De normering van academisch ondernemerschap: perspectieven vanuit het onderwijs(bekostigings)recht, het Europees staatssteunrecht en de academische vrijheid & wetenschappelijke integriteit

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Summary

The regulation of academic entrepreneurship

Views from Education and Funding Law, European State Aid Law, and Academic Freedom & Scientific Integrity

Universities are part time enterprises. They engage in formation of companies, conduct contract research, and provide venture capital. However, the Dutch Higher Education and Scientific Research Act (HESRA) is silent on these entrepreneurial activities. Instead, the regulation of academic entrepreneurship is scattered over various sources. This dissertation addresses the regulations applicable to academic entrepreneurship and the clarity of these regulations.

Chapter one introduces the research question: how is academic entrepreneurship regulated in the Netherlands and to what extent are these regulations clear to the involved actors within and outside universities? This question is addressed primarily by conducting classical legal research.

Chapter two is concerned with describing academic entrepreneurship, its (policy) background, risks, and the involved actors. It employs a definition of academic entrepreneurship provided by Cantaragiu: 'a practice performed with the intention to transfer knowledge between the university and the external environment in order to produce economic and social value both for external actors and for members of the academia, and in which at least a member of academia maintains a primary role'. The identified forms of academic entrepreneurship are (1) university spin-off formation, startup formation and technology transfer, (2) contract education, contract research and other forms of service provision, and (3) facilitation of entrepreneurship in the form of venture capital or services provided by knowledge transfer offices, incubators and science parks.

The background of Dutch education policy relevant to academic entrepreneurship includes (a) the development of policy on contract research in the second half of the previous century, (b) the formulation of principles in the Ministry of Education, Culture and Science's 1981 policy document *Nota contractonderzoek*, (c) the introduction of the higher education institutes' mission of 'the transfer of knowledge for the benefit of society' in the HESRA, which came into force in 1993, (d) the introduction of the policy rule *Notitie helderheid*

in de bekostiging van het hoger onderwijs in 2003, which contains conditions for investing public funds in private activities by higher education institutes, (e) the shift of supervision of the appropriate use of public funds by the board of universities from the Ministry of Education, Culture and Science to the Inspectorate of Education in 2012 and (f) the replacement of the aforementioned policy rule under (d) by the new policy rule *Beleidsregel investeren met publieke middelen in private activiteiten* as of 2021.

The risks of academic entrepreneurship discussed in chapter two are (i) cross-subsidization between public and private activities, (ii) unfair competition between publicly funded universities and private businesses, (iii) impairment of academic freedom (*e.g.* by limiting publication freedom) and scientific integrity (*e.g.* by conflicts of interests). Another discussed risk is (iv) the discontinuation of education or research, or potential deterioration of its quality, resulting from financial losses that are not covered by private funds or by shifting priorities towards commercial activities and neglect of public activities. Such shifting priorities and issues on sharing profits could also lead to (v) tension within and between research groups.

The involved actors described in this chapter are the personnel, knowledge transfer offices, representative bodies, the executive board, the supervisory board, and the scientific integrity committee or official – and, outside of the university, various government bodies and LOWI, the Dutch independent advisory board on scientific integrity.

Chapter three and *four* are concerned with the extent to which universities are allowed to invest in academic entrepreneurship and how they relate to other businesses in this regard. Chapter three addresses the perspective of education (funding) law, whilst chapter four addresses the perspective of European state aid law.

In *chapter three*, the applicable provisions in HESRA and its delegated rules are discussed. In short, universities receive annual government funding, and they have discretion on its spending. However, executive boards of publicly funded universities must account for the legitimate and efficient spending of the funds (article 2.9 HESRA) and are obliged to manage the resources of the institution for proper operation and ensuring the continuity of the institution (article 2.17 HESRA). The HESRA contains an unused legal basis for regulating the use of public funds for private activities for the benefit of education or scientific research (article 2.7a HESRA). Instead, article 4 § 5 of the ministerial decree on annual reporting by education institutes (*Regeling jaarverslaggeving onderwijs*) obliges universities to account for the policy pursued as set out in the policy rule *Beleidsregel investeren met publieke middelen in private activiteiten*. This policy rule concerns the use of public funds and publicly funded facilities for private activities. The policy rule defines private activities as 'all activities that are partly carried out under the responsibility of the competent authority of a

higher education institution, insofar as the activities are aimed at more than just the performance of a publicly funded statutory mandate'. The policy rule provides seven conditions for the allocation of public funds for private activities, including that 'the investment does not lead to unfair competition'. This condition is expanded upon by the condition that higher education institutes must charge the full economic cost of the private activity. For elements that must be included in the calculation of the full economic cost, the policy rule refers to the provisions of the Market and Government Act (*i.e.* Chapter 4B of the Dutch Competition Act) and the Decree Market and Government. However, the policy rule is stricter by requiring an *ex post facto* calculation of the costs, while the Market and Government Act only requires a realistic estimate of the costs.

In *chapter four*, the focus is on the applicability of European state aid law. State aid law is only applicable when undertakings are the beneficiary of such aid. An undertaking is any entity engaged in an economic activity, irrespective of its legal form and the way in which it is financed. An economic activity consists of offering goods or services on a given market. The chapter discusses case law of the European Court of Justice on the qualification of education as a service and as an economic activity. The chapter also discusses soft law on state aid for research, development, and innovation. In this soft law, the European Commission gives member states leeway to invest in the exploitation of intellectual property by research organizations (or research infrastructure), provided that the profits are reinvested in primary activities of these research organizations (or that research infrastructure). The European Commission is also lenient towards using state funds for limited purely ancillary activities that are economic in nature but are regarded as non-economic activities and are therefore outside the scope of European state aid law. This lenient approach has neither been affirmed nor rejected by the European Court of Justice.

