



Reports of Cases

OPINION OF ADVOCATE GENERAL
ČAPETA

delivered on 28 April 2022¹

Joined Cases C-164/21 and C-318/21

SIA Baltijas Starptautiskā Akadēmija

v

Latvijas Zinātnes padome (C-164/21)

(Request for a preliminary ruling from the Administratīvā rajona tiesa (District Administrative Court, Latvia))

and

SIA Stockholm School of Economics in Riga

v

Latvijas Zinātnes padome (C-318/21)

(Request for a preliminary ruling from the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia))

(Reference for a preliminary ruling – Regulation (EU) No 651/2014 – Article 2(83) – Aid for research and development and innovation – Concept of a research organisation – Higher education institution exercising economic and non-economic activities – Determining the primary activity)

I. Introduction

1. Can private higher education institutions be considered research and knowledge-dissemination organisations? This is the essence of the questions posed by the Administratīvā rajona tiesa (District Administrative Court, Latvia) and the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia).

2. More specifically, in the two cases, the Court is invited to interpret the concept of ‘research and knowledge-dissemination organisation’ as set out in Article 2(83) of the General Block Exemption Regulation (‘the GBER’).²

¹ Original language: English.

² 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). A legally non-binding consolidated version can be accessed here: <http://data.europa.eu/eli/reg/2014/651/2021-08-01>.

II. Legal framework

3. Article 1(1)(d) of the GBER provides that it applies, inter alia, to aid for research and development and innovation.

4. In specifying further the concepts relating to this category of aid, Article 2(83) of the GBER defines a ‘research and knowledge-dissemination organisation’ as: ‘an entity (such as universities or research institutes, technology transfer agencies, innovation intermediaries, research-oriented physical or virtual collaborative entities), irrespective of its legal status (organised under public or private law) or way of financing, whose primary goal is to independently conduct fundamental research, industrial research or experimental development or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer. Where such entity also pursues economic activities the financing, the costs and the revenues of those economic activities must be accounted for separately. Undertakings that can exert a decisive influence upon such an entity, in the quality of, for example, shareholders or members, may not enjoy preferential access to the results generated by it’.

III. The relevant facts, the questions referred and the procedure before the Court

5. The two cases before the referring courts share almost identical facts: the applicants are both private higher education institutions that applied respectively to two different calls announced by the Latvijas Zinātnes padome (Latvian Science Council) for research project funding.

6. In both cases, the Latvian Science Council rejected the applications as ineligible, as the applicants partly pursued economic activities.

7. Both calls for project proposals were drawn up in accordance with Ministru kabineta 2017. gada 12. decembra noteikumi Nr. 725 ‘Fundamentālo un lietišķo pētījumu projektu izvērtēšanas un finansējuma administrēšanas kārtība’ (Decree No 725 of the Council of Ministers of 12 December 2017 on procedures for evaluating fundamental and applied research proposals and administering their funding) (‘Decree No 725’).

8. Under Decree No 725, to be eligible for research funding, the project must be undertaken by a scientific institution listed in the Register of Scientific Institutions which, irrespective of its legal status (organised under public or private law) or the manner in which it is funded under the legal provisions governing its activities (statutes, internal regulations or constituent instruments), pursues mainly activities that are non-economic in nature and satisfies the definition of a ‘research and knowledge-dissemination organisation’ under Article 2(83) of the GBER.

A. Case C-164/21

9. The applicant in the main proceedings, SIA Baltijas Starptautiskā Akadēmija, provides academic and non-academic higher education services. It is an accredited higher education institution, which operates in accordance with the Komerclikums (Commercial Code) in so far as the latter is not contrary to the Augstskolu likums (Law on Higher Education Institutions). One of the applicant’s defined areas of activity is scientific activities. The applicant is listed in the Register of Scientific Institutions.

10. By decision of 23 January 2020, the Latvian Science Council approved the regulation governing the general call for fundamental and applied research projects for 2020 ('the Call Regulation') to which the applicant submitted a project proposal.

11. By decision of 14 April 2020, the Latvian Science Council rejected that project proposal on the grounds that the applicant is not a scientific institution within the meaning of Decree No 725.

12. According to the project proposal, in 2019 the proportion of turnover accounted for by non-economic activities as compared with economic activities was 95% against 5%. However, 84 % of the total turnover comprised fees for academic activities which, given the nature of the activities pursued by the applicant (a limited liability company whose primary goal is to make a profit), constitute economic activities. The applicant's principal activity is therefore, according to the Latvian Science Council, commercial.

