V

(Yttranden)

FÖRFARANDEN FÖR GENOMFÖRANDE AV KONKURRENSPOLITIKEN

EUROPEISKA KOMMISSIONEN

STATLIGT STÖD – TYSKLAND

Statligt stöd SA.34402 (2015/C) (ex 2012/NN)

statlig finansiering av programvarulösningar för universitet (HIS)

Uppmaning enligt artikel 108.2 i fördraget om Europeiska unionens funktionssätt att inkomma med synpunkter

(Text av betydelse för EES)

(2016/C 085/03)

Genom den skrivelse, daterad den 23 december 2015, som återges på det giltiga språket på de sidor som följer på denna sammanfattning, underrättade kommissionen Tyskland om sitt beslut att inleda det förfarande som anges i artikel 108.2 i fördraget om Europeiska unionens funktionssätt avseende ovannämnda stöd/åtgärd.

Berörda parter kan inom en månad från dagen för offentliggörandet av denna sammanfattning och den därpå följande skrivelsen inkomma med sina synpunkter, som ska sändas till följande adress:

Europeiska kommissionen,
Generaldirektoratet för konkurrens
Registreringsenheten för statligt stöd
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Synpunkterna kommer att meddelas Tyskland. Den tredje part som inkommer med synpunkter kan skriftligen begära konfidentiell behandling av sin identitet, med angivande av skälen för begäran.

SAMMANFATTNING

FÖRFARANDE

Kommissionen mottog ett klagomål från Datenlotsen Informationssysteme GmbH om att det offentliga företaget Hochschul-Informations-System GmbH (HIS, numera HIS eG) har gynnats av skatteförmåner och (årlig) statlig finansiering i nästan 40 år. Den klagande anser att detta utgör olagligt statligt stöd till HIS, i strid med EU:s konkurrensregler. De tyska myndigheterna överlämnade sina synpunkter på klagomålet och hävdade att sådana skatteförmåner och den årliga statliga finansieringen inte utgör statligt stöd eller, om så är fallet, att de utgör befintligt stöd, som också upphörde i och med omvandlingen av HIS GmbH till kooperativet HIS eG.

BESKRIVNING AV ÅTGÄRDEN

HIS har varit 100 % offentligägt (först av den tyska staten och de tyska delstaterna och därefter enbart av delstaterna) sedan 1976. Från början och fram till den 31 december 2013 har företaget gynnats av statligt stöd (finansiering av underskott). Hittills har företaget också gynnats av undantag från handels- och bolagsskatt. Företagets huvudsakliga uppdrag är att stödja universiteten och deras administrationer för att garantera en rationell och ekonomisk prestanda genom att (bland annat) utveckla förfaranden för att rationalisera och bistå universitetets administration. HIS började utveckla it-lösningar och tillhandahålla it-tjänster för universiteten vid en tidpunkt då tekniken påstods vara ny och då det inte fanns några andra leverantörer av sådana lösningar och tjänster.

Tyskland hävdar att skattelättnader och statligt stöd fram till den 31 december 2013 inte utgör statligt stöd i den mening som avses i artikel 107.1 i EUF-fördraget. HIS skulle inte vara ett ”företag”, utan snarare en del av en ”intern statlig/intern organisation” på utbildningsområdet och verksamheten huvudsakligen av icke-ekonomisk karaktär. Dessutom skulle HIS inte få någon fördel i den mening som avses i artikel 107.1 i EUF-fördraget eftersom fördelarna i sin helhet fördes vidare (genom de statliga universiteten) till Tyskland. Tyskland anser också att det var ekonomiskt rationellt att samla all it-verksamhet för de statliga universiteten i en enda enhet. De tyska myndigheterna anser också att det årliga statliga stödet gäller en tjänst av allmänt ekonomiskt intresse i den mening som avses i artikel 106.2 i EUF-fördraget, eller befintligt stöd. Den direkta statliga finansieringen avskaffades den 31 december 2013.

Klaganden anser tvärtom att den statliga finansieringen och undantag från skatt som HIS åtnjutit fram till den 31 december 2013 utgör olagligt statligt stöd. De tjänster som HIS tillhandahåller hade kunnat levereras av andra marknadsaktörer, åtminstone sedan 1990-talet. Klaganden anser vidare att kooperativet, HIS eG, fortsätter att gynnas av effekterna av tidigare stöd.

BEDÖMNING AV ÅTGÄRDEN

Efter en första bedömning betvivlar kommissionen att det statliga stödet till HIS fram till den 31 december 2013 utgör statligt stöd i den mening som avses i artikel 107.1 i EUF-fördraget, oavsett om det är befintligt stöd eller nytt stöd.

Vad gäller förekomsten av statligt stöd, anser kommissionen att en intern struktur inte utesluter HIS från att vara ett företag i den mening som avses i artikel 107.1 i EUF-fördraget. HIS verksamhet skulle kunna vara icke-ekonomisk om det visar sig att tillhandahållandet av mjukvara var direkt kopplat till och nödvändigt för uppfyllandet av den offentliga uppgiften som universitet och forskningsorganisationer har anförtrotts.

Efter sin preliminära bedömning hyser kommissionen också tvivel om att den statliga finansieringen till HIS i sin helhet flöt tillbaka till staten (via universitet), och att statens och delstaternas finansiering av HIS för att täcka dess underskott, utgör ett marknadsmässigt beteende (principen om en privat investerare i en marknadsekonomi) och därför inte utgör statligt stöd. Särskilt visar kommissionens preliminära bedömning att om HIS betraktas som ett företag kan en selektiv ekonomisk fördel för HIS inte uteslutas och följaktligen kan de aktuella åtgärderna omfatta statligt stöd. Efter sin preliminära bedömning betvivlar kommissionen också att villkoren för en tjänst av allmänt ekonomiskt intresse är uppfyllda.

Om det konstateras att det rör sig om statligt stöd, måste det bedömas huruvida stödet kan betraktas som befintligt eller nytt stöd. Baserat på aktuella uppgifter som lämnats av Tyskland och klaganden, framgår att en marknad för den relevanta programvaran för universitetsförvaltning) uppstod först under 1990-talet. Om denna tidsrymd (och den relevanta marknaden) bekräftas, kan HIS inte ha fått statligt stöd före 1990-talet. Kommissionen kan dock inte avgöra om stödet skulle kvalificeras som befintligt stöd eller som nytt stöd, eftersom uppgifter om förekomsten av marknaden inte är konsekventa. Det är på detta stadium framför allt inte klart huruvida uppkomsten av marknaden kunde kvalificeras som en utveckling av den inre marknaden i den mening som avses i artikel 1 b v i procedurförordningen, och om det statliga stödet till förmån för HIS, som en del av ett stödsystem, inte var föremål för betydande förändringar över tiden.

