3 Classifying continuing education and training under EU state aid law

This chapter provides first an overview of the criteria for distinguishing between economic and non-economic activities. It discusses the notion of an “undertaking” in EU state aid law in relation to continuing education and training (CET) at public HEIs. It examines the relevant judgments by the European Court of Justice (ECJ), it looks at how the ECJ’s decisions on education-related cases can inform the understanding of state aid rules, and it discusses how those judgments are represented in publications and decisions by the European Commission (EC). The interpretation of the distinction between economic and non-economic activities at HEIs in KMK Guidelines is also discussed. This chapter also elaborates on the exceptions to and exemptions from the rules on state aid and indicates how they apply to CET; and explains how the costs of a programme should be analysed and fees set to remain within the state aid rules.

Classification of CET as economic or non-economic

One of the reasons for the legal uncertainty surrounding CET is that the European Commission (EC) has not made a decision on continuing education and training (CET) in higher education. This means that it is necessary to analyse ECJ case law and EC decisions on related types of activity and to infer how they would interpret CET cases if they came for judgment. To do so, this analysis looks at ECJ case law and EC decisions that have parallels with CET, and discusses how programmes should be classified under EU law as "economic" (meaning they may not be subsidised) or "non-economic" (in which case, the prohibition on state subsidy will not apply). Beyond this initial classification sit other criteria and defining characteristics that are used in the assessment of the applicability of the state aid rules to a CET programme, leading to a set of criteria and principles that underpin the assessment of the applicability of the state aid law to CET.

The relevance of the "undertaking" notion in EU state aid rules for CET at public HEIs

As noted in Chapter 2, the distinction between non-economic and economic activities is decisive for the notion of an "undertaking" under EU state aid law. An "enterprise" is any entity engaged in an economic activity, regardless of its legal form and the way it is funded (ECJ, 1991[1]).[1] Therefore, having the status of an undertaking means that an entity is engaged in an **economic activity**. A HEI is not an enterprise in the sense of EU state aid law if, and to the extent that, it carries out non-economic activities. On the other hand, a HEI's economic activities should not be funded by the state. The funding of economic activities with state resources is subject to the prohibition of state aid.

CET does not belong to the core areas of sovereign activity, which are inherently non-economic (such as, for example, national defence, policing or the penal system) (Mestmäcker/Schweitzer, 2016[2]).[2] Therefore, classification depends on an examination of the nature of a CET programme, to determine how closely it meets the characteristics of an economic activity, by looking at four criteria:

- the existence of **private competition**;
- the **funding structure** and a corresponding profit motive;
- the embedding of the respective programme in the **state education system**;
- a possible **special state/public interest** in the specific programme.

The ECJ made a further clarification regarding the significance of competition, which is important for the evaluation of CET programmes offered by higher education institutions. The classification as an **economic activity** depends on whether the activity in question is carried out on a market in competition with other or potential economic agents (ECJ, 2006[3]).[3] Thus, if the offer by the entity in question competes with that of economic agents pursuing the same goal, this speaks in favour of its classification as an economic activity.[4] This is important in the present case, because CET programmes offered by state institutions of higher education can compete with those offered by private providers.

This suggests that CET at HEIs can, at least in principle, be either economic or non-economic, with, possibly, some CET programmes meeting the criteria for economic activities and some not.

The classification of CET as economic or non-economic is not straightforward because of the complexity of the criteria above and because of how they are understood in the complex, multi-layered legal system in the EU. Therefore, this chapter analyses the treatment of education in the legal system to identify the principles that are likely to guide the ECJ and the EC in their interpretation of the status of CET in Brandenburg's HEIs, before summarising how the four criteria apply in the case of higher education CET.

ECJ case law on the notion of services

EU treaties, regulations and directives do not include any explicit decisions on the classification of CET as economic or non-economic. However, ECJ has developed case law on services, (including education, and,

in one case, CET). This case law is currently being codified by the EC – that is, translated – into EU state aid rules.

Development of case law on the notion of services

The ECJ has never directly ruled on the classification of CET under EU state aid rules. The question of the classification under EU law of educational programmes, especially CET programmes, has been raised several times in cases before the ECJ, but not specifically in connection with the prohibition of state aid in Art. 107(1) TFEU, but in relation to the notion of services in Art. 57 TFEU.

The **notion of services** is defined by the TFEU within the framework of the EU's fundamental freedoms. The freedom to provide services, in accordance with Art. 56 *et seq*. TFEU, is one of the fundamental freedoms that underpin the operation of the EU (as is, for example, the free movement of goods). These fundamental freedoms serve to establish the internal market within and between the EU Member States. According to Art. 57(1) TFEU, "services" within the meaning of the EU treaties are services which are normally provided for remuneration, insofar as they are subject to the provisions on the free movement of goods and capital and on the free movement of persons. According to ECJ case law, remuneration in this context constitutes the economic consideration for the service in question (ECJ, 1988[4]).[5]

Box 3.1 below sets out the ECJ judgments in the Humbel and Edel case (ECJ, 1988[4])[6], the Wirth case (ECJ, 1993[5])[7], the Schwarz and Gootjes-Schwarz case (ECJ, 2007[6])[8], the Zanotti case (ECJ, 2010[7])[9] and the Kirschstein case (ECJ, 2019[8]).[10] The essential parts of the reasoning of the judgments are first reproduced and then set in relation to each other.

Box 3.1. ECJ cases on education, considered as a service

The Humbel and Edel case

The first examination of educational services under the notion of services was carried out by the ECJ in the Humbel and Edel case. In this case, the parents of a French pupil brought an action because he had to pay an enrolment fee to attend secondary school in Belgium while Belgian pupils were not required to pay such a fee. The parents refused to pay the fee. One of the issues in this case was the classification of education at the Belgian secondary school as a service within the meaning of EU law. The ECJ denied the status as a service on the following grounds (ECJ, 1988[4]):

> *"The essential characteristic of remuneration thus lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service.*
>
> *This characteristic is, however, absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such as system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents.*
>
> *The nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrollment fees in order to make a certain contribution to the operating expenses of the system. A fortiori, the mere fact that foreign pupils alone are required to pay a minerval can have no such effect."*

The Wirth case

In the Wirth case, the ECJ had to rule again on the question of whether an educational programme should be classified as a service. In this case, the plaintiff, a German citizen, sought educational support from the German state under the Federal Training Assistance Act (BAFöG) to receive funding to study

jazz saxophone in the Netherlands. However, he was denied BAFöG support. In its judgment, the ECJ denied the service character of the course of study in question (ECJ, 1993[5]), on the grounds:

> *"As the Court has already emphasized [in the Humbel and Edel case], the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service. In the same judgment, the Court considered that such a characteristic is absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity, but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents. The Court added that the nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system.*
>
> *Those considerations are equally applicable to courses given in an institute of higher education which is financed, essentially, out of public funds.*
>
> *However, as the United Kingdom has observed, whilst most establishments of higher education are financed in this way, some are nevertheless financed essentially out of private funds, in particular by students or their parents, and which seek to make an economic profit. When courses are given in such establishments, they become services within the meaning of Article 60 of the Treaty. Their aim is to offer a service for remuneration.*
>
> *However, the wording of the question submitted by the national court refers solely to the case where an educational institution is financed out of public funds and only receives tuition fees (Gebuehren) from the students.*
>
> *The answer to the first part of the first question must therefore be that courses given in an establishment of higher education which is financed essentially out of public funds do not constitute services within the meaning of Article 60 of the EEC Treaty."*

The Schwarz and Goethes-Schwarz case

In the Schwarz and Goethes-Schwarz judgment, the ECJ developed its case law further. Here, the plaintiffs sought from the German tax authority tax benefits for the school fees they paid for their children's attendance at schools in other EU Member States. They argued that German income tax law provided only for these benefits for attendance at certain German private schools and that this was contrary to EU law. On the question of the classification of tuition offered by private schools as services, the ECJ judgment first summed up the two decisions mentioned above and added (ECJ, 2007[6]):

> *"It is not necessary for that private financing to be provided principally by the pupils or their parents. According to consistent case-law, Article 50 EC does not require that the service be paid for by those for whom it is performed.*
>
> *The information from the referring court shows that the school fees paid by the Schwarzes to Cademuir School for the two children were estimated in themselves at DEM 10 000 per year at least. According to the German Government, that amount is significantly higher than that charged by private schools established in Germany and benefiting from Paragraph 10(1)(9) of the EStG.*
>
> *Since the decision to refer contains no precise information on the financing and operating methods of Cademuir School, it is in any event for the national court to assess whether that school is essentially financed by private funds."*

The Zanotti case

Another ECJ judgment of particular interest for this study was handed down in the Zanotti case (ECJ, 2010[7]). This case directly concerned a CET programme. The dispute also revolved around a tax benefit under national (in this case, Italian) law, which an Italian lawyer did not receive. He had attended a

master's course in international tax law at the International Tax Center in the Netherlands. The Italian tax authority refused to apply the national regulations to the case, according to which the amount charged by a corresponding state training institution could be deducted. On the question of whether the International Tax Center had provided services within the meaning prescribed by Union law, the court stated, with reference to the previous court decisions:

> *"However, the Court has held that courses offered by educational establishments essentially financed by private funds, in particular by students and their parents, constitute services within the meaning of Article 50 EC, since the aim of those establishments is to offer a service for remuneration.*
>
> *Therefore, courses essentially financed by persons seeking training or professional specialisation must be regarded as constituting services within the meaning of Article 50 EC."*

The Kirschstein case

Another case presented an opportunity to reconsider the previous case law. In the Kirschstein case (ECJ, 2019[8]), the ECJ was called upon to answer a number of questions referred for a preliminary ruling on whether services which are provided by a HEI fall within the definition of services in Art. 57 TFEU if they are offered by private institutions that act with the intention of making a profit. It is not so much the judgment itself that deserves special attention, but the opinion of Advocate General Bobek. In his submission, the Advocate General took the opportunity to subject the delimitation criteria of the case law to fresh examination[11]. He questioned the generalisation of their assessment. The strict boundary between state and private HEIs can no longer apply in today's higher education landscape, as even state-organised HEIs are increasingly moving into the realm of private-sector activity[12]. He therefore proposed to dissolve the distinction between private and public providers, proposing that parallels could be drawn with the health system (where both private and public providers are active in providing health care and whose services are classified as "non-economic services of general interest", to which the freedom to provide services does not apply. The Advocate General argued that it would make logical sense to differentiate in higher education law according to the activity and not according to the organisational ownership or structure. For this reason, the Advocate General proposed that the following criteria be used for differentiation.