13. The applicant in the main proceedings challenged that rejection before the referring court, arguing that independent research constitutes its principal activity. The applicant argues that neither the GBER nor the Call Regulation stipulate that an applicant may not carry out economic activities and make a profit from them; nor do they establish what proportion of activities should be economic and what proportion non-economic. The applicant claims that it clearly separates the principal activities that are non-economic in nature from those that are economic.

14. In the context of these proceedings, the Administratīvā rajona tiesa (District Administrative Court) submitted the following questions to the Court of Justice:

- '(1) Can a (private law) organisation which has various principal activities, including research, but most of whose revenue comes from providing educational services for consideration, be classed as an entity within the meaning of Article 2(83) of [the GBER]?
- (2) Is it justified to apply a requirement regarding the proportion of financing (revenues and costs) obtained from economic and non-economic activities in order to determine whether the entity satisfies the requirement in Article 2(83) of [the GBER] that the primary goal of the entity's activities must be to independently conduct fundamental research, industrial research or experimental development or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer? If the answer is that it is justified, what would be an appropriate proportion of financing from economic and non-economic activities to use in determining the primary goal of the entity's activities?
- (3) Is it justified, pursuant to Article 2(83) of [the GBER], to apply a requirement that the revenues obtained from the principal activity should be re-invested in the principal activities of the entity in question, and must other aspects be assessed in order to determine properly the primary goal of the activities of the institution submitting the project proposal? Would the use made of the revenues obtained (whether they are reinvested in the principal activities or, for example, in the case of a private founder, paid out as dividends to the shareholders) alter that assessment, even in a situation in which most of the revenues come from fees for educational services?
- (4) Is the legal status of the members of the institution submitting the project proposal — that is to say, whether it is a company formed under commercial law in order to carry on an economic activity (an activity for consideration) with the objective of making a profit [Article 1 of the Komerclikums (Commercial Code)] or whether its members or

shareholders are natural or legal persons whose objective is to make a profit (including through the provision of educational services for consideration) or were founded for non-profit purposes (in the case of an association or foundation, for example) — decisive in determining whether the institution satisfies the definition in Article 2(83) of [the GBER]?

- (5) Are the proportion of domestic students and students from EU Member States as compared with the proportion of foreign students (from third States) and the fact that the goal of the principal activity pursued by the institution submitting the project proposal is to provide students with higher education and qualifications that are competitive in the international labour market in accordance with current international requirements (paragraph 5 of the applicant's statutes) decisive in assessing whether the activities of the institution submitting the project proposal are economic in nature?'

15. Written observations were submitted by the parties to the main proceedings, the Netherlands Government and the European Commission.

B. Case C-318/21

16. On 22 May 2019, the Latvian Science Council approved the rules governing a call for fundamental and applied research projects for 2019 and announced a call for projects, to which the applicant, SIA Stockholm School of Economics in Riga, submitted a project proposal.

17. By decision of the Latvian Science Council of 19 September 2019, the project proposal was rejected on the grounds that it did not satisfy the eligibility criteria set out in Decree No 725. That decision was based on the fact that 34% of the applicant's activities were non-economic compared with 66% that were economic. The Latvian Science Council therefore decided that the applicant's principal activity was commercial in nature and that it could not be held that its primary goal was to independently conduct fundamental research, industrial research or experimental development or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer.

18. The applicant challenged that decision, arguing that it satisfied the requirements imposed by Decree No 725 because it was listed in the Register of Scientific Institutions and its principal activity was non-economic in nature. In that regard, the applicant submitted documents to show that the financial contributions provided by the principal activity were separate from the economic activities and that the profits from the applicant's economic activities were reinvested in the research institution's principal activity.

19. By judgment of 8 June 2020, the Administratīvā rajona tiesa (District Administrative Court) dismissed that action. According to that court, the report on turnover for 2018 shows that the applicant's economic activities account for a greater proportion of revenue and costs than those from its non-economic activities. It therefore considered that the applicant is not a scientific institution eligible to receive State funding for fundamental and applied research.

