

DECISIONS

COMMISSION DECISION (EU) 2020/391

of 20 September 2019

on the measure SA.34402 – 2015/C (ex 2015/NN) implemented by Germany for Hochschul-Informations-System GmbH

(notified under document C(2019) 6836)

(Only the German text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments (¹) and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) On 15 March 2012, the Commission received a complaint from Datenlotsen Informationssysteme GmbH ('Datenlotsen' or 'the complainant') alleging that the direct grants and tax exemptions for the public undertaking Hochschul-Informations-System GmbH ('HIS'), constituted State aid within the meaning of Article 107 of the Treaty and were incompatible with the internal market.
- (2) By letter dated 23 December 2015 ('the Opening Decision'), the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the measure.
- (3) The Opening Decision was published in the *Official Journal of the European Union* (²) on 4 March 2016, inviting interested parties to submit their comments on the measures. The Opening Decision was sent to the complainant on 13 January 2016. Germany replied to the Opening Decision by letter of 23 February 2016.
- (4) The Commission received comments from interested parties in the time period between 16 March and 4 May 2016. By letter of 24 May 2016, those comments were sent to Germany that submitted its views on them by letter of 19 July 2016.
- (5) The Commission requested further information from Germany on 4 April, 9 November 2017 and on 16 March 2018 as well as on 11 February, 4 April and 5 June 2019. Germany replied on 6 April, 21 November 2017 and on 18 April 2018 as well as on 22 February, 17 April and 5 July 2019.
- (6) The complainant submitted further information relating to the measures on 4 November 2016, 9 February, 31 May and 5 October 2017.

(¹) OJ C 85, 4.3.2016, p. 6.

(²) OJ C 85, 4.3.2016, p. 6.

2. DETAILED DESCRIPTION OF THE MEASURES

2.1. Description of the facts

(7) HIS was established by the foundation Stiftung Volkswagenwerk in 1969 as a non-profit organisation. In 1976 the federal State ('Bund') and the Länder acquired all shares ⁽⁵⁾ in HIS and held it up until its conversion into a cooperative ⁽⁶⁾ (see recital 15). The objective of HIS was to support higher education establishments and the competent authorities in their efforts to achieve the rational and cost-effective fulfilment of their higher educational role.

(8) HIS was operating on a non-profit basis ⁽⁷⁾, although it was incorporated in 1976 as a limited company governed by private law ('GmbH'). Its funding acts were the consortium agreement ('Konsortialvertrag'), the contractual agreement between Bund and the Länder defining the modalities of collaboration and obligations of HIS' owners, as well as the bylaws ('Satzung'). The objectives and the parameters of the annual operations were laid down in the annual work programmes/business plans ('Arbeitsprogramme'/'Wirtschaftsplan').

(9) The Satzung provided that the supervisory board was made up of members appointed by the Länder, the conference of rectors of the higher education establishments (an association bringing together German universities and higher education establishments which are public or recognised by the State), and the federal authorities.

(10) The objectives of HIS included the introduction and application of information systems for use in the management of higher education institutions ⁽⁸⁾.

(11) The Konsortialvertrag and the Satzung provided that the contractual parties (Bund and Länder) committed to jointly cover the resource needs of HIS and that the funding were to cover the material needs of HIS, to the extent that these activities did not generate sufficient revenues to carry out the tasks assigned to HIS.

(12) The following administrative processes were continuously supported by HIS products: application and enrolment management, student administration, exam administration, personnel and job administration. HIS IT systems (for example, the new software generation 'HISinOne' ⁽⁷⁾) are used in over 200 public and religious higher education establishments in Germany ⁽⁸⁾.

(13) The establishment of HIS was intended to guarantee a long-term, continually available range of services not geared to profit maximization, but exclusively to higher education requirements in the information technology sector for higher education. In order to facilitate such a range of supply, HIS has received state subsidies continuously since its foundation in the form of direct grants. As a non-profit/public benefit purpose organisation, HIS was also exempt from corporation tax ('Körperschaftsteuer') ⁽⁹⁾ and trade tax ('Gewerbesteuer') ⁽¹⁰⁾.

⁽⁵⁾ The shareholder structure of HIS and the funding structure complied with the shared financing of higher education institutions in Germany: Pursuant to Article 30 of the Basic Law, the Länder are in principle competent for performing state tasks in the education and science sector; the federal government only undertakes the funding of academic institutions in specific cases.

⁽⁶⁾ On 28 January 2014, HIS was transformed into a cooperative (HIS eG), in which the public universities also participate.

⁽⁷⁾ Section 3(1) of the Satzung provides that the undertaking serves exclusively and directly public benefit purposes within the meaning of the 'The tax-privileged purposes' section of the Fiscal Code ('Abgabenordnung' or 'AO').

⁽⁸⁾ Section 2(1) of the Satzung (2000): 'The purpose of the company is to support higher education institutions and competent administrative bodies in their efforts to perform higher education tasks rationally and cost-effectively by "(a) developing procedures for rationalising university administration and advisory support for their application; (b) producing studies and expert opinions to form the basis for decision making; (c) developing guiding principles for university construction; (d) ensuring information provision and the organisation of information exchange". From these, (a) and (d) are directly linked to university IT, software development and support.'

⁽⁷⁾ Software system HISinOne is a technically and functionally integrated, web-based university management system for all processes and structures at universities of any organisation type and size. It was designed as an IT solution for the strategic management of universities and is pre-configured by integrated reference models and processes for various types of higher education and State specific requirements in Germany. It supports students in planning their studies and supports the audit offices, personnel administration, alumni office or student secretariat at the universities.

⁽⁸⁾ Germany has confirmed in its reply to the Opening Decision that in the present context, religious higher education institutions are synonymous with public higher education institutions.

⁽⁹⁾ Notice on the modification of 24 May 1965 of the Corporation Tax Act ('Bekanntmachung der Neufassung des Körperschaftsteuergesetzes vom 24. Mai 1965', Bundesgesetzblatt Jahrgang 1965 Teil I Nr. 24, ausgegeben am 11. Juni 1965, S. 449).

⁽¹⁰⁾ Notice on the modification of 25 May 1965 of the Trade Tax Act ('Bekanntmachung der Neufassung des Gewerbesteuergesetzes vom 25. Mai 1965', Bundesgesetzblatt Jahrgang 1965 Teil I Nr. 24, ausgegeben am 11. Juni 1965, S. 458).

(14) At the start, HIS provided its products and services to universities free of charge, but in 1997, it started to impose charges on the public higher education institutions, leaving, however, the nature of the financing, in fact a financing of losses, as such, unaffected. In 2003, the financing was modified again, as the fees were transformed into prices that were fixed by the supervisory board. This led to a significant co-financing of HIS' activities by the universities, increasing from 35,7 % in 2002 to 74,1 % in 2013. On 16 September 2013, HIS formally split off the higher education development and higher education research areas and transferred those to an independent institution funded by the Bund and the Länder. The higher education IT support services were retained by HIS IT. In the following, the designation 'HIS IT' will also be used in relation to the time-period prior to 2013 to indicate transaction figures or refer to other facts that were linked specifically to the IT activities of HIS.

(15) As of 28 January 2014, HIS was altered into a cooperative ('Genossenschaft', and renamed 'HIS eG'). Germany confirmed that since 1 January 2014, HIS no longer received direct grants. HIS eG is financed by its members. All Länder (previously shareholders of HIS) are members of HIS eG and the cooperative is open for membership to public universities. When joining the cooperative, each member is obliged to pay in at least one, with a possible maximum of ten, shares of EUR 5 000. Members also incur an annual membership fee and, in addition, universities belonging to the cooperative pay a fee for the services that HIS eG provides. Only members can benefit from HIS eG's services.

2.2. The complaint

(16) Datenlotsen, the complainant, is a German company active in the market of university IT systems since 1993. According to its own indications, Datenlotsen counts over 70 universities as its clients in Germany, Austria and Switzerland providing integrated IT software and support for campus management. Its flagship product is 'CampusNet'.

(17) According to the complainant, until 31 December 2013 unlawful State funding enabled HIS to offer software to German and foreign public and private universities without charging a licence fee and to offer software support services below market price, which undercut competitors and in general inhibited the software market development in Germany. The services HIS offered allegedly competed with the complainant's own commercial services. The complainant claims that the yearly State funding constitutes non-notified operating aid (⁽¹⁾) from which HIS has benefited for almost 40 years.

(18) The complainant also pointed out that HIS was subject to tax exemptions, notably exemptions under the Corporation Tax Act, the Trade Tax Act and the Value Added Tax.

(19) In addition, the complainant made allegations of State aid to the benefit of HIS eG. However, as it was expressly stated in recital 16 of the Opening Decision, those allegations are not part of the formal investigation in this State aid matter and will consequently not be addressed in this decision.

2.3. Germany's arguments prior to the Opening Decision

(20) Germany argued that the measures did not constitute State aid in the sense of Article 107(1) of the Treaty. First, HIS was not an 'undertaking', but rather a part of a 'State internal/in-house organisation' in the field of education and its activities were mainly of a non-economic nature. Second, HIS' activities would be in line with the State's educational tasks that extend to providing universities with human, financial and organisational resources.

(21) Germany further argued that HIS, through its State funding, had not benefitted from an advantage in the sense of Article 107(1) of the Treaty, as any 'advantage had been passed, in its entirety, back to Germany through the State-funded universities. Germany also explained that it was an economically rational, market conform decision to bundle all IT operations for the public universities into one single entity, HIS.

⁽¹⁾ According to the complainant, the direct grant funding to HIS varied over time: in 2011, it amounted to around EUR 9,2 million, in 2010 to EUR 8,6 million and in 2008 to EUR 8,2 million. These alleged amounts were paid to HIS on an annual basis by the Bund and the Länder.

(22) In the alternative, the German authorities argued that the yearly State funding

- (a) concerned a service of general economic interest (SGEI) in the sense of Article 106(2) of the Treaty; or
- (b) constituted existing aid pursuant to Council Regulation (EU) 2015/1589⁽¹²⁾ ('the Procedural Regulation') that became aid as a result of the development of the internal market, more specifically, the development of a market for HIS' products.

(23) Finally, Germany stated that the direct State funding (the deficit financing through the payment of direct grants) was abolished on 31 December 2013. With respect to the alleged tax measures, Germany argued that the exemptions were the outcome of the proper application of German tax legislation.

2.4. **Grounds for initiating the formal investigation procedure**

(24) In its decision to open the formal investigation procedure, the Commission expressed doubts as to whether the direct grants and the tax measures that benefitted HIS until 31 December 2013⁽¹³⁾ constituted aid within the meaning of Article 107(1) of the Treaty and, if so, whether it qualified as compatible existing aid.

2.4.1. *Presence of aid*

(25) As to the existence of State aid, the Opening Decision expressed doubts with respect to the existence of a number of elements necessary for the conclusion that the measures did not constitute State aid.

(26) First, the Commission raised the question as to whether or not HIS constituted an undertaking within the meaning of Article 107(1) of the Treaty. More specifically, the Commission questioned whether HIS' activities were non-economic on the basis that (1) HIS was an instrument used within the 'in-house' structure of the State in the field of education⁽¹⁴⁾; or (2) HIS' activity, more specifically, the provision of software to universities, was closely connected with carrying out of a public task of the State⁽¹⁵⁾ 'by its nature, its aim and the rules to which it [was] subject'⁽¹⁶⁾. In the *Compass-Datenbank* judgment, the Court found that data collection activity in relation to undertakings on the basis of their obligation to disclose data that cannot be separated from the collection and maintenance of this data, constituted a non-economic activity⁽¹⁷⁾. The Commission expressed doubts with respect to the characterisation of HIS' activities as non-economic in view of the following facts:

- (a) some features of the software provided by HIS were not 'education specific' such as personnel and financial software;
- (b) the HIS software may not have been used by the universities purely for a non-economic purpose;
- (c) the existence of competitors in the market could challenge the notion that HIS had been carrying out a non-economic activity that is ancillary to the public task of providing university education; and

⁽¹²⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9). Point (v) of Article 1(b) provides that a measure that did not constitute aid when it was put into effect can become State aid due to the evolution of the internal market.

⁽¹³⁾ See recital 19.

