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**Subject: State Aid SA.47650 (2017/FC) – Germany  
State aid to public procurement platform Cosinex**

Excellency,

## **1. PROCEDURE**

- (1) By letter of 13 February 2017 the European Commission (the “Commission”) received a complaint concerning the granting of alleged State aid by the Land of North Rhine-Westphalia to cosinex GmbH (“Cosinex”), a German computer software company. According to the complainant, who wishes to remain anonymous, this alleged State aid was given through the direct award of contracts since 2005 and the payment of allegedly excessive remuneration for services provided by Cosinex.
- (2) The Directorate General for Competition (“DG Competition”) forwarded the non-confidential version of the complaint to the German authorities on 12 June 2017. On 7 September 2017 the German authorities provided their opinion on the matter.
- (3) On 9 February 2018, the complainant, responding to the opinion given by the German authorities of September 2017, reduced the scope of the initial complaint. In addition, the complainant requested referral of the case to the Directorate General for Internal Market, Industry, Entrepreneurship and SMEs (“DG GROW”) for clarification of questions relating to public procurement law before proceeding with the case under State aid aspects.

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- (4) By letter of 12 March 2020, DG GROW submitted a preliminary assessment regarding public procurement aspects of the complaint to the complainant based on the documents available in the file at the time.<sup>(1)</sup> On 24 March 2020, the complainant requested to continue the State aid investigation of its complaint. Following a virtual meeting between the case team and the complainant of 12 August 2020, the complainant submitted further information by letter of 14 October 2020.
- (5) DG Competition forwarded the non-confidential version of the complainant's submission of 14 October 2020 to the German authorities on 12 November 2020 and received comments from the German authorities on 11 February 2021. The German authorities submitted a first non-confidential version of the submission of 11 February 2021 to DG Competition on 18 May 2021.
- (6) By e-mail of 5 October 2021, DG Competition requested further information from the complainant, who provided it together with additional information by letter of 20 June 2022.
- (7) By letter of 5 January 2022, DG Competition requested the German authorities to submit a new non-confidential version of their submission of 11 February 2021. The German authorities sent their final response on the confidentiality of that submission to the Commission on 8 July 2022.
- (8) By letter of 24 June 2022, the Commission forwarded the non-confidential version of the complainant's submission of 20 June 2022 to the German authorities. The German authorities submitted their comments on 22 August 2022.
- (9) The Commission sent a preliminary assessment letter to the complainant on 18 July 2022 stating that the measures objected to did not seem *prima facie* to constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU").
- (10) The complainant disputed the preliminary findings of the Commission and submitted additional information by letters received on 17 September 2022 and 24 January 2023.
- (11) By letter of 25 April 2023, the German authorities replied to the Commission's last request of information of January 2023 and submitted comments on the complainant's submissions of September 2022 and January 2023 as well as to the Commission's preliminary assessment letter of summer 2022.

## **2. DETAILED DESCRIPTION OF THE MEASURE**

### **2.1. The alleged beneficiary**

- (12) Cosinex is a German limited liability company (GmbH – Gesellschaft mit beschränkter Haftung), operating in the sector of computer software, owned by

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<sup>(1)</sup> This was the published contract notice of 1 August 2001 and the published contract award notice of 31 January 2003, see recital (36) below.

natural persons and headquartered in Bochum, Germany. It is active in the establishment and operation of marketplaces on the internet for public and private procurement and has a focus on the development and marketing of e-government solutions. Amongst others, Cosinex is the owner of the software *cosinex Vergabemarktplatz*. It has several subsidiaries: its fully owned and controlled subsidiaries are Govtech GmbH, Govtech Services GmbH & Co. KG, and Govtech Services Verwaltungs GmbH. In addition, Cosinex holds a 50% stake in DTVP Deutsches Vergabeportal GmbH and a 34% stake in D-NRW Gesellschaft für Softwareentwicklung und Beratung mbH. Between 18 August 2010 and 1 December 2020, Cosinex held a controlling 74.90% stake in publicplan GmbH (“Publicplan”).

- (13) Publicplan is also a German computer software company, active in the development of software and the provision of IT services for the public administration.
- (14) According to the German authorities, Cosinex holds a “relatively good” market position in e-procurement solutions in Germany but well short of a dominant position. According to the German authorities, the market is characterised by genuine competition.

## **2.2. The facts**

- (15) In 2001, Projekt Ruhr GmbH, whose sole shareholder was the Land of North Rhine-Westphalia, as the contracting authority, initiated an EU-wide public procurement procedure.
- (16) By notice published in the Tenders Electronic Daily<sup>(2)</sup> on 1 August 2001 (dispatched and received by the Tenders Electronic Daily on 25 July 2001), Projekt Ruhr GmbH (the “contracting authority”) initiated a negotiated procedure, with prior publication of a contract notice, including a call for competition for the conclusion of a public private partnership (PPP) contract (the “notice”). The notice requested applications to participate in the negotiated procedure to be filed by 31 August 2001. The notice explained that the objective of the PPP project was to design, implement, and operate a platform for legally binding interactions between citizens, administration, and industry with all the necessary components, including software, hardware, applications, e-payment, security infrastructure, public key infrastructure, interface specifications and e-procurement. The notice further explained that the platform was supposed to initially focus on e-government before gradually expanding to other areas such as marketplaces, content, tourism, and culture. The notice set out that these other areas were therefore to be included in the applications. According to the notice, the platform should be operated through a PPP entity that the contracting authority would set up with the successful candidate. In the notice, Projekt Ruhr GmbH reserved the right to bring together selected candidates and other public partners into a consortium. The notice also referred to the modalities for obtaining further details about the project in the procurement documents (to be requested in writing from the contracting authority).

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<sup>(2)</sup> The Tenders Electronic Daily (TED) is the online version of the 'Supplement to the Official Journal' of the EU, dedicated to European public procurement. The contract notice of 1 August 2001 was published under the publication number 2001/S 146-101101.

- (17) 113 interested companies ordered the procurement documents from the contracting authority to obtain further details about the project and the timeline for the procedure, including the application form for participation in the process.
- (18) The procurement documents listed the suitability criteria that applicants should meet. Besides general suitability criteria such as the number of employees and annual revenues, applicants had to prove their suitability regarding the tendered project by substantiating their experience in developing digital platforms, implementing e-government projects, PPP models, and, more general, projects with the public administration.
- (19) The contract for the PPP was planned for an unlimited period, as stated in the procurement documents.
- (20) On 9 August 2001, the contracting authority held an information event for interested companies to answer questions regarding the project. At the event, the contracting authority presented and explained the project specifications and answered all questions, first those that had been submitted in writing prior to the event and afterwards those that were posed at the event. 26 companies were present at this information event, labelled the “candidate day”. The information provided in the event was later made accessible to all 113 interested companies, i.e. including those who had not attended the event, by way of a results protocol that, amongst other information, listed all questions asked and the answers given at that event. Amongst those 113 interested companies was one company that later became an applicant and candidate that indicated the complainant as its chosen subcontractor for the services to be provided in their application documents.
- (21) The contracting authority received 21 applications by 31 August 2001. For the selection of applicants that the contracting authority would conduct further negotiations with, a selection panel used a use-value analysis to assess the applications based on the suitability criteria previously communicated in the procurement documents.
- (22) An internal evaluation form prepared by the selection panel qualified the criteria “on-site presence” and “written and spoken German” as knock-out criteria. In addition, an internal document prepared by the selection panel specified twelve target criteria with the following weighting: experience with e-government in Germany, North Rhine-Westphalia and the Ruhr region (14.4 %); presentation of the methodological approach (11.4 %); presentation of the technological approach (11.4 %); willingness and ability to contribute financially to the establishment of the PPP entity (11.4 %); experience in e-government projects (10.6 %); experience in developing electronic platforms (9.8 %); experience in managing complex projects (8.3 %); experience in PPP models (8.3 %); number and qualification of staff (6.1 %); risk management system (3.0 %); turnover relating to the services to be provided in the last three years (3.0 %); experience in public sector projects (2.3 %). All candidates that obtained more than 700 out of 1 200 possible points in the above target criteria were invited to negotiate. The contracting authority invited six applicants to negotiate.
- (23) To prepare the negotiations, the contracting authority provided a benchmark paper (*Eckpunkt Papier*) to the six candidates with further information on the procedure and detailed questions on the concept of the e-government platform,

the cooperation of the winning candidate with the contracting authority and details regarding the legal form of the PPP. The candidates were requested to provide their replies and to prepare a presentation with first concepts for the realisation of the project. The benchmark paper also explained that the e-government platform was to be based on four main pillars: (i) a trust centre and public-key-infrastructure, (ii) data security, (iii) payment applications and (iv) application interfaces to expand the platform with further applications.