Om det kvalificeras som nytt stöd, skulle den offentliga finansieringen högst sannolikt snedvrida, eller åtminstone hota att snedvrida, konkurrensen. En påverkan på handeln mellan medlemsstaterna kan inte uteslutas. Därför kan kommissionen i nuläget, och på grundval av sin preliminära bedömning, inte utesluta att åtgärden, som inte anmäldes till kommissionen för att få ett förhandsgodkännande, utgör statligt stöd i den mening som avses i artikel 107.1 i EUF-fördraget som kan anses oförenligt med den inre marknaden.

När det gäller den kooperativa strukturen (HIS eG), är detta inte en del av den aktuella undersökningen, men kommer att bli föremål för ett separat beslut av kommissionen i ett senare skede.

I enlighet med artikel 16 i rådets förordning (EU) 2015/1589 kan allt olagligt stöd återkrävas från mottagaren.

SJÄLVA SKRIVELSEN

«The Commission wishes to inform Germany that, having examined the information supplied by your authorities concerning the State support to the benefit of Hochschul-Informations-System GmbH ("HIS"), it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

1. **PROCEDURE**

(1) On 15 March 2012, the Commission received a complaint from Datenlotsen Informationssysteme GmbH ("Datenlotsen" or "the complainant") concerning alleged State aid of which the public undertaking Hochschul-Informations-System GmbH, now HIS eG, would have allegedly benefited for almost 40 years.

(2) Following a request for information of 23 March 2012, by which the complaint was forwarded to the German authorities, the German authorities submitted their reply on 25 May 2012. After several telephone and e-mail exchanges, the services of DG Competition met the German authorities and HIS on 25 October 2012. The German authorities provided further information, mainly on their plans to restructure HIS into a cooperative ("*Genossenschaft*"), on 12 December 2012, 18 January 2013 and 1 March 2013. The services of DG Competition met the German authorities and HIS on 7 March 2013. In reply to a request for information and further questions from the Commission of 2, 24 and 26 April 2013, the German authorities provided further information on 19 April, 8 May, 5 July and 19 November 2013. On 22 January 2014 the German authorities replied to a request for information of 19 December 2013. An additional request for information was sent to the German authorities on 3 July 2015, to which the reply was received on 28 August 2015.

(3) Further to its complaint of 15 March 2012, the complainant provided additional information on 13 December 2012 and 17 January 2013. The services of DG Competition met the complainant on 23 January 2013, after which the latter provided further information on 15 and 28 February 2013. On 7 May 2013, the complainant provided additional information in reply to the submission of the German authorities of 19 April 2013. The complainant provided further information on 27 May, 28 June, 2 October, 20 November and 18 December 2013, and 13 and 21 February and 20 May and 4 July 2014. On 24 March, 19 May, 26 May, 17 July, 25 August and 28 August 2015, further submission were made by the complainant. The Commission services met the complainant on 4 June 2015. On 25 August 2015 the complainant explicitly requested the Commission, pursuant to Article 265(2) TFEU, to open formal investigation procedure under Article 108(2) TFEU.

2. **BACKGROUND INFORMATION**

(4) HIS was founded in 1969 by the non-profit private foundation "*Stiftung Volkswagenwerk*" and was taken over by Germany and the German *Länder* in 1976. Between 1976 and 28 January 2014, it was continuously 100 % publicly owned, with one third of its capital being owned by the Federal Republic of Germany and two thirds by the 16 German *Länder* ([1]).

(5) HIS was operating on a non-profit basis, although it was incorporated as a GmbH; a limited company governed by private law. Its funding acts were the consortium agreement ("*Konsortialvertrag*"), the contractual agreement between *Bund* and *Länder* defining the modalities of collaboration and obligations of the owners ([2]) and annexed to it, the Statute of HIS. Both date from 1977.

(6) As laid down in paragraph 2 of HIS' Statute the object of its business (at least until 31 December 2013) was to support higher education establishments and the competent authorities in their efforts to achieve the rational and effective fulfilment of their higher educational role. HIS IT systems are used in more than 220 public and religious higher education establishments in Germany.

(7) Article 5 of the *Konsortialvertrag* States that the contractual parties (*Bund* and *Länder*) commit to jointly cover the resource needs of HIS according to Article 6 of the Statute: The funding shall cover the material needs of HIS, as far as no own revenues are generated, necessary to carry out its statutory tasks, based on the annual budget. The budget is drafted on the basis of the work plan designed by the board of trustees ("*Kuratorium*"). It is proposed by the management to the supervisory board, which presents it to the owners for approval in course of the general assembly.

([1]) Until the establishment of the cooperative on 28 January 2014.
([2]) It was extended in 1992 to include the new *Länder*.

(8) Paragraph 12(1) of the Statute describes that HIS' supervisory board is made up of ten members, seven of whom are appointed on a proposal from the Conference of Ministers of the Länder, two on a proposal from 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 one on a proposal from the Federal authorities. Paragraph 15(1) of its Statute States that 19 of the 37 *Kuratorium* members are appointed by the Conference of Ministers of the Länder. As regards the volume of its activities, 5,14 % ([3]) of HIS' turnover relates to activities on behalf of entities other than public higher education authorities.

(9) At the start, HIS provided its products and services to universities free of charge, but started charging from 1997 in order to limit the public funding for HIS with the general increasing IT demand of universities.

(10) As of 28 January 2014, HIS GmbH was altered into a cooperative (*"Genossenschaft"*, HIS eG). Since 1 January 2014 HIS no longer receives the funding referred to in recital (7) above. HIS eG is financed by its members; all *Länder* (previously shareholders of HIS GmbH) are members ([4]) of HIS eG and the cooperative is open for membership to any public university/institution. When joining the cooperative, each member is obliged to pay-in at least one, with a possible maximum of ten, shares of 5 000 EUR each ([5]). Members also incur an annual membership fee ([6]) and universities belonging to the cooperative pay a fee/price for the services that HIS eG provides in addition to this. Only members can benefit from the services HIS eG provides, Reference to "HIS" in the following concern HIS GmbH exclusively.

(11) Datenlotsen is a German company active in the market of university IT systems since 1993. 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" in competition with HIS.

(12) According to Germany, since the mid-1970s HIS has provided software to universities for specific areas of university administration. Since the end of the 1980s it has been offering an integrated campus management solution ("HIS-GX"). In recent years, it developed a web-based integrated campus management system ("HISinOne"), which — according to the complainant — competes with similar integrated software solutions that are already available on the market (including CampusNet from Datenlotsen).

