



2025/1963

15.10.2025

COMMISSION DECISION (EU) 2025/1963

of 21 November 2024

**on the measure SA.39639 (2021/C) (ex 2021/NN) implemented by Italy in favour of consortium
Cineca**

(notified under document C(2024) 7987)

(Only the Italian text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provision ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) On 15 October 2014, the Commission received a complaint from BeSmart S.r.l. (“the complainant”), an Italian private IT services company, alleging that Cineca, a non-profit publicly owned consortium, receives State aid for its provision of IT services to 1) the Ministry of Education ⁽²⁾ (“MIUR” or “the Ministry”), and other public authorities as well as to 2) universities. Cineca is also engaged in the provision of High Performing (“HPC”) services. The complainant also alleges that in the absence of account separation from Cineca’s various business activities, the resources Cineca receives from the State for the provision of IT services to the MIUR and for High Performing Computing (“HPC”) services constitute a source from which Cineca cross-subsidises its activities in sectors where the complainant is active, notably the state administration IT services sector and the university IT services sector.
- (2) By letter dated 2 March 2021, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the measure.
- (3) The Commission decision to initiate the procedure (“the opening decision”) was published in the *Official Journal of the European Union* ⁽³⁾. The Commission called on interested parties to submit their comments.
- (4) The Commission received comments from four third parties. It forwarded them to Italy, which was given the opportunity to react. Italy’s comments were received by letter dated 25 February 2022.
- (5) The Commission asked the complainant for further information on 20 July 2022 to which the complainant replied on 9 September 2022. This reply was forwarded to Italy on 14 April 2023. The complainant submitted additional information on 26 July and 29 September 2023.

⁽¹⁾ State aid – Italy – State Aid SA.39639 (2021/C ex 2021/NN) – Alleged state aid measures in favour of consortium Cineca – Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 177, 7.5.2021, p. 29).

⁽²⁾ With Law Decree n.1/2020 published on the Official Journal on 9 January 2020, the MIUR has been split in the Ministry of Education and the Ministry of University and Research – MUR.

⁽³⁾ OJ C 177, 7.5.2021, p. 29.

- (6) The Commission requested further information from Italy on 6 July 2022, 2 March, 3 April and 29 April, 29 May 2023, 14 and 20 June 2024. Italy replied to these information requests on 9 September 2022, 23 April, 26 and 30 May, 7 June, 29 September 2023, and 16 July 2024.

2. DETAILED DESCRIPTION OF THE MEASURE/AID

2.1. The alleged beneficiary and its activities

- (7) Cineca ("Cineca") is a non-profit inter-university consortium established at the initiative of the Ministry of Education on 14 July 1967, to manage the North-East Italy electronic computing centre. Its original mission was to build a structure in Italy dedicated to supercomputing, to be used for research purposes ⁽⁴⁾. Subsequently, the Consortium expanded its range of activities and admitted various Italian public and private universities, and certain public research bodies ⁽⁵⁾.
- (8) Cineca's Articles of Association were amended various times and have been developed over time to focus on its main activities:
1. providing information technology services to the MIUR, universities and the public education sector fostering the development of shared IT solutions;
 2. providing HPC services.
- (9) In 2009 the Articles of Association were amended to introduce provisions on accounting separation: "The budget, and its subsequent management, shall satisfy criteria of cost effectiveness; without prejudice to the unitary nature of the accounts and financial statements, compliance with the principle of accounting separation between the activities performed for consortium members and those performed for third parties shall be ensured through specific analytical accounting entries and periodic reports" ⁽⁶⁾.
- (10) In 2012, Cineca was merged with two other public consortia (CILEA and CASPUR), aiming to establish "a national single entity responsible for guaranteeing adequate support, in terms of innovation and service offering, to satisfy the needs of the Ministry, of the university system and of the research and education sectors".
- (11) In 2014, the following entities were members of Cineca: the MIUR, 66 public universities, and 4 non-State universities. Italy explained that there are no private universities in the Italian university system. All universities have the status of public bodies and can be divided into two categories: State universities and legally recognised non-State universities. The non-State universities left the consortium in 2016 following the entering into force of a new statute. Participation in the consortium is discretionary.

⁽⁴⁾ See Amendment to the agreement N. 1167 founding an inter-university consortium for the management of the north-east Italy computing centre of 1 December 1967: "The fundamental purpose of the Consortium is to ensure the operation of the computing centre, to foster the conditions for providing the Department for Education and any member of the Consortium with the most advanced automated data processing methods, to coordinate research designed to enhance the range of assets and the processing program and to provide education on the use of automated processing. By exception, the Consortium may accept requests from companies with high productivity and modern equipment that are taking part in the latest developments, provided that there is a scientific interest for doing so'. There is a prohibition of distributing profits and the obligation to keep membership contribution, reserves and operating profits in the net assets which cannot be reinvested into commercial activities. Consortium funds cannot be accessed pursuant to Article 2612 et seq. of the Civil Code. The non-profit character is laid down also in Cineca's Articles of Association (see Article 1.3), the prohibition of distribution is laid down in Article 17 (2006 version of the Articles of Association).

⁽⁵⁾ In 2006, the MIUR also joined the Consortium.

⁽⁶⁾ Article 16(3) of Cineca's 2009 Articles of association.

2.1.1. *Cineca's main areas of business*

(i) IT services ⁽⁷⁾ to the MIUR

- (12) Cineca designs, develops, and manages information systems to support the national academic and research system. Those information systems enable the interaction between the Ministry and the universities and include a wide range of services, such as (i) the management of the national archive of tenured teaching staff and researchers employed by Italian universities; (ii) management of calls for funding of research projects; (iii) management of certain data of students ⁽⁸⁾; (iv) standard human resource management functions (e.g. payroll) for university staff; (v) websites of students and researchers; (vi) management of registration to access tests and pre-registration for university faculties or for open competitions for schoolteachers; (vii) management of the budget of universities and allocation of annual funds. Cineca also manages the National Agency for the Evaluation of the University and Research System (ANVUR) and the Italian National Research portal ⁽⁹⁾.
- (13) For those services, Cineca received annual public financing in the range of EUR 10-20 million. The amount is decided each year by means of a decree.

(ii) IT services to universities

- (14) Cineca provides an integrated university software system named U-GOV which offers the management of the main functional areas of universities. The U-GOV suite is made-up of various software modules, such as (i) course and student management (i.e. course administration, student enrolment, student administration, exam administration, etc.); (ii) human resource management; (iii) finance and accounting; (iv) document management (i.e. document archiving, digital management, etc.). Cineca has been providing services to more than 80 public universities, more than 25 non-State or private universities and to institutions abroad ⁽¹⁰⁾. The universities procure these services either directly from Cineca or through public tenders.
- (15) The corresponding income for Cineca from 2015 to 2018 was about EUR 173 million of which about EUR 159 million from State universities and about EUR 14 million from non-State or foreign universities.

(iii) High Performing Computing services (HPC)

- (16) Cineca operates the largest HPC centre in Italy and one of the major HPC centres in the European Union. HPC services target primarily public organisations to advance in basic and applied research ⁽¹¹⁾ at both national and international level.

(iv) Other services

- (17) Cineca also provides IT services to the biomedical and healthcare sector (i.e. healthcare companies as well as public or private research bodies, both Italian and foreign, and to the pharmaceutical industry ⁽¹²⁾) as well as to a variety of public and private entities ⁽¹³⁾ acting at national and international level. The related income in the period 2015 to 2018 amounts to about EUR 77 million ⁽¹⁴⁾.

⁽⁷⁾ In this document 'IT services' means design, development, provision and maintenance of IT systems and software. It also includes activities such as project management, consultancy, etc. related to IT. When necessary and appropriate, one of the above-mentioned components may be referred to.

⁽⁸⁾ ANS - Anagrafe degli studenti.

⁽⁹⁾ The Italian National Research portal (www.ricercaitaliana.it) was launched in 2005 to address the need of communicating the relevance and the value of research to citizens and to create a unified access to the Italian research system.

⁽¹⁰⁾ In Albania, Turkey, and Romania through the undertaking KION (earlier partially controlled and now incorporated in Cineca).

⁽¹¹⁾ The staff dedicated to HPC supports the users and offers consultancy in tools and techniques in several disciplinary fields ranging from medicine to meteorology, from seismology to fluid dynamics, to bioinformatics and chemistry, to provide a solid and reliable computing environment for the scientific community.

⁽¹²⁾ According to Cineca website, its clients in this sector are: ISS (National Health Institute), the CSS (National Health Council), the IOR (Rizzoli Orthopaedic Institutes in Bologna), the AIEOP (Italian Association of Paediatric Oncohaematology), the ABTC Central Operation Office, Johns Hopkins University, Baltimore, USA, Italian and foreign universities (Bologna, Padua, Milan Bicocca, Leicester), local health authorities and pharmaceutical industries (i.e. Roche Global).

⁽¹³⁾ ENI, FIAT, Ferrari, Piaggio Aero, Pilatus Aircraft, Tetrapack, Luna Rossa/BMW Oracle, Alenia Aeronautica, Hypercare, etc.

⁽¹⁴⁾ Excluding the HPC services provided to private customers.