- (24) The contracting authority informed candidates that it had established an advisory commission to assess the candidates' presentations and the following negotiations with them. Upon invitation, the candidates presented their first concepts for the realisation of the project to the advisory commission between mid-November and mid-December 2001. In mid-February 2002, the advisory commission negotiated contract details for the PPP with each candidate.
- (25) Afterwards, the advisory commission assessed the presentations and notes of the contract negotiations using another use-value analysis. It was based on the following criteria and weightings: methodology (20 %); technical approach (20 %); organisation (20 %); financing and business model (20 %); learning capacity / potential (20 %). At the end of this assessment, the contracting authority invited two candidates for further negotiations, namely a bidding consortium consisting of Cap Gemini Ernst & Young Deutschland GmbH ("Cap Gemini") and Cosinex as well as another candidate.
- (26) Projekt Ruhr GmbH awarded the partnership to the bidding consortium consisting of Cap Gemini and Cosinex on 29 May 2002. As a result of the award, the bidding consortium became a company constituted under civil law (GbR – Gesellschaft bürgerlichen Rechts), the Ruhrdigital Private Konsortium GbR.
- (27) The contracting authority informed the remaining pre-selected candidates about the award decision by letter of 14 June 2002.
- (28) Projekt Ruhr GmbH and the consortium consisting of Cap Gemini and Cosinex concluded a cooperation agreement on 28 August 2002<sup>(3)</sup>. This agreement provided, *inter alia*, for the creation of a public consortium, Public Konsortium d-NRW GbR<sup>(4)</sup>, to assert the interests of the public partners involved in the project and for a private consortium, the Ruhrdigital Private Konsortium GbR, to pool the interests of the private partners involved in the project. Two companies were established under the PPP, which was named d-NRW. First, the Projekt Ruhr GmbH and the consortium consisting of Cap Gemini and Cosinex created a company called "Besitzgesellschaft mbH & Co KG", eventually operating under the name of Ruhrdigital (later d-NRW) Besitz-GmbH & Co. KG (hereafter referred to as "ownership company"), which was majority-owned and controlled by the public consortium. Second, Projekt Ruhr GmbH and the consortium

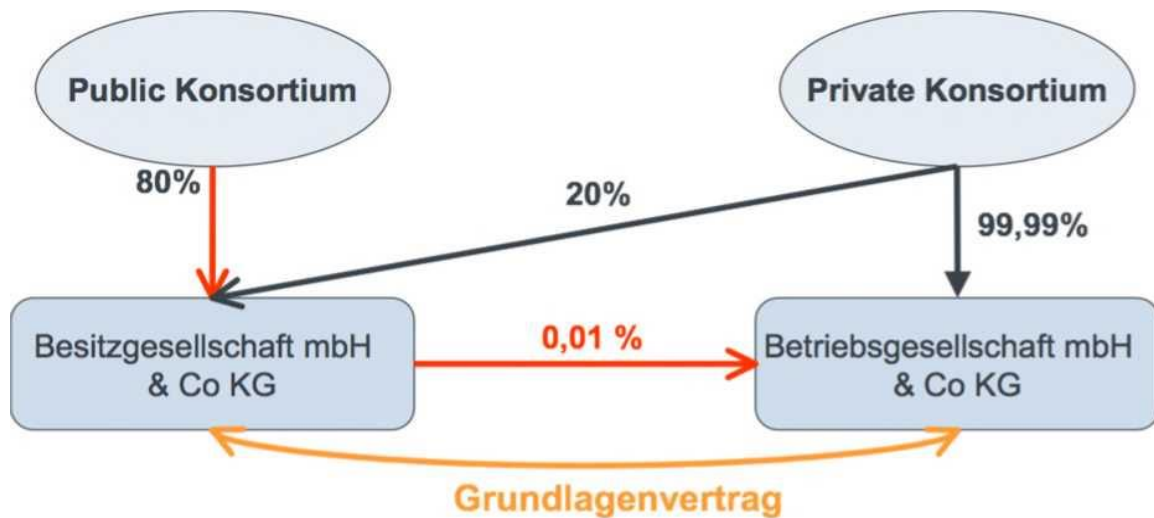
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<sup>(3)</sup> This contract was subject to the approval of the Ministry of Finance of the Land of North Rhine-Westphalia. The approval was given on 14 November 2002 with some amendments. The final version of the cooperation agreement came into effect on 28 November 2002.

<sup>(4)</sup> The public consortium within the PPP consisted in 2005 of the Projekt Ruhr GmbH and different municipalities in North Rhine-Westphalia and from 2006 until the end of 2016 of the Land of North Rhine-Westphalia, represented by the Ministry of the Interior of the Land of North Rhine-Westphalia, and numerous municipalities including the municipalities of Dortmund, Monheim and Oberhausen.

consisting of Cap Gemini and Cosinex founded a company called “Betriebsgesellschaft mbH & Co KG”, eventually operating under the name of Ruhrdigital (later d-NRW) Betriebs-GmbH & Co. KG (hereafter referred to as “operating company”), almost solely owned and fully controlled by the private consortium consisting of the Ruhrdigital Private Konsortium GbR.<sup>(5)</sup> The ownership company and the operating company concluded a contract (called “Grundlagenvertrag”), that came into effect on 28 November 2002 as an Annex to the cooperation agreement (see above in footnote 3). This contract stipulated that the operating company would take care of all business for the ownership company as part of the PPP project, i.e. the design, set-up, operation and further development of the platform. The contract expressly permitted that the operating company provided its services through subcontractors.

*Original PPP structure (until 2004)*



- (29) The Tenders Electronic Daily received the award decision on 24 January 2003 (dispatched on the same day) and published it on 31 January 2003. This publication (the “contract award notice”) described the resulting agreement (cooperation agreement and basic contract) as a ‘framework contract’ and the contracting authority estimated its total value was at EUR 40 million.
- (30) An independent legal adviser appointed by the contracting authority for the organisation and implementation of the procurement procedure in 2001 informed the contracting authority in October 2003 that in his view, the ownership company could, pursuant to the applicable public procurement rules, award contracts to the operating company directly and without prior procurement procedure in all matters covered by the basic contract. By letter of 5 February 2004, the independent legal adviser requested confirmation of this legal view from the Commission’s Directorate General for Internal Market.
- (31) In a response letter dated 9 March 2004, the Directorate General for Internal Market qualified the basic contract between the ownership company and the

<sup>(5)</sup> The private consortium initially held 99.99% of the company shares in the operating company and, as of 2004, 99.9% of the company shares in the operating company. The remaining shares were held by the ownership company.

operating company as a framework agreement. <sup>(6)</sup> It took the view that individual contracts concluded under that agreement did not need to be re-tendered if they were in accordance with the provisions of the basic contract because the framework agreement had already been subject to a procurement procedure.

- (32) In 2005, Cap Gemini left the private consortium and Cosinex remained as the sole private actor in the PPP.
- (33) Since the establishment of d-NRW in 2002 up to and including 2016, the ownership company awarded about 260 individual contracts to the operating company, the first direct contract award dating from 14 November 2005. Under the contracts, the operating company provided services to the ownership company with a total net value of approximately EUR 26 million. In 60 of these cases, Cosinex acted as a subcontractor for the operating company on e-procurement (54 contracts, overall net volume of about EUR 8.14 million) and on security infrastructure (six contracts). These 60 contracts had an overall net value of about EUR 10.6 million. In 93 cases between 18 August 2010 and 2016 Publicplan (at the time a Cosinex subsidiary) acted as a subcontractor for the operating company in various fields such as software solutions for the interactions of public authorities with citizens and the economy, e-learning, content, digital marketplaces, e-procurement, interface specification and applications. These 93 contracts had an overall net value of about EUR 7 million. As regards e-procurement, 62 contracts out of these about 260 directly awarded contracts under the framework agreement until the end of 2016 concerned e-procurement with an overall net value of about EUR 8.3 million.
- (34) By contract of 11 November 2016, the ownership company and the operating company agreed that no new individual contracts would be awarded to the operating company under the basic contract because the ownership company had decided to tender out the co-operation and partnership anew.
- (35) By a regional law on the establishment of a public law institution of 25 October 2016 (Errichtungsgesetz d-NRW AöR) <sup>(7)</sup>, the ownership company was transferred into the public body d-NRW AöR (“Anstalt öffentlichen Rechts”) with effect of 1 January 2017. On 4 March 2017, the d-NRW AöR published a contract notice for a new negotiated procedure for a framework agreement on e-government solutions, in particular software creation services, including the associated design and quality assurance, and services for general support related to e-government solutions. The d-NRW AöR estimated the total value of the procurement at EUR 5 million net. The term of the framework agreement was indicated in the contract notice as 1 January 2018 – 31 December 2021, with no option for extension. On 1 September 2017, this framework agreement was awarded to a consortium of bidders consisting of Cosinex, BMS Consulting GmbH and Publicplan. The contract award notice was published in the Tenders Electronic Daily on 12 September 2017.

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<sup>(6)</sup> MARKT/D-2/WR/ D(2004) 3229.

<sup>(7)</sup> Gesetz über die Errichtung einer Anstalt des öffentlichen Rechts „d-NRW AöR“ (Errichtungsgesetz d-NRW AöR), GVBl. NRW, Nr. 32 v. 04.11.2016, p.862.

- (36) In the letter to the complainant dated 12 March 2020 (see recitals (3) and (4) above), DG GROW informed the complainant that there were indications that the exact services to be provided in the framework of the PPP had not been well defined and only vaguely described. In DG GROW's view at the time, that could mean that the project might not have been publicised correctly. This letter by DG GROW was based on the documents that were available in the administrative file at the time, i.e. the published contract notice of 1 August 2001 and the published contract award notice of 31 January 2003 but notably not the procurement documents or any other documents related to the public procurement procedure that the German authorities submitted to the Commission in February 2021.