According to Advocate General Bobek, a distinction should be made

- between each activity (and in particular each study programme);
- between level of education, as the social character of education was apparent only at primary and secondary level and not at the higher education level;
- according to the financing of the study programme and the question of consideration, whereby the following aspects played a role:
  - the assumption of costs (not exclusively and directly by the client); and
  - the nature of the market (the larger the market for a degree programme (national, European, global), the less it could be assumed that a special and unique social and cultural objective was being pursued).

However, the ECJ did not address these proposed criteria in its judgment, stating only with reference to previous case law:

> *"It is also apparent from the Court's case-law that the organisation, for remuneration, of higher education services by institutions mainly financed by private funds and seeking to make a commercial profit, constitutes such an economic activity…"*

Sources: ECJ (1988[4]), Judgment of 27.09.1988 – C-263/86, BeckRS 2004, 72754, marginal 17 ff; ECJ (1993[5]), Judgment of 07.12.1993 – C-109/92, BeckRS 2004, 74113, marginal 15 ff; ECJ (2007[6]), Judgment of 11.09.2007 – C-76/05, NJW 2008, 351, 353, marginal 41 ff; ECJ (2010[7]), Judgment of 20.05.2010 – C-56/09, IStR 2010, 487, 488, marginal 32 f; ECJ (2019[8]), Judgment of 04.07.2019 – C-393/17, GRUR 2019, 846; Opinion of Advocate General at ECJ (2018), 15.11.2018 – C-393/17, BeckRS 2018.

Summary of the criteria in ECJ case law

The judgments outlined in Box 3.1 indicate that the criteria established in the initial judgment (the Humbel and Edel case) remain decisive. Those criteria suggest that when education meets the following characteristics it will not be classified as a service for consideration:

- teaching provided within the framework of the **national education system**;
- **public funding** of the institution in question as an integral part of the education system, as opposed to funding essentially from private means (Kirschstein judgment), so that fees paid by students do not in themselves constitute private funding if they contribute only to a certain extent to maintaining the publicly-funded system;
- the **lack of profit motive** as opposed to a profit-oriented offer of courses (see Zanotti and Kirschstein judgments).

The public funding criterion was confirmed in the Wirth judgment. The court ruled that even a HEI funded from public resources but that received fees from the students did not provide them with a service. The characteristic of "public funding" did not therefore cease to exist simply because the students also had to pay fees.

In the Schwarz case, the ECJ ruled that the private financing of the educational institution was decisive for classifying the tuition offered as a service. This means that education provided by privately funded institutions can be regarded as services within the meaning of Art. 57 TFEU.

In the Zanotti judgment, the ECJ indicated that individual "courses" could be assessed with regard to the question of funding and not the institution as a whole. This would have the consequence that the private funding of an individual course could constitute a service. This would come close to the activity-based approach of EU state aid rules, which do not consider the entire organisation, but rather classify individual activities as economic or non-economic. However, the wording of the ECJ is too ambiguous to draw this conclusion with absolute certainty.

Had the ECJ adopted the Advocate General's argument in the Kirschstein case, it would have been necessary to differentiate between the individual activities of the HEI. In particular, the question would have arisen of whether paid-for CET at a HEI for people in employment constitutes an economic activity within the meaning of EU state aid rules, which would have had to be shown as such in the separate accounts required under EU state aid rules (see the discussion below about the need to separate the accounts). However, since the ECJ did not follow this line, the case law remains open in this respect.

Transferability of case law on the freedom to provide services to EU state aid rules

In principle, the case law on education as a service can also be applied to the classification of education activities as economic or non-economic.

The first argument in support of transferability is that both the freedom to provide services in Art. 57 *et seq*. TFEU and the prohibition of state aid in Art. 107(1) TFEU are designed to ensure the functioning of the internal market. Moreover, the notion of an “undertaking” within the meaning of Art. 107(1) TFEU presupposes the offering of goods or services (Callies/Ruffert, 2016[9]).[13] It is therefore reasonable to define the notion of service under EU state aid rules in the same way as the notion of service is defined under the freedom to provide services.

However, since the judgment in Humbel and Edel, the ECJ has focused on the funding of the *entire educational institution*. If the education *organisation,* as an entity, is funded by the state, the ECJ denies that the educational provision is a service. According to ECJ case law on competition law, on the other hand, the type of funding does not play a role in the definition of an enterprise under EU state aid rules (ECJ, 2006[10])[14]. Accordingly, an undertaking, within the meaning of EU state aid rules, could also exist even if a service within the meaning of Art. 57 TFEU is not offered.

Moreover, focusing on the funding of the entire HEI, as the ECJ does, contradicts the activity-based approach of EU state aid rules, which allows the notion that one entity could provide some economic activities and some non-economic activities. In the Zanotti decision, the ECJ at least hinted at the possibility of pursuing an activity-based approach if necessary.

Nevertheless, the EC itself assumes that the case law on services is transferable to EU state aid rules. This is expressed in its publications on EU state aid rules. As an example of this, in its Services of General Economic Interest (SGEI) Communication, the EC concludes (EC, 2012[11])[15]:

> *"Case-law of the Union has established that education organised within the national educational system funded and supervised by the State may be considered as a* ***non-economic*** *activity."*

The effect of that conclusion is that the EC has transferred the case law on the notion of services to the notion of (non-) economic activity under EU state aid rules.

The European Free Trade Association (EFTA) Court has also transferred the "Humbel criteria" of ECJ case law on the notion of services into its case law (which applies in the EFTA and the European Economic Area, EEA, States Norway, Iceland and Liechtenstein) (EFTA Court, 2008[12]).[16]

The ECJ has yet to hand down a clarifying decision on this issue. Therefore, there are very good reasons for applying in principle the criteria of case law to the assessment of CET programmes under EU state aid rules, in accordance with EC practice. However, these criteria are then to be applied to the individual CET programmes using the activity-related approach of EU state aid rules.

The role of the EC in classification

The classification of CET by the EC is particularly relevant for HEIs. This is because the EC is the supervisory authority that monitors compliance with competition and state aid rules and that sanctions violations[17]. EC practice as evidenced in its publications (Box 3.2) and in its decisions in its role as the state aid authority is discussed below (Box 3.3).

EC publications

EC publications are not binding legal acts to which the EC must adhere at all times. Nor are they independent, outward-looking legal acts of the EU and thus, they do not restrict the principles of "general" EU state aid law rules. Similar to national administrative regulations, however, they serve as a means of assessing the EC's state aid practice.

The publications discussed in Box 3.2 contain rules of interpretation and application, in particular on the question of which HEIs activities are not economic and therefore eligible for state support. In addition, they provide guidance on how state subsidies for economic activities of universities can be agreed. In this way, the publications give the most up-to-date overall view of the principles that the EC intends to follow.

Box 3.2. Decisions of the EC on the economic or non-economic classification of education

SGEI Communication

The SGEI Communication contains comments on how educational services can be classified as economic or non-economic. As noted above, referring to the ECJ case law on the notion of services, the EC states that "the EU has established that education funded and supervised by the State within a national education system may be considered as a non-economic activity" (EC, 2012[11]).[18]

Explaining the distinction between economic and non-economic activities, the EC continues:

> *"Such public provision of educational services must be distinguished from services financed predominantly by parents or pupils or commercial revenues. For example, commercial enterprises offering higher education financed entirely by students clearly fall within the latter category. In certain Member States, public institutions can also offer educational services which, due to their nature, financing structure and the existence of competing private organisations, are to be regarded as economic." (EC, 2012[11]).* [19]

R&D Framework

When interpreting and applying EU state aid rules in the field of research and teaching, the EC's framework for state aid for research and development and innovation (R&D Framework) contains criteria for distinguishing between economic and non-economic activities. In the R&D Framework, the EC defines the conditions and exceptions under which HEIs' research activities may be financed with public funds without violating the prohibition of state aid in Art. 107 TFEU. It sets out the conditions under which EU Member States and public institutions may fund undertakings to carry out research, development and innovation in a way that complies with state aid rules. It also sets out the rules under which the EC examines state aid notified to it. The Framework also clarifies that certain activities carried out by HEIs and research organisations do not fall within the scope of the state aid rules.

With regard to the classification of activities of HEIs, the R&D Framework states that it generally considers **primary activities** of research institutions and infrastructures as non-economic activities. This includes, in particular:

> *"education for more and better skilled human resources. In line with …[the Humbel judgment] and decisional practice of the EC, and as explained in the Notice on the notion of State aid and the SGEI Communication, public education organised within the national educational system, predominantly or entirely funded by the State and supervised by the State is considered as a non-economic activity." (EC, 2014[13]).*[20]

EC notice on the notion of state aid

A further aid to interpretation is the EC's Notice on the notion of state aid (EC, 2016[14])[21]. In it, the EC explains explicitly which activities it believes can be seen as economic and which as non-economic. Many of the formulations can be found in the R&D Framework.

First, the EC explains its view in general terms with reference to ECJ case law:

> *"Public education organised within the national educational system funded and supervised by the State may be considered as a non-economic activity. The Court of Justice held that the State: 'by establishing and maintaining such a system of public education and financed entirely or mainly by public funds and not by pupils or their parents […] does not intend to become involved in activities for remuneration, but carries out its task towards its population in the social, cultural and educational areas." (EC, 2016[14]).*[22]

The EC then emphasises that a proportionate financing through tuition or enrolment fees in the event of predominantly state funding does not change the classification as a non-economic activity:

> *"The non-economic nature of public education is in principle not affected by the fact that pupils or their parents sometimes have to pay tuition or enrolment fees which contribute to the operating expenses of the system. Such financial contributions often only cover a fraction of the true costs of the service and can thus not be considered as remuneration for the service provided. They therefore do not alter the non-economic nature of a general education service predominantly funded by the public purse. These principles can cover public educational services such as vocational training, private and public primary schools, and kindergartens, secondary teaching activities in universities and the provision of education in universities."*

The EC then explains that, conversely, substantial funding by parents or pupils, or from commercial sources, constitutes an economic activity:

> *"Such public education services must be distinguished from services financed predominantly by parents or pupils or commercial revenues. For example, higher education financed entirely by students clearly falls within the latter category. In certain Member States, public entities can also offer educational services which, due to their nature, financing structure and the existence of competing private organisations, are to be regarded as economic."*

In light of these principles, the EC lists activities that should not fall within the scope of the state aid rules. In this respect, the R&D Framework restates the following:

> *"...the EC considers that certain activities of universities and research organisations fall outside the scope of the State aid rules. This concerns their primary activities, namely:*
>
> *education for more and better skilled human resources;*
>
> *the conduct of independent research and development for more knowledge and better understanding, including collaborative research and development;*
>
> *the dissemination of research results."*

Sources: EC (2012[11]), Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (footnote 101); EC (2014[13]), Communication from the Commission on Framework for State aid for research and development and innovation, 198/01, marginal 19(a), 2014/C 198/01; EC (2016[14]), Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262 of 19.07.2016.