2.2. The complainant and the complaint

- (18) BeSmart is an undertaking specialised in the design and development of software systems dedicated to the management of universities and public administrations. It has three product lines ⁽¹⁵⁾:
- (a) *Smart_Edu*: a software package for management of universities; Smart_edu was adopted for the first time in 2005 by the University of Rome. It is composed of various software modules for the governance of universities (secretariat, lessons, students, and teachers).
 - (b) *Smart_Gov*: a software suite for the management of calls for public funding, digital signature, management of digital libraries, email, etc.
 - (c) *Smart_Web*: internet applications (i.e. websites and e-commerce applications) with specialised expertise in web portals integrated with complex databases.
- (19) BeSmart does not provide HPC services.

2.2.1. IT services to MIUR

- (20) According to the complainant, the annual financing of Cineca by the MIUR for the provision of IT services to the MIUR constitutes illegal and incompatible State aid. The MIUR should have procured these services on the market through a tender procedure, since Cineca has not been an in-house provider. The direct procurement from Cineca has conferred an economic advantage to Cineca as the prices applied for those services are above market level. The complainant states that they are not in line with the benchmark prices of Consip ⁽¹⁶⁾.
- (21) Before 2015, these funds, allocated annually ex-ante by means of a law decree, were non-repayable; hence, according to the complainant, they were clearly not directly linked to the actual activities carried out by the Consortium for the MIUR. The complainant claimed that its view was confirmed by judgments of the highest Italian administrative court Consiglio di Stato, such as the judgment No 6009/2018 of 22 October 2018 ⁽¹⁷⁾ ("judgment No 6009/2018").

2.2.2. IT services to Italian universities

- (22) The complainant considers Cineca not to be an in-house organisation of the MIUR and of the universities belonging to the Consortium. As a result, contracts with Cineca should only have been concluded on the basis of a competitive selection procedure.
- (23) In addition, according to the complainant, the prices the Italian universities pay to Cineca for the provision of software and IT services are higher than market prices ⁽¹⁸⁾. This would represent an element of State aid.

⁽¹⁵⁾ www.besmart.it.

⁽¹⁶⁾ Consip is the central procurement agency of the Italian public administration.

⁽¹⁷⁾ Judgment of Consiglio di Stato, Sez. VI, No 6009/2018 of 22 October 2018, which, according to the complainant, was confirmed on 11 March 2020 by the Corte di Cassazione (judgment n. 7012). The Consiglio di Stato took the view that Cineca is an "undertaking" and the activities for which Cineca receives public funding are economic activities. The Consiglio di Stato concluded that the IT services for the MIUR are available on the IT market and do not fall within the exercise of public powers. The public funding granted for the provision of IT services to the MIUR constitutes illegal State aid. According to Consiglio di Stato, Cineca does not fulfil the mandatory criteria relating to "in-house" status.

⁽¹⁸⁾ As an example, the complainant submitted the direct award of software services in favour of Cineca by the University of Calabria in 2014. In that case, the initial offer of Cineca was more expensive than a competing offer made by the complainant. Subsequently, Cineca reviewed its offer reducing the price. Eventually, the direct contract award to Cineca was annulled by the TAR (i.e. the regional administrative court) of Calabria.

- (24) The complainant further argues that universities would have further incentives to purchase from Cineca. Cineca provides IT services to MIUR necessary for collection and control of academic data – through its ANS database, the Student Registry – which makes it technically possible for the universities to obtain grants from the fund called “Fondo Finanziamento Ordinario” (“FFO”) ⁽¹⁹⁾. It is therefore essential that the management application systems used by universities are interoperable ⁽²⁰⁾ with that database, which is developed and managed by Cineca. The suppliers of management software to the universities must be familiar with the technical specifications of those databases for the receipt of data. While paying inflated prices, when using Cineca’s applications, universities would get easier access to the FFO grants which would offset the higher procurement costs.
- (25) In this respect, the role of Cineca, as a preferred supplier of services to the MIUR within the university system, allegedly confers upon Cineca a technical and economic advantage. This would explain why universities are willing to pay an allegedly inflated price to use Cineca’s applications.

2.2.3. Other allegations: cross-subsidization/overcompensation

- (26) The funds transferred annually by the MIUR for IT services provided to the MIUR, the revenues resulting from IT services provided to the universities and the funds provided by the MIUR for HPC services ⁽²¹⁾ constitute resources that could be used to cover the expenses incurred by the Cineca, in relation to all activities performed thereby for both the members of the Consortium, and other public and private entities. Therefore, according to the complainant, public funds would have been used to cross-subsidise economic activities where Cineca faces competition by the complainant.
- (27) According to the complainant, Cineca did not have an accounting separation in place. The complainant further alleges that the cost allocation methodology was not based on allocation drivers determined *ex-ante* ⁽²²⁾.
- (28) For the provision of IT services to the MIUR, Cineca should only be paid the amount corresponding to the services actually provided to the MIUR. The actual amount paid should be based on a report of the activities actually carried out. However, according to the complainant, until 2015 ⁽²³⁾, Cineca had not even submitted a report of the cost of the activities carried out for the MIUR in order to receive the corresponding amount paid ⁽²⁴⁾.

⁽¹⁹⁾ The Italian Universities are financed through a fund called FFO, i.e. Fondo Finanziamento Ordinario. The FFO is made up of two parts: a ‘base quota’ and a ‘bonus quota’. The ‘basic quota’ is automatically attributed to the universities, while the ‘bonus quota’ is assigned on the basis of quantitative and qualitative criteria.

⁽²⁰⁾ Essentially, interoperability makes it possible for different information systems to communicate with each other, that is, to exchange data.

⁽²¹⁾ The type of HPC services in question considered as a possible source for the assessment of cross-subsidisation are exclusively the services financed by the MIUR. Italy calls them institutional HPC services. In this decision, it will be designated as “non-commercial/institutional HPC activities”. References to the allegations prior to the opening decision as well as in the opening decision to HPC activities is to be interpreted as “non-commercial/institutional HPC activities”.

⁽²²⁾ The complainant argued that the 2015 cost report relating to the non-commercial/institutional HPC services, for example, did not provide separate accounts in accordance with the criteria laid down in Directive 2006/111/EC. The report was simply a retrospective reconstruction of the costs incurred by Cineca in order to receive the contribution from the Ministry.

⁽²³⁾ According to the complainant, in 2015 part of the staff allocated to the non-commercial/institutional HPC services was also allocated to other activities (i.e. European Union projects and to provide services to private HPC customers). This would have amounted to double reporting of staff costs by Cineca.

⁽²⁴⁾ In this respect, the complainant refers to the report concerning Cineca’s activities in the first half of 2015. 100 % of the costs of Cineca’s entire staff engaged in non-commercial/institutional HPC services (80 people in the ‘Super Computing Applications and Innovation department’ (SCAI)), were reported for such HPC services. Therefore, that staff could not have carried out any activities on behalf of the Consortium other than the non-commercial/institutional HPC activities. However, according to the complainant, it appears they were involved in other activities as well.

2.3. Italy's arguments prior to the opening of the formal investigation procedure

- (29) Italy argued that Cineca had an essential role in the context of the national educational and research system, which was to provide appropriate support to the MIUR, the university system, the research community, and the education sector. According to Italy, Cineca was essential to enable the MIUR and the universities to carry out their public task. Italy further argued that the prices paid to Cineca for the provision of IT services were not above market prices. Thus, Cineca did not receive a selective advantage. In addition, Cineca's IT services featured a high degree of comprehensiveness and interoperability with one another, a feature distinguishing Cineca from its competitors.
- (30) Finally, with respect to the alleged existence of cross-subsidisation, Italy argued that adequate accounting methodologies in compliance with Italian accounting rules ensured that cross-subsidisation did not occur prior to 2016, and that in 2016 a formal separation of accounts was introduced. This would have excluded cross-subsidisation.

2.4. Grounds for initiating the procedure pursuant to Article 108(2) TFEU

- (31) The Commission opened the procedure to seek to establish whether 1) the payments to Cineca for the provision of IT services to the MIUR and 2) the payments by Italian universities to Cineca for university IT services constituted State aid. In addition, the Commission sought to establish whether payments made to Cineca in connection with the provision of IT services to MIUR and for the HPC services resulted in overcompensation or were used to cross-subsidise Cineca's economic activities in markets where it faced competition from the complainant.

2.4.1. *Payment for the provision of IT services to the MIUR*

Economic activity

- (32) As regards the payments for the provision of IT services to the MIUR, the Commission provisionally concluded in the opening decision that it could not be excluded that an intrinsic link between the provision of IT services to the MIUR and the MIUR's essential duties existed, and that therefore the provision of IT services to MIUR did not constitute an economic activity. This preliminary conclusion was based on the *TenderNed* case law⁽²⁵⁾ and the Commission's final decision in SA.34402 ("the *HIS Decision*")⁽²⁶⁾, which found that certain activities, such as offering an electronic platform enabling public authorities to comprehensively manage public procurement procedures (*TenderNed*) and the provision of IT services to public universities (the *HIS Decision*) were intrinsically linked to an essential duty of the State and were necessary to fulfil those essential duties. Hence, those activities would not constitute an economic activity.