### **2.3. The complaint**

- (37) The complainant claims that the development, provision, and operation of an e-procurement platform by Cosinex through directly awarded contracts under the PPP allowed Cosinex' software *cosinex Vergabemarktplatz* to obtain a better market position and Cosinex to further develop the software without own investment. In the complainant's view, this amounts to illegal state aid under Article 107 TFEU.

#### *2.3.1. Direct contract awards in breach of the applicable public procurement rules*

- (38) The complainant claims that contracts were awarded directly to Cosinex in breach of the applicable public procurement rules. In the complainant's view, State aid rules were infringed because of the alleged breach of public procurement rules.
- (39) The complainant claims that the subject matter of the PPP and the underlying contracts was not specified precisely enough in the contract notice published on 1 August 2001. According to the complainant, the publication of the procurement procedure in the contract notice of 1 August 2001 was not in line with the applicable principle of transparency under public procurement law, which constituted an infringement of the applicable public procurement rules with the effect that the Commission cannot rely on the public procurement procedure for the assumption that the cooperation has been concluded at market terms. The complainant refers in this regard to the letter dated 12 March 2020, which the complainant received from DG GROW (see recitals (4) and (36) above). Furthermore, the complainant claims that the description of the contract was misleading and argues that potential applicants – especially direct competitors of Cosinex such as the complainant – could not understand from the contract description that the tendered PPP focused on e-procurement services. The complainant also claims that the Projekt Ruhr GmbH, as the contracting authority, was by its name focused on the Ruhr region, so that interested companies could not conclude from the contract description that the e-procurement platform would be applicable to the entire Land of North Rhine-Westphalia. The complainant also states that the contract notice of 1 August 2001 did not contain any specific information about the quantity and prices of the services to be procured under the PPP. The complainant is of the opinion that the procurement procedure published in August 2001 covered only the establishment of the PPP, not the services to be procured under it.
- (40) The complainant is moreover of the opinion that an unlimited term of the framework agreement was inappropriate and restricted competition and refers to



the judgment of the Court of Justice in case C-216/17 <sup>(8)</sup>, *Autorità Garante della Concorrenza e del Mercato*, to argue that the PPP project had been concluded by infringing the applicable public procurement rules and does therefore constitute illegal State aid to the alleged beneficiary.

2.3.2. *Remuneration paid to the operating company for services provided under directly awarded contracts were above market price level*

- (41) The complainant also argues that the remuneration paid to the operating company in exchange for the latter's services provided under the directly awarded contracts was excessive and above market price level.

2.3.3. *Other claims*

- (42) The complainant argues also that the scope of the framework agreement between the ownership company and the operating company was not sufficiently specific so that individual contracts were awarded to the operating company with reference to the framework agreement that should have been tendered out, especially concerning the e-procurement platform. The complainant further claims that not all contracts that were directly awarded to the operating company and implemented by Cosinex as subcontractor fell under the scope of the framework agreement. The complainant argues that the contracts concerned should have rather been tendered out.
- (43) The complainant also claims that the original subject matter of the framework agreement had long been exhausted and that the withdrawal of Cap Gemini from the private consortium of the PPP in 2005 led to a material amendment of the co-operation under the PPP, which would have required a new call for tenders. The complainant is of the opinion that, as a result, at least the contracts awarded to the operating company after 2005 constituted State aid that was incompatible with the internal market.
- (44) The complainant takes the view that the re-tendering of the PPP in 2017 did not eliminate the distortion of competition since there had been only one bid, which would not allow the presumption of a transaction at market price level.
- (45) The complainant claims that Cosinex developed the e-procurement platform solution within the framework of the PPP and against payment from the ownership company. Therefore, the complainant believes that the rights for the developed and underlying software's source code should have been transferred to the ownership company but were kept by Cosinex instead and used by Cosinex as a market solution also outside of the PPP. According to the complainant, the fact that Cosinex kept the source code also meant that all maintenance services on the e-procurement platform had to always be directly awarded to Cosinex.
- (46) The complainant finally complains that the e-procurement platform developed under the PPP was later used as well by many municipalities in the Land of North Rhine-Westphalia based on a licence acquired from the ownership company. According to the complainant, these municipalities are generally not related to the

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<sup>(8)</sup> Judgment of the Court of Justice of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato*, C-216/17, EU:C:2018:1034.

ownership company and should have rather tendered out an e-procurement platform solution.

#### 2.3.4. Conclusion

- (47) In the complainant's view, by awarding contracts directly to the operating company without public procurement procedure and by remunerating the operating company above market price level for its services, Germany has granted illegal State aid within the meaning of Article 107(1) TFEU to Cosinex as the owner and a subcontractor of the operating company under the PPP.

#### 2.4. Comments of the German authorities

- (48) The German authorities are of the opinion that the PPP project and its implementation does not constitute State aid within the meaning of Article 107(1) TFEU because Cosinex did not receive an undue economic advantage.
- (49) The German authorities explained that the procurement procedure duly respected the principles of transparency and equal treatment required in procurement procedures and that this allows the presumption that the establishment of the PPP and its implementation was in line with market terms.
- (50) According to the German authorities, a more detailed description of the tendered contract could not be provided in the procurement documents because the PPP had as its subject intellectual and innovative creations. The contracting authority defined and specified those intellectual and innovative creations more concretely only during the individual and more detailed negotiations with the remaining candidates towards the end of the procedure. The German authorities further argue that no more detailed legal requirements for tendered framework contracts existed at the time, neither in the applicable Union Directives on Public Procurement nor in case law of the European Court of Justice and that the overall value of the services expected to be provided under the framework agreement was discernible and, apart from that, subject to further negotiations. The German authorities explain that the contracting authority's field of activity was not limited to the Ruhr region. The German authorities also explain that Cosinex has not been commissioned with the development and implementation of an individual software for an e-procurement platform but that the ownership company acquired a licence for use of standard software for such purpose from the operating company that existed already at Cosinex before the PPP. The German authorities also explain that the use of the PPP's e-procurement platform is not mandatory (only for public authorities of the Land of North Rhine-Westphalia).
- (51) The German authorities explain that the winning consortium became, through the award of the co-operation in the framework of the PPP, a company constituted under civil law (GbR), consisting of two equal shareholders, Cap Gemini and Cosinex. The GbR became the majority shareholder of the operating company. The German authorities argue that, therefore, the discontinuation of Cap Gemini as a shareholder of the GbR did not have an impact on the ownership situation of the operating company and did not constitute a substantial modification of the awarded contract.
- (52) In the view of the German authorities, Cosinex delivered all their services under market conditions.

- (53) As a last point, the German authorities argue that the right to complain is time barred because the Commission, in 2017, had no longer the power to request Germany to recover the alleged aid pursuant to Article 17 of Council Regulation (EU) 2015/1589 <sup>(9)</sup>.

### **3. ASSESSMENT OF THE EXISTENCE OF STATE AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU**

- (54) According to Article 107(1) TFEU, “*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 or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.*”
- (55) It follows that in order for a measure to qualify as State aid, the following cumulative conditions have to be met: (i) The beneficiary of the measure has to be an ‘undertaking’, (ii) the measure has to be granted through State resources and be imputable to the State, (iii) the measure has to confer an economic advantage, (iv) which is selective, (v) and has an effect on trade and competition.

#### **3.1. Undertaking**

- (56) Undertakings within the meaning of Article 107(1) TFEU are entities engaged in an economic activity, regardless of their legal status and the way in which they are financed. <sup>(10)</sup>
- (57) The alleged direct beneficiary of the measure is Cosinex.
- (58) Cosinex is a computer software company active in the establishment and operation of marketplaces on the internet for public and private procurement and has a focus on the development and marketing of e-government solutions (see recital (12) above). The contracts awarded directly to the operating company under the framework agreement within the PPP since 2005 covered various services in the fields of e-procurement, security infrastructure, software solutions for the interactions of public authorities with citizens and the economy, e-learning, content, digital marketplaces, e-procurement, interface specification and applications. These were provided in 153 cases by Cosinex or its subsidiary Publicplan in exchange for remuneration (altogether about EUR 17.5 million) (see recital (33) above). These altogether constitute economic activities.
- (59) Hence, the Commission considers Cosinex to be an undertaking within the meaning of Article 107(1) TFEU regarding the economic activities supported by the directly awarded contracts within the PPP since 14 November 2005.

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<sup>(9)</sup> Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, p. 9–29.

<sup>(10)</sup> Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, EU:C:2006:8, paragraph 107.

## 3.2. State resources and imputability

### 3.2.1. State resources

- (60) State resources include all resources of the public sector <sup>(11)</sup>, including resources of intra-State entities (decentralised, federated, regional or other) <sup>(12)</sup> and, under certain circumstances, resources of private bodies. Resources of public undertakings <sup>(13)</sup> also constitute State resources within the meaning of Article 107(1) TFEU because the State is capable of directing the use of these resources. <sup>(14)</sup>
- (61) The ownership company was at all times majority-owned and fully controlled by the public consortium within the PPP, which consisted in 2005 of the Projekt Ruhr GmbH (the contracting authority, whose sole shareholder was the Land of North Rhine-Westphalia, see recital (15) above) and different municipalities in North Rhine-Westphalia, and from 2006 until the end of 2016 of the Land of North Rhine-Westphalia, represented by the Ministry of the Interior of the Land of North Rhine-Westphalia, and the municipalities of Dortmund, Monheim and Oberhausen (see recital (28) above). Therefore, the Land of North Rhine-Westphalia and the above-mentioned municipalities in North Rhine-Westphalia exercised a controlling influence over the financial resources of the ownership company. The ownership company was thus a public undertaking and the Land of North Rhine-Westphalia together with the above-mentioned municipalities were capable of directing the use of the ownership company's resources.
- (62) Hence, the Commission concludes that the measure is granted through State resources within the meaning of Article 107(1) TFEU.

