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Subject: State aid SA.25745 (2013/NN) (ex CP 11/2008) – Germany
National website for auctions in insolvency proceedings (ZVG Portal)

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure 'Website for auctions in insolvency proceedings' (ZVG Portal) and found that no state aid is involved.

II. PROCEDURE

- (2) On 13 May 2008, the Commission received a complaint by Günter Kaiser GmbH – a private internet service provider which publishes information on insolvency proceedings in German and Austrian courts -, in which the complainant raised allegations of unlawful State aid in favour of the German www.zvg-portal.de website (hereafter ZVG Portal). ZVG Portal is a joint internet platform of the judicial administrations of the German Länder.
- (3) The complaint was forwarded to Germany for comment on 11 August 2008 and Germany commented and provided further information on 29 September 2008. These comments were forwarded to the complainant who reacted to the submission by Germany by letter dated 9 December 2008. The complainant submitted further information on 2 February 2009.

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- (4) The Commission wrote to the complainant, expressing a preliminary view that the measure did not involve State aid, on 12 May 2009, to which the complainant reacted and provided further information on 11 June 2009. This letter was forwarded to Germany on 31 January 2011, together with a request for information. Germany provided the information on 31 March 2011. The Commission wrote to the complainant on 31 May 2011 that in its preliminary view, no State aid was involved, to which the complainant reacted on 29 June 2011. Germany commented on the submission by the complainant and provided further information by letters dated 3 February, 29 March and 29 October 2012.

III. DESCRIPTION OF THE MEASURE

- (5) Under German law, one form of insolvency execution in relation to immovable property is the compulsory auctioning of the property. According to the German insolvency act (*Zwangsversteigerungsgesetz, ZVG*), auctions are carried out by the lower courts in whose district the property is located (section 35 ZVG). The organisation of the insolvency proceedings at the court is carried out by the *Rechtspfleger* (a specialised court official). The court sets the date for the auction.
- (6) Section 39 ZVG obliges the court to make public certain information about the compulsory auction. Two alternative modalities of publication are identified. Either the information is placed in the gazette which has been designated for the court's publications or it is entered in the court's designated *electronic* information and communication system.
- (7) As to the kind of information which will be made public, the insolvency acts makes a distinction between mandatory information and information which may form part of the fixation of the auction date (*Terminbestimmung*). The *Terminbestimmung* contains certain mandatory information, such as the identification of the property, in addition to the date and place of the auction (section 39(1) ZVG)¹. Section 38(1) ZVG identifies further information which should be contained in the *Terminbestimmung*. This is the property book registration reference and the size and estimated current value of the property. Finally, the court may, according to section 38(2) ZVG, publish expert valuations and estimates in the court's electronic information and communication system.
- (8) Section 40 ZVG stipulates that the auction date is to be made public on the court's board (*Gerichtstafel*), but that can be dispensed with if the information is made public on the designated electronic information and communication system. Section 40(2) ZVG gives the courts the right to also carry other *additional* publications, taking into account local customs. Section 42(2) ZVG constitutes a general right of access to reports concerning the value of the property which are in the court's possession.

¹ See section 37(1) to (5) ZVG: identification of the property, date and place of the auction, publication that this is a public auction due to insolvency and call to the public to make any pre-existing rights on the property known.

- (9) By resolution of 11 November 2005, the German Länder decided to create ZVG Portal as a judicial internet portal which contains dates and other information on insolvency auctions by German courts (hereafter 'court' or 'courts'). Potential bidders in compulsory auctions for property can find out about dates and other information regarding insolvency proceedings. The use of the portal is free of charge for all interested users visiting the website. However, a minimal fee of EUR 1 is charged by ZVG Portal to the court for uploading the information.
- (10) ZVG Portal is operated by the Land of Nordrhein-Westfalen which was, via a service agreement (*Dienstleistungsvereinbarung*), mandated by all Länder to conduct this task. Nordrhein-Westfalen then in turn concluded, for all Länder, a service agreement with the *Landesamt für Datenverarbeitung und Statistik* (LDS). The LDS is part of the administration of the Land of Nordrhein-Westfalen.
- (11) The LDS is financed jointly by all Länder. It receives annual payments of around EUR 115 200. It did not receive any initial one-off funding. In 2007, a one-off payment of EUR 30 000 was spent by the Länder, however not exclusively on the ZVG Portal, to integrate various judicial internet portals with a general judicial portal operated by the Federal Ministry of Justice.
- (12) All Länder aim to designate www.zvg-portal.de as the official information medium for all publications on insolvency proceedings within the meaning of section 39 ZVG. Several Länder (Berlin, Bremen, Hessen, Nordrhein-Westfalen, Saarland, Sachsen, and Sachsen-Anhalt)² have already adopted the relevant legal acts and designated ZVG Portal as the official publication organ in that Land.