Advantage

- (33) Further, the Commission expressed doubts and sought comments as to whether the MIUR paid market prices for the services in question or whether Cineca benefitted from a selective advantage. The Commission noted that Italy did not demonstrate that the prices for the provision of IT services to MIUR were determined through a competitive, transparent, non-discriminatory, and unconditional tender procedure, or through any other competitive methods such as e.g. independent studies⁽²⁷⁾.

⁽²⁵⁾ Judgment of the General Court of 28 September 2017, T-138/15, ECLI:EU:T:2017:675, paragraphs 59, 83 and 90, confirmed by the judgment of the Court of Justice of 7 November 2019, C- 687/17 P, paragraphs 44 and 45.

⁽²⁶⁾ Commission Decision (EU) 2020/391 of 20 September 2019 on the measure SA.34402 – 2015/C (ex 2015/NN) implemented by Germany for Hochschul-Informationen-System GmbH (OJ L 74, 11.3.2020, p. 22). Recital 127. An appeal of this decision was dismissed; see case T-34/20 in relation to which the General Court issued an order on 18 January 2021.

⁽²⁷⁾ Judgment of the General Court of 12 June 2014, *Sarc v Commission*, T-488/11, ECLI:EU:T:2014:497, paragraph 98. *Land Burgenland v Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, ECLI:EU:C:2013:682, paragraphs 94 and 95.

2.4.2. Payment for the provision of IT services to Italian universities ⁽²⁸⁾

Economic activity

- (34) As regards the provision of IT services to Italian universities, the Commission provisionally concluded, on the basis of the *HIS Decision*, that it is an activity that is intrinsically linked to the State's task of providing tertiary education and hence it is not of an economic nature. Should this provisional conclusion be confirmed, Cineca would not be considered an undertaking within the meaning of relevant case law with respect to that activity, and the payments by those universities to Cineca would not constitute State aid.

State resources and imputability

- (35) The Commission raised the question of whether the universities' decision to select Cineca for the purchase of their IT software are imputable to the State. The opening decision preliminarily concluded that imputability was likely to be present both prior to as well as after the adoption of the so-called "salva Cineca" law (i.e. Decree Law No 78/2015). Prior to the entry into force of this law, imputability may have been the result of the qualification of Italian universities as public bodies and the presence of joint representatives of the universities and the MIUR on the decision-making body of Cineca despite the fact that a significant portion of universities opted to purchase IT services from alternative providers (see recital 56 of the opening decision).
- (36) Following the entry into force of the law, imputability was considered to be likely on the basis of a provisional interpretation of the salva Cineca law requiring that entities forming part of the education, university and research structure provide IT services for their operations themselves or to procure them through bodies that have the same characteristics as Cineca.

Advantage

- (37) Further, the Commission provisionally concluded that the universities may not have paid a market price for the services provided by Cineca, and thus Cineca may have benefitted from a selective advantage.

2.4.3. Overcompensation and/or cross-subsidisation of activities where the complainant is a competitor

- (38) Finally, the Commission raised the question of whether Cineca has cross-subsidised its sales of IT products and services by using public funds received from the MIUR for the non-commercial/institutional HPC activity and/or for IT services to the MIUR to support its sales of university software services and IT services to State administration entities, in two segments where the complainant is a competitor of Cineca.
- (39) The opening decision noted that a formal accounting separation system was introduced only in 2016. Before 2016, Cineca used a cost accounting procedure of "direct cost allocation", consisting of profit centres, cost centres and commitments, broken down by reference to the operational units of Cineca's organisational arrangements. The current accounting separation system allows for a more detailed cost/revenue correlation procedure with costs fully attributed to the relevant business units.
- (40) The opening decision also explained that Cineca had in fact re-drafted the annual accounting (cost) report (for the non-commercial/institutional HPC services) in 2015 applying the criteria introduced in 2016. According to the restated cost report, Cineca had higher costs than the costs incurred and billed to the MIUR at the time of the original report, i.e. in 2015.
- (41) However, the Commission did not have sufficient data to verify the accounting methodology used by Cineca for its recalculation and the actual data to which this methodology was applied.

⁽²⁸⁾ It must be pointed out that the opening decision drew the preliminary conclusion that the provision of IT services to Italian public universities may not constitute an economic activity (on the basis of the *HIS Decision*). See recital 114 of the opening decision and compare with recital 127 of the *HIS Decision*.

- (42) The Commission thus sought to establish whether sufficient safeguards with respect to effective account separation were established within Cineca before 2016 (see recital 30), and whether the account separation methodology established in 2016 was effective. In the alternative, the Commission sought to establish whether any other system was put in place that prevented cross subsidisation and/or overcompensation.

3. COMMENTS FROM INTERESTED PARTIES

- (43) The Commission received comments from the complainant, three undertakings, two of which are active in the IT services sector, the Italian authorities, and Cineca.

3.1. Comments from the complainant

3.1.1. IT services to the MIUR

- (44) According to the complainant, the annual public financing by the MIUR to Cineca for the provision of IT services to the MIUR constitutes illegal and incompatible aid. The complainant states at the outset that it is a competitor to Cineca in the public administration IT services sector and lists projects that it successfully carried out on behalf of public administration entities. These include the digitisation of the Committee for International Adoptions of the Prime Minister's Office ⁽²⁹⁾, activities for the municipality of Bari, the creation of a public register for meningitis cases for the Spallanzani Hospital of Rome, and a labour market related IT service for the Lazio regional authority. The complainant refers to regional court judgments and a Council of State judgment ⁽³⁰⁾ which acknowledged its standing to challenge the support Cineca received for the provision of IT services to the MIUR.

3.1.1.1. Economic activity

- (45) The complainant argues that the provision of IT services to the MIUR constitutes an economic activity, as it was pointed out by an Italian Council of State judgment ⁽³¹⁾ which states that "the IT support services for the MIUR (...) can be found on the market for I.C.T. services and products through the common public tendering procedures and do not fall within the prerogatives of the public authorities". EU merger decisions are also based on the notion that IT services are offered in various segments of the IT services sector demonstrating that most providers are operating in a large number of customer sectors.
- (46) Further, the Italian Competition Agency held in procedure A490 – *Telematics Civil Process* that the actions of "Net Service", a company dominant in the market for the development and operation of online telematic civil trial (PCT) negatively impacted the downstream market of application software for legal professionals operating within PCT. Net Service obtained an unfair advantage on the market due to its privileged relationship with a government ministry. Another opinion, procedure 1778 – *Electronic School Register*, found a breach of Article 102 of the TFEU by two undertakings with a combined market share of more than 50 % in the market of innovative IT applications for schools through restricting the compatibility of their software with competitors' registers. These decisions, according to the complainant, confirm the economic nature of the activities in question while also finding that these activities constitute means that are distinct and separate from the exercise of State power.
- (47) These examples are said to demonstrate that Cineca is a mere supplier of IT services to the MIUR and the universities, hence it is an undertaking. This undertaking has acquired a dominant position on the market, as a result of receiving direct awards in breach of the European public procurement rules, which also breached the combined provisions of Articles 102, 106, 28, 49 and 56 of the TFEU.

⁽²⁹⁾ This work was carried out by Cineca until 2015-2016, which used the complainant as subcontractor for the project. Subsequently, the complainant obtained the contract on its own.

⁽³⁰⁾ See e.g. Council of State judgment No 6009/2018, Section 2.2. and judgment of regional court TAR Lazio 10528/2019.

⁽³¹⁾ Council of State judgment No6009/2018 section 6.2.

3.1.1.1.1. Analysis of the applicable case law ⁽³²⁾

(48) According to the complainant, the Commission decision's analysis of the "intrinsic link" argument taken from *TenderNed*, *ZVG Portal*, *CompassDatenbank* cases (in view of the *Scattolon* case) is incorrect. According to these cases, an activity is not economic, if it is connected, by its nature, purpose, and the rules to which the activity is subject, to an essential function of the State. In more detail, the complainant explains its understanding of the following elements of these cases along with their relevance to this case:

- (1) Legal obligation: in the above cases, there was a statutory obligation on the State entities not only to carry out an activity, but also relating to the *mediums* through which the activity was to be carried out: to adopt e-procurement procedures in the *TenderNed* case; the publication of information on judicial auctions on the internet in the *ZVG Portal* case; or to publish in a *publicly available database* data on undertakings pursuant to an EU Directive in the *CompassDatenbank* case. According to this case law, the *mediums* in question must be inseparable from the public task. On the contrary, a generic obligation, such as for *Cineca*, is not enough to remove an activity from the sphere of entrepreneurial activity.
- (2) Internalisation: the public authorities must self-produce (internalise) the service without having recourse to a third party. The entities that developed/operated the service must be part of the State (*TenderNed* and *ZVG Portal*) ⁽³³⁾.
- (3) No decision to introduce a market mechanism: the Member State must not have decided to introduce market mechanisms, see *ZVG Portal* and Paragraph 16 of the SGEI Communication ⁽³⁴⁾. The Italian authorities have not decided to internalise the service in question, they decided to outsource it to a third party.
- (4) High-intensity link: the link between the activity and the public function of the State must be particularly pervasive/intensive. The service must in fact be inseparably connected. In the judgment of *EasyPay* ⁽³⁵⁾ which found that the activity of money order carried out by the Bulgarian Post which permits the payment of pensions was severable from old-age benefits, and was not the only means of making the payment.
- (5) Absence of consideration: in the *TenderNed* case and the *ZVG Portal* case, the service was provided free of charge or for a symbolic fee. In the *TenderNed* case, the Court pointed out that the non-profit making character of an entity is relevant but in itself not sufficient factor for the determination as to whether or not an activity is economic. In fact, the *CompassDatenbank* judgment found the activity to be non-economic because the remuneration was determined by law and not by the provider of the service. The fact that an activity is carried out for consideration appears to be objective proof that the activity is economic, i.e. that the State decided to introduce market mechanisms.

