Commission Decision (EU) 2020/391 of 20 September 2019 on the measure SA.34402 – 2015/C (ex 2015/NN) implemented by Germany for Hochschul-Informations-System GmbH (notified under document C(2019) 6836) (Only the German text is authentic) (Text with EEA relevance)

COMMISSION DECISION (EU) 2020/391

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

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THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments[1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) On 15 March 2012, the Commission received a complaint from Datenlotsen Informationssysteme GmbH ('Datenlotsen' or 'the complainant') alleging that the direct grants and tax exemptions for the public undertaking Hochschul-Informations-System GmbH ('HIS'), constituted State aid within the meaning of Article 107 of the Treaty and were incompatible with the internal market.

(2) By letter dated 23 December 2015 ('the Opening Decision'), the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the measure.

(3) The Opening Decision was published in the *Official Journal of the European Union*[2] on 4 March 2016, inviting interested parties to submit their comments on the measures. The Opening Decision was sent to the complainant on 13 January 2016. Germany replied to the Opening Decision by letter of 23 February 2016.

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(4) The Commission received comments from interested parties in the time period between 16 March and 4 May 2016. By letter of 24 May 2016, those comments were sent to Germany that submitted its views on them by letter of 19 July 2016.

(5) The Commission requested further information from Germany on 4 April, 9 November 2017 and on 16 March 2018 as well as on 11 February, 4 April and 5 June 2019. Germany replied on 6 April, 21 November 2017 and on 18 April 2018 as well as on 22 February, 17 April and 5 July 2019.

(6) The complainant submitted further information relating to the measures on 4 November 2016, 9 February, 31 May and 5 October 2017.

2. DETAILED DESCRIPTION OF THE MEASURES

2.1. Description of the facts

(7) HIS was established by the foundation Stiftung Volkswagenwerk in 1969 as a non-profit organisation. In 1976 the federal State (‘*Bund’)* and the Länder acquired all shares[(3)] in HIS and held it up until its conversion into a cooperative[(4)] (see recital 15). The objective of HIS was to support higher education establishments and the competent authorities in their efforts to achieve the rational and cost-effective fulfilment of their higher educational role.

(8) HIS was operating on a non-profit basis[(5)], although it was incorporated in 1976 as a limited company governed by private law (‘*GmbH*’). Its funding acts were the consortium agreement (‘*Konsortialvertrag*’), the contractual agreement between Bund and the Länder defining the modalities of collaboration and obligations of HIS’ owners, as well as the bylaws (‘*Satzung*’). The objectives and the parameters of the annual operations were laid down in the annual work programmes/business plans (‘*Arbeitsprogramme’/‘Wirtschaftsplan’*).

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

(10) The objectives of HIS included the introduction and application of information systems for use in the management of higher education institutions[(6)].

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

(12) The following administrative processes were continuously supported by HIS products: application and enrolment management, student administration, exam administration, personnel and job administration. HIS IT systems (for example, the new

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software generation '*HISinOne*'[7]) are used in over 200 public and religious higher education establishments in Germany[8].

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

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

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

2.2. The complaint

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

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

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State funding constitutes non-notified operating aid[11] from which HIS has benefited for almost 40 years.

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

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

2.3. Germany's arguments prior to the Opening Decision

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

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

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

(a) concerned a service of general economic interest (SGEI) in the sense of Article 106(2) of the Treaty; or

(b) constituted existing aid pursuant to Council Regulation (EU) 2015/1589[12] ('the Procedural Regulation') that became aid as a result of the development of the internal market, more specifically, the development of a market for HIS' products.

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

2.4. Grounds for initiating the formal investigation procedure

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

2.4.1. *Presence of aid*

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

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

(a) some features of the software provided by HIS were not 'education specific' such as personnel and financial software;

(b) the HIS software may not have been used by the universities purely for a non-economic purpose;

(c) the existence of competitors in the market could challenge the notion that HIS had been carrying out a non-economic activity that is ancillary to the public task of providing university education; and

(d) HIS' supply of IT services to German private and foreign universities did not appear to be a non-economic activity. In connection with the supply of services to German private and foreign universities, Germany alleged that accounts relating to this activity were separated from the accounts relating to the services to public universities, but according to the Opening Decision, Germany failed to provide evidence.

(27) Second, the Opening Decision expressed doubts as to whether or not the direct grants conferred a selective advantage on HIS within the meaning of Article 107(1) of the Treaty as the State funding from which HIS benefited may not have entirely flowed back to the State (through the universities). It was stated in the Opening Decision that the direct grants to HIS might not conform to the market economy operator principle.

(28) The Opening Decision expressed doubts regarding the question of whether the tax exemptions granted to HIS provided a selective advantage to HIS that other non-profit undertakings with a public benefit purpose carrying out an economic activity would not benefit from. In sum, the Commission questioned whether the exemptions in question were correctly applied to HIS.