partner enterprise', within the meaning of paragraph 2 of that article, or as a 'linked enterprise', within the meaning of paragraph 3 of that article, is regarded as an 'autonomous enterprise'.

36 According to Article 3(3)(a) of that annex, two enterprises are said to be 'linked' when, inter alia, one of them has a majority of the voting rights of the shareholders of the other, whereas, according to the first subparagraph of Article 3(2) of that annex, two enterprises are said to be 'partners' when they do not qualify as 'linked enterprises' but one of them holds, alone or jointly with one or more linked enterprises, at least 25% of the capital or voting rights of the other, subject to the exceptions listed in points (a) to (d) of the second subparagraph of Article 3(2) of that annex.

37 As regards the latter provision, it provides that an enterprise is to be classified as an 'autonomous enterprise' within the meaning of Article 3(1) of Annex I to Regulation No 651/2014, even where at least 25% of its capital or voting rights are held by certain categories of investors, such as, inter alia, pursuant to points (b) and (d) of the second subparagraph of Article 3(2) of that annex, universities and certain autonomous local authorities, provided that those investors are not, linked, either jointly or individually, with that enterprise, in accordance with Article 3(3) of that annex.

38 In that context, Article 3(4) of that annex nevertheless lays down a general rule of exclusion from the classification as an SME, according to which an enterprise cannot be considered to be an SME 'if 25% or more of the capital or voting rights are directly or indirectly controlled, jointly or individually, by one or more public bodies', unless those bodies fall, as stated in that provision, within the categories of investors listed in the second subparagraph of Article 3(2) of that annex.

39 It follows from all those provisions that an enterprise is excluded from classification as an SME, within the meaning of Annex I to Regulation No 651/2014, if at least 25% of its capital or voting rights is controlled, albeit indirectly, jointly or individually, by one or more public bodies, except where the latter are investors not linked to that enterprise, within the meaning of Article 3(3) of that annex and which are referred to in points (a) to (d) of the second subparagraph of Article 3(2) of that annex.

40 In the present case, it is common ground, as is apparent from the answers to the questions put by the Court at the hearing, that NMI TT, which was refused classification as an SME by the decision at issue in the main proceedings, is an enterprise linked to the NMI-Institut, within the meaning of Article 3(3)(a) of Annex I to Regulation No 651/2014, since NMI-Institut holds the majority of voting rights. It follows that NMI TT does not fall within the scope of the exception provided for in the second subparagraph of Article 3(2) of that annex with regard to certain categories of investors.

41 Accordingly, it is necessary only to examine whether, in accordance with the general rule of exclusion laid down in Article 3(4) of Annex I to Regulation No 651/2014, an enterprise such as NMI TT may be excluded from classification as an SME, within the meaning of that annex, solely on the ground that it is indirectly controlled by public bodies represented in the enterprise with which it is linked and which exercises direct control over it.

42 In that regard, it should, however, be borne in mind that Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to give a ruling on the interpretation of the Treaties and on acts adopted by the EU institutions. It is therefore not for the Court either to establish the facts which have given rise to the dispute in the main proceedings and to draw any inferences therefrom for the decision which the referring court is required to deliver, or to interpret the relevant national laws or regulations (judgment of 14 May 2020, *Bouygues travaux publics and Others*, C-17/19, EU:C:2020:379, paragraphs 51 and 52).

43 It is in the light of those preliminary considerations that the questions asked by the referring court should be answered.

The concept of 'public body' within the meaning of Article 3(4) of Annex I to Regulation No 651/2014

44 In order to determine whether the concept of 'public body', within the meaning of Article 3(4) of Annex I to Regulation No 651/2014, is intended to include entities, such as universities, higher education establishments and a chamber of commerce and industry, it should be borne in mind that, according to the settled case-law of the Court, it follows from the requirements both of the uniform application of EU law and the principle of equality that the wording of a provision of EU law that does not contain any express reference to the law of the Member States in order to determine its meaning and scope must, throughout the European Union, be interpreted independently and uniformly, irrespective of characterisation in the Member States, taking into account the wording of the provision at issue and also its context and the purpose of the rules of which it forms part (judgment of 5 February 2020, *Staatssecretaris van Justitie en Veiligheid (Signing-on of seamen in the Port of Rotterdam)*, C-341/18, EU:C:2020:76, paragraph 40 and the case-law cited).

45 Consequently, in the absence of a reference to national law in Article 3(4) of Annex I to Regulation No 651/2014, the concept of 'public body' contained in that provision must be regarded as an autonomous concept of EU law, the meaning and scope of which must be identical in all Member States. It is therefore for the Court to give a uniform interpretation of that concept in the EU legal order.