⁽³²⁾ Commission decision of 2.5.2013 in State aid SA.25745 (2013/NN) (ex CP 11/2008) – Germany – *National website for auctions in insolvency proceedings (ZVG Portal)* C(2013) 2361 final; Judgment of the European Court of Justice, *CompassDatenbank v. Republik Österreich*, C-138/11 of 12 July 2012, ECLI:EU:C:2012:449, Judgment of the Court of Justice of 6 September 2011, *Ivana Scattolon v. Ministero dell'Istruzione, dell'Università e della Ricerca*, C-108/10, ECLI:EU:C:2011:542.

⁽³³⁾ The complainant also refers in this context to 1) the *Foster* judgment, of 19 March 1992 (C-188/90; ECLI:EU:C:1990:313) which stated that a directive could be relied on against organizations or bodies which were subject to the authority or control of the State or had special powers and 2) paragraph 16 of the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4) ("SGEI Communication"); it follows from the Court of Justice case-law that Article 107 of the Treaty does not apply where the State acts "by exercising public power" or where authorities **emanating** [emphasis added] from the State act "in their capacity as public authorities".

⁽³⁴⁾ "Generally speaking, unless the Member State concerned **has decided to introduce market mechanisms**, [emphasis added] activities that intrinsically form part of the prerogatives of the official authority and are performed by the State do not constitute economic activities". Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, paragraph 16 (OJ C 8, 11.1.2012, p. 4).

⁽³⁵⁾ Judgment of the European Court of Justice of 22 October 2015 in *EasyPay v. Republic of Bulgaria*, C-185/14 ECLI:EU:C:2015:716. The complainant claims that in a recent judgment, the Court of Justice seems to have adopted an even stricter approach than earlier cases. According to *EasyPay*, an activity is inseparable from the exercise of official authority if it constitutes the "only means" for the provision of the service (i.e. money orders for pension payments in that specific case did not constitute the only means of paying pensions, hence that activity was economic).

- (6) Finally, the *Scattolon* judgment ⁽³⁶⁾ recognised that the supply of administrative, technical, and auxiliary staff to educational establishments, the operation of which is a State obligation, is an activity of an economic nature and is not connected to the exercise of public power. The renting of property or provision of technical or administrative staff is not different from the provision of software. They constitute an instrumental medium that allows public authorities to satisfy a general mandate in education which must be made available by the competent authorities to ensure the smooth functioning of public education. These mediums do not lose their economic character just because they are conducted in connection with a public mandate.
- (49) In sum, according to the complainant, as the opening decision points out, the MIUR does not provide education per se, but administrative and management services. The IT services offered by Cineca do not require any personalisation. They are easily available in the market and cannot, therefore, be regarded as “essential” or “indispensable”. In particular the services to the MIUR constitute a mere provision of classic operational management services for the operation of complex computer systems for a public administration entity, without any particularly complex technical solutions such as updating and redesigning web portals, consultancy, regulatory analysis; preparation of signature framework; maintenance of servers, software, ISDN lines, workstations, smartcards ⁽³⁷⁾. Cineca’s service is not more than the provision of qualified human resources, i.e. personnel such as project leader, functional analyst, system architect, system engineers and programmer analysts, advisors, and consultants. Any operator could provide such services with a transition period of three to four months.
- (50) On that basis, the complainant concludes that the services provided to the MIUR would constitute an economic activity. The MIUR itself does not provide education per se, and Cineca’s IT products and services merely enable the MIUR to perform its ministerial functions. There is no precise legal obligation imposed on the MIUR to provide IT services. The use of IT software and products used by the MIUR and universities are part of a more general objective of computerisation of the Italian public administration. The use of IT software and products by the MIUR and the universities is encompassed within the general objective of the computerisation of the entire Italian public administration (2012 e-government plan).
- (51) Cineca’s provision of the IT services distinguishes MIUR from other ministries, such as the Ministry of Justice, for example. The Ministry of Justice has a statutory obligation to provide justice services and to that end, to provide the necessary IT tools (see Article 16(3) (b) of Legislative Decree No 300/1999), and it still used Consip for the procurement of the services in question.
- (52) Unlike HIS GmbH in the *HIS* case, Cineca was not established with the explicit aim of carrying out the tasks it has carried out. Its aim, at its establishment, was to serve as an automatic data processing centre. (See 1969 bylaws: “to provide the most advanced data processing mediums”). In its bylaws of 1998 and 2005, nothing mentions the goal of providing IT services. Only the 2006 bylaws mention the task of “providing appropriate information systems”. Only after the 2017 amendment of Cineca’s Articles of Association was a reference to “IT services” mentioned.
- (53) No mandate for the provision of IT services was mentioned in the legal provisions relating to the merger between Cineca, CILEA and CASPUR ⁽³⁸⁾, either. The relevant regulation only establishes the option for the MIUR and the universities to request IT services from Cineca.

⁽³⁶⁾ Judgment of the Court of Justice of 6 September 2011, *Ivana Scattolon v. Ministero dell’Istruzione, dell’Università e della Ricerca*, C-108/10, ECLI:EU:C:2011:542, paragraph 44-47.

⁽³⁷⁾ See the 2015 cost report for services to the MIUR. These are pure IT technical support services to the MIUR for the management of websites, administrative processes, and document dematerialisation (i.e. digitisation).

⁽³⁸⁾ Article 7(42-bis) of Decree Law No 95/2012: “The Ministry of Education, Universities and Research shall promote a process of incorporation of the inter-university consortia Cineca, Cilea and Caspur in order to streamline spending for the functioning thereof through the establishment of a single entity tasked with providing adequate support in terms of innovation and provision of services, for the needs of the Ministry, the university system, the research sector and the education sector. The implementation of this paragraph will not generate new or additional costs for public finance”.

- (54) Furthermore, the entrepreneurial vocation of Cineca would interrupt the intrinsic link of its activities with a public function. The activity which lacks an intrinsic link to a public function is outsourced to a third party with a business vocation. This is the conclusion according to *ZVG Portal*, according to which the economic nature of an activity must be judged in the context in which the activity takes place.
- (55) Cineca's Articles of Association also mentioned the possibility of Cineca's provision of services to private undertakings⁽³⁹⁾. Cineca's sphere of activities and client base expanded dramatically since its establishment which originally only served as supercomputing centre. It has expanded into the university IT sector including in foreign countries and into several industries, such as healthcare and biomedical industries, pharmaceutical industry as well as various other industries in which Italian and international companies, such as ENI, are active. Cineca also held stakes in other businesses such as in KION (with regard to the university IT business) and SCS Srl (in connection with the HPC activity). Cineca licenses software and withholds economic exploitation rights both in connection with public administration software⁽⁴⁰⁾ as well as university IT software.
- (56) Both EU level as well as Italian judgments support the complainant's arguments relating to the economic nature of the provision of IT services to the MIUR. In the judgment of C-3/88 *Commission v. Italy*, the ECJ found that the "the design, programming and operation of data processing systems are of a technical nature and are thus unrelated to the exercise of official authority"⁽⁴¹⁾.
- (57) The TAR Lazio court found in its judgment No 2922/2017 that "there is the activity requested from a third party (in this case, Cineca) to meet these specific institutional needs, such as the creation of a website, a database, or a computer application. The latter is an economic activity and remains such, since it concerns the provision of services or the production of goods, which may, in the abstract, be acquired by the institutional body concerned on the market of ICT products and services".
- (58) In sum, the complainant considers the provision of IT services to the MIUR to constitute an economic activity.

3.1.1.2. Selective economic advantage

- (59) The complainant disputes the Commission's position as to the use the Market Economy Operator (MEO) principle for the determination of a selective advantage. It is because the non-refundable⁽⁴²⁾ grants, according to the complainant, cannot be considered as consideration for the acquisition of IT services, since for that, the amount would need to be charged to a different section of MIUR's annual cost estimate⁽⁴³⁾. In addition, there would have needed to be a contract or other document to regulate the transaction *ex-ante*. Further, there was no VAT payment on these payments which would have been necessary if it had been a consideration for services. Finally, there was no reporting obligation relating to these payments, and no proof of existence of any such reports for the years 2004 to 2016.

⁽³⁹⁾ Only in 2017 were these articles amended to indicate that only consortium members are entitled to Cineca's services.

⁽⁴⁰⁾ A recent Italian court case (Council of State judgment 30/2020 of 5 December 2019) confirmed that the source code of a software Cineca developed for a competition administered by the MIUR constituted Cineca's property.