20. The applicant appealed against the judgment of the Administratīvā rajona tiesa (District Administrative Court) to the referring court. In this context, the questions referred in this case to the Court of Justice by the Administratīvā apgabaltiesa (Regional Administrative Court) are as follows:

- ‘(1) Must Article 2(83) of [the GBER] be interpreted as meaning that an entity (such as universities or research institutes, technology transfer agencies, innovation intermediaries, research-oriented physical or virtual collaborative entities) whose operating objectives include independently conducting fundamental research, industrial research or experimental development or widely disseminating the results of such activities by way of teaching, publication or knowledge transfer, but whose own funding consists mainly of revenue from economic activities, can be considered a research and knowledge-dissemination organisation?
- (2) In determining whether the entity complies with the requirement in Article 2(83) of [the GBER] that the primary goal of the entity’s activities must be to independently conduct fundamental research, industrial research or experimental development or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer, is it justified to apply the requirement concerning the proportion of funding (revenue and costs) derived from economic and non-economic activities?
- (3) If the answer to the second question referred is in the affirmative, in determining whether the entity’s primary goal is to independently conduct fundamental research, industrial research or experimental development or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer, what percentages of funding must be obtained from economic and from non-economic activities?
- (4) Must the rule in Article 2(83) of [the GBER], which establishes that undertakings that can exert a decisive influence upon the entity submitting the project proposal, in the quality of, for example, shareholders or members, may not enjoy preferential access to the results generated by that entity, be interpreted as meaning that the members or shareholders of the said entity may be either natural or legal persons with a profit motive (including through the provision of educational services in return for payment) or not-for-profit entities (such as an association or foundation)?’

21. Written observations were submitted by the parties to the main proceedings and the European Commission.

IV. Analysis

22. As requested by the Court, in my analysis I will focus on the first two questions posed by the referring court in Case C-164/21 and on the first three questions posed in Case C-318/21.

23. In essence, those two sets of questions ask for the interpretation of Article 2(83) of the GBER in order to help the referring courts to decide whether a private higher education institution, financed mainly through fees for academic services, can be considered a ‘research and knowledge-dissemination organisation’ in the sense of that provision. The referring courts also ask whether the proportion of financing of economic activities in relation to non-economic activities is relevant when determining the primary goal of that organisation.

24. I am of the opinion that the Court lacks jurisdiction to answer those questions. I will explain my position in section IV.A. Should the Court decide otherwise, I will provide the answers to the questions referred in section IV.B.

A. Jurisdiction of the Court

1. The GBER is not applicable as a matter of EU law

25. The Court has jurisdiction to interpret EU law in the preliminary ruling procedure when its application arises before a national court as a matter of EU law.³

26. The questions posed by the referring courts concern the interpretation of Article 2(83) of the GBER.

27. It is therefore first necessary to establish the reasons why that provision is relevant in the present cases.

28. The objective of the GBER is to determine situations in which State aid can be considered to be compatible with the internal market, even when it is not notified and has not been individually approved by the European Commission. The cases before the referring courts, however, do not relate to the question whether the grants at issue were subject to notification as State aid or not. Instead, it appears that Article 2(83) of the GBER became relevant in domestic proceedings by way of Decree No 725, in which the definition from the GBER was used to determine the institutions eligible for public research grants.

29. Article 2(83) of the GBER does not, therefore, apply as a matter of EU law, but rather as a result of the Latvian Council of Ministers' choice, expressed in Decree No 725, to use a definition from an EU legal act for purely domestic purposes: determining eligibility for public research grants.

30. Therefore, Article 2(83) of the GBER applies as a matter of national law and not as a matter of EU law.

2. The purpose of the definition of a 'research and knowledge-dissemination organisation' is different in the GBER and in Decree No 725

31. It further appears from the references and observations of the parties that the reason for choosing to use the definition from the GBER lies in the Latvian State's endeavour to secure compatibility with the EU rules on State aid.

32. Conversely, the reason for including the definition of 'research and knowledge-dissemination organisation' in the GBER, as I will explain, has nothing to do with the legality or illegality of research aid granted directly to such organisations.

³ Judgments of 19 December 2013, *Fish Legal and Shirley* (C-279/12, EU:C:2013:853, paragraphs 29 and 30), and of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 44); order of 21 February 2022, *Leonardo* (C-550/21, not published, EU:C:2022:139, paragraph 11).

33. The GBER does not, in any of its provisions on research and development aid, exclude the obligation to notify by reference to the type of the beneficiary entity. Rather, the GBER takes a functional approach: it is the aid for the activities of fundamental research, industrial research, experimental development and feasibility studies that fulfils other criteria set out in Chapter III, Section IV, of the GBER that is exempt from the notification obligation⁴ and thus presumed to be compatible with the internal market.

34. The involvement of an entity defined as a ‘research and knowledge-dissemination organisation’ in Article 2(83) of the GBER has a role to play in the decision of whether notification is necessary or not, as I will explain in a moment. However, that definition in itself does not influence whether the research grant awarded to a research institution is compatible with the internal market.