46 As regards, first, the wording of Article 3(4) of Annex I to Regulation No 651/2014, since neither that provision nor any other provision of that regulation, in particular Article 2 thereof, contains a definition of the concept of 'public body', its meaning and scope must be determined in accordance with its usual meaning in everyday language (see, by analogy, judgment of 5 February 2020, *Staatssecretaris van Justitie en Veiligheid (Signing-on of seamen in the Port of Rotterdam)*, C-341/18, EU:C:2020:76, paragraph 42 and the case-law cited).

47 According to its usual meaning, the concept of 'public body' must be understood as referring to the State, regional or local authorities and to bodies established for the specific purpose of meeting needs in the general interest, which have legal personality and are either financed for the most part or controlled directly or indirectly by the State, or by regional or local authorities or by other public bodies.

48 It follows from that that Article 3(4) of Annex I to Regulation No 651/2014 is intended to include all entities and authorities falling within the scope of public authorities.

49 Second, as regards the context in which that provision appears, it follows from recital 13 of the 2003 Recommendation, on which the definition of 'SME', within the meaning of Annex I to Regulation No 651/2014, is based, as stated in paragraph 34 of the present judgment, that the exclusion provided for in that provision encompasses, in the interests of legal certainty, the various public entities of a Member State, in order to avoid arbitrary distinctions between them.

50 In that regard, it should be noted, as the Commission has done, that Directive 2006/111, the purpose of which is to impose on Member States a certain number of obligations with a view to ensuring the transparency of financial relations between those States and public undertakings, defines, in Article 2(a), the concept of 'public authorities' as including, in addition to the State authorities, regional and local authorities and all other territorial authorities.

51 Third, as regards the objective pursued by Article 3(4) of Annex I to Regulation No 651/2014, it should be borne in mind that, as has been pointed out in paragraphs 33 and 34 of the present judgment, the independence test is intended to reserve favourable measures for SMEs to enterprises which do not have access to resources enabling them to overcome the obstacles linked to their size. Entities and

authorities which fall under the purview of public authorities, due to those entities and authorities' access to various means, in particular economic and financial, irrespective of their nature or organisational arrangements, are likely to enable an enterprise to overcome such obstacles.

52 It follows that the concept of 'public body', referred to in that provision, is to be understood as including any entity or authority which falls under the purview of public authorities, including regional or local authorities and bodies established for the specific purpose of meeting needs in the general interest, which have legal personality and which 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.

53 In the present case, it is therefore for the referring court, in accordance with the case-law cited in paragraph 42 of the present judgment, to determine, taking into account the applicable national provisions, a number of which have been invoked by EuroNorm and the Commission, but whose interpretation does not fall within the jurisdiction of the Court, whether the University of Tübingen, the Reutlingen Institute of Higher Education and the Chamber of Commerce and Industry of that city fulfil those criteria.

54 At the hearing, NMI TT claimed, in that regard, that it is apparent from the 'User guide to the SME definition', published by the Commission in 2015, in particular page 19 of that document, that, according to that institution, universities, whatever their status under national law, cannot be regarded as 'public bodies' covered by the general rule of exclusion laid down in Article 3(4) of Annex I to Regulation No 651/2014.

55 However, it should be noted at the outset that that guide states, on page 2, clearly and explicitly, that 'it does not have any legal force and does not bind the Commission …, [the 2003 Recommendation] [being] the sole authentic basis for determining the conditions regarding qualification as an SME'. This is all the more reason why such a non-binding guide cannot bind the Court.

56 In any event, it must be noted that, on page 19 of that guide, the Commission, contrary to what NMI TT suggests, does not in any way indicate that the universities would in no circumstances be capable of coming within the general rule of exclusion laid down in Article 3(4) of Annex I to Regulation No 651/2014, but merely points out that, as is already apparent from paragraphs 38 to 41 of the present judgment, universities, where they fall within the concept of 'public body' within the meaning of that provision, are not subject to that rule, provided that they are not linked, within the meaning of Article 3(3) of that annex, to the enterprise concerned, a condition which NMI TT itself accepted at the hearing, as is apparent from paragraph 40 of the present judgment, was not satisfied in the present case.

57 In the event that the referring court comes to the conclusion that one or more of the entities referred to in paragraph 53 of the present judgment constitute public bodies within the meaning of Article 3(4) of that annex, it is still necessary to clarify, in response to the questions raised by the referring court in that regard, that it is irrelevant for the application of that provision that the persons appointed on the proposal of those public bodies serve on a voluntary basis within the enterprise concerned, since it is in their capacity as members of those bodies that they have been proposed and appointed, which it is for the referring court to determine.