Summary of criteria in EC publications

The assessment of the three EC publications presented in Box 3.2 shows that ECJ case law on the notion of services has been transferred by the EC to EU state aid rules. However, the EC makes additions and its own assessments. However, it should be noted that CET at HEIs is not explicitly mentioned, and consequently, policy makers and higher education institutions still face considerable uncertainty regarding the application of the law.

In the view of the EC, "education and training" at HEIs can, in principle, be of a non-economic nature. This ruling is based on the education and training being, firstly, predominantly or completely funded by the state and, secondly, supervised by the state. This privilege does not necessarily apply to other HEI activities. However, in the R&D Framework, the EC identifies certain primary activities of HEIs as generally non-economic.

One such primary activity of higher education is "education for more and better skilled human resources". However, it is questionable whether this also includes CET at HEIs or, whether, by dint of the use of the word education and training ("*Ausbildung"* in the German text), only includes a person's initial (vocational) qualification (excluding subsequent upskilling). As a result, the open wording does not give a clear indication of whether the EC sees CET also as a primary activity of HEIs. However, the German wording

"*Ausbildung von mehr und besser qualifizierten Humanressourcen*" (education and training for better qualified human resources) suggests the possibility of the inclusion of CET.

If CET cannot be confidently categorised under "education and training for more and better skilled human resources", it is necessary to clarify the defining criteria to reach greater certainty as to the status of CET under the law. The EC refers to the case law, in other words, the type of funding, the intention to make a profit and the embedding in the state education system, but it is clear that the EC considers other criteria to be applicable as well. The EC's assessment refers to the "nature, financing structure and the existence of competing private organisations" of the educational services. Thus, the very existence of competing private organisations could also be taken as evidence of an economic activity. This is consistent with ECJ case law, according to which, for economic activities in general, it is also important whether the service in question competes with that of other economic operators. It remains open, however, whether the EC considers private competition to be a **sufficient** condition to constitute an economic activity, even if the CET programme is part of the public education system and is also publicly financed.

In particular, the primary activities of higher education according to the R&D Framework cannot be used directly for the classification of CET; CET is not among the examples given in the Framework. The common factor that differentiates non-economic activities from the economic activities mentioned is that they are recognisably part of the primary tasks of HEIs and are provided independently of the wishes of third parties. They are non-economic even if, as in the case of the privileged activity of knowledge transfer, fees are also charged, as long as such fees flow back into the non-economic domain.

Activities which, on the other hand, are performed in dependence on and targeted at the interests of third parties are considered to be of an economic nature, such as the contract research referred to in the R&D Framework.

Looking at the CET provided by HEIs, the decisive factor from the perspective of the EC is whether the CET offered is a *primary activity* of the HEI. The more clearly the CET programme can be derived from a specific educational mandate, the more likely it is to be classified as a non-economic activity. This also corresponds with the ECJ's formulation that educational programmes "within the framework of the state education system" are not services. However, it is not yet possible to definitively classify CET as such.

When considering the objective of EU state aid rules, the EC's adoption of funding predominantly from the public purse as a fundamental criterion in state aid rules can easily be criticised as it attaches importance to an economic approach that is linked to the type of **service** offered. In contrast, the rules do not give weight to the type and manner of **funding**.

The EC adopts an economically oriented approach, a "refined economic approach"[23], to its assessment of an activity against the state aid rules (EC, 2005[15]) (EC, 2009[16]) (EC, 2009[17]). This stance reflects the purpose of EU state aid rules and their objective to prevent distortions of competition within the internal market and impairment of trade between Member States (Bartosch, 2016[18])[24]. Whether or not there is a distortion of competition can ultimately only be answered if the competitive conditions on the market in question and their respective economic effects are taken into account.

The ECJ also takes an economic approach in its case law. According to the Court, the question to be examined under EU state aid rules is whether, in the context of a particular statutory scheme, a state measure is such as: “to favour 'certain undertakings or the production of certain goods' within the meaning of Article 92(1) of the Treaty in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question”. (ECJ, 2001[19]) (ECJ, 2005[20]).[25]

The substantial characteristics of EU state aid are to be interpreted on the basis of the objectives of EU state aid rules and the understanding described above.

The functional notion of an undertaking under EU state aid rules also shows that EU state aid rules are based on an economic approach. The question of whether an organisation qualifies as an undertaking is based solely on the pursuit of economic activity and not on the legal form, funding or profit orientation of the organisation. The question of whether a favour exists is also to be answered by means of an economic approach (Mederer, 2015[21]).[26]

Thus, the focus of the state aid assessment is on the economic nature of activities, and not on whether an activity is funded by the state. This is because EU state aid rules aim to prevent state funding causing distortions of economic activities. If the state funds an activity and if the fact of state funding were to result in a classification of the activity as non-economic, then that activity would be removed from the scope of EU state aid rules. The very thing that EU state aid rules intend to prevent would in fact lead to the activity being withdrawn from the scope of EU state aid rules through state financing. The consequence would be that EU state rules would fail to achieve their purpose.

Despite this contradiction, the EC has adopted funding structure as one of the criteria for assessment against EU state aid rules. In light of this clear EC policy, it should be applied accordingly in higher education, notwithstanding the doubts and risks outlined here, until such time as the issue is clarified by the EC or by the ECJ.

Decision-making practice of the EC with regard to state aid rules

Special attention must also be paid to the EC's decision-making practice on the classification of CET programmes. It appears that the EC does not systematically apply the criteria discussed above in every case. It is also apparent that the EC attaches considerable importance to proximity to and integration in the state education system (see Box 3.3).

Box 3.3. Cases on the application of state aid rules to higher education decided by the EC

Prerov Logistics College, Czech Republic

The Prerov Logistics College case (EC, 2006[22]) concerned a Czech private HEI that received a subsidy from the Czech Republic. The college offered an accredited bachelor's degree programme. The HEI generated its own income through tuition fees and had its own financial resources in the form of investment. However, the exact funding structure was not disclosed in detail.

The EC decided that this private college was not an undertaking in the sense of EU state aid rules and was part of the state education system. The educational programmes offered, and the research, development and other activities conducted within the college's study programme were dependent the approval of the Czech Ministry of Education. The college was barred from engaging in other activities. In addition, any profits could only be reinvested in the college's activities. The distribution of earnings was not possible, and therefore the EC concluded there was no intention to make a profit, deciding that overall, the college was not engaged in any economic activities but pursued a role in the education system in the general interest of the public.

The EC, in contrast to case law on the notion of services, did not base its decision on the funding of the HEI, and the partial funding from private resources was not brought forward as an issue. The decisive criterion here was legal integration into the public education system, in conjunction with a lack of profit-making intent and the corresponding state supervision.

Private Foundation of the Liceu Conservatorium, Spain

In 2018, in the Private Foundation of the Liceu Conservatorium case (EC, 2018[23]), the EC decided that granting funds to a private HEI to implement a state-recognised bachelor's degree programme in music

does not constitute state aid if the programme is part of the state education system. This decision depended on the level of integration into the state education system and the majority funding.

The EC reiterated that the decision also applied if the pupils or parents paid part (in fact around 35%) of the fees for the course, but not if the pupils or parents bore the majority of the costs. The striking aspect of this case was that the Member State funded less than 50% of the costs of the degree course. This meant that the bachelor's degree programme was not fully or predominantly funded from state resources, and the EC expressed clear doubts as to whether this did not constitute an undertaking within the meaning of Art. 107 TFEU.

However, the EC did not have to decide on this question because it considered the study programme to be a measure aimed at preserving culture and promoting cultural education within the meaning of Art. 53 TFEU. The EC thus considered the measure to be compatible with the prohibition of state aid.

Partium Knowledge Centre, Hungary

The EC's decision in the Partium Knowledge Centre case (EC, 2008[24]) also highlighted that the services provided by the publicly funded HEI in Hungary were partly free of charge, partly benefited individuals and not undertakings and, concerning research and development services, fell under the relevant examples of the R&D Framework for non-economic activities.

BBC Digital Curriculum

In its decision on the BBC Digital Curriculum (EC, 2003[25]), the EC emphasised that the existence of a market could constitute economic activity even if the service in question was offered free of charge in this market. This is in line with the particular importance that the ECJ also attaches to the competition criterion for the notion of an undertaking.

Sources: EC (2006[22]), EC Decision of 08.11.2006, State aid No N 54/2006; EC (2018[23]), EC decision of 08.11.2018, State aid. 43700 (2018/NN) / C(2018) 7215; EC (2008[24]), EC decision of 26.11.2008, State aid No N 343/2008; EC (2003), EC decision of 01.10.2003, State aid No N 37/2003.

The Prerov Logistics College decision could play a role in the shaping of CET at HEIs in Brandenburg as it could mean that the integration of a CET programme in the state education system is more important to the EC than the funding structure. However, such a conclusion cannot be drawn with absolute certainty – the facts of the case in this decision by the EC are not presented in sufficient detail.

Interpretation of EU state aid rules in the KMK Guidelines

The Standing Conference of the Ministers of Education and Cultural Affairs of the *Länder* in the Federal Republic of Germany (*Ständige Konferenz der Kultusminister der Länder in der Bundesrepublik Deutschland*, KMK) has published a set of guidelines for differentiating between economic and non-economic activities at HEIs (KMK, 2017[26]). The Guidelines are intended to assist HEIs in assessing their programmes, but, unlike the judgments of the ECJ and the decisions of the EC, these are only advisory and have no legal standing. They contain some indications regarding CET programmes.

When do the KMK Guidelines treat CET at HEIs as an economic activity?

The KMK Guidelines are intended to offer a first orientation for classifying and assessing state aid for research, development and innovation (RDI) in terms of the EU state aid rules. They are primarily aimed at HEIs as institutions for research and knowledge dissemination in the terms to Section 1.3(ee) of the

R&D Framework. The guidelines (KMK, 2017[26]) do not offer a proper classification of CET at HEIs in terms of EU state aid rules on the basis of the R&D Framework and refer to European Union law:

> *"The basis for the distinction between economic and non-economic activity under state aid rules is solely [European] Union law. Other alternatives, such as the criterion of national taxability or the distinction between sovereign and non-sovereign tasks are not suitable as differentiation criteria, as they are not congruent Europe-wide and sovereign tasks are essentially defined nationally. There are also exceptions where services are to be assumed to be non-economic despite their taxability. Furthermore, the objectives of the European Union framework and national tax law are not congruent." (KMK, 2017[26])*.