3. **ALLEGATIONS MADE BY THE COMPLAINANT**

(13) Datenlotsen considers that the yearly State funding that HIS received until the end of 2013 (see recital (7) above) constitutes incompatible State aid. According to the complainant, until 31 December 2013 this State funding allegedly 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 offers compete with the complainant's own commercial services and cannot, in the complainant's view, be considered services of general economic interest ("SGEI"); the yearly State funding rather constitutes non-notified operating aid (in the amount of over EUR 9 million in 2011 only ([7])) of which HIS benefited during for almost 40 years. The complainant also claims that the State support perpetuated an inefficient company unable to keep up with technological evolution and innovation and to provide the software (campus management system) needed by the universities. In addition, the complainant argues that the existing market structure ([8]) would at the same time prevent universities from acquiring other software on the market.

([3]) Figure from case C-15/13, Judgement of the Court of 8 May 2014 *Technische Universität Hamburg, Hochschul Informations System GmbH against Datenlotsen Informationssysteme*.

([4]) See letter of HIS to all German public universities of 29.01.2014, submitted by the complainant on 13.02.2014, page 1.

([5]) Statute of the cooperative, § 39.

([6]) According to the Statute of HIS eG, the amount of the yearly fee is to be determined by the management and supervisory board, but cannot exceed 6 000 EUR per year.

([7]) According to Germany, only EUR 3,29 million of this amount (37 % of the grant) concerns University-IT (which is the subject of the complaint). The other activities of HIS (not subject of the current decision) are university research (*"Hochschulforschung"*), i.e. research on higher education, and university development, (*"Hochschulentwicklung"*), i.e. support regarding construction/land use planning and regarding resources and projects planning in the field of organisational development.

([8]) Through long term maintenance contracts related to existing software supplied by HIS as well as software development contracts relating to the product "HISinOne", universities are allegedly bound to HIS.

(14) In addition, the complainant takes the view that tax exemptions applied to HIS should be regarded as incompatible State aid. In this regard, the complainant alleges two different tax exemptions: (i) exemption from corporation tax based on § 5 para. 1 Nr. 9 of the German Corporation Tax Act; and (ii) exemption from trade tax based on § 3 N. 6 of the German Trade Tax Act (in connection with § § 51 et seq. of the German Taxation Regulation).

(15) According to the complainant, HIS carries out economic activities which consist in creating and providing software to German and foreign public and private universities, as well as offering software support services. The complainant therefore takes the view that these tax exemptions provide a total reduction of the amount of tax that should normally be borne by HIS. Therefore, the complainant argues that the tax exemptions constitute a selective advantage which consists in reducing HIS' tax burden and which should be regarded as State aid contrary to EU law.

(16) Finally, the complainant also opposes the change of HIS into a cooperative, which allegedly would continue to entail State aid. In the complainant's view the direct State funding has been replaced by indirect State funding through the universities, which need to pay more for the service under the cooperative than before and therefore receive additional funding from the budget of the regions to ensure their software needs are met. Additionally the complainant notes that the cooperative keeps operating on the basis of structures and products that were developed with illegal State aid. This non-recovered aid continues to give an illegal competitive advantage to HIS. The Commission is, at the time of this decision, in the process of examining the cooperative structure of HIS eG in order to determine whether it entails State aid and, if so, whether this aid could be considered compatible. Therefore, this part of the complaint is not covered by the present decision and will be subject to a separate decision by the Commission. At present, the Commission does not have sufficient information to take a first view on that part of the complaint.

4. **POSITION OF THE GERMAN AUTHORITIES**

(17) In their letter of 25 May 2012, the German authorities claim that HIS did not benefit of any State aid in the sense of Article 107 TFEU as the criteria of that article are not fulfilled. In particular, Germany considers that HIS cannot be deemed an undertaking in the sense of Article 107(1) TFEU but rather be part of "internal State/in-house organisation" ("*staatlicher Binnenbereich*") in the field of education: for efficiency reasons, the *Länder* and *Bund* would have bundled, in HIS, (software supply) resources that should otherwise have been provided separately by each *Land* or each college. According to Germany, the federation/the regions should not be obliged to "outsource" the provision of such college software services. Germany also argues that the activities of HIS would mainly be of non-economic nature as its aim is in line with the State's educational task, which includes providing colleges with human, financial and organizational resources. Thus HIS supplied its services for non-economic purposes. In this context, Germany refers to Commission decision No 343/2008 ([9]) and the *Fenin* case law ([10]). Moreover, HIS would not benefit from an advantage in the sense of Article 107(1) TFEU as this advantage was passed on entirely to the (State-owned) universities and therefore ultimately flew back to the State. HIS, as a pure intermediary, could thus not be a beneficiary of aid ([11]).

(18) In the alternative, the German authorities argue that the yearly State funding relates to an existing aid scheme or would be part of an SGEI in the sense of Article 106(2) TFEU. According to Germany, guaranteeing education and research (public tasks, which constitute a clear SGEI) needs practical implementation through the provision of software. Germany was thus obliged to provide this software to the universities and used HIS as a vehicle to do so. Germany considers that HIS' Statutes and its work programme constitute a sufficient entrustment act and that the compensation of HIS follows from the combined reading of the work programme and the budget.

([9]) http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_n343_2008.

([10]) Judgement of the Court in case C-205/03 (appeal to case T-319/99).

([11]) Germany refers to the (old) Community Framework for state aid for R & D&I (OJ C 323, 30.12.2006, page 1), point 3.1.2, according to which, if research organisation or other non-profit innovation intermediaries can prove that the totality of the state funding has been passed on to the final recipient and that there is no advantage granted to the intermediary, the intermediary organisation may not be recipient of state aid. However, in the Commission's preliminary view, it is doubtful that HIS could qualify as an "innovation intermediary" in the sense of the Community Framework, in particular in light of the fact that the complainant claims that it not only supplies a software system similar to that of HIS, but that HIS' software system (HISinOne) is moreover under development since well over 10 years and does not seem to be ahead of the market. (The current Framework for State aid for R & D&I is published in OJ C 198, 27.6.2014).

(19) At the same time Germany holds that the funding of HIS constitutes market conform behaviour and therefore does not constitute aid: HIS' shareholders (Federation and Regions — since 2014 only the Regions) got a return for their funding, as they also fund the colleges, including their administration. Considering the State as a whole, the funding of the "subsidiary", HIS, would thus advantageous to the group (as it benefits the public colleges and in this way the budget of the Regions). It would be a rational, market-conform, decision of the State to develop (through HIS) IT for all colleges, which the latter could then use at a low price.

(20) Germany also argues that, should the State support qualify as aid, it should be considered existing aid; In line with the Procedural Regulation's definition for existing aid ([12]) 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. Only in the 1990s private companies started supplying integrated college software ("Campus Management solutions") ([13]). Therefore the German authorities argue that the State support became aid only upon emergence of a market.