58 Consequently, Article 3(4) of Annex I to Regulation No 651/2014 must be interpreted as meaning that the concept of 'public body' in that provision 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. It is irrelevant, for the purposes of the application of that provision, that the

persons appointed on the proposal of those public bodies serve on a voluntary basis within the enterprise concerned, since it is in their capacity as members of those bodies that they have been proposed and appointed.

The existence of control, within the meaning of Article 3(4) of Annex I to Regulation No 651/2014

59 In accordance with the case-law referred to in paragraph 44 of the present judgment, it is necessary to take into consideration the wording of Article 3(4) of Annex I to Regulation No 651/2014, as well as the context in which it is written and the objectives pursued by the legislation of which it forms part, in order to determine whether the existence of control, within the meaning of that provision, requires only that public bodies hold jointly, albeit indirectly, at least 25% of the capital or voting rights of the enterprise concerned, in accordance with the terms of the statutes of the enterprise which exercises direct control over it, or whether, moreover, it is necessary to examine whether such bodies are able to influence and coordinate the effective exercise by their representatives of their voting rights or whether the latter actually take account of the interests of such bodies.

60 First, as regards the wording of Article 3(4) of Annex I to Regulation No 651/2014, it should be noted that that provision, in accordance with recital 13 of the 2003 Recommendation, on which, as noted in paragraphs 34 and 49 of the present judgment, that annex is based, refers solely to the degree of participation by public bodies in the capital or voting rights of the enterprise concerned, without mentioning, moreover, the actual conduct adopted by those bodies or by their representatives.

61 Second, as regards the context of which that provision forms a part, it should be observed that Article 3 of Annex I to Regulation No 651/2014 expressly provides, for the purposes of determining whether an enterprise is linked to another enterprise, that it is necessary to examine whether, in practice, the former actually exercises a decisive influence on the latter.

62 In particular, the second subparagraph of Article 3(3) provides for a presumption of absence of a dominant influence when the investors referred to in the second subparagraph of Article 3(2) do not interfere directly or indirectly in the management of the enterprise concerned, 'without prejudice to their rights as shareholders'.

63 Conversely, as can be seen from the fourth subparagraph of Article 3(3), that article provides that enterprises may be considered to be linked when, as a result of the role played by a natural person or a group of natural persons acting jointly by coordinating in order to influence the business decisions of the enterprises concerned, they constitute a single economic unit, even though they do not formally have any of the relationships referred to in the first subparagraph of Article 3(3) (see, to that effect, judgment of 27 February 2014, *HaTeFo*, C-110/13, EU:C:2014:114, paragraphs 34, 35 and 39, and order of 11 May 2017, *Bericap*, C-53/17, not published, EU:C:2017:370, paragraph 17).

64 By contrast, Article 3(4) does not contain similar provisions in respect of public bodies controlling, jointly or individually, at least 25% of the capital or voting rights of another enterprise.

65 The definition of an 'SME' within the meaning of Annex I to Regulation No 651/2014, in that it leads to the granting of advantages to enterprises falling under that concept, most often through rules providing exceptions to the general rules, must be interpreted strictly (see, to that effect, judgment of 27 February 2014, *HaTeFo*, C-110/13, EU:C:2014:114, paragraph 32).

66 Third, as regards the objective pursued by Article 3(4) of Annex I to Regulation No 651/2014, it should be noted that, in accordance with the independence test on which the concept of, inter alia, 'SME' within the meaning of that annex is based, that provision is intended to ensure, as is apparent from paragraphs 32 to 39 of the present judgment, that the enterprise concerned has the capacity to take commercial decisions autonomously.

67 A situation which is characterised by the existence, between different enterprises, of structural links, in terms of shareholdings and voting rights, precludes those enterprises from being considered economically independent of each other, since it results in one firm being in a position, independently of its actual behaviour, to exert a decisive influence on the decision-making of another enterprise (see, by analogy, judgment of 2 April 2009, *Glückauf Brauerei*, C-83/08, EU:C:2009:228, paragraphs 32 to 34).

68 Furthermore, it should be noted that both Article 3(4) of Annex I to Regulation No 651/2014, as is apparent, in particular, from recital 30 of that regulation and recital 13 of the 2003 Recommendation, and that regulation itself, which provides for an exemption of categories of aid compatible with the internal market, are intended to increase administrative clarity and legal certainty by ensuring effective and simplified monitoring of the competition rules on State aid (see, by analogy, judgment of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraph 141 and the case-law cited).