⁽⁴¹⁾ Judgment of the Court of Justice of 5 December 1989, C-3/88, ECLI:EU:C:1989:606, paragraph 13. The question in this case was whether Italy's practice of contracting IT services only with entities in public ownership was in line with the TFEU's provisions of freedom of establishment. The complainant argues that the fact that the case involved the violation of a Treaty article (Article 51 TFEU) unrelated to State aid, is of no relevance. For the question of whether Cineca is an undertaking, the complainant also advances that the question is whether the activity can, at least in principle, be carried out by a private undertaking with a view to making a profit. (See Opinion of Advocate General Jacobs in case C-264/01 delivered on 3 May 2003 in *AOK Bundesverband, and Others*, ECLI:EU:2003:304." In assessing whether an activity is economic in character, the basic test appears [...] to be whether it could, at least in principle, be carried on by a private undertaking in order to make profits).

⁽⁴²⁾ Before 2015, these funds, allocated annually *ex-ante* by means of a law decree, would have been non-repayable; hence it would be clear that they were not directly linked to the actual activities carried out by the Consortium for the MIUR. This view was allegedly confirmed by the judgment of Consiglio di Stato, Sez. VI, No 6009/2018 of 22 October 2018, as confirmed on 11 March 2020 by the Corte di Cassazione (judgment n. 7012).

⁽⁴³⁾ In case of "consideration", the amounts should have been charged to category of costs specifically intended for intermediate consumption and capital goods, under the responsibility of the Department for the Planning and Management of Human, Financial and Instrumental Resources.

- (60) According to the complainant, the opening decision states that Cineca was not selected on the basis of a proper tender. According to the complainant, MIUR thus breached the public procurement rules given that Cineca is not an in-house entity of the MIUR. The procurement of IT products and services through public procurement is a widely accepted practice among Italian public administration entities ⁽⁴⁴⁾. In fact, Article 1 (512) of Law 208/2015 requires that for the purpose of optimising and rationalising purchases of “IT goods and services and connectivity, ministries and public universities (...) shall satisfy their needs exclusively through the purchase and negotiation tools of Consip or [other entities] for goods and services [that are] available from Consip or these other entities.”
- (61) The complainant states that Consip is widely used for the procurement of comparable specialised products and services such as police cars. Examples include the Ministry of Justice awarding a contract to the undertaking “Net Service” following a tender for the development of a technological platform for the Ministry for the introduction of “electronic civil procedure” in the entire territory of Italy, which forms part of the Ministry’s essential function. The MIUR itself also launched a restricted tender for the development and management of education information system, which forms part of its essential functions.
- (62) In terms of advantage, the complainant argues that not obtaining the services through a public procurement procedure enabled Cineca to provide MIUR with services that it would not have otherwise been able to provide.
- (63) The complainant further argues that the prices charged by Cineca are above market level. Although the Lazio Regional Administrative Court judgment No 10528/2019 ⁽⁴⁵⁾ – relating to the 2018 award for the IT services to the MIUR – actually excluded that the amount of compensation exceeded market prices, but that finding was inadequate, because the report used the wrong benchmark for market prices ⁽⁴⁶⁾. The correct benchmark would have been the prices quoted by Consip for the various specialists in a tender for “integrated management systems for public administration” which is comparable to Cineca’s services, and which had been won by a group of IT providers. Cineca’s prices exceeded Consip tender prices by 96 %.
- (64) Further, an expert opinion provided by Cineca about the market value of Cineca’s services to the MIUR ⁽⁴⁷⁾ (“Expert opinion on services to the MIUR” or the “Corso study on the MIUR services”) uses Assinter prices as a market benchmark for the compensation of specific expertise. Assinter is an association of Italian undertakings that operate according to an in-house model. Thus, these prices would not be an appropriate benchmark because they are established in the absence of a competitive tender procedure. Another proper benchmark would have been the rates resulting from another Consip tender for awards in connection with the “Public Connectivity System.” Finally, the Corso study on the MIUR services uses hypothetical estimates for certain elements, such for work required for development and evolutionary maintenance activities, whereas it should have used actual figures such as total number of hours worked or actually incurred costs.
- (65) The 2018 cost report submitted by Cineca to the MIUR relating to the costs of providing the IT services to the MIUR was prepared *ex-post* and not *ex-ante* as required by the EDF case law ⁽⁴⁸⁾. The report clearly refers to non-economic factors, such as the “institutional interests”, and benefits gained by the reference users. Non-economic interests cannot be taken into consideration in a MEO test.

⁽⁴⁴⁾ As shown on the relevant website, managed by Consip: “The programme for streamlining purchasing within the public administration uses ICT technologies applied to the procurement of the public administration with the aim of streamlining the expenditure of the administration, by improving the quality of purchasing and reducing unit costs, simplifying, and boosting the speed and efficiency of public procurement processes, and guaranteeing transparent and traceable purchasing processes”. See the website: <https://www.consip.it/attivita/programma-di-razionalizzazione>.

⁽⁴⁵⁾ Published on 13.8.2019, section 3.3.1. “(...) adequate evidence has been provided to consider that the offer submitted by Cineca is economically appropriate, its comparison with market prices and the provision of payment within the limits of the maximum amount allocated by the contested decree (...) after reporting the amount actually due. These factors are considered to exclude that the contribution allocated to Cineca and, consequently, the amount that will actually be paid, can be classified as State aid.”

⁽⁴⁶⁾ The proper benchmark is not a combination of Consip prices and Assinter prices (as described in the award letter by MIUR prepared to show economic adequacy pursuant to the Italian national public procurement legislation) but the prices of a specific tender for ICT services for Italian public administration that was actually won by a group of well-known companies.

⁽⁴⁷⁾ The expert opinion is titled “Notes on the valorisation of Cineca services to the former MIUR”. The complainant notes that it does not have access to the underlying technical reports of the expert opinions.

⁽⁴⁸⁾ Judgment of the Court of Justice of 5 June 2012, *Commission v. EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraph 95.

- (66) The expert opinion (see recital 64) relating to the value of the services to the MIUR in the years between 2006 and 2016) was based on an incomprehensible calculation methodology. The estimates used for the value of the work invested in the provision of the MIUR services is hypothetical and thus may be misleading. For example, the estimation of the work relating to the development work using the Assinter benchmark, the extrapolation of the values from 2019 for the year 2018 through the application of a “degree of turbulence” from year to year, and the estimation of the degree of productivity using the International Software Benchmarking Standards Group benchmarks are all questionable. Finally, for the workload input, Cineca should have used the documented, real data based on the annual reports, or on the cost data, which could have been extracted, had Cineca had account separation in place. The use of profit and loss account for receipts/revenues demonstrates the lack of account separation.

3.1.2. *IT services to the universities*

- (67) BeSmart states that it is a competitor to Cineca in the university IT services segment. BeSmart’s university software product, “smart_edu” is an advanced ‘Enterprise Resource Planning (ERP)’ product made up of numerous operational modules covering all management and computerisation needs of Italian universities. The product was developed in accordance with Italy’s Digital University Guidelines adopted by the MIUR. It is available both as a product to be installed at universities’ data centre and also as a “software as a service (SaaS mode). This latter version is included in the AgID ⁽⁴⁹⁾ catalogue of cloud services qualified for public authorities. Smart_edu is also available in the Mepa system, i.e. in the electronic market for public procurement, which is managed by Consip. The most important modules of smart_edu are as follows: 1) for university governance: asset accounts, automated management of information flows, Smart GOV modules for university governance, business intelligence, and advanced telephony solutions; 2) for university offices: accounting, allocation of offices, and classrooms for various classes, research register, placement services, international mobility management; 3) for secretariats: student secretariat managing student careers event workflow, student files, data warehouse, payment management system; 4) for teachers: managing examination sessions, creating teachers’ profile, provision of remote signature, provision of electronic storage, etc; 5) for students: e-learning modules, digital stamps for digital certificates, platform for drawing up calls for tenders, ranking lists, etc. For all these functionalities, BeSmart operates corrective, evolutionary and ongoing maintenance services, technical assistance, and helpdesk.
- (68) Despite Cineca’s dominance, BeSmart was able to compete with Cineca, (with lower prices and better quality) and a number of universities managed to change supplier. Cineca markets the U-GOV modules separately and they are interoperable with the products of other providers and universities have no difficulties in this respect.
- (69) BeSmart significantly increased the number of its university clients between 2014 and 2022. Some former Cineca/KION clients switched for BeSmart and some universities selected certain systems of BeSmart.

3.1.2.1. *Economic activity*

- (70) In addition to the analysis of jurisprudence and case law (see recital (48), which the complainant appears to believe is applicable to the provision of IT services to the MIUR, the complainant presents a number of arguments specifically relevant to the provision of IT services to the universities. The complainant states that Cineca entered the university IT services market in 2001, when the market already existed, with the undertaking KION, that has been characterised by a strong profit making and expansionary motive ⁽⁵⁰⁾.

⁽⁴⁹⁾ Agenzia per l'Italia Digitale (Digital Italy Agency). The agency is the technical agency of the Presidency of the Council of Ministers. The main purpose of the Agency is to guarantee the achievement of the Italian digital agenda objectives and contribute to the diffusion of information and communication technologies, with the aim of fostering innovation and economic growth. AgID has the task, among other things, of coordinating public administrations in the implementation of the Three-Year Plan for information technology in Public Administration.

⁽⁵⁰⁾ KION’s operation of Cineca’s software company has a profit margin of 1 %, whereas its market project activities achieve a 20 % margin. It has expanded into the university IT sector including in foreign countries.

