

4 CET in practice at HEIs in Brandenburg

This chapter looks at the actual practices of Brandenburg's HEIs in their implementation of CET programmes. It draws from information provided by seven Brandenburg HEIs about the types of CET programmes they offer – including academic programmes, certificate courses, vocational development courses and language courses, among others. The HEIs also reported on how they organise, implement and manage CET programmes. These approaches are then assessed against the legal principles established in Chapters 2 and 3. This chapter also offers comparative analysis of the CET practices of Brandenburg's HEIs with those of HEIs in Bavaria, Hesse and North Rhine-Westphalia.

The situation at Brandenburg's HEIs

Chapter 3 outlined the criteria used in determining whether (and if so, how) the EU state aid rules apply to CET in HEIs. This chapter now turns to the extent to which the actual CET programmes offered by Brandenburg's HEIs comply with the criteria for non-economic activities.

The State of Brandenburg is home to eight public higher education institutions (HEIs) – four universities (Brandenburg University of Technology Cottbus-Senftenberg, European University Viadrina Frankfurt/Oder, Film University Babelsberg Konrad Wolf, and University of Potsdam) and four universities of applied sciences (Brandenburg University of Applied Sciences, University for Sustainable Development Eberswalde, University of Applied Sciences Potsdam, and Technical University of Applied Sciences Wildau) – and two specialised HEIs in public administration (*Verwaltungsfachhochschulen*). Beside these, there are two HEIs funded by churches and three private institutions.

The basis for the discussion in this chapter is information supplied by seven of the eight public HEIs in Brandenburg¹ via responses to a questionnaire, which was developed for the purpose of giving the legal analysis an empirical basis.

Evaluation of the questionnaire

The questionnaire aimed initially to explore the basic approach and the fundamental methods of dealing with CET of any kind at the HEIs. In addition, it was intended to provide an overview of the CET offerings of Brandenburg's HEIs and the environment in which these offerings operate.

Accordingly, the questionnaire is divided into two sections. In the first section, the questions aim to ascertain the level of knowledge at the participating HEIs with regard to classifying courses and programmes in terms of their relevance to EU state aid rules. In the second section, the questions aim to discover more about the different CET offerings of Brandenburg's higher education institutions. The corresponding categories of CET offerings are set out below as clusters. These are CET programmes, such as:

- CET degree-awarding programmes such as MBA degrees;
- study programme modules and certificate courses;
- vocational development courses/events (*berufliche Fortbildungsveranstaltungen*);
- extracurricular language courses;
- CET offerings such as lectures, courses, workshops that are open to both students and third parties;
- co-operative study programmes.

Knowledge of relevant terms for classifying an activity under EU state aid rules

The answers to the first set of questions show that the great majority of the participating HEIs work with the framework for classifying an activity under EU state aid rules and are familiar with the essential distinctions.

The legal framework is generally known to the participating HEIs, but fewer than half of the respondents knew the SGEI Communication or the concept of aid compatible with the common market (*vereinbare Beihilfe*). An assessment tool to distinguish between economic and non-economic activities exists at almost every HEI surveyed. Five of the seven HEIs organise CET either through a special-purpose enterprise or an enterprise of a commercial nature.

CET degree-awarding programmes (Weiterbildungsstudiengänge) cluster

The first cluster concerns degree-awarding programmes, for example, MBA degrees. Six of the seven participating HEIs offer such a degree. Most of these programmes are offered for a fee. Two-thirds of the programmes offered are costed using the full-cost method (see Annex A for a discussion of costing approaches) and one-third are priced using the partial cost method. Of those that calculate on a partial cost basis, all indicated that the fee component is a maximum of 50% of the full cost. Only one of the six HEIs does not see itself in competition with private providers; three other HEIs stated that their programmes are partially in competition with private providers. Three responses indicate that private providers do not offer these programmes due to a lack of the necessary expertise and/or resources, while three others stated that they were unaware of why private providers did not offer these programmes, and one expressed the view that only public HEIs can offer such programmes.

Certificate courses cluster

This cluster includes study programme modules and certificate courses which are not incorporated into a complete study programme. All seven HEIs offer these kinds of courses, and six of the seven fund them exclusively by charging fees, whereby the calculation is done using the full-cost method. All of the HEIs consider themselves to be in competition (two of them at least partially) with private providers.