35. The definition in Article 2(83) of the GBER is relevant only in relation to a few provisions of Chapter III, Section IV, of the GBER. First, effective collaboration between research and knowledge-dissemination organisations and undertakings can lead to an increase in the allowed intensity of State aid for certain research projects.⁵ Secondly, innovation aid for small and medium-sized enterprises (SMEs) can cover the costs for secondments of highly qualified researchers from such organisations to work on the project of a beneficiary SME.⁶ Finally, aid for research and development in the fishery and aquaculture sector may only be granted directly to a ‘research and knowledge-dissemination organisation’.⁷ That exhausts the instances when the definition of ‘research and knowledge-dissemination organisation’ in Article 2(83) is used in the GBER.

36. Finally, nowhere in the GBER is there any indication that the concept of a ‘research and knowledge-dissemination organisation’ has any bearing on the definition of an undertaking for the purposes of Article 107(1) TFEU.⁸ If such an institution engages in economic activities, it will be classified as an undertaking and the research aid it receives will need to be approved as being compatible with the internal market, either in each individual case upon notification or automatically without notification, provided that it satisfies the conditions of the GBER.

37. Therefore, in order to ensure that public research financing is compatible with EU State aid rules and thus to avoid the breach of such rules by decisions of the Latvian Science Council, the exclusion of research organisations that also engage in economic activities is not necessary. Depending on the situation, such aid might be compatible with the internal market.

⁴ If within the notification thresholds set out in Article 4(1)(i)(i) of the GBER.

⁵ Article 25(6)(b)(i) of the GBER. The intensity of State aid is a percentage of eligible financing through State resources for particular types of projects. For example, aid intensity for industrial research which, under the GBER, does not have to be notified, is 50%. However, if a research and knowledge-dissemination organisation participates in that project, the intensity of the aid may be increased by 15%, that is, up to 65% of the entire cost of the project.

⁶ Article 28(2)(b) of the GBER.

⁷ Article 30(5) of the GBER.

⁸ See Section IV.A.3. below.

38. It should be added that EU State aid policy is favourable towards research aid. Research enhances the level of knowledge in society and creates new economic opportunities.⁹ However, even if outcomes of research projects are generally beneficial for society, a number of projects might have an unattractive rate of return from the perspective of private investors. Therefore, as explained by the European Commission, State aid may ‘contribute to the implementation of projects which result in an overall societal or economic benefit and which would otherwise not be pursued’.¹⁰ When addressing such market failures or asymmetries in information or coordination between different research entities,¹¹ research and development aid is generally seen as compatible with the internal market.

39. There is, in my view, no doubt that private higher education institutions are able to contribute to research, innovation and consequently growth in the same way as their public counterparts. I therefore see no reason to exclude such institutions as potential recipients of research aid.

40. The EU’s own research funding programmes do not exclude private higher education institutions from its projects, such as Horizon Europe funds,¹² including Marie Skłodowska-Curie actions.

41. That being said, as noted by the Netherlands Government, the choice of the institutions eligible for research aid through public resources in the end lies entirely with the Latvian State. It may choose to exclude private research and teaching institutions, which provide teaching services for consideration. That decision, however, is not dictated by EU law, and most certainly not by Article 2(83) of the GBER.

3. Research and knowledge-dissemination organisations and EU State aid rules

42. As beneficiaries of public research financing, research organisations may indeed find themselves in different positions under EU State aid rules. It must be said that those rules apply to research organisations in the same way as they do to any other institution. Therefore, research organisations will be subject to State aid rules provided that they qualify as undertakings. However, if they do not, they will be outside the scope of Article 107(1) TFEU. EU State aid rules will, therefore, not apply to research grants awarded to research organisations that do not qualify as undertakings.

⁹ The importance of research is recognised by Article 179(1) TFEU as well as in different EU programmes. Thus, for instance, research had an important place in the ‘Europe 2020’ growth strategy (Communication from the Commission – Europe 2020: A strategy for smart, sustainable and inclusive growth, Brussels, 3 March 2010, COM(2010) 2020) and is promoted in the research and innovation strategy 2020-2024 (https://ec.europa.eu/info/research-and-innovation/strategy/strategy-2020-2024_en). See, also, von Wendland, B., ‘New Rules for State Aid for Research, Development and Innovation: Not a Revolution but a Silent Reform’, *European State Aid Law Quarterly*, Vol. 14(1), 2015, p. 25.

¹⁰ Communication from the Commission – Framework for State aid for research and development and innovation (OJ 2014 C 198, p. 1) (‘the Framework’), point 49.