- (71) The IT services to university offered by Cineca do not require any customisation/personalisation. They are used in the university's organisational and administrative processes. These are Enterprise Resource Planning ('ERP') ⁽⁵¹⁾ products that are not different from ERP products for other types of undertakings. The products and services are mediums that are completely separate from the public mandate of Cineca and are easily available in the market ⁽⁵²⁾. Therefore, they cannot be regarded as "essential" or "indispensable".
- (72) There is a market for these services with competitors such as SAP and Oracle, Italian Teams Systems, Zucchetti and Maggioli, and the existence of a market was confirmed also by decisions of the Italian Competition Agency ⁽⁵³⁾.
- (73) The complainant argues that Cineca operated on the market of IT products and services as an undertaking and not as a functional entity closely linked to the exercise of general interest mandate of the universities. This is most evident in connection with the universities, where the partial subsidiary setup by Cineca with private entities pursued a profit making and expansionary objective. These activities thus constitute activities of an "undertaking" and constitute a means that is separable from public authorities.
- (74) The complainant also argues that there is no legal obligation on Cineca to provide university software to universities. Only the 2017 amendment of the Cineca's Articles of Association contains a reference to "information services". There is no reference to any sort of mandate with respect to university IT services relating to Cineca either in relation to the merger of Cineca with two other entities (see recital 53) or in the "salva Cineca" law.
- (75) According to the complainant, Article 1 (512) of Law 208/2015 also demonstrates the lack of legal obligation on Cineca to provide IT services to universities. This provision requires that for the purpose of optimising and rationalising purchases of "*IT goods and services and connectivity*", ministries and public universities shall satisfy their needs exclusively through the purchase and negotiation tools of Consip or other entities for goods and services available from Consip or these other entities.

3.1.2.2. State resources and imputability

- (76) The complainant claims that the measures in favour of the universities are imputable to the Italian State regardless of whether or not there is legal obligation to use Cineca as an IT service provider arising from the "salva Cineca" law.
- (77) Further, the opening decision erred in referring to the rules of imputability relating to public undertakings (see recitals 121-122 of the opening decision). Instead of the criteria laid down in these recitals ⁽⁵⁴⁾, it is Point 39 of the Commission Notice on the notion of State aid ("NOA") ⁽⁵⁵⁾ that is relevant. According to this point, "in cases where a public authority grants an advantage to a beneficiary, the measure is imputable to the State even if the authority in question enjoys legal autonomy from other public authorities" ⁽⁵⁶⁾.

⁽⁵¹⁾ "Enterprise Resource Planning" is a software used for operating a business supporting automation and processes in finance, human resources, manufacturing, supply chain, services, procurement, and more.

⁽⁵²⁾ In addition, the complainant claims that Cineca was not the one that developed all operational modules included in the U-Gov (university software). It obtained them thorough the purchase of undertakings that owned the products. U-Gov is far from being complete, and BeSmart's product has more features than Cineca's. Thus, one cannot say that other operators offer incomplete solutions.

⁽⁵³⁾ The case AS 755 of 10 September 2010 of the Italian Competition Agency found that Cineca's market share in the university software segment was around 80 %. The complainant claims that this share is currently 90 %, but there is no indication of where this information comes from.

⁽⁵⁴⁾ I.e. whether the entity can take a decision relating to the measure without taking into account the requirements of public authorities, the presence of factors of an organic nature which link the public undertaking to the State, the nature of the public undertaking's activities, etc.

⁽⁵⁵⁾ 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).

⁽⁵⁶⁾ Also highlighted by Advocate General Whatelet in its opinion in *Commerz Nederland* (C-242/13) paragraph 65.

- (78) Universities are not public undertakings, hence the *Stardust Marine* jurisprudence⁽⁵⁷⁾ is not applicable. *Stardust Marine* held that “[e]ven if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State”. Imputability therefore is to be examined on the basis of “whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures”⁽⁵⁸⁾. However, given that a university is not an undertaking, it is not necessary to determine whether a public authority has been involved in the decision in question.
- (79) In this case, although State universities cannot be considered a structure (or body) of the central State, they nevertheless form part of the State apparatus in the broadest sense, just like autonomous entities, such as local bodies and regions, since they all share an autonomy of constitutional standing. In the case of universities, this autonomy is ‘functional’ and ‘political’ for the local bodies and regions.
- (80) Specifically, universities constitute non-economic public bodies fully in line with the concept of ‘public administration’⁽⁵⁹⁾, as explained by the Italian legislator. Indeed, pursuant to Article 1(2) of Legislative Decree No 165/2001, “public administrations means all the administrations of the state, including institutes and schools of every level and branch and educational institutions, state companies and administrations with their own independent regulatory system, Regions, Provinces, Municipalities, Mountain Communities, and their consortia and associations, university institutions (...)”
- (81) Further, European public procurement laws are applicable to State universities. Through an express provision of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contract (“Public Procurement Directive”) ⁽⁶⁰⁾, State universities are included in the category of ‘bodies governed by public law’; that are established to satisfy ‘requirements of general interest, of a non-industrial or commercial nature’, are vested with a legal personality, and whose activities are financed ‘predominantly by the state’; they are also subject to ‘supervision’ by the State.
- (82) In addition, public universities are established by law, they possess public power and are subject to supervision by the MIUR and, in financial matters, by the Ministry of Finance⁽⁶¹⁾. The main source of their funding is State transfers, although they can regulate their own income. They are included in the list of public administrations in the consolidated profit and loss account drafted based on Article 1(3) of Law No 196/2009, drafted by the ISTAT, according to criteria dictated by Eurostat.

⁽⁵⁷⁾ Judgment of the General Court of 16 May 2002, *France v Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294.

⁽⁵⁸⁾ Judgment of the General Court of 16 May 2002, *France v Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294. “The mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the financial support measures in question here, to be imputed to the State”. Paragraph 52.

⁽⁵⁹⁾ On this point, the complainant refers to the *Air France v Commission* judgment, T-358/94, ECLI:EU:T:1996:194, paragraph 62, which states that ‘that conclusion is not undermined by the arguments to the effect that the Caisse enjoys legal autonomy from the political authorities of the State, that the appointment of its Director-General, who is subject solely to supervision by an independent supervisory commission, is irrevocable, that the Caisse has a special statute in relation to the Cour des Comptes, and that it has a particular accounting and fiscal regime. Those arrangements are part of the internal organization of the public sector, **and the existence of rules for ensuring that a public body remains independent of other authorities does not call into question the principle itself of the public nature of that body. Community law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid**’. [Emphasis added by complainant.]

⁽⁶⁰⁾ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94 of 28.3.2014, p. 65). See Article 1(9)(2), Annex III, No VIII.

⁽⁶¹⁾ The complainant argues that State universities are bodies established to satisfy ‘requirements of general interest, of a non-industrial or commercial nature’, vested with a legal personality, whose activities are financed ‘predominantly by the state’; they are also subject to ‘supervision’ by the State. The complainant cites, by way of analogy, the *Foster* judgment of 19 March 1992 (C-188/90; ECLI:EU:C:1990:313) that related to the reliance on directives not transposed with respect to the State. The relevant part in that case stipulates “that provisions of a directive could be relied on against **constitutionally independent authorities responsible for the maintenance of public order and safety**.” [Emphasis added by the complainant.]

3.1.2.3. Selective economic advantage

- (83) The complainant states that, similarly to the situation in connection with the services to the MIUR, there was no competitive selection procedure for the acquisition of university IT services on the part of the universities. The complainant is of the view that Cineca is not an in-house organisation of the universities belonging to the Consortium. As a result, the universities could and should have concluded contracts with Cineca only on the basis of a competitive selection procedure. The Italian Competition Agency's finding that direct awards to Cineca of university IT services contracts infringed public procurement legislation was confirmed by rulings of regional administrative courts (see TAR of Tuscany, Florence, No1521/2017 but see also Council of State judgment No 2383/2018).
- (84) In addition, the complainant claims that Cineca is selling university IT services above market price. The universities also fail to carry out an *ex-ante* examination of the offers by Cineca. In those few cases when alternative operators could provide offers, Cineca's offer always turned out to be higher than those of alternative providers.
- (85) As an illustration for Cineca's inflated prices, the complainant mentions the example of a purchase by the University of Calabria where prices would have been above market level, but which have subsequently been reduced ⁽⁶²⁾.
- (86) As regards a market study ⁽⁶³⁾ by Professor Corso, ("Expert opinion on services to universities" or the "Corso study on the university services") that was submitted by Italy, allegedly showing that the prices paid by universities did not exceed market prices, the complainant articulates a number of criticisms. It views, for example, the benchmark used by the expert opinion on services to university to be unrealistic because, similarly to the benchmark for the price of the services to the MIUR, the benchmark for the university services prices is also considered to be Assinter prices. In addition, the expert opinion ignored the existence of the complainant's services that were a real alternative. These services would have been available for EUR 250 EUR+VAT "Person Day" for the same application management services that the submitted study relates to. Finally, the valuation of the university services is based on the erroneous assumption that a competitor would limit its prices to managing corrective and evolving maintenance and user support and would not include the costs of developing and providing alternative and equivalent services. Thus, the hypothetical competitor would have the same costs as Cineca ⁽⁶⁴⁾.
- (87) The argument that Cineca's prices contain the development costs and the extra costs of customisation of the product/service for the universities is not credible because these products and services are exactly the same as the ones offered by BeSmart at lower prices.