This statement is followed by a conclusion by the KMK that is important for the assessment of CET:

> *"Whether an educational service is of an economic nature therefore depends not only on the structure of the funding of the offer but also on the profit-making intention of the provider and on how the education sector is organised in the Member State concerned and whether there is a specific public interest in the services offered. When assessing whether educational services offered by private HEIs and funded by fees are an economic activity, the integration of those services into the state education and control system must also be taken into account. Differences in the circumstances in the Member States can lead to different assessments." (KMK, 2017[26])*.

By using the term "educational service" (*Bildungsdienstleistung*), the KMK indicates that it does not understand education and training (*Ausbildung)* as initial (vocational) training only, but interprets the term broadly. In this interpretation, it is fundamentally possible to classify CET as a non-economic activity. This represents a concretisation of the R&D Framework, which leaves open the question of whether "education and training [*Ausbildung*] for better qualified human resources" includes CET or whether the use of the term *Ausbildung* restricts it to initial (vocational) training.

Like the R&D Framework, the KMK Guidelines place an emphasis on the structure and funding by the state. Section 9 of the Guidelines lists case studies intended to serve as aids to interpretation for HEIs and which are important for implementation at HEIs. Undergraduate study programmes and consecutive master's programmes are assigned to the non-economic sphere, in accordance with case law of the ECJ, if they constitute organised public education within the national education system that is predominantly or completely funded and supervised by the state. Indicators for this are, for example, conformity with the higher education institution plans of the *Länder*, agreements on study programmes and the requirement for accreditation. This should apply even if the undergraduate programmes are part-time and funded by fees. The KMK Guidelines state:

> *"The levying of fees does not preclude classification insofar as these fees merely contribute to covering operational costs (additional costs caused by special formats, e.g. events at weekends, in the evenings or at special venues)." (KMK, 2017[26])*.

This mirrors the approach of the EC, which has ruled that partial funding of education from fees does not constitute an economic activity. This is particularly the case if the educational programmes in question are integrated in the state education system. However, the reference in the Guidelines to "operational costs" (as opposed to capital costs or, possibly, overhead costs) is not found in the R&D Framework and thus represents a further refinement.

With regard to postgraduate master's study programmes, the KMK makes a differentiation that is linked solely to the way in which they are funded. From the KMK's point of view, a postgraduate master's study programme is also to be classified as non-economic if the programme is predominantly publicly funded (requirement 1) and state-supervised (requirement 2). “Predominant” state funding is assumed if 50% of the full costs are borne by the state. Further grounds are:

> *"In the event of predominant funding by the state, the programme is classified in the non-economic domain. This enables the promotion of CET (also subject- or target group-specific) in accordance with the educational policy ideas of the respective Land." (KMK, 2017[26])*.

Conversely, a postgraduate master's programme should consistently be classified as economic if it is not predominantly funded by the state. According to the KMK, state supervision alone is not sufficient to classify a programme as non-economic. This principle of classifying continuing education programmes according to the way in which they are funded is maintained throughout the KMK Guidelines.

This differentiation is continued for further education and training *(Fortbildung*), whereby it is noted that *Fortbildung* is non-economic if there is "a special state interest in [it] (e.g. teacher training)". The same applies to language courses, which are to be deemed non-economic if there is a special state interest in them and they are predominantly funded from the public purse.

The KMK thus introduces a further characteristic, namely, “special state interest", in addition to structure and funding. A special state interest is inherent some CET programmes. The classification of CET as non-economic can therefore be linked to its “proximity” to the state education system. This allows the conclusion that the evaluation also depends on whether the particular CET programme is to be evaluated as education (*Bildung*) within the framework of the state education system. This criterion reflects the analysis of ECJ case law (described above – see Box 3.1).

Language courses, on the other hand, are considered to be economic insofar as they are completely or predominantly liable to fees or charges. In the case of internal CET (*interne Weiterbildungsangebote*), the differentiation is changed: If the CET is provided by HEI staff, it is non-economic, but if third parties are involved, it is economic. The KMK Guidelines do not provide any further rationale for this differentiation.

In summary, the KMK Guidelines aim to find a solution under which HEIs can classify (vocational) CET courses as non-economic. To do this, the KMK makes use of two main elements:

- Element 1: predominantly state funding of the programme;
- Element 2: special state interest in the programme offered by HEIs.

This interpretation is clearly influenced by ECJ case law on state education, which foregrounds the state education system with its state organisation and the state interest. The predominantly public funding is apparently to be understood as indicating the state character of the programme, thus making it possible to classify the programme in the non-economic domain.

Critical examination of the KMK Guidelines

The KMK Guidelines understandably play an important role in practice as they make it possible for HEIs to define manageable delimitations. This is necessary in the absence of more detailed case law or codification of the EU framework by the EC.

Nevertheless, there is no overlooking that fact that the KMK Guidelines have weaknesses. These are addressed below, and recommendations for further development of the Guidelines for the future are given as part of recommendations for action.

Substantial state funding

If substantial state funding is to be a defining criterion for non-economic activity, an EU state aid contradiction arises.

Currently, the KMK Guidelines and the R&D Framework make the level of funding the defining criterion for classifying an educational activity as economic or non-economic. It was noted above that making the level of state funding a decisive criterion seems, at first glance, to be contradictory: the more funding for an activity is drawn from the public purse, the less the activity is subject to EU state aid rules, which aim to prevent distortion of competition by state funding. The counter view is that predominant state funding suggests that a CET programme is particularly relevant for the public interest, and this is an expression of

the principle that the public interest is important for the classification of CET programmes at HEIs under EU state aid rules.

The dynamic nature of EU law and the general tendency to greater economisation makes it possible that funding will become less important as a criterion (Marwedel, 2014[27]) in the future and that this would be used only as an indicator for the more general criteria of relevance for the public interest. This would mean that classifying CET as a non-economic activity would be possible even if it is (fully) funded from fees. The decisive factor seems to be, therefore, that the CET programme in question can be justified as being in the public interest. The increasing importance of CET in the EU, as discussed in Chapter 1 of this report, is also relevant in this context. However, this assessment does not yet satisfy the criteria of EU state aid rules.

Another factor may be that provision of funding for CET programmes and a "specific" state interest could also be the result of a lack of services offered by private participants in the market. Why else should the state fund CET programmes at public HEIs? The state is concerned with safeguarding the availability of services because there is a shortage (or absence) on the German market.

"Special state interest"

According to the KMK Guidelines, the existence of a "special public interest" (Section 8) is a condition for a CET programme at a HEI to be non-economic. The lack of precision in this criterion makes it difficult to apply.

The special public significance of education means that any activity undertaken by a HEI can probably be classified as being in the "state interest." Education and training, and CET specifically, is already an explicit objective of the EU and is anchored in Art. 166(2) TFEU and the Preamble of TFEU[27]. In addition, CET is of increasing importance to societies in the EU, and CET is anchored as a core function in [German] higher education laws. Whereas § 21 HRG (old version) stipulated that HEIs should develop and offer opportunities for CET, after the amendment in § 2(1) HRG and in agreement with the higher education laws of the *Länder* – **continuing education and training** is assigned as a core task for HEIs, alongside research and teaching. Brandenburg's higher education legislation refers to CET in § 25 BbgHG. That section of the law confirms the responsibility of HEIs to develop and offer continuing education studies in accordance with § 3(1) BbgHG.

Thus, acting in the state interest does not provide a clear criterion for distinguishing between economic and non-economic activity. However, the proximity of the respective CET programme to the state's educational mandate can be a determining factor for its classification as non-economic, especially in cases of doubt.

Overall assessment of the KMK Guidelines

In agreement with the EC, the KMK Guidelines emphasise, in particular, the financing structure of CET programmes. However, they also cite a "specific state interest" clearly as a defining criterion. For example, certain language courses (such as the programme offered by the German Academic Exchange Service (DAAD)) could be classified as non-economic due to the special state interest in them (KMK, 2017[26]). The upshot is that it is not possible to classify every example of CET as an economic or non-economic activity using the KMK Guidelines. This begs the question of whether the Guidelines could be adapted better to EU criteria and thus could offer HEIs greater legal security. This will be discussed in further detail in Chapter 5.

Assessment of CET against the classification criteria

Two conclusions can be drawn from the discussions above.

Firstly, the EC does not explicitly classify CET at HEIs as a non-economic activity. Although education and training of better qualified human resources is generally considered non-economic, it cannot be said with certainty whether CET also falls under this category.

Secondly, it follows that, in the absence of a clear classification, it is a matter of individual definition criteria. The ECJ case law and the EC's practice show which criteria the EC would most probably apply at present when classifying CET programmes. The wording of the SGEI Communication and the EC Notice on the notion of State aid states:

> *"In certain Member States, public entities can also offer educational services which, due to their nature, financing structure and the existence of competing private organisations, are to be regarded as economic." (EC, 2016[14]).*

The following therefore addresses the assessment of higher education CET against the four primary criteria set out at the beginning of this section:

- the existence of **private competition**;
- the **funding structure** and a corresponding profit motive;
- the embedding of the respective programme in the **state education system** (“nature” of the service);
- a possible **special state or public interest** in the specific programme.

The first three criteria do not need to apply jointly. Only one criterion might be relevant for a particular CET programme.

However, as these decisions by the ECJ and the EC refer primarily to education and training services in general, it is not possible to say with absolute certainty how the criteria would be interpreted in relation to CET services. In particular, the ranking of the criteria identified is still unclear.

Competing private organisations

The case law of the ECJ on the notion of an undertaking suggests that whether the programme is offered on the market in competition with other economic operators may be relevant for the classification of CET programmes offered by HEIs. A CET programme that is not (or does not have the potential to be) in competition with private organisations cannot be held to be distorting trade and therefore, has no significance under EU state aid rules, and so could be classified a non-economic activity. This is because the prevention of distortions of competition is an essential aim of EU state aid rules. Consequently, the EU institutions are likely to be inclined to attach particular importance to this criterion when classifying CET programmes (Marwedel, 2014[27]). The SGEI Communication and the EC's notice on the notion of state aid speak more precisely of the "existence of competing private organisations".

The ECJ has stressed that competition with other economic operators can give rise to economic activities even if the respective goods or services are offered without the intention of making a profit (ECJ, 2006[3])[28], underlining the weight that the ECJ gives to the competition criterion. It is therefore reasonable to expect that the EC would classify a CET service as economic if it competes with services offered by other economic operators in a relevant market within the meaning of EU competition rules (EC, 1997[28]) (Marwedel, 2014[27]).