Vocational development courses/events (berufliche Fortbildungsveranstaltungen) cluster

Vocational development courses/events do not require participants to have a higher education degree, but can be completed with or without a certificate. All respondents also indicated that their HEI offers courses of this kind, six of them fully funded by fees and the other one partially fee-funded. The fees were calculated using the full-cost method by six of the seven HEIs. All of the HEIs consider themselves to be in competition (two of them at least partially) with private providers. The three responses to the question about the reasons for the lack of private providers indicated that private providers did not offer such courses because they lack the necessary expertise and/or resources.

Language courses cluster

CET programmes include language courses outside of the regular curriculum of study programmes. Five of the seven higher education institutions indicated that they offer such extracurricular language courses, two of them as partially fee-funded and two as fully fee-funded. The basis for calculation was given by three HEIs, with an inconclusive result. But here, too, the five HEIs are fully or partially in competition with private providers.

Lectures, courses, workshops and other offerings cluster

Five out of seven HEIs indicate that they offer CET in the form of lectures, courses, workshops and other offerings that are accessible to both students and third parties. Here, a diverse picture emerges with regard to whether fees are charged (Yes = one HEI; No = two HEIs; Partial = two HEIs). Of the three HEIs that charge fees, two stated that the fee is calculated using the full-cost method and the other HEI stated that it is calculated using the partial cost method. The majority of HEIs see themselves at least partly in competition with private providers in this cluster as well. With regard to the lack of private offerings, two respondents stated that private providers did not offer services in the field due to a lack of expertise or resources.

Co-operative study programmes cluster

The final block of questions aimed to gather information about co-operative study programmes on offer. Only one responding HEI indicated that it offered a study programme in co-operation with another organisation. It is offered on an exclusively fee-charging basis, whereby the fee is calculated using the full-cost method. The programme stands in competition with offerings from private providers.

Assessment of the clusters with regard to the delimiting criteria in EU state aid rules

The following section assesses how the various CET offerings in higher education can be classified using the EU state aid rules criteria. In the process, the particular legal difficulties that exist in the differentiation between economic and non-economic activities will be discussed.

Assessment of the CET degree-awarding programmes cluster

CET degree-awarding programmes are offered by almost all participating Brandenburg HEIs.

With regard to *competition from private organisations*, it is significant that half of the responding HEIs perceive themselves to be at least partially in competition with private providers. This implies that they are engaged in an economic activity.

With regard to the *financing structure*, two-thirds of the CET study programmes are offered for a fee on a full-cost basis. This means that private funding is involved, which speaks in favour of a commercial activity. The other third of the study programmes are at least 50% funded by the state (meaning that they are predominantly publicly funded). What matters here is how the private competition criterion relates to the public funding criterion, in any case insofar as the study programmes in question can be said to be competing.

No HEI reports an *intention to make a profit*.

Regarding *integration into the state education system*, CET study programmes at German public HEIs are deeply integrated into the state education system. This is, above all, the result of how higher education is organised and the official oversight of higher education institutions.

Turning to the potential *public interest in CET study programmes*, at least one HEI does not see itself as being in competition with private organisations at all. This is the case because the public HEIs are of the opinion that private providers cannot offer CET programmes, as they lack the necessary expertise and/or resources, or that only public HEIs can offer CET programmes of this type. In those areas where the private sector is not effective, a special public interest could be deemed to exist in order that CET can be offered at all.

The private competition and the predominantly private funding mentioned above all speak in favour of classifying these CET programmes as economic activities undertaken by the HEIs under the currently applicable criteria of EU state aid rules.

Assessment of the certificate courses cluster

Certificate courses that are not part of a full study programme are offered by all participating HEIs. The criterion of private funding through fees on a full-cost basis is particularly salient here. The higher education institutions also face – at least partially – *private competition*.

However, an *intention to make a profit* cannot be established in this cluster either.

Integration into the state education system is unequivocal, as the courses are offered by public HEIs.

However, the clearly perceptible competition with private providers means that the *special public interest* must be seen as being lower here than for CET study programmes.

Among these CET programmes, the thresholds for classification as non-economic are regularly breached, implying that this is *prima facie* economic activity. The result would be different only if *integration into the state education system* were to be regarded as a sufficient condition of non-economic activity. However, more compelling reasons speak against this due to the objective of EU state aid rules (on the problem of the order of priority of delimiting criteria).