¹¹ Ibid.

¹² Article 2(16) of Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, and repealing Regulations (EU) No 1290/2013 and (EU) No 1291/2013 (OJ 2021 L 170, p. 1).

43. It is settled case-law of the Court in the field of competition law that an undertaking is an entity engaged in an economic activity, in the sense that it offers goods or services on the market.¹³ The classification as an undertaking does not depend on whether the entity is established under public or private law or whether it seeks to make a profit.¹⁴ The same applies, in principle, to research organisations.¹⁵

44. The qualification of an entity as an undertaking is relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former.¹⁶ Therefore, aid supporting activities of research organisations that are considered economic will be subject to State aid rules, whereas aid supporting the non-economic activities of those organisations will be outside the scope of those rules.

45. Universities are usually organisations that engage in both research and knowledge-dissemination activities through teaching and publication.

46. The Court has excluded teaching activities provided by institutions integrated in the system of public education and financed predominantly by public funds from the notion of service provision.¹⁷ Such activities, therefore, find themselves outside the scope of State aid rules. Conversely, the activity of offering education financed through private funds¹⁸ was found by the Court to constitute a provision of services.¹⁹ It therefore constituted an economic activity,²⁰ unless private funds came from the provider itself.²¹

47. A research and teaching organisation may at the same time pursue economic and non-economic activities, for example, by offering classes for consideration as its economic activity, and by conducting fundamental research as its non-economic activity. That seems to be the situation of the two universities that are applicants in the main proceedings.

48. The question arising in such situations is whether any aid granted from or through State resources to an organisation that also engages in economic activities necessarily places it within the scope of Article 107(1) TFEU.

¹³ Judgments of 16 June 1987, *Commission v Italy* (118/85, EU:C:1987:283, paragraph 7); of 18 June 1998, *Commission v Italy* (C-35/96, EU:C:1998:303, paragraph 36); and of 19 February 2002, *Wouters and Others* (C-309/99, EU:C:2002:98, paragraph 46).

¹⁴ Judgments of 19 February 2002, *Wouters and Others* (C-309/99, EU:C:2002:98, paragraphs 46 and 47), and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 41).

¹⁵ The Framework (n 10), point 17.

¹⁶ Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 44). See, also, Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262, p. 1) ('the Notice'), point 10.

¹⁷ Judgments of 27 September 1988, *Humbel and Edel* (263/86, EU:C:1988:451, paragraphs 17 to 19), and of 7 December 1993, *Wirth* (C-109/92, EU:C:1993:916, paragraphs 15 and 16).

¹⁸ The financing might be provided by pupils or their parents, but also by third persons, as the economic nature of the teaching activity does not depend on being paid for by those for whom it is performed. Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 49).

¹⁹ Judgments of 11 September 2007, *Commission v Germany* (C-318/05, EU:C:2007:495, paragraph 69), and of 20 May 2010, *Zanotti* (C-56/09, EU:C:2010:288, paragraph 32).

²⁰ Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraphs 45 to 48).

²¹ Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 48).

49. In the context of higher education, the case-law of the Court clarified that this is not so. If non-economic activities of a research and knowledge-dissemination organisation can be distinguished from its economic activities, and if it can be established that the aid concerns only non-economic activities, then such a transfer from State resources is not considered State aid pursuant to Article 107(1) TFEU.²²

50. More generally, the Court has found that the ‘classification as an activity falling within the exercise of public powers or as an economic activity must be carried out separately for each activity exercised by a given entity’.²³

51. The European Commission accepted the same reasoning in the Framework. Thus, it explained that ‘where the same entity carries out activities of both economic and non-economic nature, the public funding of the non-economic activities will not fall under Article 107(1) [TFEU] if the two kinds of activities and their costs, funding and revenues can be clearly separated so that cross-subsidisation of the economic activity is effectively avoided’.²⁴

52. Therefore, if a research organisation is engaged in both economic and non-economic activities, public funding falls under State aid rules only in so far as it covers the costs linked to the economic activities. The European Commission determines this by assessing whether the public funding allocated to an organisation for a specific accounting period exceeds the costs of non-economic activities incurred in that period.²⁵

53. Additionally, if a research organisation provides educational services for remuneration but all profits from such activities are reinvested in the primary activities of research, then its activities would be considered non-economic activities in their entirety.²⁶

54. Therefore, whether aid granted to a research organisation amounts to State aid depends on the qualification of the funded activity as economic or non-economic. If the funded activity is non-economic in nature, State aid rules do not apply, even if the same entity engages also in economic activity, which is, however, clearly separated from the funded activity. If the funded activity is economic, such funding is State aid pursuant to Article 107(1) TFEU. Such aid may however ultimately be considered compatible with the internal market, and consequently allowed.