⁽¹⁴⁾ The Opening Decision in its recital 38 referred to the Judgment of the General Court of 16 July 2014, *Zweckverband Tierkörperbeschaffung Rheinland-Pfalz, im Saarland, im Rheingau-Taunus-Kreis und im Landkreis Limburg-Weilburg v Commission*, T-309/12, ECLI:EU:T:2014:676, paragraphs 70 to 74 for the statement that the fact that an activity is carried out 'in-house' does not exclude that the activity is economic. In this judgment, the General Court held that whether the State exercises an activity directly by a body belonging to public administration or another special entity, has no impact on the application of competition rules to that activity. It also held that such a body exercises an economic activity, as long as that activity can, in principle, be performed on an open market, i.e. as long as the market is not completely closed to competition by a statutory provision in the Member State in question.

⁽¹⁵⁾ Recital 29 of the Opening Decision citing the Judgment of the Court of Justice of 12 July 2012, *CompassDatenbank v Austria*, C-138/11, ECLI:EU:C:2012:449, paragraph 41.

⁽¹⁶⁾ Recital 28 of the Opening Decision citing the Judgment of the Court of Justice of 19 January 1994, *SAT Fluggesellschaft mbH v Eurocontrol*, C-364/92, ECLI:EU:C:1994:7, paragraph 30.

⁽¹⁷⁾ Recital 29 of the Opening Decision citing the Judgment of the Court of Justice of 12 July 2012, *CompassDatenbank v Austria*, C-138/11, ECLI:EU:C:2012:449, paragraphs 40-41.

- (d) HIS' supply of IT services to German private and foreign universities did not appear to be a non-economic activity. In connection with the supply of services to German private and foreign universities, Germany alleged that accounts relating to this activity were separated from the accounts relating to the services to public universities, but according to the Opening Decision, Germany failed to provide evidence.
- (27) Second, the Opening Decision expressed doubts as to whether or not the direct grants conferred a selective advantage on HIS within the meaning of Article 107(1) of the Treaty as the State funding from which HIS benefited may not have entirely flowed back to the State (through the universities). It was stated in the Opening Decision that the direct grants to HIS might not conform to the market economy operator principle.
- (28) The Opening Decision expressed doubts regarding the question of whether the tax exemptions granted to HIS provided a selective advantage to HIS that other non-profit undertakings with a public benefit purpose carrying out an economic activity would not benefit from. In sum, the Commission questioned whether the exemptions in question were correctly applied to HIS.
- (29) Third, the Commission expressed doubts as to whether or not the SGEI conditions were fulfilled, given that the contracts and other legal provisions applicable to HIS' activity would not amount to an 'entrustment' and no mechanism for the avoidance of overcompensation was established in advance, as required by the *Altmark*⁽¹⁸⁾ judgment for a finding that the measures did not constitute State aid.
- (30) The Commission considered that in case the measures constituted State aid they would most likely distort, or at least, threaten to distort competition. In addition, an effect on trade between Member States could not be excluded.

2.4.2. Qualification as new aid

- (31) Should the existence of State aid be established, the Commission expressed doubts as to whether the measures at issue could be considered existing aid within the meaning of Article 107(1) of the Treaty and point (v) of Article 1(b) of Regulation (EU) 2015/1589, as Germany argued.
- (32) Germany argued that the yearly funding of HIS, as a scheme, must be considered existing aid because at the time when it was granted (in 1976), there was no market for the products and services provided by HIS, and hence the yearly funding could not constitute State aid within the meaning of Article 107(1) of the Treaty. The Commission considered that a market for the IT products and services in question may have emerged since the founding of HIS within the meaning of Article 1(b)(v) of Regulation (EU) 2015/1589, (see recital 191 of the Opening Decision), and HIS might therefore have benefitted from State aid since the emergence of this market. The Opening Decision noted, however, that Germany did not provide sufficient proof that a market did not exist in 1976, while HIS' activities were already ongoing. In addition to evidence that a market did not exist at the beginning of the reference period, Germany was required to prove that the scheme did not undergo significant alterations since it became State aid. The Commission referred to the fact that changes to a financing instrument were to be considered to be significant if its main elements have been changed, such as the nature of the benefit, the objective pursued by the measure, its legal basis, the range of benefitted undertakings or the source of the financing.

2.4.3. Compatibility of the aid

- (33) Regarding the compatibility of the alleged aid measures, the Commission expressed doubts as to whether or not they would be compatible with the internal market on the basis of any guidelines, Commission Regulation (EU) No 651/2014⁽¹⁹⁾, Commission Regulation (EU) No 1407/2013⁽²⁰⁾, or directly under the provisions of Article 107(3)(c) of the Treaty.

⁽¹⁸⁾ Judgment of the Court of Justice of 24 July 2003, *Altmark Trans GmbH*, C-280/00, ECLI:EU:C:2003:415, paragraphs 89-90.

⁽¹⁹⁾ 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 of the Treaty (OJ L 187, 26.6.2014, p. 1).

⁽²⁰⁾ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1).

3. COMMENTS FROM INTERESTED PARTIES

3.1. Comments from interested parties other than the complainant

(34) In addition to comments from the complainant and Germany, the Commission received 42 submissions predominantly from public higher education institutions using HIS software and smaller sub-contractors that depend on the open architecture of HIS products for their businesses. Furthermore, two Italian software providers commented.

(35) With the exception of the two Italian undertakings, the interested parties emphasised the close link between the functionality of HIS products and services and the university system overall.

(36) The university system required the development of specific IT-solutions, tailored to the specific needs of public higher education institutions. IT solutions, it was pointed out, have been developed and customised over time in close cooperation between HIS and the parties that submitted comments. Since its foundation in 1976, there had been a close link between HIS' activities and public education. Initially, in the mid-1970s, HIS began to develop software for individual university administration departments. This activity concerned solutions for different administrative areas that were, however, not interrelated. With HIS-GX, the first integrated campus management solution was developed in the late 1980s. Although products and technologies changed over time, HIS always had similar functionalities, such, as for example, supporting student application and admission, student, alumni, exam and course administration ⁽²¹⁾.

(37) Several parties pointed out that the open source and data model of HIS allowed universities to further develop software products according to local usage requirements. Overall, interested parties expressed the view that the software products in question were highly specialised and customised with a view to fulfilling specific functions within the university system in Germany.

(38) Several interested parties also pointed out that HIS' activities did not have a market foreclosing effect. A large majority of respondents were of the view that a market for software solutions to the higher education sector in Germany developed in the past 12 to 14 years, more specifically, since 2005/2007. A smaller group indicated however that a market came into existence already in the 1990s albeit with a significantly more limited portfolio than that of HIS. It is undisputed that suppliers of at least parts of the university management applications have been in existence since then and universities have been free to select one or more other suppliers. However, respondents noted that even today there is no full-blown market, as there is not a single supplier that can provide the full scope of the services that HIS does.

(39) Many respondents also pointed out that, should HIS go bankrupt, as a result of the State aid procedure (based on a recovery of aid scenario), this would greatly disrupt the German public university system. Switching costs are said to be enormous and a significant period of time would be involved (at least 24 months or even 8-10 years). HIS' disappearance would also weaken competition on the market, whereas the open source nature of HIS' software has in fact a competition fostering effect. Generally, the public higher education institutions in Germany that commented felt that the provision of the in-house/self-supply solutions for the performance of their administrative core business as carried out by HIS was satisfactory and should be maintained.

(40) The two undertakings in Italy were critical of the system and expressed the view that HIS had been benefitting from incompatible State aid. They compared the support system of HIS to the situation in Italy, which they also criticised for involving State support to a certain Italian supplier of university software. One also pointed out that case law, in particular the judgment *Commission v Italy*, stated in the context of software supply for the general State administration that 'the design, programming and operation of data processing systems, are of a technical nature, and thus unrelated to the exercise of official authority' ⁽²²⁾.

⁽²¹⁾ See footnote 7.

⁽²²⁾ Judgment of the Court of Justice of 5 December 1989, *Commission v Italy*, C-3/88, ECLI:EU:C:1989:606, paragraph 13.

3.2. Comments by the complainant

3.2.1. The measures do constitute State aid

3.2.1.1. HIS is an undertaking exercising an economic activity

- (41) The complainant points out that an entity's classification as an undertaking always takes place with respect to individual activities. Neither the entity's status in national law, nor its objective relating to profit making is of any relevance.
- (42) The complainant states that the Opening Decision questioned HIS' character as an undertaking based on the *Compass-Datenbank* judgment (23). In that judgment, the Court of Justice established that making company data available to the public by the State is not an economic activity because it is inseparable from the collection of the same data that is part of the public power of the State ('*hoheitliche Befugnisse*') (24). According to the complainant, the factual background in the current case is different from that of the *Compass-Datenbank* judgment. The *Compass-Datenbank* judgment was about the data disclosure activity of private companies in relation to facts and documents registered in the Austrian commercial registry. As a distinctive feature, the complainant points out that in *Compass-Datenbank*, the entire disclosure activity was thoroughly regulated, including a legal disclosure obligation on the registering companies coupled with an 'enforcement activity'.
- (43) The complainant further argues that pursuant to German law, private undertakings can exercise public powers but the authority to do so must be transferred to the undertaking through legislation. According to the complainant, HIS did not have public power or a public task to provide IT services to universities, and it did not have a statutory obligation.
- (44) In fact, continues the complainant, HIS provided a service that, pursuant to German laws, could also be provided by private undertakings. Some sort of a link between HIS' services and the State's obligation in the educational field, cannot, according to the complainant, lead to an elimination of the characterisation of HIS as an undertaking. Universities need different types of services, including software. The fact that they need services, such as text editing for example, would not lead to the conclusion that Microsoft is not an undertaking.
- (45) The complainant also points out that the General Court found in the case of *Zweckverband Tierkörperfeseitigung Rheinland-Pfalz* (25) that a public sector undertaking legally entrusted with a public duty (elimination of domesticated animals that died of certain contagious diseases posing a health hazard) was found to have carried out an economic activity.
- (46) According to the plaintiff, the judgment of the General Court in *Spain v Commission* (26) and the Court of Justice in the *Aéroport de Paris* (27) establish that an activity is economic if there are competitors on a market. In addition, the complainant cites two more cases: Commission Decision C(2013) 2361 final concerning State aid SA.25745 (*ZVG Portal*) (28) and Commission Decision C(2009) 211 final concerning State aid N467/08 (*Aware-P programme 'advanced water management and rehabilitation in Portugal'*) (29). In the latter case, the Commission found that the development of commercially exploitable software for the improvement and maintenance of water management infrastructure was an economic activity. In *ZVG Portal*, the complainant argues, the publication of auctions in insolvency proceeding by Courts was found not to constitute an economic activity but was a public task based on a legal obligation and a 'procedural necessity'.

(23) See Recital 29 of the Opening Decision.

(24) Judgment of the Court of Justice of 12 July 2012, *CompassDatenbank v Austria*, C-138/11, ECLI:EU:C:2012:449, paragraph 41.

(25) Judgment of the General Court of 16 July 2014, *Zweckverband Tierkörperfeseitigung Rheinland-Pfalz, im Saarland, im Rheingau-Taunus-Kreis und im Landkreis Limburg-Weilburg v Commission*, T-309/12, ECLI:EU:T:2014:676, recital 71.

(26) Judgment of the General Court of 26 November 2015, T-461/13, *Kingdom of Spain v Commission*, ECLI:EU:T:2015:891.

(27) Judgment of the Court of Justice of 24 October 2002, C-82/01 P, *Aéroport de Paris v Commission*. ECLI:EU:C:2002:617, recital 79.

(28) Commission Decision C(2013) 2361 final of 2 May 2013, SA.25745 (2013/NN) (ex- CP 11/2008) – Germany – National Website for auctions in insolvency proceedings (*ZVG Portal*) (OJ C 167, 13.6.2013, p. 1), http://ec.europa.eu/competition/state_aid/cases/247954/247954_1433360_92_2.pdf

(29) Commission Decision C(2009) 211 final of 28 January 2009, SA.26572 (N 467/08) – Portugal – Aware-P programme (OJ C 106, 8.5.2009, p. 21). http://ec.europa.eu/competition/state_aid/cases/227527/227527_946839_29_1.pdf

- (47) In sum, according to the complainant, supplying a service in connection with the exercise of a public task does not take the undertaking providing that service out of the scope of 'undertaking'.
- (48) The complainant also argues that the *TenderNed* judgment⁽³⁰⁾ does not apply to HIS' activities. In this judgment, the General Court found that providing contracting authorities with tender procedure functionalities in accordance with applicable (EU level and national) law on public procurement is connected to the exercise of public power (paragraph 59 of the *TenderNed* judgment). According to the complainant, the criteria recognised in that judgment, such as (1) the service is entrusted to the undertaking in an effort to ensure implementation of EU level legislation (paragraph 106 of the *TenderNed* judgment); (2) the activity's nature as a service of general interest; (3) the existence of a statutory obligation mandating the provision of the service; and (4) the lack of remuneration for the service by those who use it, supports the conclusion that HIS was an undertaking. The complainant points out that there is no statutory obligation or any other type of legal empowerment for HIS to carry out its activities.
- (49) Finally, the complainant reiterated that HIS must be regarded as an undertaking, both in the old and in the new (HIS eG) legal form. The complainant also argued that the foreclosure of the market had been progressing, as HIS continues to receive contracts for the delivery of IT services. HIS could develop its products and obtain its current market position as a result of continuous State financing over the past decades.

