



## EUROPEAN COMMISSION

Competition DG

Directorate A

Unit A3

State aid Case Support and Policy

Brussels,  
COMP/A3/AF/ eh

**Subject: Reply of the European Commission on a request for information from the European Ombudsman on Query by Bavarian Ombudsman, ref. Q3/2021/TE**

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### **I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY**

The European Ombudsman has sent to the European Commission on 4 October 2021 a Query by the Bavarian Ombudsman concerning the inability to subsidise a health care related study programme related to the Master of Social Management at the University of Applied Sciences Munich, due to presumed incompatibility with EU State aid rules.

### **II. THE QUERY TO THE EUROPEAN OMBUDSMAN**

On 9 September 2021, the European Ombudsman received a query from the Bavarian Ombudsman concerning EU State aid rules. A prospective student of the Master of Social Management at the University of Applied Sciences Munich turned to the Bavarian Ombudsman, after the course was not offered in the academic year 2021/2022.

The University explained to the Bavarian Ombudsman that the course is entirely financed by fees paid by participants and, since the number of participants was too low this year, it could not offer the course in a cost efficient manner. The University further explained that it is not able to receive subsidies to finance the programme due to EU State aid rules.

The Bavarian Ombudsman contacted the European Ombudsman to obtain clarifications of the EU State aid rules. He is concerned that the rules may result in the study programme no longer being offered and points out that it concerns the health care sector, which, he says, is already suffering from a shortage of qualified young professionals.

### **III. EUROPEAN OMBUDSMAN'S INQUIRY**

On 4 October 2021 the European Ombudsman has forwarded the query by the Bavarian Ombudsman to the European Commission. He requested the Commission to respond to the query by 29 October 2021, if possible, so that the European Ombudsman can forward the information to the Bavarian Ombudsman.

According to the European Ombudsman the notion of an ‘undertaking’ in relation to such universities/courses would appear to be central to the query, as well as whether their public financing is compatible with EU law, specifically State aid rules.

#### **IV. THE REPLY OF THE EUROPEAN COMMISSION TO THE QUERY OF THE BAVARIAN OMBUDSMAN**

According to Article 107(1) TFEU, State aid is any measure granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States. The conditions laid down by that provision for a finding of State aid are cumulative. Accordingly, a measure constitutes State aid only if the following four cumulative conditions are met:

- i. The measure is financed through State resources and is imputable to the State.
- ii. The measure provides a selective economic advantage to an undertaking.
- iii. The measure distorts or threatens to distort competition.
- iv. The measure affects trade between Member States.

In view of the cumulative nature of these criteria, if one of them is not met, the measure cannot be qualified as State aid within the sense of Article 107(1) TFEU.

The European Commission underlines that according to recital (6) of the Commission Notice on the notion of State aid<sup>1</sup> (“NoA”), State aid rules are only applicable where the beneficiary of a measure is an “undertaking”. According to jurisprudence of the Union Courts, undertakings are “entities engaged in an economic activity”, regardless of their legal status and the way in which they are financed.<sup>2</sup>

According to recital (28) of the NoA, 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’*<sup>3</sup>.

Moreover, recital (29) of the NoA clarifies that “[t]he 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

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<sup>1</sup> 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, C 262, 19.7.2016, p. 1.

<sup>2</sup> Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74; Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, paragraph 107.

<sup>3</sup> Judgment of the Court of Justice of 11 September 2007, *Commission v Germany*, C-318/05, ECLI:EU:C:2007:495, paragraph 68.

*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”.*

However, as further explained in recital (30) of the NoA, 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 activities.

Furthermore, following the decision of the Commission of 19 December 2012 in case SA.20829<sup>4</sup>, educational activities are deemed to be carried on a non-commercial basis if a number of specific conditions are met. In particular, the activity must be on a par with public education and the school must apply a non-discriminatory enrolment policy, including disabled students, apply collective working agreements, have structure that meet the applicable standards and publish its accounts. In addition, the activity must be provided either free of charge or for a symbolic fee covering only a fraction of the actual cost of the service.

Based on the information contained in the query by the Bavarian Ombudsman and transmitted by the European Ombudsman, it seems that the specific educational course provided by the Bavarian university is entirely financed by fees paid by participants/students. In such a case this educational service carried out by the Bavarian University could be regarded as an economic activity and the European Union rules on State aid, under article 107 and 108 of the Treaty for the Functioning of the European Union (TFEU) would then be applicable to the educational service offered.

However, the Commission is not in possession of complete set of information concerning the educational activities carried out by the University of Applied Sciences Munich nor on its financial structure and cannot in this context make any assessment on the qualification of the educational services carried on by the Bavarian University, and particularly the Master of Social Management as non-commercial or commercial services, and on the application of State aid rules.

The Commission underlines that, even if financing that training programme with public money would be considered as State aid, depending on how the measure is designed, it could still be authorised or block exempted.

The Commission also notes that Member State have the discretion to decide if they want to give State aid and the Commission has the role to verify, if aid is disbursed, that State aid rules are correctly applied according to Articles 107 and 108 of the TFEU.

## **V. CONCLUSION**

The Commission concludes that, based on the information contained in the Query by the Bavarian Ombudsman, it cannot in this context make any assessment on the qualification of

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<sup>4</sup> Commission Decision of 19 December 2012 in State aid case SA.20829 – Scheme concerning the municipal real estate tax exemption granted to real estate used by non-commercial entities for specific purposes implemented by Italy C(2012) 9461, OJ L 166, 18.6.2013, p.1.

the educational services carried on by the University of Applied Sciences Munich, and related to the Master of Social Management, as non-commercial or commercial services, and on the application of State aid rules. Even if financing that training programme with public money would be considered as State aid, depending on how the measure is designed, it could still be authorised or block exempted.

The Commission notes that Member States have the discretion to decide if they want to give State aid and the Commission has the role to verify, if aid is disbursed, that State aid rules are correctly applied according to Articles 107 and 108 of the TFEU.

Yours faithfully,

*(e-signed)*

Koen VAN DE CASTEELE

Head of unit