55. A careful reader will have noticed that nowhere in this section has Article 2(83) of the GBER been mentioned. That is so because it is of no relevance for the applicability of State aid rules to research grants awarded to research institutions.

4. Interim conclusion: the Court does not have jurisdiction

56. On the basis of the foregoing, given that the EU provision the interpretation of which is sought applies only as a matter of national law, and since it applies for a different purpose than the one it serves under EU law, I consider that the Court does not have jurisdiction to answer the questions referred.

²² Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 51). See, also, Buts, C., Nicolaides, P., Pirlet, H., ‘Puzzles of the State Aid Rules on RDI’, *European State Aid Law Quarterly*, Vol. 18(4), 2019, p. 489, at p. 494.

²³ Judgment of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376, paragraph 25).

²⁴ The Framework (n 10), point 18.

²⁵ The Framework (n 10), point 20 and the accompanying footnote 6.

²⁶ The Framework (n 10), point 19(b). See also, the Notice (n 17), point 32.

57. Certainly, based on the *Dzodzi* line of case-law, the Court has held that it has jurisdiction in situations where domestic legislation adopts the same solutions in situations equivalent to those regulated by EU law. The national legislator decides, in such a case, to use EU law to regulate an equivalent domestic situation. In such a scenario, the Court considered that, in order to forestall future differences of interpretation, it is clearly in the EU interest that provisions or concepts taken from EU law be interpreted uniformly, irrespective of the circumstances in which they are to apply.²⁷

58. For example, in *Dzodzi* itself, the Belgian legislature decided to extend the application of EU rules relating to cross-border situations to an equivalent, purely internal situation.²⁸

59. Another example of where the Court based its jurisdiction on the need for a uniform interpretation in cases falling outside the scope of EU law concerned situations in which Member States extended the applicability of the directive on commercial agents, applicable only to the sale of goods, also to the provision of services.²⁹

60. The third example of where the *Dzodzi* logic was used relates to the interpretation of mixed agreements. In *Hermès*, even though a provision of a mixed agreement³⁰ applied to a situation that was outside the scope of EU law, the Court found it had jurisdiction to interpret it because of its potential application to equivalent situations governed by EU law.³¹ In other words, there was *an EU interest* in the uniform interpretation of provisions applicable to *equivalent* situations.

61. Finally, the Court also reasoned in a similar way in a number of cases in the area of competition law, in which EU rules were transposed by the domestic legislature to purely internal situations without any impact on trade between Member States.³²

62. An important reason justifying the jurisdiction of the Court in all the aforecited cases was the equivalence of, on the one hand, purely internal situations for the regulation of which national law referred to EU law and, on the other hand, EU situations for which the relevant EU rule was designed. By contrast, in situations where the purpose of the EU rule was unrelated to the purpose for which it was used in the domestic context, the Court has declined jurisdiction.³³

²⁷ Judgments of 18 October 1990, *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360, paragraph 41); and of 18 November 2021, *Visma Enterprise* (C-306/20, EU:C:2021:935, paragraph 45). For a clear and detailed overview of the *Dzodzi* line of cases, see Opinion of Advocate General Bobek in *J & S Service* (C-620/19, EU:C:2020:649, points 27 to 50).

²⁸ Judgment of 18 October 1990, *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360, paragraph 43). The situation concerned the derived right of a third-country national, the spouse of a Belgian national working in Belgium, to reside in that country. In order to avoid reverse discrimination of its own nationals, Belgium envisaged that EU law relating to free movement of workers would also apply to purely internal situations.

²⁹ Judgments of 16 March 2006, *Poseidon Chartering* (C-3/04, EU:C:2006:176, paragraphs 11 to 19); of 28 October 2010, *Volvo Car Germany* (C-203/09, EU:C:2010:647, paragraphs 23 to 28); of 3 December 2015, *Quenon K.* (C-338/14, EU:C:2015:795, paragraphs 17 to 19); and of 17 May 2017, *ERGO Poist'ovňa* (C-48/16, EU:C:2017:377, paragraphs 29 to 32).

³⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights, approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1) ('the TRIPS Agreement').

³¹ Judgment of 16 June 1998, *Hermès* (C-53/96, EU:C:1998:292, paragraph 32). The case concerned an interim measure provided by the TRIPS Agreement to a Benelux trademark. Even if such trademarks were not governed by EU law, the same provision of the TRIPS Agreement was potentially applicable to EU trademarks.