3.2.2. *The measures do not constitute existing aid*

3.2.2.1. There was a market for university software decades ago

- (50) The complainant alleges that already in the 1970s there were undertakings in Germany and abroad that were or could have been active in the market of electronic data management in the higher education sector. At the time when HIS started to become interested in university software systems, there were undertakings active in the software market for small and mid-sized companies in all industries.

3.2.2.2. There was a significant alteration to the scheme

- (51) The complainant alleges that the supported activities, the manner of financing, as well as the formulation of the objective in the case constantly changed. HIS' purpose, according to the Satzung, was phrased in a very broad and vague manner. Such vague formulations fail to fulfil the requirement of legal certainty as individuals cannot assert their rights based on such unclear language. The amount of financing was determined on a year-by-year basis, thus the measure was in fact a series of grants on a yearly basis.
- (52) As to the supported products/services, there was no continuity in the product range over the years. The methods of data collection evolved continuously: services in the 1970s had nothing in common with the services of the 1990s (such as the 'GX modules' (see recital 36)) or with the campus management systems of the 2000s. In terms of objectives, HIS' purpose originally (in 1969), was to link and evaluate data that individual universities provided and which was necessary to create educational programmes. HIS also coordinated information consolidation between the Bund and the Länder. Given that from 1971 onward, university statistics were handled by the Federal Bureau of Statistics, HIS needed a new activity. HIS then developed software to assist universities to generate the data needed for the central data evaluation. In addition, HIS developed university research as an activity that consisted of interviewing students.
- (53) In 1976, the complainant continues, HIS took over the task of 'developing procedures for rationalising university administration and advisory support for their application', which could have been carried out by other undertakings. This was so even if there was in fact no undertaking that was *actually* offering the same service.
- (54) The complainant states that in the 1980s and 1990s, undertakings gradually discovered universities as potential clients that had a need for university specific software. HIS reacted by extending its range of activities by simply adding to its product range software products for operational university management, such as the 'SOS' (Studenten-Operations-Systems) products. This was never part of the field of activity designated by the Satzung. Thus, the State financing of HIS supported an activity in a market on which HIS always had competitors.

⁽³⁰⁾ Judgment of the General Court of 28 September 2017, Case T-138/15, *Aanbestedingskalender and Others v Commission*, ECLI:EU:T:2017:675.

- (55) The origin of HIS' current market position, according to the complainant, is in the 1980s and 1990s. With the financial support provided by the State, HIS developed and sold HIS modules of the GX generation that are still in use in almost all universities. This State financing enabled HIS to establish its extensive presence on the market, even though, the complainant alleges, HIS' products did not meet the requirements of the market. According to the complainant, in 2012, HIS in fact announced that it would concentrate on smaller universities, which could purchase services in addition to the standard set of services for extra fees. However, competitors do exist for these additional services, some of which managed to obtain clients.
- (56) The complainant insists that competition (in the form of alternatives to HIS' products) was in fact already present in the 1990s when integrated campus management systems were introduced. The most important competitor for HIS' products left the market for economic reasons and Datenlotsen also offered a competing product. Datenlotsen was in fact so successful that over the past years, it won the majority of 28 public procurement procedures.
- (57) The complainant mentions a whole range of other competitors, in Germany and outside that existed at the time the complainant submitted its comments, and it states that universities often made their own developments. The complainant also points out that a system similar to Germany's existed in Spain, France and parts of Italy.

4. COMMENTS FROM GERMANY

- (58) Germany puts forward the argument that pursuant to Article 17 of Regulation (EU) 2015/1589, the recovery of any and all aid awarded prior to 2003 would be barred by the statute of limitations.
- (59) The German authorities consider that HIS did not benefit from any State aid in the sense of Article 107(1) TFEU.

4.1. The measures do not constitute State aid

4.1.1. HIS is not an undertaking

4.1.1.1. HIS is part of 'internal/in-house organisation'

- (60) Germany reiterated that HIS should rather be regarded as 'State internal/in-house organisation' ('staatlicher Binnenbereich') in the field of education: for efficiency reasons, the Länder and the Bund bundled in HIS software supply resources that should otherwise have been provided separately by each Land or each university. Germany pointed out that an overwhelming majority of the 42 interested parties that commented on the Opening Decision also supported this view. Germany welcomed the many comments expressing the view that universities relied, from the beginnings, on cost-effective solutions that HIS provided. Germany also pointed out that half of the comments noted that HIS' disappearance would result in a collapse of the German higher education system. Thus, HIS' existence and operation, noted Germany, is considered to be a critically important condition of a properly functioning public higher education system in Germany.
- (61) The Bund or the Länder, according to Germany, should not be obliged to 'outsource' the provision of such university software services, noting that the State reserves the right to take a basic decision on whether to perform services itself and is not under an obligation to turn to the market ⁽³¹⁾. Public procurement laws also permit the State to make this decision ⁽³²⁾.
- (62) The establishment of HIS, says Germany, was intended to ensure a long-term, continuously available range of services in the area of information services for universities, not focusing on profit maximization but solely on university needs. HIS only carried out activities to the extent it was necessary for the universities to carry out their public task.

⁽³¹⁾ See also Communication of the Commission of 20.11.2007, COM (2007)725 final, p. 4 ('it is essentially the responsibility of public authorities, at the relevant level, to decide on the nature and scope of a service of general interest. Public authorities can decide to carry out the services themselves or they can decide to entrust them to other entities, which can be public or private, and can act either for-profit or not for-profit').

⁽³²⁾ Judgment of the Court of Justice of 22 December 2010 in C-2015/09, *Mehiläinen Oy*, ECLI:EU:C:2010:807, paragraph 31; Judgment of the Court of Justice of 9 June 2009 in C-480/06, *Commission v Germany*, ECLI:EU:C:2009:357, paragraph 45.

(63) Although HIS itself is not a public enterprise, in view of its management, tasks and control mechanisms (its management by public authorities/entities, which also determine its budget, its specific work programme, as well as the conditions of its operation), it is to be viewed as an entity that is embedded in the State itself.

(64) Germany states that the judgment *Zweckverband Tierkörperbeseitigung Rheinland-Pfalz* ⁽³³⁾ concluding that an 'in-house' entity can carry out an economic activity, is not inconsistent with its position, given that HIS does not carry out an economic activity. An assumption of the existence of an economic activity cannot be based on the fact that HIS itself is not technically identical with the State or with any one of the State's subdivisions. When an entity, regardless of its legal form, provides services to public entities in support of the State's public tasks, the activity is not of an economic nature.

(65) In connection with the argument that HIS' activities were not of an economic nature, Germany emphasizes that for at least two decades (until the mid-1990s) there was no market for university management software, so there was a general market failure in this field. There were no potential suppliers of the services that HIS provided in the 1970s. The complainant itself stated in several of its earlier submissions that the market was established in 1993 at the earliest. This view was confirmed by the comments submitted by other interested parties, many of which supported the view that the market came into existence only in the past few years. Comprehensive software in the College Management field only exists since 2007 or 2008, which is to say since about the time public procurement procedures were introduced. Even now, says Germany, referring to a number of comments from interested parties, no products as comprehensive as HIS' are available on the market.

4.1.1.2. HIS Services constitute an inseparable part of the non-economic activities of universities in the areas of research and education

(66) Germany argues that both Commission Communication 2014/C 198/01 ⁽³⁴⁾ ('R&D Framework') and Commission Communication 2012/C 8/02 ⁽³⁵⁾ ('SGEI Communication') state that public education organised within the national educational system, predominantly or entirely funded by the State and supervised by the State is considered as a non-economic activity.

(67) Germany reiterates that HIS' activities would mainly be non-economic as its aim is inseparable from the State's educational tasks, which includes providing universities with human, financial and organisational resources. The Satzung specifically provides that the purpose of HIS' activities is the provision of support to universities, in particular through the development and implementation of processes for the rationalisation of university management.

(68) Germany is of the position that without an efficient IT-based university administration, the constitutional right to free access to higher education could not be guaranteed and the constitutionally enshrined obligation of the State to ensure a functioning higher education system within the meaning of the first sentence of Article 12(1) of the Basic Law ⁽³⁶⁾ could thus not be fulfilled. University education would simply collapse in the absence of effective university IT instruments for the completion of university management tasks. Germany reiterated that even now, there is a lack of private providers willing or able to provide IT services custom made to meet the entire scope of universities' needs.

(69) Germany rejects the complainant's argument that the *Compass-Datenbank* judgment does not support the position that HIS is not an undertaking. Germany points out that whether or not HIS itself has public powers (*hoheitliche Befugnisse*) is irrelevant. The *Compass-Datenbank* judgment in fact concludes that activities inseparably linked to the exercise of a public task have a non-economic character ⁽³⁷⁾. The Opening Decision itself stated that based on the *Compass-Datenbank* case law, HIS' activities could very well be viewed as activities that are 'necessary' to the exercise of a non-economic public task ⁽³⁸⁾. The complainant, continues Germany, rightly points out that not all services that universities need for their day-to-day operation, such as, for example, the use of licenses, the renting of real estate property, constitute an activity inseparable from the execution of the public task of public education.

⁽³³⁾ Judgment of the General Court of 16 July 2014, *Zweckverband Tierkörperbeseitigung Rheinland-Pfalz, im Saarland, im Rheingau-Taunus-Kreis und im Landkreis Limburg-Weilburg v Commission*, T-309/12, ECLI:EU:T:2014:676, paragraph 70.

⁽³⁴⁾ Communication from the Commission – Framework for State aid for research and development and innovation (OJ C 198, 27.6.2014, p. 1).

⁽³⁵⁾ 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 (OJ C 8, 11.1.2012, p. 4).

⁽³⁶⁾ First sentence of Article 12(1) of the Basic Law: 'All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training'.

⁽³⁷⁾ Judgment of the Court of Justice of 12 July 2012, *CompassDatenbank v Austria*, C-138/11, ECLI:EU:C:2012:449, paragraphs 38, 40.

⁽³⁸⁾ See recitals 29, 30, 31 and 32 of the Opening Decision referring to paragraphs 40 and 41 of the Judgment of the Court of Justice of 12 July 2012, *CompassDatenbank v Austria*, C-138/11, ECLI:EU:C:2012:449.

Germany explains, however, that services specifically tailored to the needs of universities were inseparable from the execution of universities' 'public' tasks if those services substitute self-provided services that are critically important to the execution of the public task⁽³⁹⁾ and are not available on the market in the required scope. Germany also states that HIS itself does need to have public power or public task in the field of education for its activities' to fall within the scope of the *Compass-Datenbank* jurisprudence.

(70) With respect to one of the submissions by undertakings from Italy⁽⁴⁰⁾, analysing *Commission v Italy*,⁽⁴¹⁾ (see recital 40) Germany provides a more nuanced argumentation relating to non-separability. Germany argues that that judgment (1) did not establish that software and IT services are *per se* separable from the exercise of public powers or the carrying out of public tasks; (2) is related to rules about freedom of establishment and freedom to provide services⁽⁴²⁾. Finally, Germany points out that the justification argued for the Italian position in that judgment was the treatment of confidential data. Germany argues that the *Commission v Italy* judgment did not invalidate its 'inseparability' argument in the present case. Beyond the entirely different circumstances (general State administration systems as opposed to university software), legal grounds (freedom of establishment and to provide services as opposed to State aid rules), and possible justification (confidentiality) for the selection of certain types of companies as contractual partners, the difference between the facts underpinning this judgment and the fact pattern in the current case is considerable. According to Germany, the college software at issue in the present case must be tailored to the very specific needs of university administration. In addition, no comparable product range for university administration software was offered by the market. Finally, Germany argues that the *Compass-Datenbank* judgment, rightly, did not refer to the *Commission v Italy* judgment.