Assessment of the advanced training courses cluster

All responding HEIs also offer advanced training courses.

The competition criterion is also clear in this cluster, as the HEIs consider themselves to be *competing mostly with private providers*.

The large majority of the offerings are fee-based, with the fees calculated using the full-cost method, meaning that the criterion of *predominantly private funding* is also met.

Integration into the state education system could be used to argue that the activity is non-economic, depending on how heavily this criterion is weighted. This cannot be established with any degree of certainty, however.

It is more difficult to discern a *special public or state interest*, as the presence of apparently vibrant competition from private providers means that the state has relatively little interest in filling an apparent gap in CET provision.

Assessment of language courses cluster

The majority of responding HEIs also have offerings in the language courses cluster.

All these offerings are – at least partially – in *competition with those of private providers*.

Looking at *source of funding*, the language courses are generally offered for a fee, but there are courses that are offered free of charge and that are thus substantially state-funded. One HEI indicated that it calculated fee charge using the partial cost method, covering 50% of the costs. If state funding is more than 50% in this case, the courses would also be deemed as substantially state-funded.

As language courses offered by institutes in the state education system, they are clearly *integrated into the state education system*.

There may be a *special state interest* in certain language courses, in accordance with the KMK guidelines (for example, events of the German Academic Exchange Service, *Deutscher Akademischer Austauschdienst*, DAAD). Otherwise, however, the presence of robust private competition speaks more in favour of the classification of language courses as economic activities.

Assessment of the lectures, courses, workshops and other offerings cluster

CET in this cluster is offered by the overwhelming majority of responding HEIs.

The majority of the offerings are seen to have *competition from the private sector*, but not all. This appears to indicate that some of the activities in this cluster are to be seen as non-economic.

Looking at source of funding, there are a number of activities offered free of charge, meaning that they are state-funded. This could, therefore, also be a field that could be classified as non-economic.

Integration into the state education system is also established.

The *special public interest* could arise, in particular, from the fact that private competition in this cluster is perceived to be relatively weak. There seems to be a particularly clear “supply gap” here, which the state must close with its own resources in order to fulfil its CET mandate.

Assessment of the co-operative study programmes cluster

Co-operative study programmes are predominantly *privately funded* and face the presence of *competition from private providers*.

Summary assessment of the competition from private providers criterion

In terms of EU state aid rules, the competition situation is problematic when private providers are present. This is particularly relevant in the case of co-operation in CET provision with another enterprise/undertaking.

It can be deduced from the responses of the HEIs that certain “competition-free” areas exist. However, the vast majority of situations in all of the clusters must be presumed to involve competition, and this makes competition a general obstacle to classifying the CET provision here as non-economic. However, the EC has yet to clarify if that constitutes grounds for CET to be classified as economic.

Summary assessment of state funding and profit intention

CET practice at HEIs in Brandenburg shows that CET is offered in several categories for a fee that covers the full costs and cannot therefore be said to be “substantially” funded by the state. The fact that several categories of CET provided is not fully publicly funded or predominantly publicly funded speaks against them being classified as non-economic.

It can make a difference from the point of view of EU state aid rules whether the HEI intends to make a profit with a specific CET offering by charging fees, or whether it merely intends to cover its costs. After evaluating the questionnaire, it appears that where the HEIs charge fees, they do so on the basis of covering all their costs at the most, meaning that the categories of CET offered by the HEIs in question here are not offered with the intention of making a profit. This can be used to argue in favour of classification as non-economic activities. Case law and EC practice is not clear on this matter, however, and so the lack of intention to profit cannot be said with certainty to be a sufficient condition to constitute a non-economic activity.

Summary assessment of integration into the state education system

The EC’s decision on the private Czech HEI, Prerov Logistics College, emphasised the integration of the private institution into the state education system for qualification as a non-economic activity. Brandenburg’s public HEIs are bound to the state’s Higher Education Act (BbgHG), meaning that they have control and responsibility for the oversight of their CET offerings but that they are under the authority of the state within the framework of higher education organisation. As a result, it can be argued on very good grounds that the criteria of state oversight is fulfilled with regard to the activities in question.

With regard to the EC’s decision practice, this could be decisive in classifying the activities as non-economic.