Funding structure and intention to return a profit

A second important criterion is the funding structure of the CET programme. Funding that is (at least) substantially granted from public resources speaks to a non-economic activity (according to the ECJ in the Wirth case, see Box 3.1 above), although, in the absence of clear case law, the possibility of an economic character despite predominantly public funding cannot be excluded.

Neither the ECJ nor the EC specify what proportion of funding may be called substantial. In the literature on CET, it is argued that a state funding ratio of more than 50% of the full costs for a particular course is to be considered "substantial" in the sense of ECJ case law (Marwedel, 2014[27]). This argument is supported by the fact that, where there are only two possible sources of funding, the word "substantial" must be taken to mean “more than half of the total funding”. Funding by the state amounting to no more than 50% would therefore not constitute substantial state funding.

However, the argument that the activity is non-economic could still be made on the basis that a CET programme is operated without the intention of making a profit; in other words, at least half of it is privately funded, but overall it only covers costs (Marwedel, 2014[27]). However, there is a level of legal risk in that case, as the ECJ has never clarified the relationship between the funding ratio and the intention to make a profit. The EC has taken up the lack of intention to profit as an argument for non-economic activity and has connected that feature with integration into the state education system. This makes clear that considering defining criteria in isolation from each other is problematic.

In line with the activity-based approach of EU state aid rules, the funding structure of *individual CET programmes* must be examined. ECJ case law on the notion of services (Box 3.1) primarily focuses on the fact that the national education system is usually funded from the state budget and the court refers to the educational institution as an entire organisation. However, the EC assumes, especially in the R&D Framework, that a distinction is drawn between individual activities for the purposes of EU state aid rules. Since the notion of an undertaking under state aid rules differentiates according to economic unit rather than legal form, this is to be complied with.

Integration in the state education system

Integration into the state education system is another criterion used in particular by the EC, which refers to the "nature" of the educational service (see Box 3.3 above).

In principle, the more integrated an educational service is in the state education system and its regulations, the more likely it is to be non-economic. This is clear in the EC's decision on the Prerov Logistics College case (EC, 2006[22]), which set out criteria in favour of that position. The issue at hand was the state's permission to act as a tertiary education institution and to offer a certain course of studies. The limited freedom of action to develop other activities was also of importance. With regard to CET at public higher education institutions, there are some arguments in favour of it being of a non-economic "nature". Public institutions, which are subject to state recognition and supervision, fulfil a state mandate for CET. In some cases, state degrees are awarded (master's degrees). In Brandenburg, for example, HEIs remain responsible for content and examinations even when they collaborate with non-university institutions (§ 25(4) BbgHG).

Special state/public interest

Finally, the criterion of public interest requires separate consideration. The KMK Guidelines explicitly reference public interest as a criterion, but neither the ECJ nor the EC mention it. However, integration into the state education system and substantial public funding are associated with the public interest of the Member State. This suggests the possibility that the special public interest in CET programmes will play a more important role in ECJ case law and the practice of the EC in the future.

The special public interest criterion is relatively imprecise, as noted in the discussion of the KMK Guidelines above. This is because education, especially CET, is in the public interest because of the demographic and technological change described in Chapter 1, which have led to political priority on upskilling/reskilling the workforce. If this criterion were to become a determining factor in EU state aid rules in the future, the scope for states to fund CET would be greatly expanded. However, it remains to be seen whether the EC will abandon the "solid" criterion of the financing structure.

Prioritising the criteria

The fact that there are four criteria means that, in some cases, the order of priority of the defining criteria will arise. It cannot be deduced with certainty from the publications and decisions of the EC whether public funding can also constitute a non-economic activity if the service in question is in competition with private organisations. The explicit objective of avoiding distortions of competition by means of EU state aid rules suggests that, in principle, public funding cannot constitute a non-economic activity if the publicly-funded offering is in competition with the services offered by private organisations. (Marwedel, 2014[27]) also notes this lack of clarity, writing that competition from private organisation is certainly the most important criterion but is not a criterion for exclusion:

> *"If there is clear competition from private organisations, the EC could consider objecting to state subsidies for CET at HEIs even if the funding structure and the nature of the CET provision actually constitute a non-economic activity. In areas where comparable competing offers exist, it is therefore to be assumed in principle that the activity is economic. However, with strong counter-arguments regarding the funding structure and, if applicable, the nature of the educational service, the classification as a non-economic activity can still be justified in individual cases." (Marwedel, 2014[27]).*

Further defining criteria in prohibition of state aid

Economic activity does not alone constitute grounds for prohibition under Art. 107(1) TFEU; other defining criteria must be met. This section of the chapter explores those criteria as they apply to an activity that has been categorised as economic. It considers how the **pricing policy** of the HEI offering the CET affects the prohibition on state aid, it looks at the further defining characteristics of "**favour**", "**market distortion"** and **"distortion of competition"**.

Preferential treatment and market-appropriate consideration through pricing

If the categorisation of the CET programme leads to the HEI's activity being classified as economic, the prohibition on state funding may not apply if no favour ensues for an undertaking.

First, a distinction must be drawn between the different levels of EU state aid rules. The favoured undertaking can either be the HEI itself or a CET institution as a third party.

Direct aid on the "first level" to the economically active HEI applies if the HEI offers its CET programmes using publicly-funded infrastructure and human resources and if the fees collected do not cover the full costs.

Indirect state aid may also apply at the "second level". For example, organisations (commercial or non-profit) that offer CET and are not part of the HEI itself can offer CET under a contract to the HEI. If the HEI made its (state-funded) infrastructure available to the CET provider and if it did not receive market-appropriate consideration for that use, then this would count as a state subsidy. If a fair market price was paid for the use of the facilities for the CET provision, then that would not count as a subsidy. This applies equally to the relationship between the HEI and its own subsidiaries, which also offer CET in co-operation with CET institutions outside the HEI sector (in Brandenburg, this is regulated in § 25(4) BbgHG.).

The chapter presents below an analysis of market-appropriate consideration, especially with regard to the case of co-operation with third parties. This is also because HEIs in Brandenburg are allowed to co-operate with non-university institutions in CET by § 25(4) BgbHG.

Market economy principle

As explained above, a state benefit for an economic activity is not an advantage if a fair market consideration is paid for it. The provision of a service at market price cannot constitute an advantage and thus cannot constitute state aid. This means that each individual case must be examined to identify if HEI infrastructure has been used in the CET programme or if HEI staff have contributed to it; andif so, whether that infrastructure or that staffing been charged out at a fair market price.

Where a fair market price does not exist, a consideration is deemed appropriate if it reflects the total cost of the service and generally includes a margin or profit or mark-up that is oriented against the mark-ups typically used by undertakings active in the same field as the service provided. Regarding the covering of costs and the inclusion of an appropriate mark-up, the ECJ required the consideration paid must cover the following three elements: i) all variable additional costs in the performance of the service; ii) an appropriate contribution to the fixed costs of the infrastructure; and iii) an appropriate return on the equity capital invested (ECJ, 2003[29]; Bartosch, 2016[18])[29].

An alternative level of consideration can be deemed appropriate only if it is the result of negotiations conducted according to the "arm's length" principle, in which the HEI negotiates as a service provider in order to extract the maximum economic benefit at the closing of the agreement, whereby it must cover at least its marginal costs. Management theory understands marginal costs as performance-specific additional costs, in other word the cost incurred by delivering one additional product (Bartosch, 2016[18])[30]. According to Point 15(f) of the R&D Framework, "arm's length" means:

> *"that the conditions of the transaction between the contracting parties do not differ from those which would be stipulated between independent enterprises and contain no element of collusion. Any transaction that results from an open, transparent and non-discriminatory procedure is considered as meeting the arm's length principle." (EC, 2014[13]).*

Permissibility of flat-rate charges

A flat-rate charge can also be agreed as fair market consideration.

EU state aid rules are not clear on the matter. Point 21 of the R&D Framework simply states:

> *"Without prejudice to Point 20, where research organisations or research infrastructures are used to perform economic activities, such as renting out equipment or laboratories to undertakings, supplying services to undertakings or performing contract research, public funding of those economic activities will generally be considered State aid." (EC, 2014[13]).*

Point 25 R&D Framework reinforces that:

> *"(a) The research organisation or research infrastructure provides its research service activities or contract research activities at market price.*
>
> *(b) Where there is no market price, the research organisation or research infrastructure provides its **research service activity** or contract research activity at a price which:*
>
> *- reflects the full costs of the service and generally includes a margin established by reference to those commonly applied by undertakings active in the sector of the service concerned, or*
>
> *- is the result of arm's length negotiations where the research organisation or research infrastructure, in its capacity as service provider, negotiates in order to obtain the **maximum economic benefit** at the moment when the contract is concluded and covers at least its marginal costs." (EC, 2014[13]).*

The wording puts "research service activity" and not "activities" as the basis for the calculation. The emphasis on the singular activity suggests that each economic activity engaged in by a HEI must be calculated according to the criteria above or the HEI would be in breach of the prohibition on state aid.

However, this approach would do justice to neither legal nor economic considerations. From a legal point of view, such an approach would be questionable because resource-intensive projects and CET programmes (such as the use of machines and laboratories) are likely to incur higher "invoice sums" in the form of contributions from participants or course fees. If the flat-rate charges for more cost-intensive CET programmes are related to the costs defrayed by the CET provider to the HEI for [other] CET programmes and are reflected in the overall costs of the HEI, then it seems possible to argue that flat-rate charges for CET programmes are compatible with EU state rules. A cost-intensive individual project can also be in conformity with the above calculation requirements, and it therefore cannot be assumed that a flat-rate charge is *per se* contrary to EU state rules[31].

EU state aid rules are legal provisions which are, of necessity, practicable and linked to economic reality. In other words, the rules create a set of boundaries within which HEIs and research institutes work but which they may not transgress. This means that the rules do not contain particular economic figures, such as the size of profit mark-ups, as economic realities can be very different depending on the Member State, the HEI or the research institute.

In addition, the EU rules on state aid follow an economic approach. They do not give primary consideration to the question of how the individual costing steps are carried out, but are concerned to see that they result in a causally just calculation of cost and that the above-mentioned framing conditions are observed. This also implies that the provisions of the R&D Framework on separate accounting can only offer general orientation. They form the framework that must be respected, but do not prescribe the concrete form.

In other words, HEIs have freedom to make choices about how they work within those boundaries, as long as they do not go outside the bounds.