(21) With regard to the exemptions from corporation tax and trade tax, the German authorities take the view that the tax exemptions are the outcome of the proper application of tax legislations. Pursuant to § 5 para. 1 Nr. 9 of the German Corporation Tax Act, non-profit undertakings are exempt from corporation tax inasmuch as they do not carry out an economic activity. Pursuant to § 3 N. 6 of the German Trade Tax Act in connection with § § 51 *et seq*. of the German Taxation Regulation, non-profit undertakings are exempt from trade tax inasmuch as they do not carry out an economic activity. Since HIS is a non-profit association which does not carry out economic activities, HIS is tax exempt. The German authorities explain that the same tax exemptions apply to any non-profit entity in Germany and refer to court jurisprudence ([14]) according to which a tax scheme which constitutes an advantage for the recipient, but which is justified by the character or structure of the system, does not fulfil the selectivity criteria.

5. **ASSESSMENT**

(22) According to Article 107(1) TFEU, "*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*". It follows that in order for a measure to qualify as State aid, the following cumulative conditions have to be met: (i) the measure has to be granted out of State resources and be imputable to the State, (ii) it has to confer an economic advantage to an undertaking, (iii) the advantage has to be selective, and (iv) it has to distort or threaten to distort competition and has to be liable to affect trade between Member States.

5.1. **Existence of State aid**

5.1.1. *State resources*

(23) As regards the yearly State funding, the Commission observes that it consists in (deficit) funding of HIS, financed directly by the Federal Republic of Germany and the *Länder* from the federal and regional budgets. They thus constitute State resources. Since the decision to provide the funding lies in the hands of the Federal Republic of Germany and the *Länder*, the measure would clearly be imputable to the State. Additionally, funding from public law bodies (i.e. universities) also constitute State resources, as these are part of the State, and all their spending is hence imputable to the State.

(24) Additionally, by exempting HIS from corporation tax and trade tax, the German authorities forego revenue which would constitute State resources. Hence, the measures at issue involve a loss of State resources and they are therefore granted through State resources.

5.1.2. *Presence of an economic advantage*

(25) According to Article 107(1) TFEU, in order for State aid to be present, an economic advantage has to be provided to an undertaking. In the present case, Germany contests the nature of HIS as an undertaking, and therefore this element needs to be assessed before examining the presence of an economic advantage.

([12]) Council Regulation (EU) 2015/1589, Article 1(b)v.
([13]) Germany in particular mentions the Campus Management solutions offered by GINIT since the beginning of the 1990'ies and by SAP as of the middle of the 1990'ies (Submission of Germany of 5.7.2013, p. 4).
([14]) ECJ decision in case C-6/12, paragraph 22, as of 18.07.2013, cases C-78/08 to C-80/08, graph 64, as of 08.09.2011

5.1.2.1. *Is HIS an undertaking?*

(26) According to settled case-law, in the field of State aid 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. Any activity consisting in offering goods or services on a given market is an economic activity ([15]).

(27) Germany argues that HIS was not an undertaking because it did not engage in an economic activity. According to Germany, HIS had as statutory aim the support of German public universities and their administrations in order to ensure the rational and economic performance of their scientific and educational tasks. This aim is in line with the State's duty for providing education, which requires providing universities with human, financial and organizational resources. As such, HIS supplied its services for non-economic purposes and therefore did not engage in an economic activity.

(28) The Commission notes in the first place that activities which fall within the exercise of public powers are not of an economic nature justifying the application of the Union's competition rules ([16]). This is, inter alia, the case where the State acts "by exercising public power" ([17]) or where the activities carried out by a given entity are connected with the exercise of powers of the State by their nature, their aim and the rules to which they are subject ([18]).

(29) The Commission must therefore assess whether the activities carried out by HIS belong to the sphere of public power or are connected to the exercise of those powers by their nature, aim and the regulation to which those activities are subject. In this respect, the Commission considers it relevant to make reference to the *Compass Datenbank* case law of the Court of Justice. According to that judgment, *"a data collection activity in relation to undertakings, on the basis of a statutory obligation on those undertakings to disclose the data and powers of enforcement related thereto, falls within the exercise of public powers. As a result, such an activity is not an economic activity"* ([19]). In addition, the Court noted that *"an activity consisting in the maintenance and making available to the public of the data thus collected […] also does not constitute an economic activity, since the maintenance of a database containing such data and making that data available to the public are activities which cannot be separated from the activity of collection of the data"* ([20]).

(30) In this respect, the Commission recalls that, on the basis of the case law ([21]) the Commission in the Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest ("the SGEI Communication") ([22]) has considered that, public higher education organised within the national educational system, predominantly or entirely funded by the State and supervised by the State is considered a non-economic activity. On this basis, it must be assessed whether the activities of HIS are inseparably connected to the educational tasks carried out by higher education establishments, which would render HIS' activities non-economic.

(31) On the basis of the information available, it appears possible to consider at this stage that HIS' activities could be considered non-economic to the extent that they seem to be necessary to, and inseparable from the public task of higher education, (see also Article 7 Grundgesetz). This is reflected by paragraph 2 of HIS' Statute, which defines the object of HIS' business as supporting higher education establishments and the competent authorities in their efforts to achieve the rational and effective fulfilment of their higher educational role (see recital (6) above). As means to this end, the Statute in paragraph 2 narrows the activities of HIS to (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 clearly linked to university IT; software development and support.

([15]) Case C-41/90 Höfner and Elser [1991] ECR I-1979, paragraph 21, case 19/61 Mannesman AG v. High Authority of the ECSC [1962] ECR 357, paragraph 371 and joined cases 17/61 & 20/61 Klöckner-Werke AG and Hoesch AG v. High Authority of the ECSC [1962] ECR 325, paragraph 341:

([16]) See case C-138/11 *Compass v Austria (Compass Datenbank)* EU:C:2012:449, paragraph 35; Case 107/84 *Commission v Germany* EU:C:1985:332, paragraphs 14 and 15; and Case T-347/09 *Germany v Commission* EU:T:2013:418, paragraph 27.

([17]) Case C-118/85 *Commission v Italy* EU:C:1987:283, paragraphs 7 and 8.

([18]) Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol* EU:C:1994:7, paragraph 30.

([19]) Case C-138/11 *Compass v Austria (Compass Datenbank)* EU:C:2012:449, paragraph 40.

([20]) Case C-138/11 *Compass v Austria (Compass Datenbank)* EU:C:2012:449, paragraph 41.

([21]) See for instance case C-318/05, point 68; 109/92, Wirth, point 1.

([22]) OJ C 8, 11.1.2012, p. 4–14, points 26-29.

(32) In the light of the *Compass Datenbank* case law, it appears that the above would apply not only to the collection and storage of data but also to making the data available to higher education entities through an IT application and the provision of IT support services, to the extent that the latter — although it could *per se* be construed as the provision of services on a market — would be necessary to the exercise of public task, i.e. the provision of public higher education. On the basis of the information available, the Commission is of the view at this stage that public higher education could not be adequately exercised without the abovementioned activities.