IV. THE COMPLAINT

- (13) The complainant has operated the internet platform www.zvg.com since 2005. On that platform he offers information on insolvency auction dates in Germany and Austria. Besides the date of the auction and the name of the property to be auctioned his internet platform also offers download options of exposés, photos and expert valuations of the property. The complainant receives the information from the lower courts in Germany. The courts pay the complainant for his services. The fee varies, depending on the amount of work necessary in order to be able to present the information on the internet, between EUR 40-70. The complainant states that other market operators charge approximately the same amount.

² In those Länder the publication in the ZVG Portal is obligatory, but additional publications in other media, including private media, remains possible. In the other Länder, the situation varies: In Bavaria the ZVG Portal *can* be used and only in that case no publication in the gazette is necessary. Baden Wuerttemberg publishes obligatorily in a print medium and local courts decide whether *in addition publication* should be done on ZVG Portal or private media. This is the same in Brandenburg, Mecklenburg-Vorpommern, Niedersachsen and Schleswig-Holstein. Hamburg, Thuringia and Rheinland-Pfalz do not use the ZVG Portal at all.

- (14) Apart from the complainant, there are several other private operators offering similar services. According to the complainant, some of these operators had to leave the market due to the activities of ZVG Portal, which offers the same kind of information and presents it in a similar manner.
- (15) The complainant alleges that the financing of ZVG Portal constitutes an advantage that amounts to unjustified State aid. The complainant criticises any initial funding, if such initial funding took place, and the annual contributions by the Länder. The complainant stresses that it is that funding which makes it possible for ZVG Portal to charge only EUR 1 for the publication and thus outcompete private operators.
- (16) The complaint considers the operation of ZVG Portal to be that of an 'undertaking' within the meaning of Article 107(1) TFEU. He denies that the publication of the information is the expression of the court's judicial tasks. He considers that to be a normal service rendered by ZVG Portal, which could also be found on the market. In that regard the complainant compares the activity of the ZVG Portal to that of a printer or publisher which is paid by the State, under a normal contract, to create the official gazette which is used for official publications.
- (17) For the distinction between the judicial activities resulting from the insolvency act and the publication, the complainant relies on a judgment by the German Federal Civil court (Bundesgerichtshof – BGH) which distinguishes between the obligation to publicise certain information regarding the auction and the medium by which publication is achieved³. The court states that the insolvency act determines the scope of the publication, but pre-supposes the existence of a publication organ, which does not need to be determined by formal law⁴. In this regard, the complainant in particular criticises the publication of expert valuations, i.e. information which according to the insolvency act may be made public, but is not on the list of mandatory information.
- (18) The complainant stresses that the purpose of the complaint is *not* to prevent courts from publishing mandatory information according to section 37 ZVG on the internet, but he criticises the fact that ZVG Portal also publishes information like expert valuations according to 38(2) ZVG at a price which does not reflect the market conditions.
- (19) The complainant also pointed to possible advantages deriving from State liability for the portal. The complainant points out that the operator of an internet page is responsible for its content and that for that reason private operators spend a lot of time and money to ensure that the pages e.g. do not infringe personality or author's rights. ZVG Portal asks the experts to delete

³ Beschluss des Bundesgerichtshofs (BGH) of 16 October 2008, V ZB 94/08. The BGH order had to deal with the question whether the gazette and the electronic information and communication platform for publishing auction information in insolvency proceedings can be designated to be the 'official organ' only by formal legislative act or by way of an administrative order (*Allgemeinverfügung*).

⁴ Paragraph 16 of the BGH order.

critical information from their valuations and, while legally still responsible, can seek compensation from them in the event of a claim. However, as the State is liable for ZVG Portal, the complainant argues that it does not have to insure itself against the risk of failure to recover any sums paid from the experts. The complainant states that private operators do have to insure against that risk.