### 3.2.2. Imputability

- (63) If the alleged advantage is granted through a public undertaking, imputability of the measure to the State is less evident and several factors have to be taken into consideration in order to determine if imputability exists. The mere fact that a measure is taken by a public undertaking is not *per se* sufficient to consider it

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<sup>(11)</sup> Judgment of the General Court of 12 December 1996, *Air France v Commission*, T-358/94, EU:T:1996:194, paragraph 56.

<sup>(12)</sup> Judgment of the General Court of 6 March 2002, *Territorio Histórico de Álava and Others v Commission*, Joined Cases T-92/00 and 103/00, EU:T:2002:61, paragraph 57.

<sup>(13)</sup> Pursuant to Article 2(b) of Commission Directive 2006/111/EC, of 16 November 2006, on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17), 'public undertaking' means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

<sup>(14)</sup> Judgment of the Court of Justice of 16 May 2002, *France v Commission (Stardust)*, C-482/99, EU:C:2002:294, paragraph 38. See also Judgment of the Court of Justice of 29 April 2004, *Greece v Commission*, C-278/00, EU:C:2004:239, paragraphs 53 and 54, and Judgment of the Court of Justice of 8 May 2003, *Italy and SIM 2 Multimedia SpA v Commission*, Joined Cases C-328/99 and C-399/00, EU:C:2003:252, paragraphs 33 and 34.

imputable to the State. <sup>(15)</sup> In such cases, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure. <sup>(16)</sup> However, it does not need to be demonstrated that, in a particular case, the public authorities specifically incited the public undertaking to take the measure in question. <sup>(17)</sup>

- (64) The ownership company was created as a project-linked company of the public authorities of the Land of North Rhine-Westphalia that had no activities outside of the project. Thus, the only and sole corporate purpose of the ownership company was to implement the project of the Land of North Rhine-Westphalia within the framework of the PPP.
- (65) The Commission considers that this setting directly links the ownership company to the public authorities in North Rhine-Westphalia.
- (66) Furthermore, the German authorities neither argued that the measure was not imputable to the State, nor did they deny or question the imputability to the state of the measure.
- (67) The Commission therefore considers that the direct award of contracts by the ownership company to the operating company with reference to the framework agreement within the PPP since 14 November 2005 was imputable to the State of Germany.

### **3.3. Economic advantage**

- (68) An advantage, within the meaning of Article 107(1) TFEU, is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention. <sup>(18)</sup> Economic transactions carried out by public undertakings do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions. <sup>(19)</sup> The underlying concept provides that the behaviour of public bodies should be compared to that of similar private economic operators under normal market conditions to determine whether the economic transactions carried out by such bodies grant an advantage to their counterparts.
- (69) The relevant method to assess whether an economic transaction carried out by a public undertaking took place under normal market conditions and, therefore,

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<sup>(15)</sup> Judgment of the Court of Justice of 16 May 2002, *France v Commission (Stardust)*, C-482/99, EU:C:2002:294. See also Judgment of the General Court of 26 June 2008, *SIC v Commission*, T-442/03, EU:T:2008:228, paragraphs 93 to 100.

<sup>(16)</sup> Judgment of the Court of Justice of 16 May 2002, *France v Commission (Stardust)*, C-482/99, EU:C:2002:294, paragraph 52.

<sup>(17)</sup> It is, furthermore, not necessary to demonstrate that, in a particular case, the public undertaking's conduct would have been different if it had acted autonomously, see Judgment of the General Court of 25 June 2015, *SACE and Sace BT v Commission*, T-305/13, EU: T:2015:435, paragraph 48.

<sup>(18)</sup> Judgment of the Court of Justice of 29 April 1999, *Spain v Commission*, C-342/96, EU:C:1999:210, paragraph 41.

<sup>(19)</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraphs 60 and 61.

whether it involved the granting of an advantage (which would not have occurred in normal market conditions) to its counterpart is the Market Economy Operator test <sup>(20)</sup>.

- (70) This test assesses whether the public undertaking acted the same as a market economy operator would have had in a comparable situation. If this is not the case, the beneficiary undertaking has received an economic advantage, which it would not have obtained under normal market conditions, placing it in a more favourable position compared to that of its competitors.
- (71) Whether a State intervention is in line with market conditions must be examined on an *ex-ante* basis, having regard to the information available at the time the intervention was decided upon. <sup>(21)</sup>
- (72) A transaction's compliance with market conditions can be directly established through transaction-specific market information where it concerns the sale and purchase of assets, goods and services (or other comparable transactions) carried out through a competitive <sup>(22)</sup>, transparent <sup>(23)</sup>, non-discriminatory <sup>(24)</sup> and unconditional <sup>(25)</sup> tender procedure.

### 3.3.1. *The procurement procedure for the project*

- (73) Using and complying with the procedures provided for in the EU Public Procurement Directives can be considered sufficient to meet the requirements of a competitive, transparent, and non-discriminatory tender procedure provided that all the conditions for the use of the respective procedure are fulfilled. <sup>(26)</sup>

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<sup>(20)</sup> See section 4.2. of 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, 19.7.2016, p. 1.

<sup>(21)</sup> Judgment of the Court of Justice of 5 June 2012, *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraphs 83, 84 and 85 and 105; Judgment of the Court of Justice of 16 May 2002, *France v Commission (Stardust)*, C-482/99, EU:C:2002:294, paragraphs 71 and 72; Judgment of the General Court of 30 April 1998, *Cityflyer Express v Commission*, T-16/96, EU:T:1998:78, paragraph 76.

<sup>(22)</sup> A tender procedure has to be competitive to allow all interested and qualified bidders to participate in the process.

<sup>(23)</sup> The procedure has to be transparent to allow all interested tenderers to be equally and duly informed at each stage of the tender procedure. Accessibility of information, sufficient time for interested tenderers, and the clarity of the selection and award criteria are all crucial elements for a transparent selection procedure. A tender has to be sufficiently well-publicised, so that all potential bidders can take note of it.

<sup>(24)</sup> Non-discriminatory treatment of all bidders at all stages of the procedure and objective selection and award criteria specified in advance of the process are indispensable conditions for ensuring that the resulting transaction is in line with market conditions. To guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively.

<sup>(25)</sup> A tender for the sale of assets, goods or services is unconditional when a potential buyer is generally free to acquire the assets, goods or services to be sold and to use them for its own purposes irrespective of whether or not it runs certain businesses. If there is a condition that the buyer is to assume special obligations for the benefit of the public authorities or in the general public interest, which a private seller would not have demanded — other than those arising from general domestic law or a decision of the planning authorities —, the tender cannot be considered unconditional.

<sup>(26)</sup> This does not apply in specific circumstances that make it impossible to establish a market price, such as the use of the negotiated procedure without publication of a contract notice, see point 93 of

- (74) The Projekt Ruhr GmbH initiated a negotiated procedure by way of publication of a contract notice in the Tenders Electronic Daily on 1 August 2001 for the design, implementation and operation of a platform for legally binding interactions between citizens, administrations and business with all the necessary components via a PPP company to be established with the award winner (see recitals (15) and (16) above).

#### 3.3.1.1. The applicable Public Procurement Directive

- (75) The EU legal framework for public procurement applicable in August 2001 consisted of:
- (a) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (“Council Directive 92/50/EEC”),
  - (b) Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (“Council Directive 93/36/EEC”),
  - (c) Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (“Council Directive 93/37/EEC”) and
  - (d) Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.
- (76) In the case at hand, the Projekt Ruhr GmbH, as the contracting authority, was not going to award a public supply contract within the meaning of Article 1(a) of Council Directive 93/36/EEC or a public works contract within the meaning of Article 1(a) of Council Directive 93/37/EEC and was neither operating in the water, energy, transport, or telecommunications sector.
- (77) The Projekt Ruhr GmbH was going to award a contract for pecuniary interest to be concluded in writing with a service provider that was not subject to one of the exclusions in Article 1(a)(i)-(ix) of Council Directive 92/50/EEC, *i.e.* a public service contract within the meaning of Article 1(a) of Council Directive 92/50/EEC.
- (78) Therefore, Council Directive 92/50/EEC is the applicable legal basis for the assessment of the correctness of the negotiated procedure initiated by the Projekt Ruhr GmbH on 1 August 2001.

#### 3.3.1.2. Choice of the negotiated procedure with publication of a contract notice

- (79) There are no indications that the contracting authority made an error in choosing a negotiated procedure for the following reasons.

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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, 19.7.2016, p. 1..