(71) Germany comments on further elements articulated in the Opening Decision that relate to the question of whether HIS is an undertaking. As to whether the universities used HIS' products purely for non-economic purposes (see paragraph 26(b)), Germany states that it is not entirely clear how universities could use these products in such a manner. Germany points out that these products were not tailored to a specific, conceivably economic, activity (such as continuing adult education, for example). In any event, for a determination of whether the grants constitute State aid, the central question, Germany emphasises, was whether HIS' services are inseparably connected to the exercise of the State's educational task. Germany referred to the same principle in connection with the assumption that HIS' software also contained elements for personnel and financial management (see recital 26(a)) while also pointing out that the software products in question were not general financial or personnel management software products.

4.1.1.3. Possible economic activities (sales to German private and foreign universities) are marginal and have no State aid character

(72) With respect to HIS' supply of IT services to private German and foreign universities Germany advanced the argument that this activity did not involve State aid because

- (a) the foreign beneficiaries of HIS' activities are overwhelmingly public universities, and as such, are non-economic actors;
- (b) the accounts relating to HIS' activity with respect to these clients are kept separated from the accounts relating to HIS' supply of software to German public universities;
- (c) work provided by staff for individual tasks and projects was recorded in a separate in-house system;
- (d) personnel and material costs directly attributable to employees working on individual tasks and projects were allocated according to the proportion of hours the employee spent on the individual task or project;
- (e) overhead was distributed proportionately to individual tasks and projects;

⁽³⁹⁾ See recital 37.

⁽⁴⁰⁾ Regarding the submissions of the two Italian entities in support of the complainant, Germany points out that they are partially based on considerable misunderstanding of the factual situation (such as whether or not HIS continues to be receiving State support, and whether its product range includes non-university related software) and they partially focus on the Italian market. Therefore, Germany considers these submissions to be of limited relevance.

⁽⁴¹⁾ Judgment of the Court of Justice of 5 December 1989, *Commission v Italy*, C-3/88, ECLI:EU:C:1989:606. This judgment stated in the context of software supply for the general State administration that 'the design, programming and operation of data processing systems, are of a technical nature, and thus unrelated to the exercise of official authority. Paragraph 13.

⁽⁴²⁾ Judgment of the Court of Justice of 5 December 1989, *Commission v Italy*, C-3/88, ECLI:EU:C:1989:606, paragraphs 11 and 13.

(f) in the spirit of the R&D Framework (43), an ancillary economic use of the input HIS provides to the universities did not deprive the financing of HIS' services of its non-State aid character.

(73) The fact that HIS did not compete with market distorting low prices (see allegation in recital 17) was, according to Germany, also demonstrated by the fact that in public procurement processes it was outbid by competitors, even though the prices at which it offered its services, were limited to cost coverage. Germany asserted that HIS stopped participating in public procurement processes for private and foreign universities since Germany engaged in discussion with the Commission relating to HIS' activities since 2012.

(74) Germany argues that even if all of HIS' activities relating to German private and foreign universities were to have an economic nature, the scope of these activities expressed through the magnitude of the resulting revenues in relation to all of HIS' revenues was marginal. Germany submitted information relating to (1) the revenues HIS IT gained from its supply of software services to private and foreign universities between 2003 and 2013; and (2) the proportion these revenues represented in the totality of its revenues. The revenue figures range between EUR 25 800 (2003) and EUR 220 330 (2010) representing between 0,45 % (2003) and 1,73 % (2008) of HIS-IT's total revenues in the individual years. These figures, Germany argues, should be considered as 'ancillary activities' in analogy to point 20 of the R&D Framework. (See recital 72 f.)

(75) Germany also argues that the proportion of the grants provided to German private and foreign universities did not exceed the *de minimis* threshold of EUR 200 000 laid down in Regulation (EU) No 1407/2013 in any successive three year time-period (44) between 2003 and 2013. This was because the contribution by the universities to the total costs of providing HIS IT's services varied between 34,5 % and 74,1 % of these total costs between 2002 and 2013. So if the proportion of revenues from German private and foreign universities in the context of HIS IT's total revenues (the percentages mentioned in recital 74: between 0,45 % and 1,73 %) were applied to HIS IT's total financing minus the universities' own contribution, the amounts did not exceed the EUR 200 000 limit in any of the successive three year time periods.

Table 1

Cumulated amount of direct grant to HIS IT in each year + the preceding two years

Year	Direct grants to HIS IT, not including cost sharing (fees) by universities (in million EUR/year)	Percentage of revenue from sales to private German and foreign universities (%)	Amount of direct grant in proportion to percentage of revenues from sales to private German and foreign universities (in EUR/year)	Cumulated amount of direct grant in year + preceding two years (in EUR) 2005 = 2003 + 2004 + 2005; 2006 = 2004 + 2005 + 2006
2003	3,7	0,45	16 650	16 650
2004	3,8	0,86	32 680	49 330
2005	3,8	1,06	40 280	89 610
2006	3,8	0,86	32 680	105 640
2007	3,7	1,2	44 400	117 360
2008	3,8	1,73	65 740	142 820
2009	3,9	1,54	60 060	170 200

(43) Point 20 of the Framework for State aid for research and development and innovation: 'Where a research organisation or research infrastructure is used for both economic and non-economic activities, public funding falls under State aid rules only insofar as it covers costs linked to the economic activities. Where the research organisation or research infrastructure is used almost exclusively for a non-economic activity, its funding may fall outside State aid rules in its entirety, provided that the economic use remains purely ancillary, that is to say corresponds to an activity which is directly related to and necessary for the operation of the research organisation or research infrastructure or intrinsically linked to its main non-economic use, and which is limited in scope' (OJ C 198, 27.6.2014, p. 1).

(44) Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid. Article 3 (OJ L 352, 24.12.2013, p. 1.).

Year	Direct grants to HIS IT, not including cost sharing (fees) by universities (in million EUR/year)	Percentage of revenue from sales to private German and foreign universities (%)	Amount of direct grant in proportion to percentage of revenues from sales to private German and foreign universities (in EUR/year)	Cumulated amount of direct grant in year + preceding two years (in EUR) 2005 = 2003 + 2004 + 2005; 2006 = 2004 + 2005 + 2006
2010	4,1	1,72	70 520	196 320
2011	4,0	1,27	50 800	181 380
2012	4,2	0,96	40 320	161 640
2013	4,2	0,70	29 400	120 520

4.1.2. HIS did not receive a selective advantage

4.1.2.1. Selective advantage through the direct grants

(76) Supported by a high number of submissions, Germany argues that through the direct grants, HIS did not receive an advantage because it acted as if it were an 'intermediary' in analogy to the concept described in point 22 of Section 2.1.2 (45) of the R&D Framework. All 'advantage' was forwarded to the universities that could obtain these services at a reasonable price.

(77) In addition, Germany repeated the argument that HIS' owners, the Länder and the Bund received an advantage as the cost of financing the universities were reduced through the non-profit seeking operation of HIS that provided the services in question. In this sense, the State acted in an economically rational manner, in conformity with the market economy operator principle. Several submissions supported the notion that there was economic rationality in bundling the IT resources into HIS and offer them to the universities in this manner.

4.1.2.2. Selective advantage through the tax exemptions

(78) Germany argues that the tax exemptions did not confer an advantage on HIS, but were the outcome of the proper application of German tax legislation. Pursuant to point 9 of section 5(1) (46) of the Corporation Tax Act, and point 6 of section 3 (47) of the Trade Tax Act in connection with sections 51 et seq. of the Fiscal Code (48) ('Abgabenordnung' or 'AO'), non-profit undertakings with a public benefit purpose are exempt from trade tax inasmuch as they do not carry out an 'economic activity'.

(79) Germany states that the Opening Decision's preliminary conclusion that HIS enjoyed a reduction in its tax obligation is incorrect, as HIS was not subject to corporation tax and trade tax. This is because as a public benefit organisation within the meaning of the provisions of German tax law which are at issue, HIS did not obtain taxable income within the meaning of section 7 (49) et seq. of the Corporation Tax Act and did not have trade revenues within the meaning of section 6 (50) et seq. of the Trade Tax Act. Germany adds that HIS had never made profits that could have been subject to tax. The tax burden for HIS, Germany concludes, was therefore exactly zero, and would have been so even if it had not had an exempt status.

(45) Point 22 of Section 2.1.2 of the R&D Framework states: 'The Commission will not consider the research organisation or research infrastructure to be a beneficiary of State aid if it acts as a mere intermediary for passing on to the final recipients the totality of the public funding and any advantage acquired through such funding.' Framework for State aid for research and development and innovation.

(46) Point 9 of Section 5(1) of the Corporation Tax Act: 'Exempted from corporation tax [are the following entities]: (...) corporations, associations of persons and assets which, in accordance with the articles of association, the business of a foundation or other conditions and the actual management, serve exclusively and directly charitable, public benefit or ecclesiastical purposes (Sections 51 to 68 of the Fiscal Code)'.

(47) Point 6 of section 3(1) of the Trade Tax Act: 'Exempted from trade tax [are the following entities]: (...) corporations, associations of persons and assets which, in accordance with the articles of association, the business of a foundation or other conditions and the actual management, serve exclusively and directly charitable, public benefit or ecclesiastical purposes (Sections 51 to 68 of the Fiscal Code)'.

(48) Fiscal Code (1977) Bundesgesetzbl. 23 June 1976, Nr. 29, I. S. 613.

(49) Section 7 of the Corporation Tax Act: 'Principles of taxation: (1) Corporation tax is determined on the basis of taxable income. (2) Taxable income is the income within the meaning of Section 8(1).' Section 8(1): 'The definition of income and the method of its calculation are laid down in the Personal Income Tax Act and this act. Section 8(2): 'In case of entities with unlimited tax liability within the meaning of points 1 to 3 of Section 1(1)3 [including a limited liability company] all income must be considered as income from a business enterprise.'

(50) Section 6 of the Trade Tax Act: 'Tax base: The tax base for the trade tax is the trade income'. Section 7 of the Trade Tax Act: 'Trade income is the profit from the trade activity to be determined in accordance with the provisions of the Income Tax Act or the Corporation Tax Act (...)'.

- (80) Germany in fact argues that in the preliminary investigation phase, the complainant seems to acknowledge that the tax exemptions were the result of the 'public benefit' ('gemeinnützig') role of HIS, and points to HIS' recurring annual losses.
- (81) Germany further argues that the alleged tax advantages *prima facie* fail to satisfy the requirement of 'selectivity' as HIS was not treated differently from other public benefit undertakings.
- (82) Finally, Germany argues that the complainant never articulated clearly the tax exemptions as a separate complaint ground. It points out that the complaint itself only contained a statement asserting that HIS '*may* [emphasis added] enjoy tax advantages' and that more detailed arguments were made only with respect to the tax advantages that continued to benefit HIS eG.

4.2. The measures constitute existing aid since 1976

- (83) Germany again submitted the subsidiary argument that even if the State support qualified as State aid, recovery would be excluded as the measures would enjoy continued protection as 'existing aid' since 1976 within the meaning of Article 1(b)(v) of Regulation (EU) 2015/1589⁽⁵¹⁾. According to this provision, a measure that did not constitute aid when it was put into effect, can become State aid due to the evolution of the internal market. For a protection of existing aid to continue, case law⁽⁵²⁾ requires that there be no significant alteration to the measure since it has become State aid. Otherwise, the alteration creates a new aid measure.
- (84) Existing aid measures enjoy legal protection as long as the Commission has not established their incompatibility with the internal market⁽⁵³⁾ and ordered future oriented appropriate measures (see Article 108(1) of the Treaty⁽⁵⁴⁾ and Article 22 of Regulation (EU) 2015/1589⁽⁵⁵⁾). The only exception, Germany argues, is when the activity is liberalised through an EU act. Given that neither of these actions has been carried out, there was no market at the inception of the measures and the measures did not undergo any significant change, they qualify as lawful existing aid.

4.2.1. There was no market for college software before 1993

- (85) According to Germany, there was no market for college software when HIS was founded in 1969 and when the Bund and the Länder took over its shares in 1976. Whereas in its comments on the Opening Decision, the complainant says (see recital 50) that actual or potential competitors existed in the 1970s, in the complaint form, it states that prior to 2000 'only the HIS-GX software existed'⁽⁵⁶⁾. Thus, the market must have emerged after the year 2000. The market in fact only started emerging in the 1990s. A number of third party comments also emphasised that for decades, there was no university software and that it was only in the 1990s that providers for certain applications sporadically appeared on the market. Real alternatives to HIS' products only appeared in the most recent years. Germany states that there are good reasons to assume that the market only emerged in 2006/2007 when the first public procurement procedures took place, even though individual providers for specific elements of university management software processes were in existence before. The complainant itself states in its submission of 19 November 2013 that 'developments in the past *seven* [emphasis added] years show that private providers are in the position to supply universities with integrated campus management software.' Given this, HIS could not have had a market distorting effect when a market did not even exist in the first place. As it was pointed out, in the absence of HIS, universities would have needed to solve IT related needs on their own using their own resources.