Therefore, appropriate flat-rate charges, as often practised in reality, are not excluded by default if they lead to results which adhere to the legal framework. This applies particularly if they lead to a causally just allocation of costs for the use of resources between the HEI and the participants in a CET programme or any intermediary third party. Annex A contains a discussion of how HEIs might implement costing to meet the framework boundaries discussed here.

Interim conclusions

An advantage and thus the defining element of state aid can be avoided if the HEI charges a market-appropriate fee. If the fair market price is unknown, the full costs of providing services, including a reasonable profit mark-up, are to be charged. Alternatively, charges are deemed appropriate if they are the result of negotiations conducted according to the arm's-length principle in which the entity acts in its capacity as a service provider with the goal of extracting the maximum economic benefit at the conclusion of the contract, whereby it covers its marginal costs at the minimum.

When determining the market-appropriate consideration, the following points are to be given special attention when co-operating with a enterprise in the context of CET:

- **First:** A flat-rate calculation of the market-appropriate consideration does not appear to be excluded under EU state aid rules. However, such a flat rate requires continuous preliminary and final costing, i.e. a plausibility check in a periodic time frame, as well as regular evaluations and adjustment.
- **Second:** In order to be able to carry out this plausibility check where the co-operation is with a third-party undertaking, transparency between the HEI and the undertaking with which the HEI co-operates is imperative.

- **Third:** The plausibility check of the calculation presupposes that at the level of the undertaking and in accordance with the principles above, the actual use of resources of the HEI – and not merely the calculated use – are recorded and are disclosed to the HEI in a manner that allows a plausibility check, both with regard to the extent of the use of the HEI's resources and the manner in which the utilisation of resources is recorded.

Distortion of competition and impairment of inter-community trade

Market distortion and the resulting distortion of competition is a defining condition for prohibition under state aid rules. This condition relates to the existence of a potentially competitive relationship with other market participants. This also applies for a non-profit undertaking which is (or could potentially be) actively in competition with other – profit-oriented – private undertakings (EC, 1998[30]) (EC, 1998[31])[32].

The question of a potential distortion of competition was also linked to the categorisation of an activity as economic or non-economic. If the activity of the HEI, i.e. the CET programme, is in clear competition with private CET institutions, then it is possible that an activity that is actually non-economic could be classified as economic. This does not apply if no potential competitive situation can occur at all, i.e. there is no market for the programme.

However, if the potential "user" or "customer" can choose between different CET programmes for each other as equivalents with the same outcome (certifications, diplomas, admission certificates), there is a distortion of the market in favour of the subsidised CET where CET programmes offered by HEI receive public funding and are thus preferred.

As a separate criterion of Art. 107(1) TFEU, the criterion of market distortion or distortion of competition can also apply to a CET programme.

However, the existence of an advantage does not *per se* result in a market distortion (see above). It is only to be assumed if competition is likely to be influenced through the improvement of the market position of a direct beneficiary or a third party and to the detriment of another market participant, competitor, or third party (Lux-Wesener/Kamp, 2009[32])[33].

Insofar as their funding from the public purse or their use of public resources enables the HEIs to offer marketable CET programmes at a lower cost than competitors, the result could be a (potential) influence on competition. In the opinion of the ECJ, no general or clear effect on the market is required to be proven for a distortion of the market to exist; the mere potential of influence constitutes impact on trade (ECJ, 2000[33]) (Soltész, 2011[34])[34].

Therefore, it is essential to undertake an analysis and classification of many the CET programmes offered by HEIs.

The potential for *cross-border* market influence and impairment of inter-State trade must also be considered among the defining characteristics. This requirement does not apply only if the funded economic activity is a CET programme that operates or is used only locally, and which has regionally restricted impact (EC, 2012[11])[35]. The case of Prerov Logistics College, the Czech HEI that offered courses in Czech with an exclusively regional focus to its fewer than 150 students, illustrates that point. There was no expectation that students from outside the state would enrol in the course on grounds of the geographical situation, and so the EC decided that the public funding of the private school has no impact on (cross-border) trade between the Member States, even assuming that the notion of an undertaking in Art. 107(1) TFEU was fulfilled (EC, 2006[22])[36].

However, programmes which could potentially enter into cross-border competition and which do not provide the possibility of obtaining a public higher education degree could be competitive in the private CET market, so that an impairment of competition would be seen as fulfilled. The same applies if the provision of the CET programme were to be maintained without equivalent financial consideration.

Only if no supra-regional cross-border competition can – even potentially – come into existence, can a market distortion or distortion of competition (trade impairment) be ruled out, even in the case of economic activities by HEIs.

Possible justifications and exceptions to the prohibition of state aid

If a CET programme meets all the criteria of Art. 107(1) TFEU, the prohibition of state aid applies. Nevertheless, there are other possibilities for exemption from the EU ban on state aid. In detail, these are exemption under the General Block Exemption Regulation (GBER), classification as *de minimis* aid, fulfilment of the 20% clause and structuring as a service of general economic interest (SGEI). All four types are explained below.

Exemption on the basis of General Block Exemption Regulation

In certain cases, a CET programme that fulfils the criteria of Art. 107(1) TFEU may nevertheless be exempted from the prohibition of state aid under Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text (General Block Exemption Regulation, GBER). However, the requirements are strict, meaning that there are uncertainties in the application of this exemption to CET.

First, the general conditions of the GBER are to be observed, which are detailed in Chapters I and II (Arts. 1 - 12 GBER). This means:

- **Aid must be "transparent"**, (Art. 5 GBER). The GBER focuses on whether the gross grant equivalent (essentially, the market price proxy) can be calculated without a risk assessment. According to the Regulation, certain forms of aid are generally considered transparent (Art. 5(2) GBER). If the aid is a grant, an interest rate subsidy, a guarantee, a risk finance measure or aid for the establishment of a start-up, it is considered to be "transparent" within the meaning of the GBER.
- **Aid must have an incentive effect**, (Art. 6 GBER). Aid may not to be granted for activities which a recipient would carry out under market conditions even without aid.
- In addition, **aid may not exceed the notification thresholds** of Art. 4 GBER and must be notified and published in accordance with the procedure in Arts. 9 and 11 GBER.

If an aid measure fulfils these requirements, it can be examined to see if one of the special circumstances set out in Chapter III of GBER is fulfilled.

With regard to aid for CET, the following circumstances could be of particular interest: Training aid (Art. 31 GBER); aid for compensating the costs of assistance provided to disadvantaged workers (Art. 35 GBER); aid for culture and heritage conservation (Art. 53 GBER); or aid for start-ups (Art. 22 GBER)[37]. These are described in Box 3.4.

Box 3.4. Exemption from the prohibition on state aid under the GBER

Training aid

Art. 31 GBER provides for the exemption of aid measures which concern the education and training of workers, without further defining the term "training aid". The exemption was introduced in 2014 because undertakings might be reluctant to train their employees further – to the benefit of society as a whole – for fear of losing their qualified workers (Nowak, 2016[35])[38]. This comprises all forms of aid that concern training measures but excludes aid for mandatory training (Art. 31(2) GBER) such as safety training, because in those cases, there is no need for an additional financial incentive for the training to be conducted (see Art. 6 GBER) (Nowak, 2016[35])[39]. Art. 31(4) GBER restricts the training aid to 50% of the cost; however, if the training is given:

- to disadvantaged workers, the rate is increased by 10 percentage points;
- in a medium-sized enterprise, the rate is increased by 10 percentage points;
- in a small enterprise, the rate is increased by 20 percentage points;

as long as the aid intensity is no more than 70%, overall.

Eligible costs are personnel costs for trainers (both external and in-house) (Bartosch, 2020[36])[40], costs which are incurred by the trainers (e.g. travel costs, materials), costs for advisory services and personnel costs for participants while they are taking part in the training measure.

If a HEI offers training programmes which are used by undertakings, certain elements can benefit from exemption and receive up to 50% (and no more than 70%) of costs in state aid. This takes the form of a subsidised offer from a HEI when all the relevant conditions of Chapter 1 GBER (particularly transparency, Art. 5 GBER) are met.

Disadvantaged workers

Aid granted in support of disadvantaged workers may be exempt on the basis of Art. 35 GBER. The exemption focusses on the extra costs incurred in providing support for disadvantaged workers. Aid for training staff needed to assist disadvantaged workers (Art. 35(2)(b) GBER) could be relevant for CET programmes. Such aid would be covered by the GBER, provided that the general conditions set out in Chapter I GBER are met.

Cultural heritage

Exemption on the basis of Art. 55 GBER requires the aid to be used for the conservation of cultural heritage.

This exception is particularly aimed at the maintenance of institutions such as museums, theatres and heritage sites. The exemption can also apply to training to support the maintenance of intangible heritage such as folklore, customs and crafts (Art. 53(2)(c) GBER) and activities connected with cultural and artistic education (Art. 53(2)(e) GBER. CET programmes designed to offer cultural or artistic training could therefore be exempted from the prohibition on state aid under the conditions of Chapter 1 GBER and Art. 53 *et seq* GBER.

As an example, in 2018, the EC found that funding for a bachelor's programme in music offered by a private HEI fell under the terms of Art. 53 GBER (EC, 2018[23]). However, Recital 72 of the GBER makes clear that activities may not benefit from the exemption if they have a predominantly commercial character. Therefore, an exemption on the grounds of Art. 53 GBER can be considered only on the

condition that the activities are cultural or artistic education. This is unlikely to be the case for a CET programme offered by a HEI.

Aid for start-ups

An exemption from the prohibition on state aid could *prima facie* be considered if the CET programme is to be carried out by a start-up. Art. 22(3) GBER permits loans, guarantees and grants to be granted to a start-up. This applies to aid that has the form of stockholders' contributions. Grants of up to EUR 400 000 gross grant quavalent are fundamentally permissible. According to Art. 107(3)(c) TFEU, the aid may be extended to EUR 600 000 if:"the aid facilitates the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest."

It is doubtful, however, that CET programmes contribute to the "development" of certain economic activities or economic areas within the meaning of Art. 107(3)(c) TFEU above. To do this, they would have to constitute an incentive to steer entrepreneurial behaviour in the direction of a specific, generally recognised economic, social or environmental objectives. As can be derived from Art. 31 GBER and Recital 53 GBER, this could be constituted by undertakings relying on CET that have positive effects for society as a whole; this is not clear, however.