- (20) Germany considers that the publication of the auction date and related information is closely linked to the court's duty to organise insolvency auctions. For that reason Germany denies that the operation of ZVG Portal constitutes an 'undertaking' within the meaning of Article 107(1) TFEU.
- (21) Germany points out that the insolvency act explicitly confers the task on the courts to publish the mandatory information according to section 37 and the additional information according to section 38 ZVG. It states that expert valuations normally are already available during the insolvency proceedings (and are not specially conducted for the auction) as they are used to fix the property's value.
- (22) Germany furthermore points out that even before the creation of ZVG Portal all information on the auction date and other information such as the expert valuations were made available to potential bidders by presenting the information within the court's premises. The electronic publication just facilitates the work of the courts. Germany also refers to the obligation of the German courts according to section 42(2) ZVG to grant access to this information to the general public, which it considers a public authority task.
- (23) Germany underlines in particular that the *Rechtspfleger* is still free – as before the creation of the ZVG Portal – according to section 40(2) ZVG to organise *additional* publication in other media.
- (24) Germany further argues that the financing of ZVG Portal by the Länder does not exceed what is necessary for the operation of the portal. It therefore doubts the existence of an advantage as the portal is just compensated, on market terms, for a service rendered. In the alternative, Germany claims that the financing fulfils all the criteria of a public service compensation according to Article 106(2) TFEU.

V. STATE AID ASSESSMENT OF THE MEASURE

- (25) According to Article 107(1) TFEU, State aid is any aid granted by a Member State or through State resources in any form whatsoever which distorts, or threatens to distort, competition by favouring certain undertakings, in so far as it affects trade between Member States. Those conditions are cumulative. If one of them is not fulfilled, the financial support for ZVG Portal does not constitute aid within the meaning of that provision.

- (26) It is therefore appropriate, in the present case, to begin by examining whether ZVG may be said to be an undertaking, i.e. an entity which carries out an economic activity. The notion of economic activity has been defined as meaning any activity consisting in offering goods and services on a given market⁵. The notion of 'undertaking' has to be understood in a functional manner. It covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed. Therefore activities of the Land of Nordrhein-Westfalen, as the legally responsible operator of ZVG Portal, could be classed as economic and the Land could be considered to be a recipient of State aid.
- (27) However, activities which fall within the exercise of public power are not of an economic nature justifying the application of the competition rules⁶. Therefore, Article 107 TFEU does not apply where the State acts 'by exercising public power'⁷ or where authorities emanating from the State act 'in their capacity as public authorities'⁸.
- (28) The complainant argues that the fact that Nordrhein-Westfalen and the other Länder concluded a service agreement rather than instructing Nordrhein-Westfalen to conduct the task, demonstrates that no public authority behaviour is at stake. Germany responds that the Länder are public bodies, which can agree themselves on public authority matters by way of contract. Under German law a distinction is made between private law and public law contracts. Germany argues that the agreement in question is a contract of public law nature as it is meant to foster the fulfilment of a judicial task which falls under the responsibility of the Länder. Furthermore, the German Länder do not have any authority to instruct each other in areas under their respective competence. Therefore the fact that Nordrhein-Westfalen was not instructed but obliged via an agreement is not decisive for the qualification of whether it conducts in substance an economic activity. It is only decisive whether the activity as such, i.e. the offer of information on insolvency proceedings including the publication of expert valuations and photos by ZVG Portal, is economic in kind or constitutes an exercise of public authority.
- (29) An entity may be deemed to act by exercising public powers where the activity in question is a task that forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject. Generally speaking, unless the Member State concerned has decided to introduce market mechanisms, activities that intrinsically form part of the

⁵ Joined Cases C-180/98 to C 184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, paragraph 75.

⁶ See, to that effect, judgment of 12 July 2012, C-138/11 *Compass v Austria (Compass Datenbank)*, paragraph 35 with reference to Case 107/8 *Commission v Germany* [1985] ECR 2655, paragraphs 14 and 15.

⁷ Case C-118/85 *Commission v Italy* [1987] ECR 2599, paragraphs 7 and 8.

⁸ Case C-30/87 *Bodson/Pompes funèbres* [1988] ECR I-2479, paragraph 18.

prerogatives of official authority and are performed by the State do not constitute economic activities⁹.