⁽⁶²⁾ The complainant submitted the direct award of software services in favour of Cineca by the University of Calabria in 2014. In that case, the initial offer of Cineca was more expensive than a competing offer made by the complainant. Subsequently, Cineca revised its offer reducing the price. Eventually, the direct contract award to Cineca was annulled by the TAR of Calabria. A transaction relating to the University of Bergamo was also mentioned, in which a discount was achieved on the previously agreed fee.

⁽⁶³⁾ A study titled "Evidence from the study on the valorisation of services provided by Cineca to Italian universities", of 15 April 2021, by Professor Mariano Corso. [Evidenze dallo studio sulla valorizzazione dei servizi resi da Cineca alle università italiane].

⁽⁶⁴⁾ The complainant also submitted another technical report focusing on the "infrastructure hosting" subsegment between 2004 and 2018, which appears to support the position of Italy in connection with the issue of advantage relating to the sale of the IT services to the MIUR and the universities. This separate study was prepared by Mr Aiello of Partners4Innovation Srl. According to this study, the infrastructure hosting market segment only developed by the year 2014, hence before, it would not have been possible to use the market. As to the time period beginning 2015, the study says that turning to the cloud services market (i.e. IBM) would have cost 2,8 times more than Cineca's services. According to this separate study, Gartner, a research company, also confirmed this element based on its annual survey of a benchmark showing the percentage of IT expenses relative to turnover of mid-sized undertakings, Cineca's infrastructure costs were comfortably below. The complainant criticises the report for stating that no competitor existed for hosting services and for being contradictory to the Corso report.

- (88) The complainant further argues that universities would have additional incentives to purchase from Cineca. The high degree of interoperability between the MIUR's information system and the information systems for the universities facilitated Cineca's provision of IT services to the universities ⁽⁶⁵⁾. Besides, as a provider to the MIUR, if there is a modification in the MIUR software, Cineca is the first to be able to implement the modification in the university software. Thus, Cineca is a privileged provider that maintains a technical advantage over its competitors.
- (89) Based on these considerations, the complainant is of the view that Cineca obtains an advantage in connection with the sale of IT services to the Italian universities.

3.1.3. Cross-subsidisation/overcompensation

- (90) According to the complainant, the resources of Cineca consist of funds transferred annually by the MIUR for IT services provided to the MIUR, revenues resulting from IT services provided to the universities, funds provided by the MIUR to provide HPC services and any other payments to the Consortium by other public administrations ⁽⁶⁶⁾. These 'resources' would be used to cover the expenses incurred by the Consortium in relation to all activities performed for both the members of the Consortium and other public and private entities. Therefore, according to the complainant, public funds would have been used to cross-subsidise economic activities where Cineca faces competition by the complainant.
- (91) The complainant alleges that for HPC activities, Cineca received the following amounts annually, in the time period from 2015 to 2018: EUR 11 million from the MIUR for the non-commercial/institutional ⁽⁶⁷⁾ HPC activity, EUR 6 million from the undertaking ENI, and EUR 10 million from the EU for EU projects, including from the Horizon 2020 programme ⁽⁶⁸⁾.
- (92) The complainant also submitted shortly before the conclusion of the formal investigation procedure two investigative reports from the year 2020 that it claims support its arguments relating to the cross-subsidisation issues. One investigative report contains a public prosecutor's initial fact finding from Lazio which was published on 24 July 2020 ⁽⁶⁹⁾. The second report was issued by the Bologna Tax Police of 15 June 2020 ⁽⁷⁰⁾.

⁽⁶⁵⁾ The complainant claims that this was confirmed in the opening decision, but this is not the case. The opening decision stated in this regard that *the complainant* had made the following claims: "Cineca provides IT services to MIUR necessary for collection and control of academic data – through its ANS database, the Student Registry – which makes it possible for the universities to obtain grants from the fund called "Fondo Finanziamento Ordinario" ("FFO"). It is therefore essential that the management application systems used by universities are interoperable with that database, which is developed and managed by Cineca, and the suppliers of the management software to the universities must be familiar with the technical specifications of those databases for the receipt of data. While paying inflated prices, when using Cineca's applications, universities would get easier access to the FFO grants which would offset the higher procurement costs."

⁽⁶⁶⁾ Other public authorities, such as the Italian Medicines Agency (AIFA), the Customs Department and certain local authorities (e.g. some Italian provinces).

⁽⁶⁷⁾ As explained in footnote 21, for the non-commercial and non-EU funded HPC projects which are funded by the MIUR, the Italian authorities use the term "institutional" HPC activities, and it encompasses HPC services to State universities and research bodies. This decision uses the term "non-commercial/institutional HPC activities" to designate HPC activity that is not carried out on behalf and with the support of the EU or for private clients and which is financed by the MIUR.

⁽⁶⁸⁾ This does not include grants from the EUROfusion programme funded by EURATOM.

⁽⁶⁹⁾ This document was drafted by the Public Prosecutor of the Italian Court of Auditors in a procedure started by the latter against two Heads of Department of the Ministry and five persons holding positions in Cineca's management (Director Generals and Presidents) for loss of revenues incurred by the Treasury.

⁽⁷⁰⁾ This investigation resulting in the report originated by the complainant to enforce the judgment No 6009/2018 (see references in footnotes 17, 30, 31 and 42 for recitals 21, 44, 45, and 59 respectively) and was also triggered by allegations that there are indications of double (or even triple) reporting of the same personnel costs vis-à-vis the EU and private clients (see recital 119). The report also compared the original 2015 non-commercial/institutional HPC related cost report with the restated version of this report in 2019 (see recitals 40 and 102 et seq.) and concluded that neither one can be considered to be incorrect, given that they were drawn up using two different methods.

(93) The complainant's allegations and arguments can be divided into three major categories:

- a) the general lack of a method for the *ex-ante* determination of cost allocation between Cineca's various activities;
- b) examples of *ex-post* restatement of Cineca's cost reports submitted to the MIUR for reimbursement in connection with non-commercial/institutional HPC activities; and
- c) examples of overcompensation received as a result of 1) claiming reimbursement for non-commercial/institutional HPC related, and artificially inflated cost items from the MIUR, the EU, as well as from private clients, and 2) inaccuracies and inconsistencies in accounting.

3.1.3.1. General lack of a method for the *ex-ante* determination of cost allocation and other methodological deficiencies

(94) According to the complainant, Cineca did not have an *ex-ante* method for the allocation of costs in place (i.e. for avoidance of cross-subsidisation of business activities), as required by Article 4 of Commission Directive 2006/111/EC ⁽⁷¹⁾, ("Transparency Directive"), which mandates that public undertakings financed by the State maintain separate and reliable accounts relating to different activities carried on by the same undertaking. In other words, the complainant alleges that the cost allocation methodology was not based on allocation drivers determined *ex-ante* ⁽⁷²⁾. In particular, Cineca did not have clearly established, consistent, objectively justified and clearly defined cost accounting principles, as required by subsection (b) and (c) of Article 4 of the Directive.

(95) The complainant argues that for the IT services to the MIUR, Cineca should only be paid the amount corresponding to the services actually provided to the MIUR. The actual amount paid should be based on a report of the activities actually carried out. However, according to the complainant, until 2015 ⁽⁷³⁾, Cineca had not even submitted a report ⁽⁷⁴⁾ of the cost of the activities carried out for the MIUR in order to get the corresponding amount paid. In fact, Cineca started sending accounting reports to the MIUR (relating to the costs of the non-commercial/institutional HPC activity and the MIUR IT services) only from 2015 on, which in itself shows lack of compliance with the provisions of the Transparency Directive.

(96) According to the complainant, until 2015, Cineca did not have either a system for separation of accounts, or an analytical accounting system to separate the costs of orders ⁽⁷⁵⁾. Cineca simply received non-refundable grants without providing any costs or allocation drivers. The costs to be reported and allocated to individual business units were determined based on the profit & loss account prepared in the year following the subject year, i.e. *ex-post*.

⁽⁷¹⁾ 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). Article 4 provides that "(...) the Member States shall take the measures necessary to ensure that for any undertaking required to maintain separate accounts: (a) the internal accounts corresponding to different activities are separate; (b) all costs and revenues are correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles; (c) the cost accounting principles according to which separate accounts are maintained are clearly established. 2. Paragraph 1 shall only apply to activities which are not covered by specific provisions laid down by the Community and shall not affect any obligations of Member States or undertakings arising from the Treaty or from such specific provisions".

⁽⁷²⁾ The complainant argues that the cost reports for the non-commercial/institutional HPC activity constitute a retrospective reconstruction of the costs incurred by Cineca in order to get them covered by the contribution from the MIUR.

⁽⁷³⁾ According to the complainant, in 2015 part of the staff allocated to non-commercial/institutional HPC services was also allocated to other activities (i.e. European projects and to provide services to private customers). This would have amounted to double reporting of staff costs by Cineca.