Overall assessment of special public interest in CET at HEIs

With regard to a special public interest in CET by public HEIs, this study shows that there is a certain lack of offers from private providers – at least in the opinion of the responding HEIs. The HEIs are of the opinion that private providers lack expertise and resources in this area. For example, the answers to questions about CET academic programmes indicate that private offerings are not offered due to lack of the

necessary expertise and/or lack of the necessary resources, or that they are unknown to the HEIs, or that only public HEIs can provide such offerings.

It is precisely where such “gaps in supply” of CET in science can be identified that a particular public interest in provision by the state could arise. The need for CET provision is recognised both politically and legally in Germany. And where private institutions cannot – for whatever reason – be sufficiently active, the only option is to provide CET through public HEIs.

However, it should be noted that this criterion has not yet been sufficiently elaborated by case law and the EC. Although the KMK Guidelines mention it clearly, the Guidelines are not legally binding, and therefore clarification by the EC in this regard is desirable. Accordingly, relying solely on special public interest as a criterion is currently fraught with legal uncertainties, in the case of privately funded offerings.

Overall assessment of other constituting elements of the prohibition of state aid

Since the public funding of the HEIs is not open to question, the assessment of the CET practice at Brandenburg’s HEIs still depends on the constituting elements of preferential treatment and the distortion of competition and the resulting effect on intra-community trade.

With regard to preferential treatment, it is noticeable that the fees are mostly calculated on a full-cost basis, and this can prevent the fulfilment of the constituting element as state aid, since CET can then be designed in a budget-neutral way. However, a proper separate accounting is still necessary. Particular attention must also be paid that fees are market-appropriate. In principle, flat-rate charges can also be part of a permissible pricing strategy.

As regards the distortion of competition and the effect on intra-community trade, competition exists with private suppliers in most areas, but it is necessary to determine in each case not only whether a market exists at all for the CET offering, but also whether that CET is restricted to a local area. Because EU state aid rules only apply to economic activities that are relevant to the single market, if there are sufficient local restrictions on the continuing education offering, the constituting element of state aid would not be fulfilled.

Overall assessment of possible justifications and exceptions to the prohibition of state aid

It is not possible to deduce from the survey of the HEIs whether the possibilities for justifying and exempting CET from the prohibition of state aid were exploited and, if so, how. It is, however, striking that four out of the seven responding HEIs stated that they were not aware of the SGEI Communication. It can therefore be assumed that not all HEIs are aware of the significant possibilities for structuring higher education funding.

Classification of CET offered in other Länder

To put the practice at higher education institutes in Brandenburg in relation to that in other relevant states, the following discussion uses information available in the public domain to present information on CET programmes offered by public HEIs in Bavaria, Hesse and North Rhine-Westphalia.

CET offered by public HEIs in Bavaria

CET is also anchored in the state education system in Bavaria. According to publicly available information, however, the offerings are generally not fully funded by the state.

CET at Bavarian HEIs is embedded in both the Bavarian Constitution and the Bavarian Higher Education Act (BayHSchG). Art. 139 of the Bavarian Constitution regulates the funding of adult education by adult education centres and other publicly-funded institutions. According to Art. 2(1) BayHSchG, HEIs in Bavaria

serve to nurture and develop the sciences and the arts by means of research, teaching, study and **continuing education and training** in a free, democratic and social state governed by the rule of law.

Art. 2(5) BayHSchG defines academic continuing education as part of the mandate of HEIs. Study programmes may also be offered as **part-time study programmes** in accordance with Art. 56(4) BayHSchG. In addition, modular courses of study for the acquisition of academic or professional partial qualifications may be offered pursuant to Art. 56(6) BayHSchG, in which individual modules of an undergraduate or postgraduate course of study are completed. Supplementary study courses in which further partial qualifications are acquired in parallel to an undergraduate or postgraduate study course, as well as special further education studies, may also be offered.

The legal requirements provide for a mixed public-private funding structure, in which funding for individual offerings may be primarily or exclusively public or private. For part-time degree programmes, HEIs charge fees in relation to the increased expenditure incurred by offering the degree programme (see Art. 56(4) and Art. 71(2) BayHSchG). Accordingly, the HEI or the faculty in question must prepare a cost or fee calculation for the planned degree programme (Baudach; Fraunhofer; Heese et al., 2014^[1]). In accordance with § 2(2) to (4) of the Higher Education Fee Ordinance (HschGebV), the fee is based on the scope of the courses. However, a fee framework is set and, pursuant to § 2(3) HschGebV, the maximum fee is EUR 200 per person per [class] hour. For part-time studies, § 2(4) HschGebV provides for fees up to a maximum of EUR 2000 per semester. Accordingly, it can be assumed that the fees do not cover all costs in every case. It is therefore possible that individual offerings are substantially state-funded.

