



Knowledge Transfer, Research Organisations and University Education

**Transfer znalostí,
výzkumné organizace
a vzdělávání na VŠ**

Conference on State Aid Law 2018, Brno

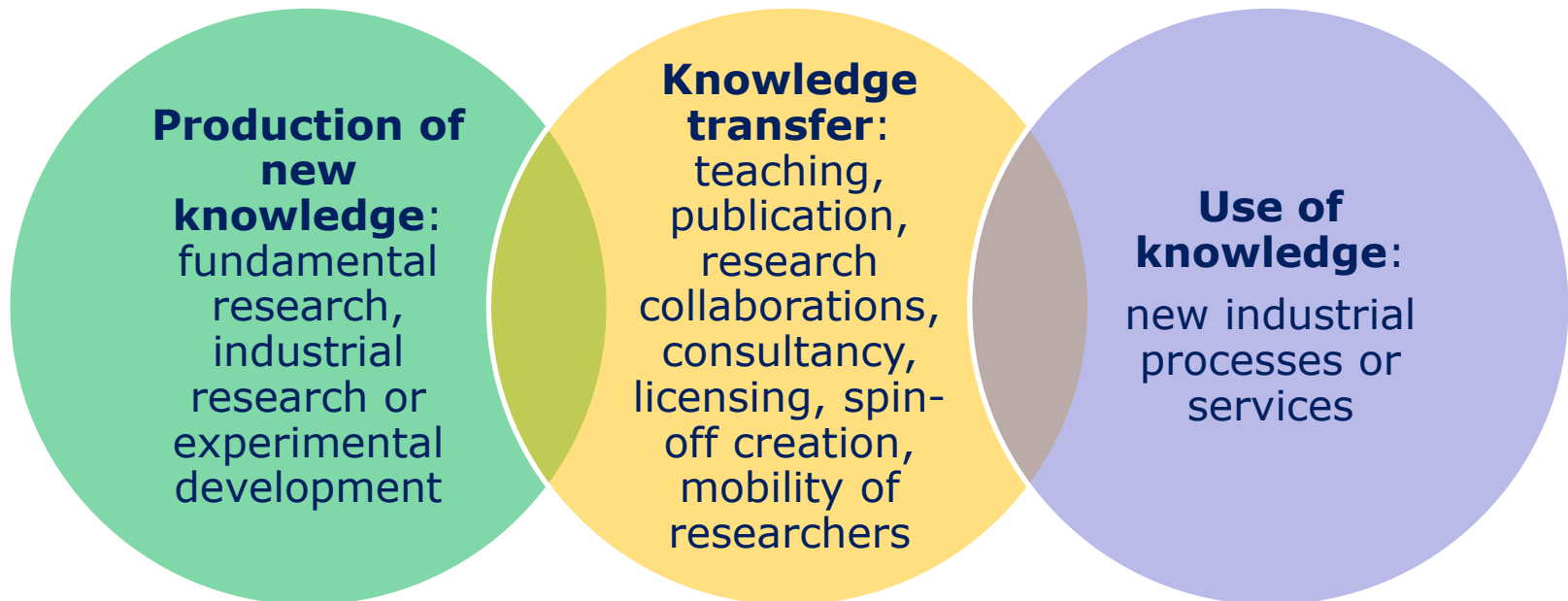
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Knowledge Transfer, Research Organisations and University Education

1. Why is the State aid question so relevant?
2. Applicable State aid legal provisions and explanatory texts
3. Knowledge transfer
4. Public financing for research organisations and research infrastructure
5. University education
6. Conclusion

Why is the State aid question so relevant?



- Universities/research organisations take part in all these processes
- **Co-operation and knowledge transfer between universities and industry in these processes**

Applicable legal provisions and explanatory texts

Communication on the Notion of State Aid ('NoA')

- 'Undertaking/economic activity', 'imputability to the State', 'State resources', 'advantage', 'selectivity', 'effect on competition and trade'

Framework for State Aid for R&D&I ('R&D&I-Framework')

- Public funding for economic activities of research organisations
- R&D-services on behalf of industry
- R&D-collaboration with industry

Communication on the application of State aid rules to compensation granted for the provision of services of general economic interest ('SGEI-Communication')

- The non-economic nature of public education
- Non-economic primary activities of research organisations (cf. R&D&I-Framework)
- Non-economic technology transfer activities (cf. R&D&I-Framework)

'Analytical Grid for Research Infrastructure'

- Presence of aid in the financing of the construction, upgrade or extension of research infrastructure

Knowledge Transfer from research organisations/ infrastructures as a 'non-economic activity'

Option 1 – Wide, non-exclusive and non-discriminatory dissemination of research results (e.g. teaching, open-access databases, open publications, open software (19 (a) 3rd indent R&D&I-Framework))

- **Option 1 implies maximum accessibility. Commercial knowledge/technology transfer practically excluded as it requires some degree of exclusivity.**

Option 2 – Knowledge transfer conducted by the research organisation/infrastructure or jointly with/on behalf of other such entities, all profits reinvested in the non-economic primary activities; the transfer service may be tendered-out to third parties (19 (b) R&D&I-Framework)