If the HEI collaborates with an undertaking in the context of CET, it may also be the case that the HEI and the undertaking are deemed to be "linked undertakings" and thus no longer fall under the scope of the regulation according to Art. 22(1) GBER. It is apparent that the regulations in the BbgHG make this the case. According to Art. 3(3) Annex I, undertakings are linked if they are in one of the following relationships with another undertaking:

- an undertaking holds the majority of voting rights of the stockholders or members in another undertaking;
- an undertaking is entitled to appoint or dismiss a majority of the members of the administrative, management or supervisory body of another undertaking;
- an undertaking is entitled to exercise a controlling influence over another undertaking pursuant to an agreement entered into with that undertaking or a clause in its articles of association;
- an undertaking which is a shareholder or member of another undertaking exercises sole control over the majority of the voting rights of that undertaking's shareholders or members pursuant to an agreement entered into with other shareholders or members of that other undertaking.

According to § 25(4) BbgHG and as described, there is the possibility of co-operation with CET institutions outside the higher education sector. However, § 25(4) BbgHG limits the possibilities for HEIs to completely dispense with the task of providing CET by co-operating with institutions outside the higher education domain (Herrmann, 2018[37]). Although the organisation and delivery of the CET programme can be assigned to a co-operating institution, the HEI remains responsible for the programme content and examinations. To make legal supervision possible and executable, a co-operation agreement must be reported to the ministry responsible for higher education institutions. The HEI must therefore establish and prove a controlling influence over the co-operating institution, so that a linked enterprise can be said to exist under Art. 3(3) GBER.

Invoking an exemption under the GBER for CET with any legal certainty appears to be possible only to a narrow extent; however, such scope as exists should be exploited.

Sources: Nowak (2016[35]) in Immenga/Mestmäcker, Wettbewerbsrecht, 5. Edition; Bartosch (2020[36]), EU-Beihilfenrecht, 3. Edition; EC (2018[23]), EC decision of 08.11.2018, State aid. 43700 (2018/NN) / C(2018) 7215; Herrmann (2018[37]) in Knopp/Peine/Topel, Brandenburgisches Hochschulgesetz, 3. Auflage, § 25 Rn. 12.

Classification as de minimis aid

Invoking the provisions of the *De Minimis* Regulation does not appear to be appropriate for CET at HEIs. According to Art. 3(1) of the *De Minimis* Regulation, aid measures only fulfil the conditions of the Regulation if they do not meet all the criteria of Art. 107 TFEU. Therefore, such *de minimis* aid is exempt from the notification requirement of Art. 108(3) TFEU and no notification to the EC is required; the aid may be granted without further ado. The problem for the HEIs, however, lies in the maximum amount allowed for such aid. The total *de minimis* aid granted to a single undertaking by a Member State may not exceed EUR 200 000 over a period of three fiscal years (Art. 3(2)). This is likely to be too low a limit with regard to the funding of CET courses at HEIs.

The 20% clause

Another exception to the prohibition of state aid in Art. 107 TFEU is provided by the "20% clause" of the R&D Framework (marginal 20) for almost or near exclusive use by a research institution or research infrastructure for non-economic activities. Certain challenges remain, however, mainly because some issues have not been clarified in case law. In particular, problems may arise because control during the year appears to be particularly exacting. Another difficulty is the scope of application for this privilege in relation to CET.

The R&D Framework provides more detailed information on the scope of application of the 20% clause. According to Point 2.1.1. marginal 20 of the R&D Framework, if a research facility or research infrastructure is used almost exclusively for non-economic activities, the EC may decide that the funding falls outside state aid rules provided the economic use of the research facility or research infrastructure constitutes an ***ancillary activity*** that is ***directly related to*** and ***necessary for*** the operation of the research facility or research infrastructure. It seems questionable whether CET fulfils these conditions.

Alternatively, the Member State can prove that there is an inseparable link between the economic and non-economic activities[41]. Here it could be argued that, in individual cases, there is an inseparable connection between the contents of a course of study and the CET that builds on it.

In any case, the scope of the economic activity must be limited to less than 20% of the HEI's activity.

The EC made a presumption in marginal 20 of the R&D Framework:

> *"For the purposes of this framework, the EC will consider this [the wording appears to refer to all the previously mentioned conditions, i.e. to the question of purely ancillary activity and of the inseparable link, and not the question of limited scope] to be the case where the economic activities consume exactly the same inputs (such as material, equipment, labour and fixed capital) as the non-economic activities and the capacity allocated each year to such economic activities does not exceed 20 % of the relevant entity's overall annual capacity." (EC, 2014[13])*.

The requirements of this presumption could, in principle, be met by CET courses offered by HEIs and would then probably – the wording is not entirely clear here – be regarded as a secondary activity or activity with an inseparable link to the main activity. However, it is not possible to generalise; a precise examination of each individual case is needed.

With regard to the interpretation and application of the capacity limit of 20%, there are uncertainties in practice which have not yet been clarified either by ECJ case law or by decisions by the EC. So far, the EC has not adopted any legally binding criteria for application. In particular, it is unclear whether the reference value for capacity should be the HEI as a whole ("research institution", for definition see Point 15(ee) R&D Framework) or de-limitable units within the HEI ("research infrastructure", for definition see Point 15 (ff) R&D Framework, which also includes, for example, equipment, archives and ICT infrastructures).

The core questions of the reference figure are therefore: Can a single research institution divide itself into several sub-units, each of which constitutes research infrastructure in this sense, and must the 20% limit then apply to each of these sub-units, or should the focus be on the research institution as a single unit?

In any case, separate accounting must be conducted in order to be able to prove that the limit is not exceeded. The economic activities falling under the 20% criterion must be shown separately in the separate accounts as "privileged economic activities" (KMK, 2017[26]). With regard to the *de minimis* limit in the case of mixed use of infrastructure for non-economic and economic activities, Point 207 of the EC Notice on the notion of State aid states:

> *"If, in cases of mixed use, the infrastructure is used almost exclusively for a non-economic activity, the EC considers that its funding may fall outside the State aid rules in its entirety, provided the economic use remains purely ancillary, that is to say an activity which is directly related to and necessary for the operation of the infrastructure, or intrinsically linked to its main non-economic use. This should be considered to be the case when the economic activities consume the same inputs as the primary non-economic activities, for example material, equipment, labour or fixed capital. Ancillary economic activities must remain limited in scope, as regards the capacity of the infrastructure. Examples of such ancillary economic activities may include a research organisation occasionally renting out its equipment and laboratories to industrial partners. The EC also considers that public financing provided to customary amenities (such as restaurants, shops or paid parking) of infrastructures that are almost exclusively used for a non-economic activity normally has no effect on trade between Member States since those customary amenities are unlikely to attract customers from other Member States and their financing is unlikely to have a more than marginal effect on cross-border investment or establishment." (EC, 2016[14]).*

However, these examples are not comparable with CET, as CET programmes at HEIs are offered in competition with private HEIs and an influence on the market can therefore be expected.

Ultimately, it is uncertain how successful invoking the 20% clause would be because the EC prescribes a relatively narrow scope of application. It therefore remains uncertain whether the clause is applicable to CET programmes at all.

Consideration as SGEI

One option for making public funding of CET at HEIs compatible is to design the programmes as a service of general economic interest (SGEI). However, such an approach is subject to strict requirements, especially with regard to the clarity and transparency of the act of entrustment necessary, and this leads to a degree of legal uncertainty. There would be a risk that the act does not meet the requirements and that compensatory payments can therefore be required.

Box 3.5 below presents a justification for CET as an SGEI. A possible design will be dealt with in Chapter 5.

Box 3.5. Classification of CET as a Service of General Economic Interest (SGEI)

When is an SGEI possible?

If the aid is within the meaning of Art. 107(1) TFEU, it is subject to notification and must, in principle, comply with all substantive requirements for aid. An exception to this is provided for in Art. 106(2) TFEU for undertakings that are "entrusted" with SGEIs. The provisions of the EU Treaties, in particular the competition rules, apply to such "SGEI aid", only "in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them."

To meet the conditions for such an exemption, it is therefore clear that the SGEI in question is not provided under market conditions. Nonetheless, the financial support in question is possible under

explicit primary legislation. The aim of the SGEI regulations is to ensure that the compensation provided does not distort competition. In other words, it neither compensates for a deficient company management that can be identified independently of the provision of the SGEI, nor does it overcompensate for the service actually provided.

The SGEI rules concern the special case under EU state aid rules where state aid of any kind is granted as compensation to offset the loss-making provision of SGEIs by an undertaking entrusted by the state with providing these services. The existence of an SGEI must be well justified on the basis of concrete circumstances; this creates legal risks.

In general, the entrustment of a special service task includes the provision of services which an undertaking acting in its own commercial interest would not have taken on, or would not have taken on to the same extent or under the same conditions. The EC provides an up-to-date overview of the definition of the term and how it can be used, taking into account ECJ case law, in its SGEI Communication. The SGEI Framework (EC, 2012[38]) and the SGEI Guide (EC, 2013[39]) prepared by the EC also provide useful information about SGEI. According to these documents, EU law does not stipulate which services are to be regarded as SGEIs and which are not. Rather, Member States and their administrations have a wide margin of discretion in determining whether a service is to be considered an SGEI (EC, 2012[11])[42].

> *"The EC's competence in this respect is limited to checking whether the Member State has made a manifest error when defining the service as an SGEI and to assessing any State aid involved in the compensation."*

According to Points 45 *et seq*. of the SGEI Communication, in this check for "manifest errors" in the SGEI definition, the EC assumes that SGEIs always have "special characteristics" compared to other economic activities. This means that services must be provided which are not in the commercial interest of the undertaking providing the service, but are in the interest of the general public and would therefore not be provided by the undertaking (or not to the same extent or under the same conditions) without the entrustment. It must be a service that the market will not provide due to lack of profitability or economic appeal. As an example, the EC cites broadband roll-out and differentiates between areas where competitive broadband services with adequate coverage are already offered (market-based service) and those where investors are not in a position to offer adequate broadband coverage (SGEI) (EC, 2012[11])[43].

Ultimately, the EC also considers that the services to be classified as SGEIs must be addressed to citizens or be in the interest of society as a whole (EC, 2012[11])[44].

Reasoning for classifying CET at HEIs as an SGEI

Arguments that the provision of CET by HEIs compensates for a market failure in the provision of an SGEI are present. However, that a service is an SGEI must be reasoned in detail in each individual case. Some examples for arguing that CET programmes can be classified as SGEI:

- The existence of an SGEI could be based on the goal of increasing the range of CET capacity of the *Land* Brandenburg. The demographic and economic changes described in Chapter 1 provide the need for Brandenburg to increase the levels of skill in its workforce. That goal is a key building block in Brandenburg's future, and also for the development of Germany's position among the EU Member States.
- Concrete arguments must be found in each individual case to make the point that funding is needed for the HEI in question to compensate for insufficient provision of CET. To achieve this, evidence is needed showing that the HEI provides supplementary CET which expands the CET capacity of the state of Brandenburg; for instance, it could be argued that CET in the medical

field could be necessary to maintain an adequate supply of medically qualified personnel in rural areas.