⁽⁵¹⁾ Article 1(b)(v) of Regulation (EU) 2015/1589: '[e]xisting aid means (...) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the internal market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Union law, such measures shall not be considered as existing aid after the date fixed for liberalization.'

⁽⁵²⁾ Judgment of the General Court in *Government of Gibraltar v Commission* of 30 April 2002, T-195/01 and T-207/01, ECLI:EU:T:2002:111, recital 111.

⁽⁵³⁾ Judgment of the General Court in *Alzetta v Commission* of 15 June 2000, T-298/97, ECLI:EU:T:2000:151, paragraph 148.

⁽⁵⁴⁾ Article 108(1) of the Treaty: 'The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.'

⁽⁵⁵⁾ Article 22 of Regulation (EU) 2015/1589: 'Proposal for appropriate measures: Where the Commission, in the light of the information submitted by the Member State pursuant to Article 21, concludes that the existing aid scheme is not, or is no longer, compatible with the internal market, it shall issue a recommendation proposing appropriate measures to the Member State concerned. The recommendation may propose, in particular: (a) substantive amendment of the aid scheme; or (b) introduction of procedural requirements; or (c) abolition of the aid scheme.'

⁽⁵⁶⁾ See page 25 of the complaint of 15 March 2012.

(86) In any event, the Opening Decision appears to accept the year 1993 as the first year of the existence of a market. (See recital 60 of the Opening Decision.) For the purposes of the issue of existing aid, the German authorities therefore accept that the market emerged in 1993.

4.2.2. *No significant alteration of the scheme took place*

(87) Germany agrees with the preliminary position of the Opening Decision (recital 80 of the Opening Decision) that the nature of the measures, the source of financing, the legal basis, the objectives of the financing and the range of beneficiaries (HIS GmbH) did not change since the measures were put into effect. Germany further states that according to case law (57), an alteration qualifies as significant if it affects the essence of the scheme, such as the basic conditions of eligibility, the legal basis (58) or the range of beneficiaries.

4.2.2.1. *Nature of financing*

(88) Germany points out that an increase in the financing does not affect the essence of the scheme if the increase is commensurate with an increase in corresponding costs of carrying out the same activity, as a number of Commission decisions in the broadcasting sector showed (59).

(89) Germany reiterates that the amount of direct State financing nominally hardly increased (from DM 2 527 000 in 1976 to DM 6 981 000 in 2001 and to EUR 4 230 000 in 2013) and the changing amounts were the result of the nature of deficit financing which was linked to increasing student numbers and in which inflation also played a role.

4.2.2.2. *Source and manner of financing, legal basis*

(90) Germany states that the source of State financing remained the same throughout the time-period: the budget of the federal State and the Länder. Germany agrees with recital 89 of the Opening Decision that the possibility of obtaining financing other than the direct grants was included in the Satzung from the beginning. Germany disagrees, however, with the characterisation in the Opening Decision that the question is whether the 'additional financing is still as low in proportion [to the overall measure] as not to change the overall character of the financing' (see recital 90 of the Opening Decision.) Germany is of the view that a significant increase in the co-financing of HIS' activities by the universities (their payment for HIS' IT services increased from 35,7 % in 2002 to 74,1 % in 2013) cannot be interpreted as a significant alteration to the scheme resulting in the loss of the measures' status as existing aid.

(91) Germany also contradicted the complainant's assertion that the measure in fact consisted of a series of direct aid grants and it states that there is no specific requirement for the definition of an 'aid scheme' beyond the wording of Article 1(d) of Regulation (EU) 2015/1589 (60).

(92) Germany also explains that procedures relating to existing aid do not aim at protecting the interests of private individuals, but the legitimate expectations of aid beneficiaries. Therefore, there is no particular 'transparency' obligation vis-à-vis private individuals that would allow them to assert their legal rights.

4.2.2.3. *Objectives and products/services*

(93) Germany further argues that HIS' objective and its activities also remained the same. Germany also contradicted the complainant's assertion that HIS' purpose, according to the Satzung, was phrased in a very broad and vague manner (see recital 51). The objective, as the Opening Decision itself established in recital 82, remained unchanged as the original objective was phrased in a broad manner. The comments received by interested parties other than the complainant and the two Italian undertakings also confirmed Germany's position that the objective of HIS in the university data processing field essentially remained unchanged for forty years: the support of universities in the

(57) Judgment of the General Court in *Gibraltar v Commission* of 30 April 2002, T-195/01 and T-207/01, ECLI:EU:T:2002:111, paragraph 111.

(58) Judgment of the Court of Justice of 9 August 1994 in *Namur Les Assurances du Crédit SA*, C-44/93 ECLI:EU:C:1994:311, paragraph 28.

(59) Commission Decision C(2007) 1761 final of 24 April 2007, SA.18957 (E 3/2005 (ex- CP 2/2003, CP 232/2002, CP 43/2003, CP 243/2004 und CP 195/2004) – Germany – Financing of public service broadcasters in Germany (OJ C 185, 8.8.2007, p. 1) http://ec.europa.eu/competition/state_aid/cases/198395/198395_678609_35_1.pdf, recital 206.

(60) 'An "aid scheme" means any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount' Judgment of the Court of Justice of 9 August 1994 in *Namur Les Assurances du Crédit SA*, C-44/93 ECLI:EU:C:1994:311, paragraph 28. [emphasis added].

field of electronic data processing/information technology⁽⁶¹⁾. Germany reiterates that the language of the Satzung relating to the objectives had to be broad enough to permit an adaptation of the services to the changing requirements. The formulation, at the same time, was not unlimited, as the task of 'developing procedures for the rationalisation of higher education administration and cooperating in the introduction and application thereof' is tailored to the automatisation of university management through electronic data processing. The formulation is clearly not broad enough to have allowed HIS to engage in activities other than the provision of software products and services to universities in the electronic data processing/IT field.

(94) With regard to HIS' information technology products and services over the years, Germany argues an overview demonstrates that they functionally remained the same, although specific modules had to be updated to conform to changed technical and organisational frameworks and developing automatisation. These developments did not change the focus and the content of these services and products. As to the argument that HIS products and services had nothing in common with its products and services in the 1990s (that is to say that there was no continuous product range), Germany states that as early as in 1976, HIS already provided the first, and partially the second generation of segments included in today's university software products. The 'SOS' product was in 1976 already provided as HIS-SOS II. Germany in fact submitted the following table to show the range of products on offer in the various fields of university management between 1976 and 2013, to demonstrate the continuity of the product portfolio. The product names sometimes changed but their core functions remained the same. The annual work programmes specifically articulated that the 'range of software offers remains the same but will be remodelled to meet the latest technological standards.' (See Work Programme/Business Plan 1995, page 18.)

Table 2

Product portfolio of HIS-IT from the foundation in 1976 until 2013

Processes	HIS products and technologies				
	1976	1986	1995	2005	2013
Technologies	Mainframes, batch processing, magnetic disks, COBOL, FORTRAN	Microcomputer systems, interactive processing on the screen, databases, Siemens BS/2000, Nixdorf8860, UNIX, 4GL, DOS, Clipper	Personal computers, relational databases (Informix), UNIX, Informix 4GL (UNIX Generation) Client-server technology with graphic user interfaces, DOS, Windows 3.1, Visual Basic, Clipper (GX-Generation)	Client-server technology with graphic user interfaces (Windows clients, database server), relational databases (Informix, Postgres), Visual Basic, C++ (GX-Generation) Internet technologies, open source libraries, self-service functions, Java Applets, Java Servlets, Java (QIS Generation)	Client-server technology (Windows clients, database server), Visual Basic, C++ (GX-Generation) Open source libraries, relational databases (Informix, Postgres), internet technologies, self-service functions, open source libraries, Java Servlets, three-level architecture, Java (QIS Generation and HISinOne Generation)
Application and admission		ZUL 8860	HISZUL-UNIX	ZUL-GX, QIS-ZUL	ZUL-GX, QISZUL, HISconnect, HISinOne APP (**)
Student administration	HIS-SOS II	HISROS (*)	HISROS-UNIX, HISROS-GX	SOS-GX, QISROS	SOS-GX, QISROS, HISinOne STU (**)
Alumni administration					HISinOne ALU (**)

⁽⁶¹⁾ EDP (electronic data processing), an infrequently used term for what is today usually called 'IS' (information services or systems) or 'MIS' (management information services or systems), is the processing of data by a computer and its programs in an environment involving electronic communication. See <https://whatis.techtarget.com/definition/EDP-electronic-data-processing>

Exam administration	HIS-POS	HISPOS (*), HIS-POS-UNIX	HISPOS-UNIX, HISPOS-GX	POS-GX, QISPOS	POS-GX, QISPOS, HISinOne EXA (**)
Course administration	HIS-LVS, HIS higher education timetable	HIS-LVS, HIS higher education timetable	HIS-LVS (extension to HISSOS)	HIS-LSF	HIS-LSF, HISinOne EXA
Personnel and jobs administration	HIS-PVS II	HISPVS II, HISPSA	HISSVA-Unix, HISSBS	SVA, RKA, ZEB	SVA-GX, QIS-SVA, RKA, QIS-RKA, ZEB, QIS-ZEB
Budgetary and cash system, cost accounting	HISKAM, HIS cost accounting model	HISMBS (*)	HISMBS-UNIX, HIS-MBS (*), HIS-KBS-UNIX, HISBES, HIS-RKA, HISBES-UNIX	FSV-GX (BES, MBS, WebMBS-3T, Fibu, IVS, MAT, KBS), COB-GX, QIS-COB	FSV-GX (BES, MBS, WebMBS-3T, Fibu, IVS, MAT, KBS), COB-GX, QIS-COB
Device management, inventory, systems and maintenance administration		HISIVS, HIS-ANL, HISINT (*)	HISIVS-UNIX, HISIVS-GX, HISINT		
Materials management		HISMAT	HISMAT, HIS-BEL-PC		
Construction, room and building management	HIS room file including building file	HISBAU II, HIS-BAU DIA	HISBAU-PC, HISRVL-PC	HIS-BAU-GX	HIS-BAU-GX

(*) For different hardware/operating system versions.

(**) The HISinOne product is an integrated, web-based JAVA application. The campus management product areas APP, STU, EXA and ALU are operated on the basis of a core segment, consisting of product areas SYS (System Management), PSV (Personalized Services and Directories), COM (Community) and BIA (Business Intelligence), which include the basic functions for operation of HISinOne.

4.3. The measures constitute compatible SGEI compensation

(95) Germany is of the opinion that the provision of education and research is a properly recognised SGEI objective, and even an obligation. Contrary to the conclusion of the Opening Decision, the provision of personnel, financial and organisational means was necessary for the fulfilment of the State's obligation in the higher education field. There was also a market failure that continues possibly even today, as no provider can offer the entire range of software services that universities need.

(96) In addition, the Satzung and work programme provides sufficient detail for an entrustment. The work programme clearly states that HIS' objective is to provide universities with software products. In the Satzung, it is specified that HIS' objective is to 'develop procedures for rationalising university administration and advisory support for their introduction and application' which is tailored specifically to the automation of business processes of universities through electronic data processing. Germany believes that the Commission's requirements regarding the specificity of an 'entrustment act' (as specified in recital 65 of the Opening Decision) is too strict.

(97) Germany concludes that based on these elements, the compensation of HIS took place in accordance with rules applicable to SGEI.

4.4. Financing of HIS eG/Market foreclosure effect of financing of HIS IT

(98) Germany first pointed out that the Opening Decision did not express doubts relating to HIS eG, into which HIS was transformed in January 2014. Therefore, the complainant's comments on this subject were irrelevant. Germany also informed the Commission that since a dialogue with the Commission regarding the complaint had started, in November 2012, HIS had not been actively present on 'the market' and had not participated in public procurement procedures.

- (99) Germany found the complainant's argumentation relating to HIS' price policy contradictory: while the complainant sometimes considered HIS' prices to amount to market distortion (see, for example, page 6 of the complainant's comments of 18 December 2013), at other times, it alleged that HIS concluded contracts with prices above the market level (see page 4 of the complainant's comments of 18 December 2013).
- (100) As regards the argument that the financing of HIS led to market foreclosure, Germany expresses agreement with the position of several interested parties that no such foreclosure has taken place and that the service provision was necessary as there was a massive market failure in the field ⁽⁶²⁾.