- (30) The exercise of judicial functions by Member States' courts constitutes such an exercise of public power, a task which is the prerogative of the State. In the case at hand, Germany has not 'decided to introduce market mechanisms', but with the creation of ZVG Portal has rather decided to carry out this activity itself.
- (31) The complainant in essence alleges that the fact that competitors were already offering information about insolvency proceedings together with expert valuations of the properties means that there exists a market for that information and that the same activity of ZVG Portal cannot therefore be carried out in-house, i.e. within the State administration, without also being classified as a commercial activity.
- (32) The mere fact that private operators are already offering the service to publish certain information, when requested by public authorities, does not mean that, if the State carries out the same or a similar activity, this activity automatically has to be considered as 'economic' in nature. This should be judged rather on the kind of activity concerned, considering also the context in which it takes place. The State does not forego the right to carry out a task, which is 'public authority' in nature, by acting at a point in time when private operators – perhaps due to lack of action by the State – have already taken the initiative to offer services to the same end.
- (33) The German insolvency act stipulates in section 15 that the order to carry out a compulsory auction of a property is to be made by the court competent for the execution of those proceedings, which is, according to section 1 ZVG, the lower court (*Amtsgericht*) in whose district the property is located. The same court will also carry out the compulsory auction, see section 35 ZVG. There is no doubt that the courts act as judicial organs when carrying out this function.
- (34) The insolvency act also prescribes a mandatory publication of the fact that such an auction will take place as well as the date fixed by the court for the same. Section 38 ZVG requires the courts to publish this information either in a gazette or an electronic communication medium designated for that purpose. The purpose of the publication is i) to achieve the best possible sale price for the property by disseminating the information as widely as possible, ii) to give persons who might have rights on the property a chance to make these rights known in the insolvency proceedings and iii) to provide potential bidders with some points of reference in relation to the decision whether to participate in the compulsory auction (and what bid to put in). The German federal court (BGH) classifies the obligation to publish as a 'procedural necessity' in order to ensure the sale of the property for an adequate price¹⁰. The Commission

⁹ See 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 (hereafter the "SGEI Communication"), OJ C 8 of 11.1.2012, p.4, paragraph 16.

¹⁰ See judgment of the *Bundesgerichtshof*, cited above at fn. 3, paragraph 27.

therefore concludes that the publication as such forms part of the insolvency proceedings carried out by the court.

- (35) What is more, the Court of Justice has also accepted that the activity of a public authority consisting *'in the storing, in a database, of information which undertakings are obliged to report under statutory obligations (emphasis added), does not constitute an economic activity'*¹¹. In the same vein, although in this case not for storage but for publication, the German courts' responsibility to make the data on insolvency proceedings known, can be considered as public authority task as it likewise results from a statutory obligation of the German insolvency act.
- (36) The complainant argues however that the obligation to publish should neither be confused with the medium in which the publication will be effectuated nor with the designation of such a medium by the court. The complainant points out that the insolvency act itself does not determine the publication medium, but simply indicates that one must be designated. The insolvency act does not single out ZVG Portal; it is possible that private operators be designated to act as the official publication organ.
- (37) The Commission notes, in this respect, that for a number of Länder ZVG Portal has been chosen as the designated publication organ within the meaning of section 39 ZVG and that this designation is carried out under public law via an administrative act of a general nature¹².
- (38) The Commission also notes that the insolvency act does not preclude the courts from carrying out the publication 'in-house'. The complainant does not deny that but states that there is already a commercial market for the publication of such information in which the State-financed ZVG Portal is now competing. For that reason the judicial administration cannot, according to the complainant, give preference to its own portal, as this would not be operating in line with market conditions.
- (39) The only legal obligation which the courts have is to publish the information in either the designated print medium or the designated electronic medium. They have no legal obligation under German law to provide this information in addition to a private market. They can, under German law, discontinue the practice of outsourcing the publication at all and do it instead by their own means, which may be e.g. the court's own website, or a joint website of several courts. In that sense the ZVG portal acts as a sort of joint electronic bill board.
- (40) Thus, the 'market' which the complainant refers to is one which is created by the decision, taken at the discretion of the *Rechtspfleger*, to have the information published, pursuant to section 40(2) ZVG, by bodies other than the officially designated organ for publication

¹¹ See C-138/11 *Compass v Austria (Compass Datenbank)*, cited above at footnote 6, paragraph 51.

¹² Namely via a so-called *Verwaltungsverfügung*.