- **Option 2 implies that the presumption of 'non-economic activity' is valid only for the first transfer from academia to industry.**

Knowledge Transfer in public-private R&D-cooperation

Contract research/R&D-service on behalf of industry

- Industry typically owns the results of the research activities and carries the risk of failure (25, R&D&I-Framework)
- (Tends to result in) unilateral knowledge transfer to industry
- The university typically has an interest to publish the results (less so in R&D-services)

R&D-collaboration with industry

- Effective collaboration between two independent parties, division of labour, sharing of risks and results (one party may still cover all costs) – (15 (a) and 27, R&D&I-Framework)
- Oriented to the exchange of experience, information, know-how in general
- University has strong interest to publish the results

Knowledge transfer in contract-R&D/R&D-services

State aid excluded if R&D is provided at market price

or, where there is **no** market price

- **full costs of the service + margin** commonly applied in the sector of the service concerned, **or**
- **arm's length negotiations** where research organisation/infrastructure negotiates to obtain maximum economic benefit at the moment when the contract is concluded and covers at least its marginal costs

Market value of IP-ownership or IP access may be deducted from the price if these remain with the research organisation/ infrastructure.

Transfer of IP resulting from a specific research service/contract research for the first time on behalf of a given undertaking, on a trial basis and during a clearly limited period of time → Price charged is considered as market price if service/contract research is unique and there is no market for it.

R&D&I-Framework: R&D-collaboration – How to avoid indirect State aid to undertakings?

The participating undertakings bear the full cost of the project, **or**

Resulting Non-IPR may be widely disseminated and any IPR generated by research organisations/ infrastructures are fully allocated to those entities, **or**

any resulting IPR resulting as well as related access rights are allocated to collaboration partners in a manner which adequately reflects work packages, contributions and respective interests, **or**

'compensation equivalent to market price' for transfer of/access to IPR generated by RO/RI. Financial and non-financial contributions of undertakings to the costs of the research organisations/infrastructures' activities that resulted in the IPR concerned may be deducted from that compensation.

Non-economic knowledge transfer between private entities

- Private entities may also conduct 'non-economic' knowledge transfer.
- Relevant criteria:
 - **Special status and obligation to “work for the good of society”**
 - **No single private interest can control the entity's activities**
 - **The entity cannot influence the direction of the research to its advantage**
 - **R&D results and other know-how developed by the entity has to be disseminated to the entire business sector in a non-discriminatory manner (publications, training, conferences)**
 - **The entity's activities correspond to a research organisation's/infrastructure's non-economic primary activities**
 - **Cross-subsidisation of the entity's economic activities is avoided**

cf. Commission decision of 8.6.2009, N 617/2008, Denmark, Technology Transfer Institutes



R&D&I-Framework: **Public funding for research organisations/infrastructure (RO/RI)**

Public funding of non-economic activities does not constitute State aid

- **Primary activities:** Public education organised within the national educational system; independent R&D; wide dissemination of research results on a non-exclusive and non-discriminatory basis (15 (ee), 19 (a) R&D&I-Framework)
- **Knowledge transfer** conducted by the RO/RI or jointly with/on behalf of other such entities; all profits reinvested in primary activities (19 (b), R&D&I-Framework).

Public funding of economic activities can constitute State aid

- e.g. renting out equipment or laboratories to undertakings, R&D services, contract research for industry.

Cross-subsidisation of economic activities is avoided by separating the costs, revenues and financing of economic from non-economic activities.

Lack of clear separation → Entire RO/RI and its funding are subject to State aid rules! (18, R&D&I-Framework)

Public financing for research organisations and research infrastructure – ‘Ancillary economic activity’

- **Presumption: Public funding for economic activities “may fall outside State aid rules” if certain quantitative and qualitative criteria are met.**
20, R&D&I Framework; 8, Analytical Grid for Research Infrastructure

Qualitative criteria – limitation of objective and content

- RO/RI used almost exclusively for a non-economic activity *and*
- economic activity is directly related to and necessary for the operation of the RO/RI, *or* intrinsically linked to its main non-economic use.

and quantitative criteria – limitation of scope

- economic activities consume exactly the same inputs (such as material, equipment, labour and fixed capital) as the non-economic activities;
- capacity allocated each year to such economic activities does not exceed 20% of the relevant entity’s overall annual capacity.