5. ASSESSMENT OF THE MEASURES

- (101) The Commission assessed the direct grants and the Corporation Tax and Trade Tax exemptions provided to HIS that benefitted HIS' supply of information technology services to German public universities and partially to German private and foreign universities.
- (102) The Opening Decision included in its scope the examination of the State aid nature and the compatibility of the alleged measures in the time-period between 1976 and 2013 (see recital 103 of the Opening Decision). The Commission therefore focuses on the examination of the measures provided in this time-period.

5.1. Presence of State aid within the meaning of Article 107(1) of the Treaty

- (103) Article 107(1) of the Treaty provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (104) For a measure to be regarded as State aid within the meaning of Article 107(1) of the Treaty, it must fulfil the following cumulative conditions: (a) it must involve State resources and must be imputable to the State; (b) it must result in an economic advantage to an undertaking; (c) the advantage must be selective; and (d) it must distort or threaten to distort competition in so far as it affects trade between Member States. If any one of these criteria is not fulfilled the measure does not constitute State aid.

5.1.1. State aid nature of the direct grants

5.1.1.1. State resources and imputability

- (105) It is undisputed that the support for HIS constituted imputable State resources. The measures were provided by the Bund and the Länder and entailed a use of State resources because the grants were provided from budgetary resources and the tax exemptions reduced the State's fiscal revenue.
- (106) Since the decision to provide the funding lies in the hands of the Bund and the Länder, the measure would clearly be imputable to the State.

5.1.1.2. Economic nature of services provided by HIS

5.1.1.3. Services provided to German public universities

- (107) According to Article 107(1) of the Treaty, in order for State aid to be present, an economic advantage has to be provided to an undertaking.
- (108) According to settled case law, the concept of 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed ⁽⁶³⁾. Any activity consisting in offering goods or services on a given market is an economic activity ⁽⁶⁴⁾.

⁽⁶²⁾ Several interested parties also pointed out that HIS' activities did not have a market foreclosing effect: it is undisputed that suppliers of at least parts of the university management applications have been in existence since the 1990s and colleges have been free to select one or more other suppliers. In addition, the open source nature of HIS' software has in fact a competition fostering effect. Competition, as several interested parties pointed out, would rather be weakened through the disappearance of HIS (which would result from a recovery of the support it enjoyed).

⁽⁶³⁾ Judgment of the Court of Justice 12 September 2000 in Joined Cases *Pavlov and Others*, C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74.

⁽⁶⁴⁾ Judgment of the Court of Justice of 23 April 1991 in *Höfner and Elser*, C-41/90, ECLI:EU:C:1991:161, paragraph 21; Judgment of the Court of Justice of 13 July 1962 in *Mannesmann AG v High Authority of the ECSC*, C-19/61, ECLI:EU:C:1962:31, paragraph 371, and Judgment of the Court of Justice of 13 July 1962 in joined cases *Klöckner-Werke AG and Hoesch AG v High Authority of the ECSC*, C-17/61 and C-20/61, ECLI:EU:C:1962:30, paragraph 341.

(109) Germany argues that HIS was not an undertaking because it was not engaged in an economic activity and it did not operate for the purpose of profit. According to Germany, HIS' aim, as specified in the Satzung, was the support of German public universities and their administrations in order to ensure the rational and economical performance of their scientific and educational tasks. Germany argues that this aim was in line with the State's duty of providing education, which includes the duty of providing universities with human, financial and organizational resources. As such, Germany concludes, HIS supplied its services for non-economic purposes and therefore did not engage in an economic activity.

(110) The Court of Justice has held that the State 'by establishing and maintaining a system of public education, normally financed from the public purse and not by pupils or their parents, does not intend to become involved in activities for remuneration, but carries out its tasks towards its citizens in the social, cultural, and educational areas' ⁽⁶⁵⁾.

(111) Accordingly, activities of public universities and research organisations linked to their educational objective constitute a non-economic activity and thus fall outside the ambit of the State aid rules.

(112) According to the case law of the Union courts, activities that are intrinsically connected with the exercise of public tasks are considered to be of non-economic nature ⁽⁶⁶⁾.

(113) Examples of such activities include, as it was explained in the Opening Decision (see recital 29 of that decision), the collection of data to be used for public purposes on the basis of a statutory obligation imposed on the undertakings concerned to disclose such data.

(114) The Commission considers that IT services provided by HIS to German public universities are sufficiently similar to the services at issue in the *Compass-Datenbank* judgement, and that HIS' services constituted an essential part of the State's task in German public tertiary education system for the following reasons.

(115) In the *Compass-Datenbank* judgment, the Court concluded that service in question, consisting in the maintenance and disclosure of the data, could not be 'separated from the collection of the data', as the collection of the data would have been useless without maintaining the data for consultation with the public (paragraph 41 of that judgment).

(116) The Opening Decision referred to this judgment and to the *SAT-Fluggesellschaft mbH* judgement for the proposition that in order to show that the provision of software services had been closely connected with carrying out State's public task in the field of public tertiary education, HIS' activities must be related to these tasks ⁽⁶⁷⁾ 'by [their] nature, their aim and the rules to which [they are] subject' ⁽⁶⁸⁾.

(117) The activities of HIS in question, more specifically the provision of tailor-made college software products and related services, satisfy the requirement of being connected, by their nature, their aim and the rules to which they were subject, to carrying out the State's non-economic activity in the public tertiary education field in a way analogous to the relevant case law.

(118) First, the nature of the services provided by HIS are closely related to the State's role to provide public higher education, as universities cannot be managed without efficient software. The provision of the software services was therefore necessary for the educational tasks of the universities, i.e. the provision of free higher education to the public, which has been an explicit aim of HIS' creation and operation.

(119) The comments submitted by several interested parties during the formal investigation also supported the argument that HIS' products and services were used to execute essential, university specific business processes, that their functionality is a prerequisite for the overall functionality of German public universities and are therefore indispensable for the fulfilment of their educational mandate. (See recitals 35, 36, 37 and 39 of this Decision.)

⁽⁶⁵⁾ Judgment of the Court of Justice of 11 September 2007, *Commission v Germany*, C-318/05, ECLI:EU:C:2007:495, paragraph 68.

⁽⁶⁶⁾ Judgment of the Court of Justice of 12 July 2012, *CompassDatenbank v Austria*, C-138/11, ECLI:EU:C:2012:449, paragraph 41.

⁽⁶⁷⁾ Recitals 28 and 29 of the Opening Decision citing the Judgment of the Court of Justice of 12 July 2012, *CompassDatenbank v Austria*, C-138/11, ECLI:EU:C:2012:449, paragraph 41.

⁽⁶⁸⁾ Recital 28 of the Opening Decision citing the Judgment of the Court of Justice of 19 January 1994 *SAT Fluggesellschaft mbH v Eurocontrol*, C-364/92, ECLI:EU:C:1994:7, paragraph 30.

(120) The provision of these software services to German public universities was not a mere general service (such as renting real estate property, obtaining legal advice from outside parties, for example) but a service that had to be tailored and adjusted to the universities' specialised needs (see recital 36 and footnote 7 of this Decision). This circumstance also supports the realistic assumption that in the absence of HIS' services, the German public universities or the Länder themselves would have needed to take care of university software development needs. The way HIS was set up and operated was a method of collectively meeting these essential functional needs of the German public universities through the pooling of experience and expertise. The example of Microsoft raised by the complainant (see recital 44 of this Decision), does not undermine this assumption because Microsoft charges (presumably) market prices for its software and its position as a globally active group vis-à-vis the German public universities is entirely different from that of HIS'.

(121) Second, it is not necessary, pursuant to the case law of Union courts to show that HIS itself pursued a public task. None of the analogous cases articulated such a requirement ⁽⁶⁹⁾. What is relevant, by contrast, is that the activity to which HIS' activities are intrinsically linked, constitutes an exercise of the State's task in the public tertiary education system.

(122) The requirement that the activity should be connected to carrying out the State's non-economic activity in the public tertiary education field 'by the rules to which it is subject', as specified by the relevant case law ⁽⁷⁰⁾, is also satisfied. The operation of HIS, in its entirety, was not expressly subject to the same range of rules and laws that govern the carrying out of the Länder's non-economic activity in the public tertiary education field. However, the necessary connection to the exercise of the public task follows from the most important elements of the rules that governed HIS. The purpose of the private legal form (GmbH) was necessary for formal legal reasons, as the Bund and the Länder were not able to set up HIS together in any other public legal form ⁽⁷¹⁾. Further, HIS' operation and management ⁽⁷²⁾ showed that it was governed as a quasi-State entity and its operation was entirely void of any profit making aspect (and, in that respect, not essentially different from that of the universities themselves). Finally, section 2 of the Satzung, which governs the operation of HIS, clearly states that 'the purpose of the company is to support higher education institutions and competent administrative bodies in their efforts to perform higher education tasks in a rational and cost effective manner'. On this basis, the Commission considers that the requirement of HIS' being connected to the exercise of public tasks or, by analogy, to carrying out a non-economic public task 'through the rules to which it was subject' is satisfied in the current case.

(123) The case at hand is similar to the *TenderNed* ⁽⁷³⁾ case law where the General Court held that for the issue of whether TenderNed's activities form part of the exercise of public tasks, the question was also articulated as whether the activities, by their nature, aim and the rules to which they were subject, were connected with the exercise of public tasks.

(124) In terms of the aim and nature of TenderNed's activities, the General Court found that the Commission was correct in considering that TenderNed's activities constituted 'means' by which public authorities could fulfil their legal (statutory) obligation to comply with European and national public procurement legislation.

(125) The *TenderNed* judgment provides further elements that indicate that HIS' supply of software/IT to the German public universities have not been of an economic nature.

(126) The *TenderNed* judgment established inseparability between the service TenderNed provided and the public task at issue in that case even though there were indications that the e-procurement in question merely 'contribute[d] to the effective operation of the [service] that was connect[ed] with the exercise of public power' (see recital 90 of the judgment). Similarly to the *TenderNed* judgment, in the present case there have also been market operators that offered parts of the service that HIS offered. However, as the General Court explained in the *TenderNed* judgment, the authorities could 'best manage the entire public procurement process' with TenderNed's services (recital 90 of the judgment) and that 'existing commercial platforms did not offer the conditions relating to price, objective

⁽⁶⁹⁾ The *Compasss-Datenbank* judgment refers to 'statutory obligation' on undertakings using the service (the arguably non-economic activity) and not on the entity that is engaged in the 'non-economic' activity (paragraph 40 of that judgment).

⁽⁷⁰⁾ See, for example, Judgment of the General Court of 28 September 2017, Case T-138/15, *Aanbestedingskalender and Others v Commission*, ECLI:EU:T:2017:675, paragraph 38, recital 29 of the Commission Decision ZVD Portal; Commission Decision C(2013) 2361 final of 2 May 2013, SA.25745 (2013/NN) (ex- CP 11/2008) – Germany – National Website for auctions in insolvency proceedings (ZVD Portal) (OJ C 167, 13.6.2013, p. 1). http://ec.europa.eu/competition/state_aid/cases/247954/247954_1433360_92_2.pdf.

⁽⁷¹⁾ Germany argued that only through a 'GmbH' was it possible to comply with the constitutional prohibition of universities' co-management between the Bund and the Länder.

⁽⁷²⁾ See recitals 8, 9 and 11 of this Decision.

⁽⁷³⁾ Commission Decision C(2014) 9548 final of 18 December 2014, SA.34646 (2014/NN) (ex 2012/CP) – The Netherlands – E-procurement platform TenderNed (OJ C 422, 8.12.2017, p. 1) http://ec.europa.eu/competition/state_aid/cases/255396/255396_1614207_95_2.pdf and Judgment of the General Court of 28 September 2017, T-138/15, *Aanbestedingskalender and Others v Commission*, ECLI:EU:T:2017:675, currently under appeal.

quality characteristics, continuity and access to the services provided that would be necessary to fulfil the objectives of the authorities (recital 107 of the *TenderNed* judgment). This reasoning can be fully applied to the case at hand. As argued by a number of interested parties, no other provider of university software offered the entire range of services that HIS offered. The complainant itself admits that private providers only offer parts of the services required in the college software field (74).

(127) To conclude, HIS' provision of university software/IT services to German public universities were intrinsically linked to carrying out the non-economic activity of providing public university education, and was therefore not economic.