CET offered by public HEIs in Hesse

The findings are similar in Hesse. CET is clearly integrated into the public education system. However, the costs of the individual offerings are generally to be covered by fees. This means that there is generally a lack of substantially publicly-funded offerings.

CET at HEIs in Hesse is regulated in § 16 of the Higher Education Act of Hesse (HessHG), supplemented by § 7(1) of the Hessian Continuing Education and Training Act (HWBG). § 16 HessHG stipulates that HEIs should develop and offer CET programmes to deepen academic knowledge and supplement practical vocational experience. Co-operation with private institutions is also provided for in § 3(9) HessHG to expand CET programmes. The various CET programmes, such as master's degree programmes, CET programmes with certificates and postgraduate study programmes, are structured differently by the HEIs.

Pursuant to § 16(3) HessHG, fees must be charged which cover the costs "in total". The governing body (*Präsidium*) of the HEI is responsible for setting the fees.

CET offered by public HEIs in North Rhine-Westphalia

North Rhine-Westphalia is the most populous *Land* in Germany, and there are correspondingly more HEIs than in Brandenburg, with 14 universities, 16 universities of applied sciences and seven public colleges of art and music. The legal survey shows that CET is also legally anchored here in the state education system as a mandate of higher education. However, programmes are to cover their costs through fees and charges. This speaks clearly in favour of them being classified as substantially privately funded.

§ 62 of the Higher Education Act of North Rhine-Westphalia (HG NRW) regulates scientific and artistic CET at HEIs in a similar way to the BbgHG. However, the options for HEIs in the area of CET differ. According to § 25(4) BbgHG, co-operation with "suitable institutions" outside the higher education sector may be entered into in order to provide CET, as long as the higher education institution remains responsible for the content and examinations. § 62(2) HG NRW opens up the possibility, in principle, of offering CET in a form governed by public law or by private law. Co-operation with (private) third parties is possible for the purpose of offering CET, § 3(3) HG NRW. Special provision is also made for the possibility of offering

language courses that are a prerequisite for admission to higher education, as well as preparatory courses that can be offered on a private-law basis pursuant to the fourth sentence of § 48(10) HG NRW.

Pursuant to § 62 (5) sentence 1 HG NRW, a cost-covering charge should be set for CET programmes offered under public law, while fees should be levied for CET programmes offered under private law.² The statutory instruction to finance public-law CET so as to cover its costs speaks in favour of classifying the corresponding activities as economic activities.

Interim summary of the situation in Bavaria, Hesse and North Rhine-Westphalia

The structuring of the role and the requirements for CET offered by HEIs in the different *Länder* sheds light on the key role that the state legislatures assign to HEIs in the field of CET.

Specific features of the *Länder* must also be taken into account; for example, the question of which instruments under private law HEIs can avail themselves of in the area of CET. Particularly relevant in this respect is that the evidence shows that CET activities of HEIs are clearly integrated into the state education system, yet it cannot be assumed that CET provision is substantially funded by the state.

This means that the problem of the order of priority of the delimitation criteria reappears. This is particularly the case since, in view of the many private CET providers in Germany, private competition with state providers can be taken as a given. Against the backdrop of this funding structure, it cannot be assumed with any legal certainty that the EC would regard the offerings in question as non-economic.

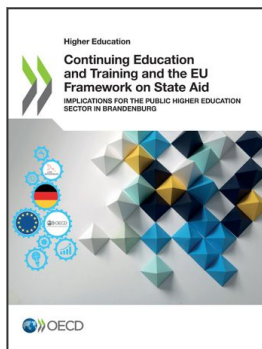
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Notes

¹ In view of their specialised mandate, the two public higher education institutions in public administration were not invited to participate in the survey.

² It should be noted, however, that this is a so-called "should provision" (*Soll-Vorschrift*) in which – if supported by an appropriate justification – deviations are, in principle, possible. See also *BVerfG, Urteil vom 28.02.1973 – VIII C 49/72*, NJW 1973, 1206, 1207.



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