(33) The fact that HIS provided IT services in exchange for remuneration since 1997 may instead indicate that the services it provides to universities are an economic activity. However, as remuneration is included in the applicable rules (see Statute Article 6) it could also be considered inseparable from the services that HIS provided. This preliminary conclusion would also apply in relation to the loss coverage of HIS in the form of direct yearly transfers by the *Bund* and the *Länder*.

(34) Notwithstanding the above, the Commission observes that it seems that in recent years HIS has been supplying also general (e.g. financial or personnel) management software that does not appear to be specific to public higher education management and may be necessary but not inseparable from it. In addition, at this stage it is not clear whether the use of the software by the universities was always strictly limited to purely non-economic purposes or whether it also served for-profit activities of the universities.

(35) In addition, it is not clear to what extent the fact that IT support for universities could be provided also by other undertakings (thus the market is not completely closed to the competition) could affect the preliminary view of the HIS activities as being ancillary to the public task of providing higher education.

(36) Also, according to the information available, it appears that HIS also supplied software and software support to private universities, which could qualify as an economic activity. According to Germany, the activity of HIS serving foreign and private universities was only limited, constituting around 2,8 % ([23]) of its turnover, and allegedly this activity was strictly separated from its non-economic main activity and cross-subsidisation was excluded. However, the Commission highlights that Germany has not provided evidence to substantiate its claim.

(37) Germany further holds that HIS should not be deemed an undertaking in the sense of Article 107(1) TFEU because it was an instrument of the State ("in-house"/"closed circle" structure, body of the State administration). According to Germany, the federal authorities and the *Länder*, for efficiency reasons, would have bundled in HIS software supply resources that should otherwise have been provided separately by each. According to Germany, the federal authorities and the *Länder* should not be obliged to "outsource" the provision of such university software services.

(38) The Commission has doubts whether the above view of the German authorities can rule out the existence of an economic activity on the basis of the case law. The fact that an activity has been provided "in house" does not exclude the existence of its economic nature. In Zweckverband Tierkörper ([24]) the General Court has held that whether the State exercises an activity directly by the body belonging to public administration or another special entity has no impact on the application of competition rules to that activity and held that the body exercises 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 in the Member State in question by a statutory provision. That is not the case here.

(39) In view of the above, the Commission notes that it has at this stage some doubt as to whether HIS can be considered an undertaking in the sense of Article 107(1) TFEU. The Commission therefore requests Germany and any other interested parties to provide additional information in this respect as to allow it to take a final view on this issue.

5.1.2.2. *Economic advantage to HIS*

(40) If HIS were to consider as an undertaking in the sense of Article 107(1) TFEU, the Commission would need to assess whether it would have received an economic advantage resulting from the measures.

([23]) Figure submitted by Germany — in contrast with the figure in the court judgement in case C-15/13.
([24]) Cases T-295/12 and T-309/12 judgements of 16 July 2014, points 70-73.

(41) With regard to the tax exemptions, it is settled case-law that the notion of aid encompasses not only positive benefits, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking ([25]). This includes advantages granted in the form of tax exemptions.

(42) Since HIS benefits from exemption from corporation tax (*Körperschaftsteuer*) on the basis of § 5 para. 1 Nr. 9 of the German Corporation Tax Act and exemption from trade tax (*Gewerbesteuer*) on the basis of § 3 N. 6 of the German Trade Tax Act in connection with § § 51 et seq. of the German Taxation Regulation, HIS benefits from an advantage consisting in a reduction of its tax burden. Hence, the measures under consideration involve an advantage available for HIS.

(43) As regards the yearly State funding, Germany argues that HIS did not get any undue benefit from it as the advantage — if any — would have been passed on entirely to the (State-owned) universities and therefore ultimately reverted to the State. According to Germany, HIS was a pure intermediary and therefore could not be a beneficiary of any aid (see also recital (17)).

(44) However, on the basis of the information available, the Commission is of the preliminary view that it is questionable whether HIS could be considered as a pure intermediary between the State and the universities or that the federation/regions, HIS and the universities could be considered as one public entity/group. Moreover, Germany has provided no evidence to demonstrate the yearly State funding to HIS would have been established in a way to avoid overcompensation.

(45) Therefore it cannot be excluded that the yearly funding as set out in the Statute and the *Konsortialvertrag* goes beyond what is necessary to provide IT support to the public universities.

(46) It should also be noted that, in Germany's views, HIS would not have been able to provide services without the yearly State funding. The State support thus seems to have constituted an advantage to HIS.

(47) Germany also argues that HIS was in line with market conform behaviour and therefore does not constitute aid: HIS' shareholders (Federation and Regions — since 2014 only the Regions) got a return for their funding, as they also fund the universities, including their administration. Considering the State as a whole, the funding of the "subsidiary", HIS, would thus be advantageous to the group (as it benefits the public universities and in this way the budget of the Regions). It would be a rational, market-conform, decision of the State to develop (through HIS) IT for all universities, which the latter could then use at a low price ([26]).

(48) However, it is questionable whether the continuous State funding of a company to enable it to supply software to universities is compatible with the Market Economy Investor Principle ("MEIP") or qualifies as market-conform behaviour. This claim seems to be at odds with the status of HIS GmbH as a non-profit organisation. Further, Germany has not provided a business plan which demonstrates that funding HIS is more advantageous than buying such services on the market. Thus, if — as appears at this stage — the funding is not in line with the MEIP, an economic advantage may exist in favour of HIS from which other providers do not benefit.

(49) Therefore, in the preliminary view of the Commission, the yearly State funding up to 31 December 2013 conferred an economic advantage to HIS in the sense of Article 107(1) TFEU.

5.1.3. *Selectivity*

(50) Concerning the yearly State funding, the Commission is of the preliminary view that the advantage (public funding under the consortium agreement) is selective since only HIS and no other software provider would have benefited from it.

([25]) Case 30/59 De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community [1961] ECR 3, p. 19.

([26]) Germany refers to the 1993 Commission Communication regarding the application of Articles 92 and 93 to public undertakings in the manufacturing sector, point 29, according to which cross-subsidisation in public holding companies will be considered as aid only where there is no other reasonable explanation to explain the flow of funds than that they constitute aid. It should be noted, however, that this is in the context of the interpretation of the MEIP to public companies and concerns subsidisation of unprofitable undertakings by profitable undertakings within the same group of public companies (comparable to private groups with a strategic plan for long-term gain). The case under investigation, to the contrary, concerns funds from the state to a separate (albeit public) company to finance the provision of software to (mainly public) universities. It does not seem straightforward that the German federation and regions, HIS and the universities could be considered to constitute one (public) company group.