³² See, for example judgment of 26 November 2015, *Maxima Latvija* (C-345/14, EU:C:2015:784, paragraphs 12 to 14); of 21 July 2016, *VM Remonts and Others* (C-542/14, EU:C:2016:578, paragraphs 16 to 19) and judgment of 18 November 2021, *Visma Enterprise* (C-306/20, EU:C:2021:935, paragraphs 41 to 49).

³³ See, for instance, judgment of 10 December 2020, *J & S Service* (C-620/19, EU:C:2020:1011, paragraphs 44 to 49).

63. As explained in Section IV.A.2. above, the definition provided in Article 2(83) has an entirely different purpose in the context of the GBER than in Decree No 725. Hence, it is manifest that the cases before the referring courts do not constitute an equivalent domestic situation to that which may arise under the GBER.

64. ‘*Dzodzi* jurisdiction’ in essence rests on two requirements: the EU interest in a uniform interpretation and the equivalence between the domestic and EU situations at issue.³⁴

65. Even if quite far-fetched, one could argue that interpreting Article 2(83) of the GBER in the present cases is in the interest of uniformity of EU law. It is indeed possible to conceive of situations in which competent national authorities and national courts will use that interpretation in the application of Chapter III, Section 4, of the GBER.

66. However, the situation in which Article 2(83) of the GBER is to be used in the present cases is not equivalent to its use in the context of that regulation. Therefore, given that the Court may only interpret Article 2(83) of the GBER in the context of the GBER itself and in line with its specific purpose, the interpretation that the Court may give in the present case cannot, in my view, be of any use to the referring courts. That would be mixing apples and oranges.

67. Finally, it should also be added that the referring courts have not explained, as required by Article 94 of the Rules of Procedure of the Court, in what way the interpretation of Article 2(83) of the GBER could be relevant in a functionally and legally different context of national law.³⁵

68. I am, therefore, of the opinion that the Court cannot establish its jurisdiction in the present cases, as the requirement of an equivalent domestic situation required by the *Dzodzi* line of cases is lacking.

69. In the event that the Court nevertheless decides that it has jurisdiction, I will now turn to the interpretation of Article 2(83) of the GBER.

B. What is a research and knowledge-dissemination organisation in the sense of Article 2(83) of the GBER?

70. Article 2(83) of the GBER describes a ‘research and knowledge-dissemination organisation’ as an entity whose primary goal is to independently conduct research (fundamental, industrial or experimental)³⁶ or to widely disseminate research results through teaching, publication or knowledge transfer.

³⁴ Advocate General Bobek has proposed three conditions for determining whether *Dzodzi* can be applied to establish jurisdiction in cases that fall outside the scope of EU law. First, national law must contain a direct and unconditional *renvoi* to the EU provision whose interpretation is sought. Second, the EU rules extended by national law must operate within a functionally and legally comparable context, where there remains an interest in preserving conceptual uniformity, and within which the interpretation of EU law provisions may still be of some practical assistance to the referring court. Finally, the referring court is obliged to explain clearly how the two requirements stated above are met in the case at hand, setting out the relevant provisions of national law. See Opinion of Advocate General Bobek in *J & S Service* (C-620/19, EU:C:2020:649, points 43 to 45, 54 to 61, and 71 to 73).

³⁵ See in that respect, judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 55). There are views that such an explanation by national court should be imposed as a procedural requirement for the establishment of the Court’s jurisdiction in *Dzodzi* type of situations. See, for example, Opinion of Advocate General Wahl in Joined Cases *Venturini and Others* (C-159/12 to C-161/12, EU:C:2013:529, points 54 to 62); and Opinion of Advocate General Bobek in *J & S Service* (C-620/19, EU:C:2020:649, point 57).

³⁶ Article 2(84) of the GBER defines ‘fundamental research’, Article 2(85) thereof defines ‘industrial research’, Article 2(86) thereof defines ‘experimental development’ and Article 2(87) thereof defines ‘feasibility study’.

71. That highlighted ‘or’ creates confusion.

72. Can an entity engage only or predominantly in research? Can it engage only or predominantly in knowledge dissemination? Must it engage in research? Must it engage in knowledge dissemination? Alternatively, must it engage in both, research and knowledge dissemination, as the term ‘research *and* knowledge-dissemination organisation’ might suggest?

73. The phrase ‘primary goal’ should, to my mind, be understood in terms of activities for the conduct of which the entity was established in the first place. Of course, there may be more than one primary activity.