- (80) Pursuant to Article 11(2)(b) and (c) of Council Directive 92/50/EEC, “[c]ontracting authorities may award their public service contracts by negotiated procedure, with prior publication of a contract notice in the following cases: [...] (b) in exceptional cases, when the nature of the services or the risks involved do not permit prior overall pricing; (c) when the nature of the services to be procured, in particular in the case of intellectual services [...], is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the best tender according to the rules governing open or restricted procedures.”
- (81) Based on the information published in the contract notice of 1 August 2001 (see recital (16) above), the services to be procured via the negotiated procedure can be summarised as computer and related services, business and management consultancy and related services, general public services, administrative services as well as the provision of services to the community. Regarding hardware, the procurement also included delivery components. In terms of value, however, these were significantly lower than the required services.
- (82) The above-mentioned services are intellectual services within the meaning of Council Directive 92/50/EEC<sup>(27)</sup>. The design, implementation, and operation of an online platform for legally binding interactions between citizens, administrations, and business with all the necessary components was something rather novel in August 2001. The Commission considers that, given the complexity of the project and its innovative nature and the associated risks, the intellectual services to be procured did not allow for prior global pricing. Moreover, intellectual services to be procured under this specific project covered a wide scope of different services at different stages of the project’s implementation process, which did not permit to establish with sufficient precision contract specifications that would enable the contract to be awarded by way of an open or restricted procedure.
- (83) The services to be procured required conceptual and innovative solutions and each applicant could have had different approaches regarding the design, the implementation, and the operation of the platform so that a negotiated procedure was justified, also to ensure that the offered solutions met the requirements of the contracting authority. This PPP project was not about a specific and pre-defined good for which the contracting authority could have launched an open procedure selecting the bidder offering the best price. The contracting authority procured an e-government platform, the design and functionality of which was still unclear at the start of the procedure. The contracting authority was able to use the negotiated procedure to make different candidates propose different solutions and choose the one that corresponded best to the needs of the contracting authority. Besides, the value of the delivery of hardware components was well below the value of the services covered by the contract and the hardware to be delivered was dependent on the services eventually procured. Hence, the delivery of hardware was a mere subordinate component of the overall procurement.
- (84) The design of a not-predefined e-government platform and its operation (the details of which depend on the exact design solution) do not permit overall

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<sup>(27)</sup> See recitals and Article 11(2)(c) of Council Directive 92/50/EEC.



pricing and the design of the e-government platform as well as the structure and corporate set-up for the PPP were unclear at the time of the procurement, which did not allow contract specifications to be established in advance. The Commission therefore considers that the conditions of Article 11(2)(b) and (c) of Council Directive 92/50/EEC were fulfilled.

3.3.1.3. Compliance with the rules for negotiated procedures with publication of a contract notice pursuant to Council Directive 92/50/EEC

- (85) There are no indications that the contracting authority did not comply with the rules for negotiated procedures with publication of a contract notice pursuant to Council Directive 92/50/EEC for the following reasons.
- (86) Pursuant to Article 8(1) of Council Directive 92/50/EEC, contracts which have as their object services listed in Annex I A (which included computer and related services as well as management consultant services and related services) shall be awarded in accordance with the provisions of Titles III to VI of Council Directive 92/50/EEC (*i.e.* Articles 11 to 37).
- (87) The contracting authority has drawn up a written report (*Vergabebericht*) for the contract award procedure that the German authorities have submitted to the Commission, which contains the information required by Article 12(3) of Council Directive 92/50/EEC. The Commission has no indication that the information requirements of Article 12(1) and (2) of Council Directive 92/50/EEC, pursuant to which (i) the contracting authority shall inform any eliminated candidate of the reasons for rejection of his application within 15 days of the date on which a written request is received, and (ii) the contracting authority shall promptly inform candidates of the decision taken on contract award and shall do so in writing if required, have not been respected.
- (88) The procurement documents contained the technical specifications in accordance with Article 14(1) of Council Directive 92/50/EEC, which says that the technical specifications defined in Annex II of Council Directive 92/50/EEC shall be given in the general documents or the contractual documents relating to each contract. The procurement documents were sent to 113 interested companies upon request (see recital (17) above) and all additional information relating to the procurement documents that was provided at the information event on 9 August 2001 was made accessible to all interested companies, including those who had not attended the event (see recital (20) above). The Commission has no indication that the time limit provided for in Article 19(6) of Council Directive 92/50/EEC has not been respected. In line with Article 15(2) of Council Directive 92/50/EEC, the contracting authority made known its intention to award a contract by negotiated procedure by way of publication of a contract notice in the Official Journal of the European Union (OJ) on 1 August 2001 (see recital (16) above). The award of the contract was published in the OJ by way of a contract award notice on 31 January 2003 (see recital (29) above), which is in line with Article 16(1) and (2) of Council Directive 92/50/EEC.
- (89) The contracting authority dispatched the contract notice and the OJ received it for publication on 25 July 2001. The contracting authority requested submission of applications to participate in the negotiated procedure by 31 August 2001 (see recital (16) above). This is in line with the time limit provided for in Article 19(1)

of Council Directive 92/50/EEC. The procurement documents submitted to all 113 interested companies were accompanied by an invitation letter to submit applications. The Commission has no indication that the requirements of Article 19(2) of Council Directive 92/50/EEC have not been respected.

- (90) The contracting authority admitted six candidates to negotiations (see recital (21) above), which is in line with the requirement of Article 27(3) of Council Directive 92/50/EEC. None of the applicants has been formally excluded pursuant to Article 29 of Council Directive 92/50/EEC and there is no indication that the suitability criteria used and communicated in the procurement documents do not fulfil the requirements of Articles 31 and 32 of Council Directive 92/50/EEC. The Commission has no indication that the contract has not been awarded based on the criteria laid down in Chapter 3 of Title VI of Council Directive 92/50/EEC. In line with Article 36 of Council Directive 92/50/EEC, the contracting authority based its award of the contract on various criteria relating to the contract, *i.e.* methodological approach, technical approach, funding/business model, and ability to learn/potential, and awarded the project to the economically most advantageous offer.
- (91) Therefore, there are no indications that the contracting authority committed an error under the rules for negotiated procedures with publication of a contract notice pursuant to Council Directive 92/50/EEC.

#### 3.3.1.4. The complainant's claims concerning transparency

- (92) The complainant argues that the publication of the procurement procedure in the contract notice of 1 August 2001 was not in line with the principle of transparency, which it deems to be applicable in the present case (see recital (39) above).
- (93) First, the complainant claims that the contracting authority had not specified the subject matter of the PPP and the underlying contracts precisely enough, so that the description of the contract was misleading. This meant that the potential applicants – especially direct competitors of Cosinex – were not able to understand from the contract description that the tendered PPP focused on e-procurement services (see recital (39) above).
- (94) The Commission considers the complainant's claim as unfounded as it cannot confirm that the contract notice published on 1 August 2001 was misleading concerning e-procurement services being covered by the project for the following reasons.
- (95) In the first place, the contract notice published on 1 August 2001 described the project's subject matter as to design, implement, and operate a platform for legally binding interactions between citizens, administrations, and industry with all the necessary components such as software, hardware, applications, e-payment, security infrastructure, public key infrastructure, interface specifications and e-procurement (see recital (16) above). It therefore made clear reference to e-procurement as a component of the platform to be designed, implemented, and operated through the PPP entity to be established with the successful candidate.
- (96) In the second place, the contract notice published on 1 August 2001 made clear reference to the procurement documents with more detailed information about the

project that interested companies could request from the contracting authority. For instance, the applicant and candidate that had indicated the complainant as their chosen subcontractor in their application documents (see recital (20) above) had requested and received the procurement documents. The procurement documents equally made clear reference to e-procurement as one of the components of the e-government platform and mentioned e-procurement as one of many different e-government projects. The procurement documents also mentioned the provision of a procurement solution (e-procurement) as one of seven tasks of the PPP.

- (97) In the third place, it is a characteristic of negotiated procedures that the specific services to be procured can still change during the procurement procedure, depending on the results of the negotiations with pre-selected candidates. The German authorities submitted that, in the field of e-government solutions and digitization of administrative processes it is not unusual and permissible to enter negotiations with a not yet conclusively defined catalogue of services and to further specify the individual services to be procured during the procurement procedure. The Commission considers this consistent.
- (98) In the fourth place, the project had a focus on e-government and was gradually to be complemented by other areas. The basic contract concluded between the ownership company and the operating company at the end of the procurement procedure in 2002 does not give any support to the complainant's claim that the project "*focused*" on e-procurement. The basic contract refers to the creation of an innovative and intermunicipal procurement system only in an annex on the project's "*set-up phase*". It describes six working levels under "*project content*", one of which is called "*value-added services*". One of the objectives for the implementation phase of the working level "*value added services*" is the setup of such procurement system. Furthermore, according to the information the Commission received from the German authorities, not more than around 24% of the about 260 directly awarded contracts under the framework agreement until the end of 2016 concerned e-procurement (see recital (33) above). At the same time, these directly awarded contracts on e-procurement account for not more than 32% of the net value of all directly awarded contracts under the framework agreement until the end of 2016 (see recital (33) above). The Commission therefore does not consider that the framework agreement had a "*focus*" on e-procurement.
- (99) In the fifth place, insofar as the complainant bases its legal view on the letter received from DG GROW on 12 March 2020, this letter constituted only a preliminary legal assessment on the basis of the information available in the administrative file at the time. The preliminary views expressed in this letter were thus based solely on the contract notice of 1 August 2001 and the contract award notice of 31 January 2003. The complete procurement documents were not available in the file at the time. DG GROW was not aware of most of the detailed information provided in section 2.2 above when the letter was sent to the complainant. Furthermore, the letter does not take account of the fact that the procurement procedure in 2001/2002 was a negotiated procedure.
- (100) Secondly, the complainant also claims that the contracting authority's name "Projekt Ruhr GmbH" suggested that it focused on the Ruhr region, so that interested companies could not conclude from the contract description that the e-

procurement platform would be applicable to the entire Land of North Rhine-Westphalia (see recital (39) above).