(51) With regard to the tax exemptions, under Article 107(1) TFEU, the measure would be selective insofar as it favours certain undertakings or the production of certain goods. In the case under review, the question arises as to whether the exemptions from corporation tax and trade tax granted to HIS constitute a selective advantage.

(52) As mentioned above, HIS benefits from the following two tax exemptions: (i) exemption from corporation tax (*Körperschaftsteuer*); and (ii) exemption from trade tax (*Gewerbesteuer*). The first exemption is based on § 5 para. 1 Nr. 9 of the German Corporation Tax Act (*Körperschaftsteuergesetz*). Accordingly, non-profit undertakings are exempt from corporation tax insasmuch as they do not carry out an economic activity. The second exemption relates to § 3 N. 6 of the German Trade Tax Act (*Gewerbesteuergesetz*) in connection with § § 51 *et seq*. of the German Taxation Regulation (*Abgabenordnung*). This provision exempts from trade tax non-profit undertakings inasmuch as they do not carry out an economic activity.

(53) Therefore, the assessment of the selective advantage is contingent upon the qualification of the HIS' activities when applying the tax legislations. Should one consider that creating and providing software to universities constitutes an economic activity, then the tax exemptions granted to HIS would be selective since they provide for an advantage that any other non-profit undertakings carrying out economic activities would not benefit from. By contrast, should one consider that it does not constitute an economic activity, then the tax exemptions apply to HIS as to any other non-profit undertakings with no economic activities. There would therefore be no selective advantage.

(54) The question of the selective advantage is therefore connected to that of the nature of the activities carried out by HIS. As has been assessed above, it cannot at this stage be excluded that HIS' are of a non-economic nature since they may be necessary and inextricably linked to the public task of providing higher education. The Commission has therefore doubts as to the assessment of the selective advantage and it invites the German authorities and the interested parties to provide further substantiated arguments on this question.

(55) In a second step, should the tax measures appear to be *prima facie* selective, one should next examine whether the differentiation that results from the nature or general scheme of the tax system of which it forms part and could hence be justified. In this regard, according to the relevant jurisprudence ([27]) and the Commission Notice on the application of the State aid rules to measures relating to direct business taxation ([28]), a Member State has to establish whether the measure under consideration derives from the basic or guiding principles of that system.

(56) In this regard, one of the arguments raised by the German authorities the measure is not selective because he *prima facie* selectivity of the measure would be justified since HIS is a non-profit undertaking. According to the aforementioned Notice, since tax cannot be levied if no profit is earned, it may be justified by the nature of the tax system that non-profit-making undertakings are tax exempt.

(57) In the present case, however, the Commission takes the preliminary view that such a justification could not apply since HIS generates income for the provision of software, which should *prima facie* be subject to tax.

5.1.4. *Distortion of competition and effect on trade between Member States*

(58) Germany argues that there was no market for university software in 1976 and therefore that the financing of HIS could not constitute State aid. In the absence of a market, there cannot be a distortion of competition affecting trade in the sense of Article 107(1) TFEU.

(59) The complainant is of the view ([29]) that in 1976, at the time when HIS was acquired by Germany and the *Länder*, HIS did not provide IT solutions and services yet. Universities did not have the IT infrastructure which could have supported the use of such solutions or to have the need for such services. Sector-specific IT solutions were first developed in the private sector in the 1980s and only around 1993 the relevant university IT solutions and services market (market for Campus Management Systems) emerged in Germany, the UK and Italy. At that moment, US providers, which had started offering such systems in the US as of the 1980's, entered the market. On the basis of the information above (and pending any relevant comments that Germany and any other interested parties may wish to make in the course of the formal investigation procedure), the Commission is at this stage of the preliminary view that at least since 1993 there has been market for higher education management software.

([27]) Case 173/73 Italian Republic v. Commission of the European Communities [1974] ECR 709, paragraph.
([28]) Commission Notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, paragraph 23.
([29]) Datenlotsen, submission of 28.08.2015.

(60) On the basis of the above, it appears to the Commission that the yearly State funding and the tax exemptions could be considered to be liable to affect trade between Member States, at least since 1993.

(61) The yearly state financing provided to HIS an economic advantage, thereby putting it in a better position than other IT services providers active on the market. It could develop further software and to provide services and offer it to higher education entities at conditions that would not be available under normal market circumstances. Therefore, at this stage, the Commission is of the preliminary opinion that the yearly State funding and the tax exemptions are likely to have altered competition.

5.1.5. *Preliminary conclusion as to the presence of State aid*

(62) In view of the above, there exist doubts as to the qualification of the HIS as undertaking in the sense of Article 107 (1) TFEU, the existence of the economic advantage and the selective nature of the tax exemptions.

Absence of aid under Altmark case law

(63) In its judgment in *Altmark* ([30]), the Court of Justice held that public service compensation does not constitute State aid within the meaning of Article 107 of the Treaty provided that four cumulative criteria are met. First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, where the undertaking that is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs that a typical undertaking, well run and adequately provided with the relevant means, would have incurred.

(64) According to German authorities the yearly State funding would be part of an SGEI. Guaranteeing education and needs practical implementation through the provision of software. Germany was thus obliged to provide this software to the universities and used HIS as a vehicle to do so. Germany considers that HIS' Statutes and its work programme constitute a sufficient entrustment act and that the compensation of HIS follows from the combined reading of the work programmes and the budgets.

(65) The Commission at this stage doubts that the Altmark-conditions are fulfilled: first, it does not seem that HIS has a sufficiently detailed entrustment act: the Statute of HIS, that would constitute the entrustment act according to Germany, is very broadly defined, having enabled HIS to extend its activities over the years. In the context of a preliminary ruling relating to a public procurement dispute opposing Datenlotsen against HIS and a Hamburg university, the Court considered that HIS is "not entrusted directly with the performance of a public service task" ([31]). Also according to the complainant, there would not be a sufficiently detailed entrustment act, in the absence of a sufficiently concrete description of required (public) services ("*Leistungsbeschreibung*"). In this context, the Commission at this stage doubts that HIS had a sufficiently detailed entrustment act.

(66) Second, the parameters on the basis of which the compensation is calculated do not seem to be established in advance in an objective and transparent manner. Based on the information currently at the disposal of the Commission, there does not seem to be any such advance definition of the parameters to calculate the compensation, nor any advance definition how this compensation is monitored.

(67) Third, there also do not seem to be clear mechanisms, defined in advance, to prevent overcompensation.

(68) Finally, it does not appear that HIS was selected on the basis of a public tender procedure and the level of its compensation does not seem to be determined on the basis of the analysis of the costs of a typical, well-run undertaking, but rather on the basis of HIS' deficits. Further, it appears that the duration of its "mandate" is not limited.