- Additionally, it must be argued in the specific case that providing additional CET makes a loss for the HEI. To provide concrete evidence of this, it must be shown that the provision of a given number of places on the CET course cannot be covered by tuition fees, for example because the necessary equipment for laboratories, library workspaces, microscopes, etc. cannot be funded. It must also be shown that the HEI has a financial disincentive to provide the CET.
- It must also be shown why the provision of additional places benefits the public and serves the interest of society as a whole. As with the expansion of broadband internet, CET can use the argument that the state of Brandenburg cannot provide the appropriate education and training capacity for itself in any other way. The cost of setting up or expanding a programme could exceed the financial means of the HEI so that an entrustment act is necessary.
- A further justification could be that only if the number of places for CET courses, for example in the field of medicine, is increased can adequate health care be safeguarded.
- It is also of interest to know whether models exist for binding graduates professionally to Brandenburg, such as scholarships, for example. Data on how many graduates stay in Brandenburg after completing their CET programme are relevant in this respect too. If graduates tend to leave the state and there are no programmes binding them to the state, the act of entrustment should show how the HEI tries to bind the students in the CET programme to the state of Brandenburg as part of its curriculum. For example, the programme can create a clear link to state and can establish a justified expectation that graduates will stay in the state upon completion.

Sources: EC (2012[11]), Communication from the Commission — European Union framework for State aid in the form of public service compensation (2011) Text with EEA relevance; EC (2013[39]), Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, of 29.04.2013, SWD(2013) 53 final/2; EC (2012[38]), Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest.

Interim conclusion on classifying CET in terms of EU state aid rules

The presentation of the classification of CET under EU law in Art. 107(1) TFEU is intended to identify when CET can be considered free of the prohibition of state aid. The question is therefore under which conditions EU state aid rules do not apply to CET offered by HEIs. If EU state aid rules are at least partially applicable to CET at HEIs, the question arises as to the adjustment measures HEIs need to consider.

Classification of CET at public HEIs in terms of EU state aid rules

It was highlighted above that there are no clear guidelines from the EC or the ECJ for classifying CET at HEIs as an economic activity or non-economic activity. In particular, the EC does not explicitly classify CET as a generally non-economic activity. This is why the demarcation criteria summarised above are important. According to these criteria, CET can be problematic from a legal point of view, in particular if it has to compete with the private sector and is not predominantly financed through public funds.

Consequences of classifying CET at HEIs as an economic activity

Insofar as EU state aid criteria suggest that a certain CET offering constitutes an economic activity, the other constituent elements of Art. 107(1) TFEU must be assessed first. Only then can possible justifications for the aid and exceptions to the prohibition of aid be considered.

The first aspect to review is whether the HEI as an undertaking (or an undertaking co-operating with the HEI) is a favoured party. If fees paid by the participants or the third-party institution are in line with market prices, treatment as a favoured party may no longer apply, and the prohibition of state aid then also does not apply. How market-appropriate remuneration is to be structured must be determined for each CET programme on a case-by-case basis.

Secondly, the existing or potential market situation must be examined to see whether cross-border trade in services between the Member States could be affected by the CET programme in question. The requirement for this is that the programme may cause a distortion of competition.

Only when these defining conditions are met does the prohibition of state aid apply. The CET programme can still be justified, however, or can be subject to an exception.

With regard to possible exceptions to the prohibition of state aid, the first option is to classify HEI funding as an SGEI. It seems less promising and recommendable to attempt to exempt the aid under the GBER, classify it as *de minimis* aid and resort the 20% clause.

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Notes

[1] According to ECJ case law, first in Judgment of 23.04.1991 – C-41/90, NJW 1991, 2891, 2891 f., marginal 21.

[2] Mestmäcker/Schweitzer in: Immenga/Mestmäcker, Wettbewerbsrecht, Band 3, 5. Auflage 2016, Art. 107 AEUV marginal 17.

[3] ECJ, Judgment of 10.01.2006 – C-222/04, EuZW 2006, 306, 311 f., marginal 122.

[4] ECJ, Judgment of 10.01.2006 – C-222/04, EuZW 2006, 306, 311 f., marginal 123.

[5] See ECJ, Judgment of 27.09.1988 – C-263/86, BeckRS 2004, 72754, marginal 17.

[6] ECJ, Judgment of 27.09.1988 – C-263/86, BeckRS 2004, 72754.

[7] ECJ, Judgment of 07.12.1993 – C-109/92, BeckRS 2004, 74113, marginal 15 ff.

[8] ECJ, Judgment of 11.09.2007 – C-76/95, NJW 2008, 351, 353.

[9] ECJ, Judgment of 20.05.2010 – C-56/09, IStR 2010, 487, 488.

[10] ECJ, Judgment of 04.07.2019 – C-393/17, GRUR 2019, 846.

[11] Opinion of Advocate General at ECJ, 15.11.2018 – C-393/17, BeckRS 2018, 28556, marginal 52 ff.; on the issues raised by the Advocate General, see Hillemann/Wittig, OdW 2019, 169.

[12] Opinion of Advocate General at ECJ, 15.11.2018 – C-393/17, BeckRS 2018, 28556, marginal 73.

[13] Cremer in: Calliess/Ruffert, EUV/AEUV, 5. Auflage 2016, Art. 107 AEUV marginal 27.

[14] ECJ, Judgment of 23.03.2006 – C-237/04, BeckRS 2006, 70228, marginal 28 with further references to established ECJ case law.

[15] Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8 of 11.01.2012, p. 4

[16] EFTA Court, Judgment of 21.02.2008 – E-5/07, marginal 80 f, available at: https://eftacourt.int/download/5-07-judgment/?wpdmdl=1631.

[17] For the tasks of the EC in EU state aid law, see Art. 108 TFEU.

[18] SGEI Communication (footnote 101), marginal 26.

[19] SGEI Communication (footnote 101), marginal 28.

[20] Communication from the Commission on Framework for State aid for research and development and innovation, 198/01, marginal 19(a), 2014/C 198/01.

[21] Commission Notice on the notion of State aid (marginal 28).

[22] Commission Notice on the notion of State aid (marginal 28).

[23] The “strong economically oriented approach” is to be used only in the examination of the compatibility of state aid with the internal market, in particular of its proportionality and impact on competition. The approach is not intended for the examination of whether state aid is present at all. EC’s discretionary power in deciding whether state aid is present is limited to carrying out complex economic evaluations.

[24] Bartosch, EU-Beihilferecht, 2. Auflage 2016, marginal 5.

[25] ECJ, Judgment of 08.11.2001 – C-143/99, NVwZ 2002, 842, 844, marginal 41; ECJ, judgment of 03.03.2005 – C-172/03, BeckRS 2005, 70158, marginal 40.

[26] Von der Groeben/Schwarze/Wolfgang Mederer, AEUV, 7. Auflage 2015, Art. 107 marginal 12.

[27] It says: "…DETERMINED to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating …"

[28] ECJ, Judgment of 10.01.2006 – C-222/04, EuZW 2006, 306, 311f., marginal 123.

[29] ECJ, Judgment of 03.07.2003 – joined cases C-83/01 P, C-93/01 P and C-94/01 P, EuZW 2003, 504, 509, Rn. 40.

[30] Bartosch/Bartosch, EU-Beihilfenrecht, 2. Auflage 2016, AEUV Art. 107 Rn. 128.

[31] Flat-rate charges can be charged for repetitive services such as courses where the market price or cost structure including profit margin is fixed and can be determined transparently. Ideally, the flat-rate charges should be reviewed and updated.

[32] Commissioner Decision 98/353/EC of 16.09.1997 on State aid for Gemeinnützige Abfallverwertung GmbH, OJ EC L 159 of 03.06.1998, p. 58; see also Commission notice on the application of the State aid rules to measures relating to direct business taxation, OJ EC C 384 of 10.12.1998, p. 3, marginal 25: "non-profit-making undertakings, such as foundations or associations".

[33] Lux-Wesener/Kamp, in: Hartmer/Detmer, Hochschulrecht, 2. Auflage 2009, Kapitel VIII, marginal 47.

[34] See ECJ, Judgment of 19.09.2000 – C-156/98, EuZW 2000, 723, 725, marginal 39; also Soltész, in: Montag/Säcker, MüKo zum Europäischen und Deutschen Wettbewerbsrecht, Band 3, 1. Auflage 2011, Art. 107 AEUV, marginal 414.

[35] See EC (2012), Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, p. 10.

[36] The presence of just a marginal “cross-border” effect would already be enough to rule out impact on intra-Community trade.

[37] In addition, aid for innovation cluster operators could also be considered, in particular "the organisation of training measures" according to Art. 28 (8)c, GBER. However, since such aid is likely to be rare in practice, it will not be discussed in more detail.

[38] Nowak in: Immenga/Mestmäcker, Wettbewerbsrecht, 5. Auflage 2016, Art. 31 AGVO Rn. 1.

[39] Nowak in: Immenga/Mestmäcker, Wettbewerbsrecht, 5. Auflage 2016, Art. 31 AGVO Rn. 6.

[40] Bartosch in: Bartosch, EU-Beihilfenrecht, 3. Auflage 2020, Art. 31 AGVO Rn. 3.

[41] See ECJ, Judgment of 26.3.2009 – C-113/07 P, BeckRS 2009, 70333, marginal 118 f.; Judgment of 12.7.2012 – C-138/11 EuZW 2012, 835, 836, marginal 38. On the practice of the Commission: EU Commission decision of 19.7.2006, N 140/2006, OJ 2006 C 244, p. 12: In the case of aid to public undertakings which provide vocational training and employment for prisoners in correctional facilities, the objective of promoting employment and reintegration cannot be separated from the sovereign activity of the prison system; decision of 27.6.2007, N 558/2005, OJ 2007 C 255, p. 22: When employing severely disabled people with a view to their independence and reintegration, the products and services they produce are merely an ancillary economic activity.

[42] See Points 45-46 of the SGEI Communication; see also ECJ, Judgment of 12.12.1973 – 127/73, GRUR Int. 1974, 342, 345; CJEU, Judgment of 15.06.2005 – T-17/02, BeckRS 2005, 70448, marginal 216; CJEU, Judgment of 26.06.2008 – T-442/03, ZUM 2008, 766, 769, marginal 195.

[43] SGEI Communication (footnote 101), Point 49.

[44] SGEI Communication (footnote 101), Point 50.