- (101) This second claim is unfounded. The complainant cannot demonstrate that interested companies were led to believe the project would strictly cover the Ruhr region (which was not more closely defined, neither in the contract notice nor anywhere else) for the following reasons.
- (102) In the first place, the contract notice published in August 2001 did not indicate in the description of the contract to be awarded that it would be limited to the Ruhr region. From the outset, the PPP was open to all municipalities in North Rhine-Westphalia. This is also reflected in the framework agreement concluded later (more precisely in the basic contract annexed to the cooperation agreement), stating that “[t]he platform is intended to serve municipalities in the Ruhr region and, if applicable, certain municipalities outside the Ruhr region”.
- (103) In the second place, the benchmark paper (see recital (23) above), which the contracting authority sent to all six pre-selected candidates before the start of negotiations, i.e. including the candidate that had indicated the complainant as their chosen subcontractor in their application documents, stated that the cooperation would take into account the needs and expectations of municipalities in the Ruhr region as well as adjacent municipalities and other municipalities in North Rhine-Westphalia.
- (104) In the third place, the German authorities explained in their submissions of 22 August 2022 and 25 April 2023 (the complainant raised this argument for the first time in their submission of 20 June 2022) that the field of activity of the contracting authority has never been limited to the Ruhr region. The objective of the contracting authority as described in its publicly available commercial register entry referred to promoting innovative processes in the Ruhr region and adjacent areas and mentioned that the contracting authority would work closely together with neighbouring municipalities.
- (105) In the fourth place, a diligent market operator cannot base its conclusions on the scope of the public procurement procedure solely on the contracting authority’s name. A diligent market operator can be expected to request and analyse the more detailed procurement documents, obtain all publicly available information necessary to make an informed application and pose any open questions to the contracting authority, for example at the occasion of the information event organised by the contracting authority. The results protocol of this information event was also sent to the candidate that had indicated the complainant as their chosen subcontractor in their application documents.
- (106) Thirdly, the complainant further raises that the contract notice of 1 August 2001 did not contain any specific information about the quantity and prices of the services to be procured under the PPP (see recital (39) above).
- (107) This third claim is unfounded as the complainant cannot demonstrate any legal obligation on the contracting authority under the public procurement rules applicable in August 2001 to clearly define the quantity and the prices of the services to be procured under the PPP in the published contract notice initiating the negotiated procedure.

- (108) In the first place, in August 2001, Council Directive 92/50/EEC did not contain any specifications as to what information was required in a contract notice initiating a negotiated procedure for the conclusion of a framework agreement concerning services that could not be conclusively described with a level of precision that would have allowed an open or restricted procedure. Annex III of Council Directive 92/50/EEC did not contain any requirements regarding the information to be published for framework agreements.
- (109) In the second place, Council Directive 92/50/EEC did not contain any substantive rules on permissible quantities, volumes or prices for framework agreements at the time. While the legal instrument of framework agreements was already recognized in public procurement law in August 2001, as evidenced, for instance, by the statements of Advocate General Lenz in his Opinion delivered on 16 February 1995 in case C-79/95 <sup>(28)</sup>, no legal regulations were in place and there was no case-law on the topic from the Court of Justice.
- (110) In the third place, the order volume was subject of the negotiations with the pre-selected candidates. In the Commission's view the negotiation of the order volume is an essential feature of a negotiated procedure in which all parts of the contract are negotiated between the parties and can therefore change during the procedure.
- (111) In the fourth place, even without a clear specification of an estimated contract value in the published contract notice, the functional description of the services to be provided within the framework of the PPP and the contracting authority's expectations as expressed in the procurement documents made it sufficiently clear to all interested companies and applicants, including the applicant and candidate that had indicated the complainant as their chosen subcontractor in their application documents, what effort and what kind of services would be requested from them.
- (112) Fourth, the complainant is of the opinion that the procurement procedure published in August 2001 only covered the establishment of the PPP, not the services to be procured under it (see recital (39) above).
- (113) This fourth claim is unfounded as the complainant cannot demonstrate that the negotiated procedure initiated in August 2001 procured only a partner for a PPP excluding any services.
- (114) The establishment of a PPP is not an end in itself but serves to subsequently provide services that are optimized as a result of the co-operation. The contract notice published in August 2001 described these services and made clear reference to the procurement documents, which further specified the services to be provided in the framework of the PPP.

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<sup>(28)</sup> Opinion of Advocate General Lenz delivered on 16 February 1995, *Commission v Greece*, C-79/94, EU:C:1995:41, supporting the view that a framework agreement falls within the scope of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts.

### 3.3.1.5. The complainant's claims concerning the unlimited term of the framework agreement

- (115) The complainant further argues that an unlimited term of the framework agreement was inappropriate and restricted competition (see recital (40) above). It argues that the cooperation and the services provided under its framework should have been re-tendered after expiry of a period defined already at the beginning of the procurement procedure.
- (116) The Commission considers this claim as unfounded for the following reasons.
- (117) In the first place, public procurement rules applicable in 2001 and 2002 did not oblige contracting authorities to limit the term of a framework agreement in a negotiated procedure. Council Directive 92/50/EEC did not contain any substantive rules on standard or maximum periods for the term of framework agreements at the time.<sup>o(29)</sup> The wording of Article 7(5), second indent, of Council Directive 92/50/EEC also suggests that contracts of indefinite duration were valid under public procurement law at the time, as it says that, “[i]n the case of contracts which do not specify a total price, the basis for calculating the estimated contract value shall be in the case of contracts of indefinite duration or with a term of more than 48 months, the monthly instalment multiplied by 48.”
- (118) In the second place, insofar as the complainant bases its legal view on the judgment of the Court of Justice in case C-216/17, *Autorità Garante della Concorrenza e del Mercato* (see recital (40) above), this judgment was delivered on 19 December 2018 concerning the interpretation of certain provisions in Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (“Directive 2004/18/EC”). Directive 2004/18/EC, which already contained provisions on framework agreements, was not in force in 2001 when the contracting authority published the contract notice regarding the public procurement procedure in the case at hand. Therefore, the judgment of 19 December 2018 in case C-216/17 cannot be used as a point of reference for a public procurement procedure that took place in 2001/2002. In addition, this judgment was rendered after the PPP relevant in this case was terminated and the d-NRW AöR re-tendered the cooperation in 2017.

### 3.3.1.6. Conclusion

- (119) The Commission concludes that Projekt Ruhr GmbH complied with the procedures provided for in Council Directive 92/50/EEC and that the conditions for the use of the negotiated procedure with publication of a contract notice were fulfilled. The tender procedure thus met the requirements of a competitive, transparent, and non-discriminatory tender procedure.

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<sup>(29)</sup> See also the judgment of the Court of Justice of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraph 74, on the interpretation of Council Directive 92/50/EEC: “[...] Community law, as it currently stands, does not prohibit the conclusion of public service contracts for an indefinite period.”

3.3.2. *The complainant's claims concerning the scope of the framework agreement*

- (120) The complainant argues that the scope of the framework agreement between the ownership company and the operating company was not sufficiently specific. Therefore, according to the complainant, individual contracts that have been awarded to the operating company with reference to the framework agreement should have been tendered out, especially the e-procurement platform (see recital (42) above).
- (121) The Commission rejects the complainant's claim. It considers that the framework agreement between the ownership company and the operating company described the services to be provided by the operating company in a sufficiently precise manner, including the services related to the e-procurement platform.
- (122) The complainant's allegation is not supported by any evidence.
- (123) In fact, the project booklet, an annex to the basic contract between the ownership company and the operating company, describes the services to be covered (under "project structure" in Article 1(1)).<sup>(30)</sup> E-procurement is mentioned therein as one of the components of the platform's module for legally binding interactions between citizens, administrations, and business. Article 1(3) of the project booklet describes the project goals and mentions the provision of procurement solutions (e-procurement) for the municipalities and to connect forms servers to the system as a sub-development goal of the platform to be achieved by the services provided by the operating company, amongst others.
- (124) This is in line with the explanations by the German authorities that the operating company did not design and establish a separate e-procurement platform but an e-government platform with different modules, one of which included an e-procurement solution, for which the ownership company acquired a licence to use standard software from the operating company.