([30]) Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.
([31]) Case C-15/13, Judgement of the Court of 8 May 2014.*Technische Universität Hamburg, Hochschul Informations System GmbH against Datenlotsen Informationssysteme*, points 16 and 25-32.

(69) In this context, it is doubtful that the concept of SGEI can be applied as the same type of services are/can be provided by private actors in the market.

(70) At this stage, the State funding of which HIS benefited therefore does not appear to fulfil the *Altmark* conditions.

5.2. **Presence of an existing State aid scheme**

(71) Germany claims that if State aid were to be present in the yearly State funding it would constitute an existing aid scheme.

(72) The Commission must therefore analyse whether, if the presence of State aid within the meaning of Article 107(1) TFUE (see above) were to be confirmed, the yearly State financing would amount to an existing aid/existing aid scheme in the sense of Article 1(b) of the Procedural Regulation ([32]).

(73) In this respect, the Commission observes that the yearly State funding finds its legal basis in the Statute of HIS and in the *Konsortialvertrag* concluded at the time when HIS was acquired by the State. These acts lay down the mandate, the management and the financing of HIS. The yearly State funding was not limited in time, and the annual amounts were not fixed in advance. Indeed, in order to receive the funding, HIS had to present its work plan and corresponding budget to its general assembly annually, which voted on its financing.

5.2.1. *Existing aid*

(74) The definition of "existing aid" is contained in Article 1(b) of the Procedural Regulation. In the present case, only point (v) of that Article appears to be applicable:

"*'existing 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 liberalisation*".

(75) In this respect, Germany has argued that the yearly funding of HIS, as a scheme, must be considered existing aid because at the time when it was granted (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) TFEU. It would only have become aid at a later point, not defined by Germany when private offers had developed such that a market emerged. At that point the scheme would have become aid, but existing aid.

(76) In this respect, the Commission notes that Germany has not at this time provided sufficient evidence to substantiate the claim that there would have been no market for HIS services in 1976 and the Commission must therefore express doubts that the yearly funding mechanism could constitute existing aid on that basis.

(77) However, even assuming the yearly funding would constitute an existing aid scheme as argued by Germany, this would only apply provided the scheme had not undergone any significant alterations as from the time when it became existing aid.

(78) Germany argues that the Federal State and the *Länder* have consistently and uninterruptedly provided the funds necessary for the fulfilment of HIS' statutory obligations on the basis of its Statutes and the *Konsortialvertrag*. In addition, in order to avoid a stronger increase of State funding, universities were required to also contribute to a certain extent by paying limited fees since 1997.

(79) Germany argues that there have not been any significant changes to the nature of the yearly State funding (annual grants), the objective pursued by the measure (software supply to universities), its legal basis the *Konsortialvertrag* and the, Statute of HIS, the benefiting undertakings/institutions (HIS) or the source of the financing (budget of the the *Bund* and the *Länder*).

([32]) 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.

(80) The texts of the Statute and of the *Konsortialvertrag*, the administrative agreement between the State and the regions, indeed, have not changed materially over time. Stock capital has increased over the years, also due to new members joining, and due to inflation. New members have merely altered the composition and number of members of the supervisory board and the Board of Trustees. Therefore, it can be noted that the nature of the benefit, the objective, the legal base and the beneficiaries have not undergone material change over time.

(81) However, the mandate of HIS, which remained unchanged over the years, was very broadly defined and therefore allowed HIS to change significantly its product portfolio over time. According to the complainant ([33]) HIS did not develop software from the start as universities did not have the IT infrastructure which could have supported the use of such software. Instead, in the 1970s HIS started developing data collection and data organisation tools for universities and for the sake of education policy. And only in the 1980s, where sector specific IT software was first developed in the private sector, HIS followed that development and began developing software as well, which eventually evolved into integrated campus management IT.

(82) This was accepted through the yearly decisions of the general assembly of HIS approving the product development plan and determining the level of funding based on the work plan and the budget. This could be considered as a succession of yearly aid decisions, however, as the activities seem to be covered by the mandate encoded into HIS' Statue, the changes cannot be considered significant, as all these activities seem to be in line with the statutory objectives.

(83) According to the Court in its judgment Namur les assurances du crédit ([34]), an aid scheme could not be found to be modified if the aid is based on legal provisions (which are not modified) and the modification results from an increase of the aid amount or circumstances affecting the activity of the entity. In any case *"Whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provision providing for it"*.

(84) In this respect, the mandate of HIS was formulated broadly enough in order to allow HIS to enlarge its field of activity and adjust its services to the changing needs of the universities.

(85) In addition to the change in activity, the funding system has changed twice over time. The first change to the funding of HIS happened in 1997. Before 1997, HIS provided all software services to the universities free of charge. In 1997, as a response to expanding demand and the need to increase HIS' budget, it was decided that part of its costs should be covered by fees charged to the universities and that the State funding would be frozen at the level of the time. The funding mechanism changed again in 2003; the fees have been converted into prices that were fixed by the Supervisory Board on proposal by the Management.

(86) It needs to be discussed further whether that change in the financing is significant. Taking into account case practice in broadcasting cases ([35]) the introduction of a certain degree of commercial financing (such as here the fees charged to the universities) arguably does not significantly alter the funding system.

(87) Also according to the case law of the General Court in the Gibraltar judgment ([36]), not every alteration to existing aid should be regarded as changing the existing aid into new aid; *"it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme."*

(88) According to Commission practice, changes to the financing instrument are 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 benefited undertakings/institutions or the source of the financing ([37]).

(89) The Statute of HIS states that the *Bund* and the *Länder* must cover all means necessary for the fulfilment of HIS statutory tasks — unless own revenues are generated. The costs related activities that are not part of the financing plan should be covered by the client ([38]). That means that the possibility of obtaining other forms of financing than the direct State funding was included from the beginning.

([33]) Datenlotsen, submission of 28.08.2015.
([34]) The Netherlands vs. Commission, T-231/06 and T-237/06 Rec. p.II-5593, point 180.
([35]) See e.g. case E 8/2006 (ex CP 110/2004 et CP 126/2004), decision on the public funding of VRT.
([36]) T-195/01 Government of Gibraltar vs. Commission para. 111.
([37]) See VRT decision, point 121.
([38]) Article 6 of the Statute of HIS GmbH.

(90) This assumes however, that the additional financing is still as low in proportion so as not to change the overall character of the financing, which is State funding. This aspect needs to be further investigated and information in this respect needs to be gathered.

(91) Furthermore, the Commission needs further elements to establish whether the development of the IT services for universities market in the 1990s could amount to the evolution of the internal market within the meaning of Article 1(b) Regulation (EC) No 2015/1589.