5.1.1.4. Services provided to German private and foreign universities

(128) According to case law, a legal entity can be regarded as an undertaking with respect to only part of its activities, if those activities must be classified as economic activities (75).

(129) As it was explained above (see recital 72), Germany argued that HIS' activity of selling software to private and foreign universities did not constitute State aid, as

- (a) it fit into the R&D Framework's concept of ancillary economic activity;
- (b) these beneficiaries of HIS' activities are overwhelmingly non-economic actors; and
- (c) the accounts relating to this activity are kept separated from the accounts relating to HIS' supply of software to German public universities.

(130) In addition, Germany argued that in case these activities constituted economic activities, the State aid part that can conceivably be linked to such activities fall under the *de minimis* threshold established by Regulation (EU) No 1407/2013.

(131) The Commission disagrees with the argument that these small-scale sales to private and foreign universities were ancillary and, on that basis, any State financing that could have conceivably supported these activities should not be regarded as State aid, for the following reasons.

(132) Germany did not sufficiently demonstrate why the concept of 'ancillary economic activities' from the R&D Framework is applicable to the case at hand. Germany did not demonstrate, for example, that the small-scale sales constituted 'an activity which is directly related to and necessary for the operation of the research organisation or research infrastructure or intrinsically linked to its main non-economic use' within the meaning of Point 20 of the R&D Framework (see in recital 72(f) and footnote 43).

(133) As to the relevance of separation of accounts, it is true that the Court of Justice held that a single establishment may carry on a number of activities, both economic and non-economic provided that it keeps separate accounts for the different funds that it receives so as to exclude any risk of cross-subsidisation of its economic activities by means of public funds received for its non-economic activities (76). However, in the present case, unlike in the case of *Escuelas Pías*, the public financing related to the entirety of the beneficiary, HIS' activities. Therefore the fact that separate accounts were maintained for HIS' sales to German private and foreign universities does not eliminate the economic nature of these sales activities.

5.1.2. Selective advantage, distortion of competition and effect on trade with respect to the grants

(134) As explained in recital 127, the Commission considers that HIS did not act as an undertaking insofar as it provided software services to German public universities. However, as regards the other criteria of the definition of State aid, the Commission considers that the direct grants provided between 1976 and 2013 could have constituted a selective advantage to HIS. In addition, given that IT services could in principle be provided in other Member States or by undertakings from other Member States, the measures would, if HIS had acted as an undertaking, had the potential to distort competition to the extent that it could have affected trade between Member States.

(74) For example, in its submission of 4 April 2016, on pages 9-10, the complainant says that 'Universities in need of more closely fitting IT solutions beyond the standard processes can buy additional capacities from HIS. However, other providers are also available for this purpose.'

(75) Judgment of the Court of Justice of 12 July 2012, *CompassDatenbank v Austria*, C-138/11, EU:C:2012:449, paragraph 37.

(76) Judgement of the Court of Justice of 27 June 2017, *Escuelas Pías*, C-74/16, ECLI:EU:C:2017:496, paragraph 51.

(135) Given that HIS was an 'undertaking' engaged in an economic activity with respect to the sales to German private and foreign universities, the measure benefitting these activities provided a selective economic advantage to the undertaking as other undertakings that provided similar services did not benefit from these measures. In addition, the State financing of HIS' supply of public universities relieved HIS from the necessity of operating for profit, hence it enabled HIS to offer the services on a cost-coverage basis only. Finally, given that this is a service that could in principle be provided in other Member States or by undertakings from other Member States, the measures had the potential to distort competition to the extent that it could have affected trade between Member States.

(136) Therefore, the direct grants that could have benefitted the sale of university software services by HIS to private German and foreign universities constituted State aid.

5.1.3. *State aid nature of the tax exemption measures*

(137) The Commission notes that in the formal investigation phase, the complainant did not submit any argument with respect to the tax exemptions enjoyed by HIS until 31 December 2013. In fact, the complainant did not at all address the tax exemptions in its comments on the Opening Decision. Arguments relating to the tax exemptions, as a distinct element of the complaint, were submitted only with respect to the status of HIS following its transformation in 2014 (77). Possible State aid measures for the benefit of HIS eG, however, is not the subject matter of this Decision, as it was not within the scope of the Opening Decision.

(138) In the Opening Decision, the Commission could not exclude that a selective advantage may have been granted to HIS, and pointed out that the assessment of a selective advantage is contingent upon the question of whether or not HIS was an undertaking (see recitals 52-53 of the Opening Decision). As the Commission concludes that HIS carried out an economic activity with respect to the sales to German private and foreign universities (see recital 133), it is not possible to exclude that the tax measures in question were selective.

(139) In addition, given that this is a service that could in principle be provided in other Member States or by undertakings from other Member States, the measures had the potential to distort competition to the extent that it could have affected trade between Member States. Therefore, the tax measures benefitting HIS could have constituted State aid.

5.2. *Existing aid*

(140) To the extent that the direct grants to HIS between 1976 and 2013 constituted State aid, the Commission considers that they constituted existing aid for the reasons explained below. Should the tax measures in question have also constituted State aid (see recital 139), the Commission considers that these measures also constituted existing aid (78) for the following reasons.

(141) Pursuant to Article 1(b)(v) of Regulation (EU) 2015/1589 (79), an aid measure is existing aid if it can be established that at the time when it was put into effect, it did not constitute State aid, but due to the evolution of the internal market, it has become State aid but was not altered by the Member State.

(142) Existing aid measures enjoy legal protection until the Commission has not established their incompatibility with the internal market (80) and ordered future oriented appropriate measures (see Article 108(1) of the Treaty (81) and Article 22 of Regulation (EU) 2015/1589 (82)).

(77) The complainant's submission of 18 December 2013.

(78) Although the Opening Decision raised the question of whether the tax measures, should they constitute State aid, would constitute incompatible operating aid, (see recital 106 of the Opening Decision), the Commission's decisional practice has evolved and concluded that exemption from corporation tax and trade tax for public benefit purpose organisations under German law constituted existing aid. (See Commission Decision C(2015) 7225 final of 26 October 2015, SA.33206 (2015/NN) – Alleged unlawful State aid to German Youth Hostel Association ('Deutsches Jugendherbergswerk') – Tax measures (OJ C 387, 20.11.2015, p. 1), http://ec.europa.eu/competition/state_aid/cases/260436/260436_1698296_81_2.pdf

(79) '[E]xisting aid means (...) v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the internal market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Union law, such measures shall not be considered as existing aid after the date fixed for liberalization.'

(80) Judgment of the General Court of 15 June 2000, *Alzetta v Commission*, T-298/97, ECLI:EU:T:2000:151, paragraph 148.

(81) See footnote 54.

(82) See footnote 55.

(143) In order to establish that the measures (as described in recital 13) in question constitute existing aid pursuant to sentence 1 of Article 1(b)(v) of Regulation (EU) 2015/1589, it must be established first that there was no market for the products and services in question when the State started providing funding to HIS.

(144) In light of the above considerations, following the examination of whether there was a market for university electronic data processing (university software), when the measures entered into force in 1976, the Commission examines whether possible subsequent changes might have affected the actual substance of the original measure. Such changes might pertain to the nature of the advantage or the source of financing, the purpose or legal basis of the aid, the beneficiaries or the scope of activities of the beneficiaries) in a way that the existing aid as a whole is transformed into a new aid.

5.2.1. *There was no market for university software in 1976*

(145) The Commission considers that the complainant was not able to prove that a market for HIS' products, more specifically, electronic data processing/IT products and services ⁽⁸³⁾ for university management existed at the time the measures in question, including the tax measures, started in 1976. A large majority of the comments from the universities supported the argument advanced by Germany that the market for university management software developed about 12-14 years ago, and that the earliest point in time when a market could have been in existence was in 1993. Several interested parties noted that although suppliers of at least parts of the university management applications had been in existence for some time, even today there is no full-blown market, in the field of electronic data processing/IT products and services for university management. According to them, apart from HIS, there is not a single supplier that can provide the full scope of products and services that HIS offers (see recital 38).

(146) The statements from the complainant in 2012 that 'before 2000 only the HIS-GX software existed' ⁽⁸⁴⁾, that 'developments in the past seven [emphasis added] years show that private providers are in the position to supply interested universities with integrated campus management software' ⁽⁸⁵⁾ coupled with the complainant's speculative statements that undertakings in Germany and abroad existed that were or could have been [emphasis added] active in the 1970s in the university management software market ⁽⁸⁶⁾ (see page 4 of the complainant's comments of 4 April 2016 and recital 53), proved to the Commission that no university software market existed in Germany in 1976. Therefore, the Commission's doubts regarding the question of whether such a market was in existence in 1976 have been eliminated.

(147) The Commission considers that the developments in the field of electronic data processing/IT products and services for university management for the German tertiary education sector does amount to the evolution of the internal market within the meaning of Article 1(b)(v) of the Procedural Regulation (see recital 91 of the Opening Decision). This conclusion is supported by a number of comments (including Germany's) to the Opening Decision that a relevant market has developed at some point during the past one to three decades for at least some partial areas within the field of software services to universities in Germany (see recitals 38 and 65).

5.2.2. *No significant alteration of the measures took place*

(148) Should the measures have indeed become State aid at some point between 1976 and 2013, it must be examined whether they have undergone any significant alteration that affected their actual substance that gave rise to new aid.

(149) According to the judgment *Government of Gibraltar v Commission*, not every alteration to existing aid should be regarded as changing existing aid into new aid. According to this case, 'it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme' ⁽⁸⁷⁾. The changes to a scheme are significant if any of its main elements, such as the nature of the financing, its source, its legal basis, the objective pursued or the beneficiaries have changed ⁽⁸⁸⁾.

⁽⁸³⁾ EDP (electronic data processing), an infrequently used term for what is today usually called 'IS' (information services or systems) or 'MIS' (management information services or systems), is the processing of data by a computer and its programs in an environment involving electronic communication. See <https://whatis.techtarget.com/definition/EDP-electronic-data-processing>

⁽⁸⁴⁾ See page 25 of the complaint (15 March 2012).

⁽⁸⁵⁾ See the submission of the complainant of 20 November 2013, Annex 2, page 6.

⁽⁸⁶⁾ See recital 50.

⁽⁸⁷⁾ Judgment of the General Court of 30 April 2002, *Government of Gibraltar v Commission*, T-195/01 and T-207/01, ECLI:EU:T:2002:111, recital 111.

⁽⁸⁸⁾ Judgment of the Court of Justice of 13 December 2018, *Südwestrundfunk*, C-492/17, ECLI:EU:C:2018:1019, paragraphs 54 and 66; Commission Decision C(2008) 725 final of 27 February 2008, SA.21395 E8/2006 (ex CP 110/2004 et CP 126/2004) – Belgique Financement du radiodiffuseur public VRT (OJ C 143, 10.6.2008, p. 7). http://ec.europa.eu/competition/state_aid/cases/215958/215958_825339_70_2.pdf, recital 121.

(150) The Commission considers that its doubts regarding the question of whether there were significant changes to the financing of HIS between 1976 and 2013 (see recitals 90, 92 and 93 of the Opening Decision) have been eliminated. The nature of the measures, the source of financing, the legal basis, the objectives of the financing and the range of beneficiaries did not change since the measures had been put into effect for the reasons below.

5.2.2.1. Nature of financing

(151) The Court has clarified in the judgment 'Namur-Les Assurances du Crédit SA' that '... the emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid or, in particular, its amount in financial terms at any moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered' ⁽⁸⁹⁾. The Commission considers that an increase in the financing does not affect the essence of the scheme if the increase is commensurate with an increase in corresponding costs of carrying out the same activity, as a number of Commission decisions in the broadcasting sector showed ⁽⁹⁰⁾.

(152) Germany reiterates that the amount of direct State financing nominally hardly increased (from DM 2 527 000 in 1976 to DM 6 981 000 in 2001 and to EUR 4 230 000 in 2013) and the changing amounts were the result of the nature of deficit financing which was linked to increasing student numbers and in which inflation also played a role.

(153) The Commission considers that the nature of the financing did not change significantly. First, the form of financing remained unchanged: direct grants and exemptions from the Corporation Tax Act and the Trade Tax Act. Second, the level of financing through the direct grants did not change significantly. Overall, the level of the direct grants increased by about 2,9 times during the period 1976 and 2013. In parallel, student numbers increased much more significantly during the same time-period. In 1976/1977, the number of students in Germany was 872 125 ⁽⁹¹⁾ and in 2013/2014, it three times higher, 2 616 881 ⁽⁹²⁾. Price levels in Germany in 2013 were 2,3 times higher than in 1976 ⁽⁹³⁾. Based on this information, the Commission considers that the nature and the level of financing did not change significantly as the number of students increased much more than the level of direct grant financing of HIS's activities, taking also into account the level of inflation in Germany between 1976 and 2014.