69 The mere taking account, for the purposes of determining whether an enterprise is eligible for the more favourable rules applicable to SMEs, of the degree of participation by public bodies in the capital or voting rights of that enterprise, without it being necessary to examine, moreover, the conduct adopted in practice by those bodies or their representatives, is clearly such as to facilitate the application by the competent authorities of the general rule of exclusion laid down in Article 3(4) of Annex I to Regulation No 651/2014.

70 It is thus apparent from both the wording of that provision and from the its context, and the objective pursued by it and by the legislation of which it forms part, that the existence of control, within the meaning of that provision is inferred solely from the degree of participation by public bodies in the capital or voting rights of the enterprise concerned.

71 Consequently, for the purposes of the existence of such control, it is sufficient for such public bodies to hold jointly, albeit indirectly, at least 25% of the capital or voting rights of the enterprise concerned, in accordance with the statutes of the enterprise which exercises direct control over the latter, without it being necessary to examine, moreover, whether such bodies are able to influence and coordinate the effective exercise by their representatives of their voting rights or whether those representatives actually take account of the interests of those bodies.

72 In the present case, although it is common ground that the NMI-Institut holds 88.8% of the voting rights in NMI TT, it is apparent from the order for reference that the Statutes of the NMI-Institut do not govern the question of the exercise of those rights.

73 However, it appears that, in accordance with Articles 2, 7 and 13 of those statutes, the Board of Trustees – all members of which, as it emerged from the discussions held during the hearing before the Court and as was explicitly stated by NMI TT itself, are currently members of the Executive Board of that company – is responsible, first, for defining the principles governing the work of the NMI-Institut, concerning, in particular the exploitation of research results and the implementation of research and development projects, and, second, has a range of advisory and decision-making powers with regard to content and financial planning as well as the appointment, dismissal and discharge of the Executive Board, the Board of Trustees being furthermore empowered to amend the Statutes of the NMI-Institut and to dissolve it.

74 Accordingly, it appears, subject to, in accordance with the case-law referred to in paragraph 42 of the present judgment, the reviews to be carried out by the referring court, that the provisions contained in the Statutes of the NMI-Institut are such as to confer on public bodies, by reason of the presence of their representatives on the Board of Trustees, indirect ownership of more than 25% of the voting rights in NMI TT.

75 In the light of all the foregoing considerations, the answer to the questions referred by the referring court is that Article 3(4) of Annex I to Regulation No 651/2014 must be interpreted as meaning that it does not preclude an enterprise from being regarded as an SME, where the body of the enterprise which holds the main part of its capital, although it is not authorised to ensure its day-to-day management, is composed for the most part of members representing public bodies, within the meaning of that article, so that the latter jointly exercise, by that sole fact, indirect control, within the meaning of that article, over the former enterprise, it being understood that:

– first, the concept of 'public body' in that article is intended to include entities such as universities and higher education establishments as well as a chamber of commerce and industry, provided that those entities are created to specifically 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, it being irrelevant in that respect that the persons appointed on the proposal of those entities serve on a voluntary basis within the enterprise concerned, since it is in their capacity as members of the latter that they have been proposed and appointed, and

– second, for the purposes of the existence of such control, it is sufficient for public bodies to hold jointly, albeit indirectly, at least 25% of the capital or voting rights of the enterprise concerned, in accordance with the terms of the statutes of the enterprise which exercises direct control over it, without it being necessary to examine, moreover, whether those bodies are able to influence and coordinate the effective exercise by their representatives of their voting rights or whether those representatives actually take account of the interests of those bodies.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Article 3(4) of Annex I to 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 [TFEU] must be interpreted as meaning that it does not preclude national legislation which excludes an enterprise from being regarded as a small or medium-sized enterprise (SME), where the body of the enterprise which holds the main part of its capital, although it is not authorised to ensure its day-to-day management, is composed for the most part of members representing public bodies, within the meaning of that article, so that the latter jointly exercise, by that sole fact, indirect control, within the meaning of that article, over the former enterprise, it being understood that:

– **first, the concept of 'public body' in that article is intended to include entities such as universities and higher education establishments as well as a chamber of commerce and industry, provided that those entities are created to specifically 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, it being irrelevant in that respect that the persons appointed on the proposal of those entities serve on a voluntary basis within the enterprise concerned, since it is in their capacity as members of the latter that they have been proposed and appointed, and**

– **second, for the purposes of the existence of such control, it is sufficient for public bodies to hold jointly, albeit indirectly, at least 25% of the capital or voting rights of the enterprise concerned, in accordance with the terms of the statutes of the enterprise which exercises direct control over it, without it being necessary to examine, moreover, whether those bodies are able to influence and coordinate the effective exercise by their representatives of their voting rights or whether those representatives actually take account of the interests of those bodies.**

[Signatures]