(92) In summary, it needs to be established on the basis of additional information whether the change of financing could be regarded as significant changes. Therefore, it cannot be established upfront whether the financing of HIS constituted an uninterrupted scheme.

(93) Therefore, the Commission does not have sufficient information at this stage to establish that the *Konsortialvertrag*, the Statute of HIS with its annual work plans and budgets can be considered to constitute an existing aid scheme covering the entire period 1976-2013 (or 1993-2013).

(94) The measures under assessment have been put into effect without prior notification and thus in breach of Article 108(3) TFEU.

5.3. **Compatibility of the aid**

(95) If the presence of State aid is confirmed (see Section 5.1) and the conditions to consider it as an "existing aid" are not met (see Section 5.2), its compatibility would therefore need to be assessed.

(96) The German authorities argued that the yearly State support in favour of HIS does not involve aid (see section 4). They did not put forward arguments to show that any State aid element possibly present would be compatible with the TFEU or submit any evidence in that respect.

(97) The compatibility of any State aid granted to HIS would normally have to be assessed according to Article 107(3)(c) TFEU. In view of the nature of the measures under assessment and their possible amount, it does not seem at this stage that the aid would fall under the General Block Exemption Regulation ([39]) the *de minimis* rules ([40]), or under any specific framework or Commission guidelines currently in force.

(98) In the absence of any secondary legislation, and in order to assess whether the measures under assessment would be compatible with the internal market on the basis of Article 107(3)(c) TFEU, the Commission would need to balance the positive effects of the aid measures in reaching an objective of common interest against their potential negative side effects, such as distortions of trade and competition. In applying the balancing test, the Commission assesses the following questions:

(1) Is the aid measure aimed at a well-defined objective of common interest (i.e. does the proposed aid address a market failure or other objective)?

(2) Is the aid well designed to deliver the objective of common interest? In particular:

(a) Is the aid measure an appropriate instrument?

(b) Is there an incentive effect, i.e. does the aid change the behavior of firms?

(c) Is the aid measure proportional, i.e. could the same change in behavior be obtained with less aid?

(3) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

([39]) Commission Regulation declaring certain categories of aid compatible with the internal market in application of Article 107 and 108 of the Treaty, http://ec.europa.eu/competition/state_aid/legislation/block.html.

([40]) Commission Regulation (EC) 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, page 1.

(99) Whereas originally the State support may have addressed a purely public task, gathering information for the purposes of education planning, and it may have been a market failure (absence of commercial providers of such services), this appears to be less so as of the emergence of the market for IT solutions and services, which, based on current information, seems to date around 1993. Also, the complainant argues that solutions from private vendors were available (see recital (13). Under such circumstances, it does not appear that the State support addressed a market failure after 1993 or so.

(100) In the preliminary view of the Commission, the support for ensuring higher education could be qualified as an objective of common interest (see e.g. Article 9 TFEU). However, it still remains to be established that the main objective of the yearly State funding for the supply of software by HIS to the universities directly served this purpose.

(101) The Commission, moreover, has doubts that the measure was well designed to deliver such objective of common interest. On the basis of the information currently available, it does not seem that there was a proper mechanism controlling the funding needed, nor any mechanism to ensure proportionality of the funding or to avoid overcompensation.

(102) Finally, given the potential effect on competition of the measures under assessment, the Commission also has doubts at this stage that the overall balance of the yearly State funding would be positive.

(103) For those reasons, in case the formal investigation procedure confirms the presence of State aid for the benefit of HIS, the Commission has doubts concerning the compatibility with the internal market of the yearly State funding of which HIS benefited in the period 1976-2013.

(104) Should new aid be found as a result of the investigation, and this aid deemed incompatible with the internal market, it would have to be recovered from the beneficiary ([41]). In this context, it needs to be assessed whether HIS eG can be regarded as economic successor of HIS GmbH. Shall HIS eG be identified as the economic successor of HIS GmbH, it would be subject to the recovery obligation.

(105) The Commission is still in the process of examining the cooperative structure in order to identify whether or not it involves State aid, and, if yes, whether this State aid can be considered compatible. This assessment will be subject, as noted in recital (16), to a separate decision by the Commission at a later stage.

(106) With regard to the tax exemptions from income tax and trade tax, should these measures be regarded as State aids, the question arises as to whether they are compatible with the internal market. The exemptions, however, appear to be operating aids, meaning that they are not linked to the carrying-out of specific projects and they reduce the undertaking's expenditure without it being possible to assess the precise volume involved. The Commission has consistently maintained that operating aids are in principle prohibited ([42]). Therefore, it appears at that preliminary stage that the tax exemptions granted to HIS, if they were regarded as State aid, would be incompatible aid with the internal market.

(107) In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Germany to submit its comments and to provide all such information as may help to assess the aid/measure, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

(108) Furthermore, within that same deadline, Germany is requested to provide specifically information on the following points:

(1) Germany is invited to comment on the precise date of emergence of a university IT solutions and services (Campus Management systems/solutions) market and in particular on the preliminary view of the Commission that this emergence dates 1 January 1993

([41]) Relevant timeline as of recital 26 of the Procedural Regulation (EC) No 2015/1589.
([42]) Commission Notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, para. 32.

(2) Germany shall provide a detailed description of the services that HIS GmbH was providing over its existence; from the start in 1976 until 1 January 2014 in a yearly breakdown. Germany is requested to provide the work programme and economic plan of HIS for the entire period 1976-2013.

(3) Germany is requested to provide all yearly budgets of HIS GmbH, which also contain the information on the source of financing; which proportion of its budget was State financed based on the HIS Statute, which came from other sources. Furthermore, Germany is invited to explain how the fees were fixed by the Supervisory Board as of 2003 and how these fees related to market prices.

(4) Germany is requested to provide turnover figures and the description of the service provided related to private and foreign universities in the period of 1993-2013.

(5) Since 1 January 2014, direct State funding has been abolished and the fees have been increased allegedly in order to switch to a cost-based price model. Germany is requested to clarify this "cost-based price model". Germany is requested to provide a detailed description and the (business) plans and other documentation regarding the financing of HIS/HIS eG following abolishment of the State funding and to clarify how, and for which products/services, specific fees are fixed in addition to the annual fee (which is to be determined by the management and supervisory board and cannot exceed 6 000 EUR). Germany is also requested to clarify whether HIS eG charges/will charge license fees and if not, how this is financed. In addition, Germany is requested to provide a complete price list of HIS GmbH and HIS eG for the past 10 years.

(109) The Commission wishes to remind Germany that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 16 of Council Regulation (EC) No 2015/1589, which provides that all unlawful aid may be recovered from the recipient.

(110) The Commission warns Germany that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

(111) The Commission notes that Germany exceptionally accepts that the adoption of the decision be in the English language.»