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<sup>(30)</sup> *"The operating company should carry out all the work required for the project for the ownership company, i.e. on the basis of individual orders that are issued by the ownership company in accordance with the agreed procedure, in particular design, build, operate and further develop the platform. Among other things, the platform will include a building block for legally binding interactions between citizens, administrations and business with the components agreed in accordance with this contract and the respective individual order, e.g. software, hardware, applications, e-payment, security infrastructure, public key infrastructure, interface specifications and e-procurement. The platform should be available for the services of the municipalities located in the Ruhr area and, if necessary, certain municipalities outside the Ruhr area that have yet to be named (so-called e-government). The platform is to be gradually expanded to include other building blocks, e.g. marketplaces, content, tourism, culture, transport, education, business start-ups, virtual city models, geodata, job exchanges, e-learning, knowledge and research networks, virtual libraries, health portals, social services, call center, business location center, ticketing and, if necessary, other services related to the platform."*

### 3.3.3. *The complainant's claims concerning the implementation of the framework agreement*

#### 3.3.3.1. Direct contract awards outside the scope of the framework agreement

- (125) The complainant claims that not all contracts that were directly awarded to the operating company and implemented by Cosinex as subcontractor fell under the scope of the framework agreement. The complainant argues that the contracts concerned should have been tendered out (see recital (42) above).
- (126) The Commission rejects this claim. It could not identify any direct contract awards to the operating company with Cosinex or another company affiliated with Cosinex as a subcontractor that were obviously not covered by the scope of the framework contract.
- (127) The Commission notes that the complainant's allegation in this regard is entirely unsubstantiated.
- (128) The ownership company awarded the first direct contract to the operating company within the framework of the PPP on 14 November 2005 (see recital (33) above). Between 14 November 2005 and 2016 included, the ownership company directly awarded to the operating company 60 contracts for which Cosinex acted as a subcontractor and 93 contracts for which Publicplan (at the time a Cosinex subsidiary) acted as a subcontractor (see recital (33) above).
- (129) As regards the 60 contracts implemented for the operating company by Cosinex, 54 contracts concerned e-procurement services. This concerned the delivery and maintenance of standard software for an intermunicipal marketplace/public procurement marketplace, consisting of two components (a public procurement centre and a public procurement marketplace). The concrete services provided were the following: (i) the provision of the software including documentation (licence grant), (ii) maintenance services for the software, and (iii) training services and other services, in particular introductory services and, if necessary, adjustment services for customers of the ownership company. These 54 contracts had an overall volume of about EUR 8.14 million. The framework agreement covered all these direct contract awards as the services contribute to the platform's module for legally binding interactions between citizens, administrations, and business as covered by Article 1(1) of the framework agreement's project booklet (see recital (123) above).
- (130) The remaining six contracts concerned security infrastructure services. This concerned support services in the Online Security Check project and the technical redevelopment of the IT application Online Security Check, the implementation of the Intelligence Information System (NADIS) interface and various additional requirements as well as services in the areas of project support and basic maintenance. These six contracts had an overall volume of about EUR 2.466 million. The e-government tool Online Security Check to support the implementation of background checks or security checks was an element of the building block for interactions between citizens, administrations, and business. These direct contract awards were covered by the framework agreement as the services contribute to the platform's module for legally binding interactions



between citizens, administrations, and business as covered by Article 1(1) of the framework agreement's project booklet (see recital (123) above).

- (131) As regards the 93 contracts implemented for the operating company by Publicplan, these contracts concerned software solutions for the interactions of public authorities with citizens and the economy (47 contracts), e-learning (20 contracts), content (five contracts), digital marketplaces (11 contracts), e-procurement (six contracts), interface specification (two contracts) and applications (two contracts). These 93 contracts had an overall net value of about EUR 7 million (see recital (33) above). These contracts covered subject matters such as the extension of the administrative search engine, the creation of a functional specification for the use of a software solution for the processing of the training allocation for care facilities and later extensions, the provision of services in the context of the implementation of the e-government tool learn:line, the provision of services in the context of the implementation of the e-government tool KiBiz (day care finder and job market), trainings on the use of online media, content-related restructuring of the existing internet presence of public authorities in North Rhine-Westphalia, re-design of the central online job market, provision of services within the framework of the electronic start-up support project, and the development, maintenance and care of the e-learning platform Digital Media Pass. These direct contract awards were covered by the framework agreement as the services contribute to the various modules and building blocks of the e-government platform as covered by Article 1(1) of the framework agreement's project booklet (see recital (123) above).

#### 3.3.3.2. Remuneration paid to the operating company for services provided under directly awarded contracts

- (132) The complainant argues that the remuneration paid to the operating company in exchange for the latter's services provided under the directly awarded contracts were excessive and above market price level (see recital (41) above).
- (133) The Commission notes that the complainant's allegation in this regard is entirely unsubstantiated.
- (134) The Commission could not identify any instances of obvious excess payment by the ownership company for services provided by the operating company under a contract that was directly awarded to the operating company with reference to the framework agreement under the PPP.
- (135) The contract award notice published on 31 January 2003 estimated the total value of the framework agreement at EUR 40 million (see recital (29) above). Since the establishment of the PPP up to and including 2016, the ownership company awarded about 260 individual contracts to the operating company. Under these contracts, the operating company has provided services with a total net value of approximately EUR 26 million (see recital (33) above). The total value of direct contract awards under the framework agreement therefore fell below the initial expectations.
- (136) According to the contractual documents the German authorities submitted to the Commission, the ownership company first requested an offer from the operating company before awarding a contract directly to the operating company with reference to the framework agreement. The ownership company's shareholder

(the Land of North Rhine-Westphalia, represented by the Ministry of the Interior of the Land of North Rhine-Westphalia) regularly conducted market research and market observations concerning the value of the services provided by the operating company under applicable agreements, comparing it with prices offered for comparable services on the market. The documents submitted by the German authorities suggest that the prices offered by the operating company were usually below the prices offered for comparable services on the market.

- (137) It also follows from the contractual documents that the German authorities submitted to the Commission that the operating company itself also conducted market investigations before choosing a subcontractor. The operating company requested offers from several potential subcontractors before subcontracting an order it had received from the ownership company.
- (138) As regards the contract award concerning the e-procurement solution of 14 November 2005, the contractual documents of the German authorities show that the ownership company's main shareholder made a detailed price performance comparison between the option to acquire a licence of use for all public authorities in North Rhine-Westphalia for Cosinex' existing standard software from the operating company under the framework agreement and the option to acquire another existing solution already available on the market. The submitted contractual documents suggest that the former option (acquisition of software licence from Cosinex) was the economically more advantageous one.
- (139) It further follows from the contractual documents that the ownership company received a 90% list price reduction for the acquisition of the licence for use of the existing standard software for e-procurement because this was a reference project for the chosen subcontractor Cosinex. This significant reduction from the list price for the ownership company does not support the complainant's claim of a remuneration above market-price level. The Commission did not find any indication that the prices paid by the ownership company for maintenance and development were above market-price level.

#### 3.3.3.3. Material amendment of the framework agreement

- (140) The complainant also claims that the original subject matter of the framework agreement had long been exhausted and that the withdrawal of Cap Gemini from the private consortium of the PPP in 2005 led to a material amendment of the co-operation under the PPP, which required a new call for tenders (see recital (43) above). The complainant is of the opinion that, as a result, at least the contracts awarded to the operating company after 2005 constituted State aid that was incompatible with the internal market.
- (141) The Commission rejects this claim for the following reasons.
- (142) As regards the concept of material amendment of a public contract, the Court of Justice held in 2008:

*“In order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention*

*of the parties to renegotiate the essential terms of that contract (see, to that effect, Case C-337/98 Commission v France [2000] ECR I-8377, paragraphs 44 and 46).*

*An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.*

*Likewise, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered.”* <sup>(31)</sup>

- (143) The framework agreement has not been materially amended through any directly awarded contracts to the operating company or the withdrawal of Cap Gemini from the private consortium of the PPP in 2005.
- (144) As regards the subject matter of the contracts directly awarded to the operating company with Cosinex or Publicplan as subcontractor, e-procurement was a component of the platform that had to be designed, implemented, and operated through the PPP entity as clearly mentioned in the contract notice published on 1 August 2001 and in the procurement documents to which the contract notice made reference (see recitals (95) and (96) above). The inclusion of such services in the framework agreement does not constitute a new award of a contract.
- (145) Moreover, the subject matter of the directly awarded contracts to the operating company with Cosinex or Publicplan as subcontractor were covered by the framework agreement (see recitals (129)-(131) above). Therefore, these direct contract awards cannot be considered an amendment to the framework agreement.
- (146) Furthermore, the original subject matter of the framework agreement had not been exhausted between November 2005 and 2016 because the framework agreement's subject matter was not only to design and build the e-government platform but also to operate and further develop the platform (see recital (123) and footnote 30 above).
- (147) As regards the withdrawal of Cap Gemini from the private consortium of the PPP in 2005, as a result of the award of the contract to the bidding consortium consisting of Cap Gemini and Cosinex, the bidding consortium became the Ruhrdigital Private Konsortium GbR (see recital (26) above), which then, pursuant to the cooperation agreement, became the private consortium of the PPP (see recital (28) above). It was also the Ruhrdigital Private Konsortium GbR that established the operating company together with the ownership company. In 2005, the private consortium held 99.9% of the shares in the operating company while the ownership company held 0.1% (see recital (28) above).
- (148) With the departure of Cap Gemini in 2005, Cosinex became the legal successor of the Ruhrdigital Private Konsortium GbR. Cap Gemini's shares in the operating

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<sup>(31)</sup> Judgment of the Court of Justice of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraphs 34-36.

company, which it held via the Ruhrdigital Private Konsortium GbR, were transferred to Cosinex. As a result, Cosinex and the ownership company remained as the two shareholders of the operating company with 99.9% and 0.1% of the shares, respectively.