- (41) Germany pointed out that in the past the courts used to publish information on insolvency proceedings in the official gazette. Today, some of the Länder in which the publication still takes place in the official gazette use the ZVG, others do not¹³. In other words, publication on the internet is – as long as the internet is not the officially designated publication organ - only done at the discretion of the *Rechtspfleger* and in addition to the official publication.
- (42) It must therefore be concluded, that the courts are not obliged to choose any particular medium for publication, but are free to publish the information on their own website and/or, as in this case, on ZVG Portal.
- (43) The question is whether this conclusion is altered by the complainant's focus on the publication by ZVG Portal of expert valuations and photos of the property, which according to section 38(2) ZVG 'can' (not must) be published in either the designated gazette or electronic communication medium.
- (44) If the court, in the exercise of this judicial function, considers the publication of certain information useful to the accomplishment of the task of efficient organisation of compulsory auction procedures, the publication of the entire set of information falls under the exercise of public authority. It is an activity that forms part of the prerogatives of official authority, is as such performed by the State and does not constitute, not even in part, an economic activity¹⁴. Indeed, the BGH, in the judgment referred to in recital 17 above, classifies the obligation to publish as a 'procedural necessity' but makes no reference to any distinction between mandatory and non-mandatory information.
- (45) The Commission considers therefore that the publication of the non-mandatory information is linked to the publication of mandatory information and both form part of the judicial activity of organising insolvency proceedings. More specifically, the objective of (wide) publication is to make the sale date known to as many interested parties as possible and to encourage an auction process in which several bidders participate, thereby maximising the final sale price. This objective is better fulfilled if potential bidders can easily take sight of the property via photos on the internet and verify the value of the property based on an independent valuation.
- (46) In this regard, the Commission also notes that the information itself – i.e. the expert valuation – is only produced because the court, in the exercise of its judicial function, asks an expert to carry out the evaluation for the purposes of the insolvency proceedings. The Court is not legally obliged to ask for expert evaluation, but does this as a rule.

¹³ See above, fn. 2; the webpage of Amtsgericht Limburg (Hessen) states that the publication in ZVG Portal is an additional service to the official publication, http://www.ag-limburg.justiz.hessen.de/irj/AMG_Limburg_Internet?cid=e4f70e71e700fd1a3060f288411ebcde. Likewise the Amtsgericht Crailsheim in Baden Wuerttemberg refers to several publication sources, such as the press, the court's board (Gerichtstafel). The Amtsgericht Neuruppin likewise informs on its webpage about the fact that insolvency proceedings dates are publishes in the official gazette of the Land Brandenburg and in addition in the press and on private internet platforms. http://www.ag-neuruppin.brandenburg.de/sixcms/media.php/4001/Merkblatt%20Bieterhinweise%20f%C3%BCr%20Zwangsversteigerungen%28Stand%2017_09_2012%29.pdf.

¹⁴ See, to that effect, Case C-30/87 *Bodson/Pompes funèbres*, cited fn. 8 above, at paragraph 18. See also the SGEI Communication, paragraph 16.

- (47) The accomplishment of the task referred to above would, on the other hand, be compromised if mandatory information could be published on ZVG Portal but, for the consultation of photos and expert valuations and in order to ensure the dissemination of full information, the court would have to invite bidders into its premises or use private internet fora. Indeed, the ZVG specifically envisages that the court uses the same electronic channels it uses for the mandatory information for the publishing of non-mandatory information. In Article 39(1) it refers, regarding mandatory information, to the court's designated electronic information and communication system, in Article 38(2), for the publishing of non-mandatory information, it also refers to the same "designated electronic information and communication system". This also facilitates the court's task, according to Article 42(2) ZVG, to grant access to this information to the general public. The publication of expert valuations thus serves the public interest and is not carried out with a view to engage in a commercial activity against remuneration.
- (48) The Commission therefore concludes that the publication of non-mandatory information serves the general interest in the same way as that of mandatory information and is inherently linked to the courts' judicial function in relation to the organisation of insolvency proceedings, based on the German insolvency act.
- (49) Finally, the fact that a minimal cost of EUR 1 is paid by the court for the publication of the relevant information does not alter that finding. The entirely symbolic sum is not in itself sufficient to constitute 'remuneration' such as to render the activity economic in nature.¹⁵ Furthermore, ZVG Portal does not offer its services to commercial operators; it is merely a self-organised tool for courts to place their information on the internet.
- (50) In conclusion, by publishing relevant information in the possession of the court on insolvency proceedings, ZVG Portal is a vehicle for the courts in fulfilling a genuine public task and responsibility and does not perform an economic activity as an undertaking within the meaning of Article 107(1) TFEU.

VI. DECISION

- (51) On the basis of the foregoing assessment, the Commission finds that the measure 'National website for auctions in insolvency proceedings (ZVG Portal)' does not involve any State aid within the meaning of Article 107 (1) of the Treaty on the Functioning of the European Union.
- (52) If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the internet site:

¹⁵ See C -138/11, fn. 6, at paragraph 39 with further reference.

<http://ec.europa.eu/competition/elojade/isef/index.cfm>.

- (53) Your request should be sent by encrypted e-mail to stateaidgreffe@ec.europa.eu or, alternatively, by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Registry
B-1049 Brussels

Fax No: +32 2 2961242

Yours faithfully,

For the Commission

Joaquín ALMUNIA
Vice-President