74. For example, institutions such as universities are commonly established in order to both disseminate knowledge and conduct research. Both teaching and research are here their primary activities. Research institutes might be established exclusively for research and might disseminate their results in external publications. Thus, research is their only primary activity. Finally, some institutions, such as language schools or vocational training institutions, might only be established to teach, but they might also conduct research on, for instance, the improvement of their teaching methodology. However, that type of research is not a primary goal of such an institution; in that scenario, research is only instrumental and therefore ancillary to the institution’s primary goal of teaching.

75. Considering that the definition in Article 2(83) of the GBER is placed in the section of that article entitled ‘Definitions for Aid for research and development and innovation’, I am of the opinion that research must be one of the primary goals of a ‘research and knowledge-dissemination organisation’.

76. If an entity has research as its primary goal, it is a ‘research and knowledge-dissemination organisation’, regardless of whether it is established under public or private law and irrespective of its manner of financing. I understand the latter to mean that a ‘research and knowledge-dissemination organisation’ may conduct both economic and non-economic activities.³⁷ It is only relevant that independent research is among its primary activities.

77. However, even if such an entity may, therefore, carry out economic activities, it can be concluded from the second sentence of Article 2(83) of the GBER that some of its research activities must be non-economic. The second sentence of that article provides: ‘where such entity *also* pursues economic activities the financing, the costs and the revenues of those economic activities must be accounted separately.’³⁸

78. The conclusion that a research activity must be non-economic, at least in part, is corroborated also by the knowledge-dissemination component of the definition under Article 2(83) of the GBER. It is inherent in research of a non-economic nature that its results are widely and publicly disseminated. The last sentence of that provision supports this interpretation, given that the research organisation may not provide preferential access to the research results, for example, to its shareholders or members.

³⁷ The Framework (n 10) also envisages that a research organisation can carry out economic and non-economic activities at the same time. See, for instance, point 20 thereof.

³⁸ My emphasis.

79. My conclusion that research, as one of the primary activities, must be non-economic at least in part also follows from the role given by the GBER to a ‘research and knowledge-dissemination organisation’. Participation of such organisations in collaborative projects or their leading role in certain types of research increases the likelihood of the compatibility of research aid with the internal market without notification.

80. I can, therefore, conclude from the wording of Article 2(83) of the GBER that a ‘research and knowledge-dissemination organisation’ should conduct research whose results are publicly available and may transfer the results of research through teaching, publication or other means. Provided that research (or a part thereof) is conducted as a non-economic activity, teaching can be provided for remuneration.

81. For the purposes of assessing the primary activities of an organisation, several factors may be of use: the statute or similar founding document of the entity in question, its annual reports, and whether it meets the criteria in national law for acquiring the status of higher education or research institution (such as accreditation),³⁹ as well as reports of the national accrediting authority. Given that higher education accreditations are usually granted for a limited period and are subject to renewal, reaccreditation decisions may also be seen as an occasion to determine the primary activity of an entity.

82. In the order for reference in Case C-164/21 it is stated that the commercial activity of the applicant in the main proceedings is allowed in so far as it is not contrary to the Law on Higher Education Institutions. This may also be relevant for unveiling the primary activity of the entity in question.

83. If an organisation carries out research and teaching as its primary activities, it is irrelevant which percentage of those activities is economic and which is non-economic for the purposes of its qualification as a ‘research and knowledge-dissemination organisation’. A clear separation of the costs of economic and non-economic activities is only relevant when deciding whether a research grant awarded to such an organisation falls within the scope of State aid rules.

V. Conclusion

84. In the light of the foregoing considerations, I propose that the Court declare that it lacks jurisdiction to answer the questions referred by the Administratīvā rajona tiesa (District Administrative Court, Latvia) and the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia).

85. In the alternative, in the event that the Court does not decline jurisdiction, I propose that it answer as follows:

- (1) An entity whose activities consist in research and education can be classified as a ‘research and knowledge-dissemination organisation’ within the meaning of Article 2(83) of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 [TFEU] if one of its primary

³⁹ See, also, Kleiner, T., ‘The new Framework for Research, Development and Innovation, 2007-2013’, *European State Aid Law Quarterly*, Vol. 6(2), 2007, p. 231, at p. 238 and 239.

activities is independent research, which is at least in part of a non-economic nature, even if some of its activities are economic or, in other words, even if part of its revenues come from providing services for consideration.

- (2) The proportion of financing from economic and non-economic activities is not relevant when determining whether an entity is a ‘research and knowledge-dissemination organisation’ under Article 2(83) of Regulation No 651/2014.