(154) The level of 'financing' through the tax exemptions was not changed significantly, since 2016 as Germany states in its submission (see recital 79) that its tax liability under the Corporation Income Tax Act and the Trade Tax Act would have been zero even it had been liable to pay these taxes.

5.2.2.2. Source and manner of financing, legal basis

(155) The Commission considers that the source, manner and legal basis of the direct grant financing remained the same throughout the time-period: source of the financing was the budget of the federal State and the Länder. The fact that the co-financing by the universities increased in its proportion in the context of the overall financing of the activity (from 35,7 % to 74,1 %) does not constitute a significant alteration of the financing for the following reasons. First, the level of 'state' financing, more specifically the State aid portion, nominally remained the same, as it was explained in the previous section. Second, the legal basis in fact provided, from 1976 onward, that the financing can be supplemented by revenues if necessary. Therefore, the Commission disagrees with the complainant's characterization that the manner of financing 'constantly changed.' The relevant language of the Satzung remained identical throughout the years: 'The owners provide the necessary resources for the execution of the objective as determined by the by-laws to the extent that no private revenues are obtained' ⁽⁹⁴⁾. In addition, in *Namur-Les Assurances du Crédit SA*, see recital 151, the court permits this type of alteration of a scheme, so long the statutory provisions underpinning the aid granting remain the same.

(156) The Commission disagrees with the complainant's position that the manner of financing changed as it was a series of grants of changing levels. (See recital 51.) The Commission is of the view that the direct grants in fact constituted an existing aid scheme and were not a series of annual individual direct grants. According to Article 1(d) of Regulation (EU) 2015/1589 an "aid scheme" means any act on the basis of which, without further implementing measures being

⁽⁸⁹⁾ Judgment of the Court of Justice of 9 August 1994 in *Namur-Les Assurances du Crédit SA*, C-44/93 ECLI:EU:C:1994:311, paragraph 28.

⁽⁹⁰⁾ Commission Decision C(2007) 1761 final of 24 April 2007, SA.18957 (E 3/2005 (ex- CP 2/2003, CP 232/2002, CP 43/2003, CP 243/2004 und CP 195/2004) – Germany – Financing of public service broadcasters in Germany (OJ C 185, 8.8.2007, p. 1). http://ec.europa.eu/competition/state_aid/cases/198395/198395_678609_35_1.pdf, recital 206.

⁽⁹¹⁾ <http://www.datenportal.bmbf.de/portal/de/K25.html>

⁽⁹²⁾ <http://www.datenportal.bmbf.de/portal/de/K25.html>

⁽⁹³⁾ <https://www.inflationtool.com/euro-germany?amount=100&year1=1976&year2=2013>

⁽⁹⁴⁾ See Section 6 of the Satzung from the years of 1976-1977 and 2000.

required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and *any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount* [emphasis added].

- (157) The Commission considers that the characteristics of the direct financing as well as the tax measures vis-à-vis HIS constituted a State aid scheme. It is because the legal bases constituted an 'act on the basis of which aid, which is not linked to a specific project, may [have been] awarded to one (...) undertaking for an indefinite period of time [and] for an indefinite amount.' The mechanisms of granting did not require any further implementing acts.
- (158) On these basis of the above law and facts, the Commission concludes that the annual direct grants constituted an existing *de facto* aid scheme and that the level, the manner and the source of financing did not undergo a significant change within the meaning of the applicable case law, *Government of Gibraltar v Commission, Namur-Les Assurances du Crédit*, and Commission Decision C(2008) 725 final of 27 February 2008, SA.21395 E8/2006 (ex CP 110/2004 et CP 126/2004) – *Belgique Financement du radiodiffuseur public VRT*.
- (159) Given that the legal basis in the Satzung remained unchanged throughout the time-period in question (see recital 155), the Commission considers that there was no significant alteration to the legal basis of the direct grants.
- (160) The Commission considers that there was no significant alteration of the legal basis for the tax benefits. First, the language of the Satzung establishing the public benefit ('gemeinnützig') purpose of the operation of HIS also remained unchanged over the years: 'The undertaking serves exclusively and directly public benefit objectives' within the meaning of tax legislation relevant to public benefit objectives ⁽⁹⁵⁾.
- (161) Second, the legal provisions underpinning the exemptions did not change, or did not change materially since 1 January 1976, when HIS was founded ⁽⁹⁶⁾. The legal basis of the exemptions were the Corporation Tax Act, the Trade Tax Act and the Fiscal Code. Germany explained that the tax exemptions in question (section 5 of the Corporation Tax Act and section 3 of the Trade Tax Act) refer to sections 51 et seq of the Fiscal Code. (See recital 78 and footnotes 46, 47 and 48.) Section 52 of the Fiscal Code ('AO') lists in fact two activities that qualify under the regulation as a public benefit activity: support for science and research (section 52(1)) and support for education and training (section 52(7)). Thus, in the current version of the applicable laws, the exemptions from the taxes in question arise from a combination of section 5 and section 3 of the Corporation Tax Act and the Trade Tax Act, respectively, and section 52 of the Fiscal Code,
- (162) Regarding the question of whether and in what form the applicable tax laws were in force at the time of the founding of HIS, the Commission concluded the following: The Corporation Tax Act in 1976 already included the exemption from the corporation tax of public benefit organizations. (See Section 4(1)6 of the version of 24 May 1965 ⁽⁹⁷⁾: 'Corporations, associations of persons and assets which, in accordance with their by-laws, foundations or other laws and according to their actual management, serve exclusively and directly ecclesiastical, non-profit or charitable purposes are exempt from the corporation tax act' and compare it to the almost identical wording of the current statute (see footnote 46)).
- (163) The Trade Tax Act in 2013 contained almost identically worded exemption as the version of the same act of 25 May 1965 in its §3(6) ⁽⁹⁸⁾. Thus, when HIS was formed, the exemptions were already in effect.
- (164) The German Fiscal Code's first version was established on 23 March 1976, thus, about three months after HIS was founded. This must be the reason why HIS' Satzung of 1976-1977 refers to a 'predecessor' of the AO, the Regulation of Public Benefit Organisations ('Gemeinnützigkeitsverordnung' of 24 December 1953).

⁽⁹⁵⁾ In the Satzung of 1976-1977 reference is made to the relevant legal basis in the Regulation on Public Benefit Organisations of 1953 and in the Satzung of 2000, the reference is made to the relevant provisions of the Fiscal Code ('AO') of 1977 which constitutes a technical and non-substantive change in comparison to the 1953 regulation as it is explained in recitals 164 and 165 of this Decision.

⁽⁹⁶⁾ HIS GmbH was taken over by the federal State and the Länder on 1 January 1976. 'HIS wurde am 01.01.1976 in die öffentliche Trägerschaft von Bund und Ländern überführt'.

⁽⁹⁷⁾ Notice on the modification of 24 May 1965 of the Corporation Tax Act ('Bekanntmachung der Neufassung des Körperschaftssteuergesetzes vom 24. Mai 1965'), Bundesgesetzbl. 11 June 1965, Nr. 24, I. S. 449.

⁽⁹⁸⁾ Notice on the modification of 24 May 1965 of the Trade Tax Act ('Bekanntmachung der Neufassung des Gewerbesteuergesetzes vom 24. Mai 1965'), Bundesgesetzbl. 11 June 1965, Nr. 24, I. S. 458.

(165) The Regulation on Public Benefit Organizations of 1953 implements ⁽⁹⁹⁾ sections 17 to 19 of the 'Law on the modification of certain tax rules' from 1934. This law from 1934 supports explicitly, in its section 17, 'science' and 'education' as a supportable charitable activity ⁽¹⁰⁰⁾. Thus, in combination with the Regulation of Public Benefit Organization of 1953, the 1934 law provided, until the AO entered into force, for an exemption from taxation of entities that engaged in public benefit activities, such as the support of education ⁽¹⁰¹⁾.

(166) Given this uninterrupted link of laws and regulations that refer explicitly to the tax exemptions in question, the Commission concludes that the legal basis remained the same within the meaning of the Commission Decision Aide d'État E 8/2006 (ex CP 110/2004 et CP 126/2004) – *Belgique Financement du radiodiffuseur public VRT* and the *Government of Gibraltar v Commission* judgment.

5.2.2.3. Objectives of public financing and supported products/services

(167) The Commission considers that HIS' activities also remained the same. The objective of the public funding, the support of universities, especially in the field of electronic data processing/information technology, remained unchanged as the Opening Decision itself established in recital 82. The comments also confirmed Germany's position that HIS' activities supported by public funding essentially remained unaltered for forty years (see recital 36).

(168) The Commission notes that there was a slight differences between the language of the Satzung relating to the objective between 1976-1977 and later years, but this difference was purely semantic. The language regarding the purpose of HIS GmbH in 1976-1977 was as follows: 'a) The development and improvement of information systems establishing the basis for decisions in higher education and procedures for rationalisation at higher education institutions, and b) the provision of advice on and cooperation in the introduction and application of information systems.' The language in later years slightly changed: 'The purpose of the undertaking is to support higher education establishments and the competent authorities in their efforts to achieve the rational and effective fulfilment of their higher educational role by a) developing procedures for rationalising university administration and supporting their introduction and application; (...) (d) ensuring information provision and the organisation of information exchange.' The Commission considers that both of these formulations are broad but they are targeted at electronic data processing. The Commission also considers that the language of the Satzung relating to the objective had to be broad enough to permit an adaptation of the services to the changing technological requirements. The formulation, at the same time, was not unlimited, as the task of 'developing procedures for the rationalisation of higher education administration and cooperating in the introduction and application thereof' cannot be understood to permit HIS to engage in activities other than the provision of electronic data processing/IT products and services.

(169) With regard to HIS' products and services over the years, the Commission is satisfied that the overview of the products Germany provided during the formal investigation procedure (see recital 94) as well as the fact that the early version of some of the products were already provided in 1976, sufficiently demonstrated to the Commission that there was a continuous product range provided by HIS GmbH over the years.

(170) Therefore the Commission concludes that HIS' activities supported by public funds have not been significantly altered during the time period under assessment.

5.2.3. Conclusions regarding the public funding to HIS between 1976 and 2013

(171) The measures for the benefit of HIS between 1976 and 2013, insofar as they constituted State aid, constituted existing aid pursuant to Article 1(b)(v) of Regulation (EU) 2015/1589.

(172) As recital 16 of the Opening Decision excluded from its scope the examination of any possible measures for the benefit of HIS eG as of 2014, the present decision does not relate to any examination of these measures.

⁽⁹⁹⁾ The official title of this regulation is as follows: 'Verordnung zur Durchführung der §§17 bis 19 des Steueranpassungsgesetzes (Gemeinnützigkeitsverordnung) vom 24. Dezember 1953. See https://www.bgb.de/xaver/bgb1/start.xav?start=/*%5B@attr_id=27bgb153s1592.pdf%27%5D#_bgb1_2F%2F%5B%40attr_id%3D%27bgb153s1592.pdf%27%5D_1564471557452

⁽¹⁰⁰⁾ 'To be recognised as support of the public [interest in] (...) Science (...) Education'. 'Als Förderung der Allgemeinheit anzuerkennen (...) Wissenschaft (...) Erziehung'. Article 17 section 3 of the 'Law on the modification of certain tax rules' ('Steueranpassungsgesetz of 16 October 1934', Reichsgesetzblatt, Part I page 927).

⁽¹⁰¹⁾ See a similar reasoning in recital 15 of Commission Decision C(2015) 7225 final of 26 October 2015, SA.33206 (2015/NN) – Alleged unlawful State aid to German Youth Hostel Association ('Deutsches Jugendherbergswerk') – Tax measures (OJ C 387, 20.11.2015, p. 1). http://ec.europa.eu/competition/state_aid/cases/260436/260436_1698296_81_2.pdf

6. CONCLUSION

(173) The Commission therefore concludes that the doubts expressed in the Opening Decision have been successfully eliminated,

HAS ADOPTED THIS DECISION:

Article 1

The measures that Germany has implemented for Hochschul-Informations-System GmbH between 1976 and 2013, insofar as they constituted State aid, constituted existing aid pursuant to Article 1 (b)(v) of Regulation (EU) 2015/1589.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 20 September 2019.

For the Commission
Margrethe VESTAGER
Member of the Commission