Public financing for research organisations and research infrastructure – ‘Ancillary economic activity’

- The ancillary character of an economic activity cannot transform it into a non-economic one.
- Calculation of overall annual capacity at the level of the „relevant entity“
 - The R&D&I-Framework does not define the term ‘relevant entity’
 - Implies an entity such as an institute, laboratory, department etc. that, with the organisational structure, capital, material and workforce that it effectively has at its disposal, could alone perform the (ancillary) activity concerned
 - Calculation based on actual annual use, based on most relevant factors (e.g. time/cost of inputs/space)

Public financing for research organisations and research infrastructure – ‘Ancillary economic activity’

- Art. 26 (7) General Block Exemption Regulation on Investment Aid for Research Infrastructure: Member States have to "put in place a monitoring and claw-back mechanism in order to ensure that the applicable aid intensity is not exceeded. "
- Eligible costs → costs relating to infrastructure construction /upgrade
- To be monitored → the share of the overall annual capacity that is used for economic activities
- Period for monitoring → the depreciation period of the relevant assets
- Variations cannot be precisely estimated *ex ante* → claw-back!
- Example:
 - **Public funding = EUR 10 million for construction; estimated ancillary economic activity up to 20% of overall annual capacity → entire public funding is not considered state aid**
 - **Later – actual economic activity turns out to be 30% of overall annual capacity → 30% of the funding to be considered as funding of economic activities (no longer 'ancillary').**
 - **Article 26(6) GBER only allows an aid intensity of 50% → EUR 1.5 million of excessive support for economic activities to be clawed-back.**

Public financing for research organisations and research infrastructure – ‘Ancillary economic activity’

‘Severability’ and ‘necessity’ criteria are demanding – T-347/09 Germany v Commission ‘Nature Conservation Areas’:

- Object: The transfer, free of charge, of natural heritage areas to regions and environmental protection organisations. Beneficiaries had to comply with certain environmental law obligations, bear all costs and risks but could, subject to environmental restrictions, generate revenue from the land, e.g. from leases for hunting and fishing and sale of wood; costs had to be offset against revenue and the positive balance to be transferred to the federal State.
- General Court:
 - confirmed that environmental protection tasks concerned did **not** constitute an economic activity
 - That the environmental protection organisations had to be considered as undertakings to the extent that they offered goods and services in competitive markets, namely sales of wood, granting of hunting and fishing leases and touristic services.
 - While those economic activities were carried out in the framework of the nature conservation activities, the General Court found that they were **not** necessary for nature conservation and could be **dissociated from the non-economic activities.**

Public financing for research organisations and research infrastructure – ‘Ancillary economic activity’

20-% rule as such not yet confirmed by the Courts – C-74/16 - Congregación de Escuelas Pías (preliminary ruling)

- Object: The exemption of the Catholic Church from a municipal real estate tax, granted in respect of work to buildings intended to be used for educational activities that do not have a strictly religious purpose.
- ! Interesting: Opinion AG Kokott as regards the economic educational activities: Only when these constitute less than 10% of the activity of the establishment (rule of thumb) may they be deemed as purely ancillary to the main non-economic activities of the school.
- **CoJ-ruling** however:
 - School was engaged in three types of activities: (i) strictly religious and non-economic; (ii) non-economic educational activities subsidised by the State; (iii) non-compulsory economic educational activities receiving no financial support from the State.
 - Remained silent on ‘ancillarity’; **tax exemption may constitute State aid if and to the extent to which the activities carried on in the premises in question are economic activities** - for the national court to determine.

University education

As a non-economic activity

- organised within the national educational system
- predominantly or entirely funded by the State
- supervised by the State
- even if tuition or enrolment fees contribute to the operating expenses of the system, as long as the general education service is predominantly funded by the public purse (27, SGEI-Communication)

As an economic activity

- Education services financed predominantly by parents or pupils or commercial revenues
- Even if performed by public entities / universities!

cf. 19 (a) 1st indent, R&D&I-Framework; 28-30, NoA; 2.1.5, SGEI-Communication

University education - Drawing the borderline between 'economic' and 'non-economic'

- 3 indicators for the economic character of educational services offered by public institutions (27, 28 SGEI)
 - ✓ the nature of the services
 - ✓ their financing structure
 - ✓ the existence of competing private organisations
- The organisation, content and financing of public education services varies among Member States and changes over time.
 - So these 3 indicators are not cumulative.
 - Their relative importance should be considered in every specific case!

Knowledge Transfer, Research Organisations and University Education - Conclusions -

- It is important for research institutions to realise that when entering into discussions with industry, State aid rules may affect what can be agreed in the contract.
- Transparent separation of the costs, financing and revenues of economic and non-economic activities is vital to avoid undue cross-subsidisation.
- 'Ancillary economic activity' should be cautiously defined and closely monitored .



Knowledge Transfer, Research Organisations and University Education

Thank you for your attention.

Legal texts, explanatory documents, literature

- Commission Notice on the notion of State aid, C/2016/2946, OJ C 262, 19.7.2016, p.1
- Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, 2012/C 8/02, OJ C 8, 11.1.2012, p. 4
- R&D&I-Framework: Communication from the Commission — Framework for State aid for research and development and innovation, 2014/C 198/01, OJ C 198, 27.6.2014, p. 1
- Commission working document 'Analytical Grid for Research Infrastructure', http://ec.europa.eu/competition/state_aid/modernisation/grid_research_en.pdf
- Interpretation questions? - DG COMP 'eState aid Wiki' – accessible for Member State authorities
- *Gert Schwendinger*, State Aid and Intellectual Property in Contract Research and R&D&I Collaboration, European State Aid Law Quarterly (EStAL) 4/2013, 685
- *Bernhard von Wendland*, New Rules for State Aid for Research, Development and Innovation', EStAL 1/2015,14.