

Executive summary

Brandenburg's economy is undergoing structural change. Coal production in the state is being phased out, while the state government is seeking to encourage the development of advanced manufacturing and to increase the capacity for innovative activity. At the same time, Brandenburg's workforce is ageing; its people will likely be expected to participate longer in the labour market than in past. Overall, the structural change will likely bring considerable technological and societal changes and these developments will likely increase the demand in the labour market for high-level skills.

Continuing education and training (CET) is thus becoming increasingly important for maintaining a highly skilled workforce in the state of Brandenburg. This heightens expectations that Brandenburg's higher education system will widen its CET offer for adults aiming to renew or augment their skills at an advanced level. However, Brandenburg's public higher education institutions (HEIs) have so far been only marginal providers. One of the constraints on the development of a greater focus on CET is the uncertainty about the use of their public resources for CET programmes in light of European Union (EU) state aid policy.

This report analyses the reasons for this legal uncertainty and provides recommendations to the state government and public HEIs in Brandenburg about how to deal with the issue of state aid law. It also provides suggestions for a potential future reform of the EU framework on state aid.

The problem

HEIs considering using their public resources for CET need to do so in the light of EU state aid rules. EU state aid policy should ensure public subsidies (state aid) are not used by firms to compete unfairly, or by state agencies to crowd out markets (economic activity). CET is defined in the Brandenburg Higher Education Act as a statutory duty of state HEIs, as with undergraduate education and research. HEI research and undergraduate education are classified as non-economic activities and are not subject to EU state aid rules. However, neither the European Commission (EC) nor the European Court of Justice (ECJ) has provided any clear directions about whether CET can be considered a non-economic activity and thus exempt from EU state aid rules. Presently, individual CET programmes are judged on a case-by-case basis as economic or non-economic. The relevant federal body, the Assembly of Ministers of Education of German states (*Kultusministerkonferenz*), has not provided sufficient clarity on state aid questions either.

HEIs risk being out of conformity with EU state aid rules, which may result in base funding being reclaimed. As a result, HEIs in Brandenburg tend to avoid offering CET, or do so only in the high-price segment or by managing the risks through associated institutes.

This report contains a legal analysis (commissioned by the OECD project team to KPMG Law) of the EU law on state aid as related to CET in higher education.

The analysis begins with an examination of whether, and under what circumstances, a CET programme should be regarded as an economic activity. It then considers cases where a programme is an economic activity but contains features that may lead to exemptions and exceptions from state aid rules. As part of the analysis, seven of Brandenburg's eight public HEIs provided information on their current CET offerings.

These offerings are assessed using the criteria and principles that came out of the analysis. Finally, the report develops a decision-making framework that would make it easier for HEIs to conduct a systematic analysis of a CET programme against the rules on EU state aid, taking account of ECJ case law and EC decisions.

Summary of recommendations

This report sets out recommendations – on the basis of the legal analysis – which aim to:

1. Simplify the rules developed by the European Commission for state aid as related to CET in higher education

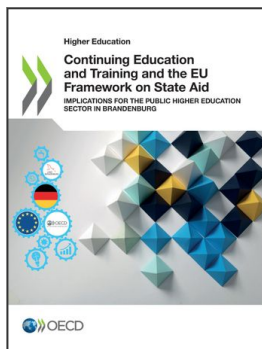
- The EC should be invited to simplify and clarify state aid rules as they apply to public funding of CET at HEIs.
- The Brandenburg state government should work with the other states (*Länder*) and the federal government to encourage the EC to codify the assessment of CET as an economic or a non-economic activity, following the model used for contract research undertaken by HEIs and codified in the draft Research and Development (R&D) Framework.

2. Standardise the individual case assessment at higher education institutions

- HEIs should adopt a standardised process for the classification of CET programmes drawn from the case law of the ECJ and the administrative practice of the EC and should set prices/fees for CET programmes in conformity with EU state aid rules.
- HEIs should document in detail their decision-making processes on the classification of CET programmes and on the costing and fee setting for programmes.

3. Develop a guideline for the Land Brandenburg

- The Ministry for Science, Research and Culture of the State of Brandenburg (*Ministerium für Wissenschaft, Forschung und Kultur, MWFK*) should formulate a guideline that would outline the classification process for CET programmes, the structure of a CET offering that complies with EU state aid rules and the possible exceptions to and exemptions from the prohibition of state aid that may be applicable.
- MWFK should submit this guideline to the EC for notification.



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