Chapter five is concerned with the way in which academic freedom and scientific integrity are guaranteed in the context of academic entrepreneurship. Academic freedom is derived from various sources. Article 1.6 HESRA states that academic freedom is observed (by everyone) at the institutions. Academic freedom includes the freedom to provide education, conduct research and receive education. Academic freedom is also protected by article 10 of the European Convention on Human Rights (ECHR) and by article 13 of the Charter of Fundamental Rights of the EU (CFR EU). In the form of freedom of sciences, academic freedom is also guaranteed in article 15 of the International Covenant on Economic, Social and Cultural Rights. The Court of Justice of the EU interprets article 13 CFR EU consistently with the case law of the European Court of Human Rights on academic freedom (See: European Commission/Hungary of 6 October, ECLI:EU:C:2020:792). In this regard, it notes that 'academic freedom in research and in teaching should guarantee freedom of expression and of

action, freedom to disseminate information and freedom to conduct research and to distribute knowledge and truth without restriction' (ECLI:EU:C:2020:792, par. 225). The European Court of Justice of the EU also considers the institutional and organizational dimension of academic freedom (protection from threats to the autonomy of the institution). There is limited case law on academic freedom in the context of academic entrepreneurship. This cited case is an exception and concerns a (private) institution's freedom of establishment in Hungary and its institutional freedom.

Academic freedom is necessary to be able to comply with standards of scientific integrity which are enshrined in codes of conduct. Chapter five focuses on the Netherlands Code of Conduct for Research Integrity (2018) which includes five principles and 61 standards for good research practices. The five principles are honesty, scrupulousness, transparency, independence, and responsibility. Examples of standards relevant in the context of academic entrepreneurship are '[i]f the research is conducted on commission and/ or funded by third parties, always specify who the commissioning party and/or funding body is' (standard 7), '[b]e open about the role of external stakeholders and possible conflicts of interest' (standard 8) or '[i]n research with external partners, make clear written agreements about research integrity and related matters such as intellectual property rights' (standard 9). The Code of Conduct also includes the institution's duties of care, such as to '[e]nsure that contracts with commissioning parties and funding bodies include fair agreements about access to and the publication of data and research material' (no. 16). According to the Code of Conduct non-compliance of standards could constitute 'research misconduct', 'questionable research practices' or 'minor shortcomings' and the Code of Conduct provides assessment criteria to weigh the seriousness of this non-compliance. Chapter five discusses advisory opinions of LOWI regarding cases of alleged non-compliance with the Code of Conduct, including a case that concerned an intrusive, external, attempt to influence certain policy research. The lack of reporting on this attempt constituted a questionable practice on behalf of the researchers.

Chapter six summarizes the regulations on (1) investing public resources and (2) guaranteeing academic freedom and scientific integrity. The chapter is concerned with the extent to which these regulations are clear, in the sense that they are formulated such that the involved actors within universities or other parties subjected to the regulations can deduce what is expected of them. The chapter identifies several issues regarding the clarity of the norms. Theses issues include:

– The inconsistent use of the concepts of 'statutory mandate' and 'private activities' of universities by the Ministry of Education, Culture and Science in its regulations and policy.

- The question whether the legal basis of the policy rule *Beleidsregel investeren met publieke middelen in private activities* in the HESRA is sufficient to regulate fair competition.
- One of the elements of assessment of education as an economic activity by the Court of Justice of the EU is whether the educational establishment is financed essentially by private funds. As Fierstra remarked as well in his case note on the *Getafe*-case (ECLI:EU:C:2017:496, NtER 2017, p. 181-189), this is inconsistent with the concept of 'undertaking' in European state aid law, which is any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.
- As discussed before, in its soft law the European Commission grants certain leeway for the public funding of economic activities of research organizations. However, there is little legal certainty as long as the Court of Justice of the EU has not affirmed or rejected the extensive interpretation applied by the European Commission.
- The Netherlands Code of Conduct for Research Integrity entails certain standards that are more comparable to best practices than clear prohibitions, which may lead to legal uncertainty for academics.

This dissertation concludes that to reach a clear legal framework for academic entrepreneurship concrete norms for various actors are necessary. Considering the risks of academic entrepreneurship, such norms should be based on multiple principles rather than the sole principle of 'efficient spending' of public funds. The main document that is relevant to academic entrepreneurship – the policy rule *Beleidsregel investeren met publieke middelen in private activities* – is based on this principle of efficient spending of public funds. These multiple principles and norms should be regulated holistically in one regulation, such as in the HESRA or in a decree under article 2.7a HESRA.

To this end, the legislator should start with redefining the universities' statutory mandates for which they should receive and spend public funds. In this process the legislator has the prerogative to formulate the scope of public tasks as well as to decide to introduce market mechanisms. According to the European Commission's soft law, what constitutes an 'economic activity' relies partly on political choices and economic developments of the Member State. Such choices or developments make it possible for an economic activity to become a non-economic activity and vice-versa. What constitutes an 'economic activity' is therefore partly influenced by choices of the legislator. Thus, the legislator should actively re-think and clarify which aspects of academic entrepreneurship should be part of the universities' statutory mandate. This dissertation aims to serve as a starting point for discussions on how academic entrepreneurship is regulated and how such regulation could be improved.