- (149) The change of shareholders in the operating company did not lead to a change in the operating company as a partnership in the form of a *Kommanditgesellschaft* and as the agent under the framework agreement. The operating company thus continued to exist and remained the contractual partner in the basic contract concluded with the ownership company. Therefore, a change of shareholders in the private consortium of the PPP and thus in the operating company could not have an impact on the basic contract concluded between the ownership company and the operating company that could be considered an amendment. Moreover, the cooperation agreement explicitly permitted a change in the shareholders of the private consortium of the PPP and this scenario has been part of the negotiations with all pre-selected candidates as evident from the detailed questions on the concept of the e-government platform submitted by the contracting authority in the benchmark paper (see recital (23) above).
- (150) According to case law, changes to shareholders normally do not result in a material contractual amendment. <sup>(32)</sup>

#### 3.3.4. *Other claims*

##### 3.3.4.1. The complainant's opinion concerning the legal effect of the re-tendering of the PPP in 2017

- (151) The complainant takes the view that the re-tendering of the PPP in 2017 did not eliminate the distortion of competition (see recital (44) above).
- (152) As set out above, the Commission considers that the transaction in 2001/2002 complied with market conditions (see recitals (73)-(119) above) and that the Commission's investigation did not confirm the complainant's claims concerning the implementation of the framework agreement (see recitals (120)-(150) above). The Commission therefore does not share the complainant's view that there was a distortion of competition that had to be eliminated with the second public procurement procedure in 2017.

##### 3.3.4.2. Development of the e-procurement platform solution within the framework of the PPP

- (153) The complainant argues that Cosinex developed the e-procurement platform solution within the framework of the PPP and against payment from the ownership company (see recital (45) above).
- (154) The Commission rejects this claim. The contractual documents submitted to the Commission by the German authorities show that the ownership company did not procure the development of the e-procurement platform but rather a software

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<sup>(32)</sup> Judgment of the Court of Justice of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraphs 51 and 52, which concerns the interpretation of Council Directive 92/50/EEC.

licence from the operating company, which used Cosinex as a subcontractor for this contract. The German authorities explained that the development of the e-procurement platform had already been carried out earlier at Cosinex' own cost. The German authorities add that the ownership company's approach of procuring a simple right of use for software is customary in the market for standard software such as the software used by Cosinex for the e-procurement platform solution.

- (155) Hence, the operating company granted the ownership company an irrevocable right of use, geographically limited to the territory of the Land of North Rhine-Westphalia, time-wise unlimited, of the software for the e-procurement platform solution. For this reason, the source code of the software remained at the operating company and no intellectual property rights were transferred to the ownership company.

#### 3.3.4.3. The licensing of the e-procurement platform to municipalities in North Rhine-Westphalia

- (156) The complainant argues that the e-procurement platform allegedly developed under the PPP by the operating company with Cosinex as subcontractor was later used as well by many municipalities in the Land of North Rhine-Westphalia based on a licence acquired from the ownership company. According to the complainant, these municipalities are generally not related to the ownership company and should have rather tendered out an e-procurement platform solution (see recital (46) above).
- (157) The Commission rejects this claim. The German authorities clarified that no municipality in North Rhine-Westphalia purchased a licence for use of the e-procurement platform solution from the ownership company or the operating company. The ownership company had rather acquired the right to sublicense the e-procurement platform to interested municipalities in North Rhine-Westphalia already with the initial procurement of the software for the e-procurement platform from the operating company in November 2005 by means of an in-house procurement. The German authorities also clarified that the operating company did not receive any licence fees for the sublicences later granted to municipalities by the ownership company.
- (158) The German authorities' assertions are supported by the contractual documents submitted to the Commission by the German authorities.

#### 3.3.5. *Conclusion on economic advantage*

- (159) The Commission has carried out the Market Economy Operator test to assess whether the award of the PPP by the Projekt Ruhr GmbH to the bidding consortium composed of Cap Gemini and Cosinex took place under normal market conditions (see section 3.3.1 above) and concludes that the public undertaking Projekt Ruhr GmbH acted the same as a market economy operator would have had in a comparable situation.
- (160) The Commission also assessed and rejected the complainant's claims concerning the scope of the framework agreement (see section 3.3.2 above), the implementation of the framework agreement (see section 3.3.3 above), and other claims the complainant made in support of their view that Cosinex has received an economic advantage (see section 3.3.4 above).

- (161) The Commission concludes that Cosinex did not receive an economic benefit which it could not have obtained under normal market conditions and that it thus did not receive an advantage within the meaning of Article 107(1) TFEU.

### **3.4. Conclusion on the existence of State aid within the meaning of Article 107(1) TFEU**

- (162) The Commission concludes that the measure does not qualify as State aid within the meaning of Article 107(1) TFEU.

## **4. LIMITATION OF THE RIGHT TO LODGE A COMPLAINT**

- (163) The German authorities argue that the right to complain is time-barred (see recital (53) above).
- (164) While there is no formal limitation of the right to lodge a complaint with the Commission under State aid rules, pursuant to Article 17(1) of Council Regulation (EU) 2015/1589, the powers of the Commission to recover aid shall be subject to a limitation period of 10 years.
- (165) Pursuant to Article 17(3) of Council Regulation (EU) 2015/1589, any aid with regard to which the limitation period has expired shall be deemed to be *existing aid*. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as *individual aid* or as aid under an *aid scheme* (Article 17(2), first sentence, of Council Regulation (EU) 2015/1589). Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period, Article 17(2), second sentence, of Council Regulation (EU) 2015/1589.
- (166) In the case at hand, the first action taken by the Commission with regard to the alleged unlawful aid was a request for information to the German authorities sent on 12 June 2017 (see recital (2) above). This implies that any potential aid granted by the German authorities in the case at hand before 12 June 2007 would have to be treated as *existing aid* and could no longer be recovered.
- (167) Therefore, even if the conclusion of the framework agreement in November 2002 (see recitals (28) and (29) above) constituted aid *quod non* (see section 3 above), regardless of whether it qualified as *individual aid* or as an *aid scheme*, it would have to be considered as *existing aid* within the meaning of Article 1(b)(iv) of Council Regulation (EU) 2015/1589 and could no longer be recovered by the Commission. The same would apply to all direct contract awards from the ownership company to the operating company with reference to the framework agreement that were made before 12 June 2007, which includes notably the contract award concerning the e-procurement solution of 14 November 2005, *i.e.* the complainant's main point of concern.
- (168) To what extent this would also apply to the direct contract awards with reference to the framework agreement that were made after 12 June 2007 depends on whether the framework agreement would have to be considered an *aid scheme* or ad-hoc *individual aid*. Contract awards under an *aid scheme* are based on new and separate decisions that constitute individual aid awards under that aid scheme whilst contract awards implementing ad-hoc individual aid are necessary

implementation measures that do not constitute new and separate decisions on the award of aid.

- (169) To determine whether a measure qualifies as an *aid scheme* or as *individual aid*, the Commission has to examine the nature of the measure in the light of the definitions set out in Council Regulation (EU) 2015/1589.
- (170) Pursuant to Article 1(d) of Council Regulation (EU) 2015/1589, *aid scheme* means any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount.
- (171) Pursuant to Article 1(e) of Council Regulation (EU) 2015/1589, *individual aid* means aid that is not awarded on the basis of an *aid scheme* and notifiable awards of aid on the basis of an *aid scheme*.
- (172) The direct contract awards with reference to the framework agreement are not aimed at “*undertakings defined within the act in a general and abstract manner*” but are aimed specifically at the operating company.
- (173) Further, any potential aid on the basis of the framework agreement would be “*linked to a specific project*”, *i.e.* the design, implementation and operation of the platform. Therefore, the framework agreement cannot be considered an *aid scheme* within the meaning of Article 1(d) of Council Regulation (EU) 2015/1589.
- (174) The framework agreement would (even if it constituted aid, which the Commission considers is not the case) rather constitute an act on the basis of which individual contracts that were linked to a specific project (the PPP’s purpose to design, implement and operate a platform for legally binding interactions between citizens, administrations and industry with all the necessary components) could be directly awarded to one undertaking, the operating company, for an indefinite period of time.
- (175) The framework agreement would therefore constitute *individual aid* within the meaning of Article 1(e) of Council Regulation (EU) 2015/1589 that was awarded in 2002 and the direct contract awards with reference to the framework agreement would have to be considered as measures necessary to implement the framework agreement, not as individual aid awards themselves. Therefore, the Commission considers that the finding of *existing aid* would cover all the direct contract awards under the framework agreement, including those after 12 June 2007.
- (176) The Commission concludes that (even if the framework agreement or any of the contracts directly awarded by the ownership company to the operating company with reference to the framework agreement constituted aid, which the Commission considers is not the case - see section 3 above) it would have to be treated as *existing aid* within the meaning of Article 1(b)(iv) of Council Regulation (EU) 2015/1589 and could no longer be recovered by the Commission.

(177) According to Article 24(2) of Council Regulation (EU) 2015/1589, which lays down the rights of interested parties, a complaint may only be lodged with respect to alleged unlawful aid or alleged misuse of aid. As explained (see recitals (163)-(176) above), the Commission is of the view that the allegations in this case concern existing aid pursuant to Article 1(b)(iv) of Council Regulation (EU) 2015/1589. It is therefore not possible, according to Council Regulation (EU) 2015/1589, to submit a complaint concerning existing aid.

## 5. CONCLUSION

(178) The Commission has accordingly decided that the measure does not constitute aid and that, if it constituted aid, it would have to be considered existing aid within the meaning of Article 1(b)(iv) of Council Regulation (EU) 2015/1589.

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

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Yours faithfully,  
For the Commission

Margrethe VESTAGER  
Executive Vice-President