⁽⁷⁴⁾ Elsewhere in the submission, however, the complainant claims that annual accounting reports Cineca sent to the MIUR were accompanied by a one-page document drafted *ex-post* titled 'MIUR Supercomputing Reporting Procedure'. The complainant points out that one of these one-page documents states that the starting point of the reporting is the costs in Cineca's Income Statement approved by the meeting of the Consortium. According to the complainant, this gives Cineca an opportunity to maximise the contribution from the MIUR by assigning extra costs to the MIUR cost reimbursement requests every June, when the income statement relating to the preceding year becomes available. This means that the costs are determined in retrospect and not *ex-ante*.

⁽⁷⁵⁾ The complainant claims that the MIUR never carried out a verification of Cineca's cost reports and that until 2014 (as was also established by the Bologna Tax Police report), no such reports were requested. Even in 2015, the MIUR only provided six cost categories that the 2020 report of the Bologna Tax Police deemed to be too vague and generic. The complainants argue that the 2020 Bologna Tax Police Report concluded that Cineca's removal, from 2016 on, from the reported costs, all costs related to other activities means that prior to 2016 this was not the case.

- (97) In any event, according to the complainant, Cineca itself admits in the annual accounts sent to the MIUR that between 2015 and 2018, it had a single register of internal accounts. At the same time, the complainant continues, Cineca maintains that it still ensured genuine separate accounting between distinct activities, even though this could not be the case.
- (98) The complainant points at specific language in some of Cineca's cost reports relating to the non-commercial/institutional HPC activity in support of its allegations. For example, the description of the methodology for the calculation of such costs (for 2015 and 2016) contains the statement that the "[i]ncome statement costs approved by the Consortium Meeting represent the starting data". This also means, according to the complainant, that the analytical accounting procedure is carried out *ex-post*.
- (99) Until 2014, the contribution from MIUR (for the non-commercial/institutional HPC activity) was in the form of capital contribution and as grants of equipment and only since 2015 was financing based on the day-to-day operation and costs of Cineca. The 2020 Bologna Tax Police report states that the difference between the two systems was substantial and allowed Cineca not to justify the costs incurred. It gave a wide margin of discretion in using the public funds and cross-subsidise other activities such as the MIUR services or other activities.

3.1.3.2. Examples of *ex-post* restatement of cost reports submitted to the MIUR

- (100) The complainant explains that costs reported to the MIUR relating to the non-commercial/institutional HPC activity is reduced (*ex-post*) by costs reported to the EU in connection with EU co-financed HPC activities. In sum, the complainant argues that there has been no system in place at Cineca that *per se* would be able to correctly identify and quantify both the direct and indirect costs *ex-ante*.
- (101) The complainant claims that since 2018, there is no longer a reference to the need to subtract *ex-post* the EU co-financed costs from the non-commercial/institutional HPC activity cost report ⁽⁷⁶⁾.
- (102) The complainant points at a number of problems with the 2015 cost report itself, and its restatement. The complainant refers to three cost reports relating to the non-commercial/institutional HPC activity in 2015. The first one refers to the first 6 months of 2015. The second one covers the full year of 2015, and the third one is for the full year of 2015 which is a restatement of the original full year report ("the restatement of 2019") for the year 2015 made in 2019 ⁽⁷⁷⁾. The complainant points out that the full year report (i.e. the second report) contained an amount of indirect costs that increased since the first report (i.e. from the report referring to the first six months of 2015) by EUR 2,8 million projecting the cost item unto the entire year.
- (103) The complainant alleges that while the indirect costs were increased in the restated report (see recital 102), the direct personnel costs decreased by almost a third between the original report and the restated report ⁽⁷⁸⁾.

⁽⁷⁶⁾ The complainant points at the newly appeared language in the 2018 report: "The complete separation of accounts through the existing cost accounting procedure means that costs are attributed to only one cost centre, thus excluding any double reporting of costs." The complainant presumably suggests with this statement that a complete separation of accounts was not in place prior to 2018.

⁽⁷⁷⁾ The background to this restatement was the initiation of an investigation relating to the 2015 figures for which the original documents were allegedly lost, and which had to be restated in 2019 using the analytical reporting method introduced in 2016 and already in existence in 2019.

⁽⁷⁸⁾ The number decreased from 82 in the original report to 36 in the restated (i.e. the 2019) report, as was also determined by the Bologna Tax Police report of 2020 (see explanation of this report in recital 92).

- (104) The complainant claims that the first and second cost reports for 2015 for the non-commercial HPC activity prove that all 82 persons were presented as having been employed for the non-commercial HPC activity full time as the list of costs items demonstrate ⁽⁷⁹⁾. Given that some work must have been carried out for projects not related to the non-commercial/institutional HPC activity, some part of this labour costs was reported to more than one client, leading to double accounting of these costs.
- (105) The complainant alleges other significant changes between the original (i.e. second report which was the first full year) report for the 2015 non-commercial/institutional HPC activity and its 2019 restatement. The 2019 restatement contained a new item, a EUR 6 343 000 VAT payment, which, according to a decision by the Italian Tax authority, was due on the basis of the sale of the services in the three-year time period ending in 2015. According to the complainant, it was incorrect to charge the entire amount for the year 2015, when this figure represents the cumulative amount owed to the Treasury at the end of the year 2015. Second, the complainant alleges that Cineca was reimbursed for this amount twice in the following manner: First, it was reimbursed when it claimed the expense in the original report. At the same time, Cineca recovered the amount from the Italian Treasury. Although the tax authority made Cineca to reimburse the Treasury, Cineca also claimed reimbursement for these costs in the restated (2019) cost reporting for 2015.
- (106) The complainant claims that the cost report for the non-commercial/institutional HPC activity for 2016 was restated in 2018 by deducting costs already accounted for previously in the amount of EUR 1 135 747. Cineca justified this adjustment based on a “fiscal transaction” and on the ‘recognition of costs by EUROfusion relating to the 2016 accounts’ ⁽⁸⁰⁾. It is clear that deducting costs from the accounting submitted to the MIUR as a result of recognition of the costs by the EU means that Cineca had accounted for that cost in the previous year to both the MIUR and the European Commission. The cost report for the non-commercial HPC activity for the year 2017 also contains a remark to the effect that a cost item of EUR 14 192 838 may need to be updated following the partial recognition of costs by the EU. Without these updates, the complainant claims, Cineca would have been reimbursed for the same costs twice.
- (107) According to the complainant, the analytical accounting procedure (since 2016) provides only for the possibility that the direct and indirect costs of the non-commercial/institutional HPC projects are adjusted (reduced) *ex-post* by costs of projects that are reimbursed by the EU (for EU funded projects). This means that non-commercial/institutional HPC financing is not separated from EU financed HPC projects and cost drivers are not allocated *ex-ante*. It also means that the final cost accounting depends on the amount of financing received from the EU.

⁽⁷⁹⁾ The opening decision states that Cineca was able to retroactively apply in 2018 (erroneously not referred to as the year 2019) the cost allocation methodology in place since 2016 to the cost figures of 2015 (see recital 146 of the opening decision). But according to the complainant, this retroactive application of the cost allocation methodology (in 2019 relating to costs for 2015) is not credible because an allocation driver using 100 % of work force for the non-commercial/institutional HPC activity cannot have possibly changed under the new methodology. Further proof that the 2015 report relating to the non-commercial/institutional HPC activity calculated with the totality of HPC staff working full time on non-commercial/institutional HPC activity was that for this activity (in the same year) a multiplication factor below 1 was used which shows that only a portion of the FTE (full time equivalent) was used.

⁽⁸⁰⁾ Based on the report by the Bologna Tax Police of 2020 (see recital 92), the complainant makes two further statements: 1) the report claims that the 2016 cost report had to be restated in 2018 and an item of EUR 3 872 315 had to be deducted as a result of reimbursement from the EU in the meantime; and 2) the report shows that in 2016, costs for acquisition of supercomputers and electricity costs have been double reported to the MIUR and the EU in a way that 100 % of costs were reported to the MIUR and 55 % reimbursement was granted by the EU resulting in a reimbursement rate for Cineca of 155 %.

3.1.3.3. Examples of overcompensation received as a result of claiming reimbursement for the same costs as well as of inaccuracies and inconsistencies ⁽⁸¹⁾

- (108) As an example, the complainant refers to the practice/rule that the EU reimburses 75 % of staff costs relating to a funded project, but Cineca reports 100 % of the staff costs to the EU. Cineca reports the remaining 25 % of the EU project's staff cost to the MIUR, although the same 25 % of the working time of the staff had already been accounted for (i.e. reported to the EU) in connection with the EU funded project. This is a double reporting of costs.
- (109) The 2015 accounting report uses a wholly inaccurate algorithm for the allocation of indirect costs for non-commercial/institutional HPC projects. It is because the calculation of the costs of a specific HPC project allowed for the deduction of only the direct costs of that specific project from that specific project's indirect costs. The correct formula would subtract all direct costs (of all other HPC projects of the same client) from that specific project's indirect costs. In the formula used by Cineca, indirect costs were thus overstated, resulting, in an example which the complainant created for the purpose of illustrating the problem, in a 50 % overstatement of overall project related costs. In addition, the complainant also challenges Cineca's indirect cost allocation method in the 2015 report of the non-commercial/institutional HPC activity on the ground that it allocates 33,33 % of all Cineca's indirect costs to non-commercial/institutional HPC costs.
- (110) The complainant also alleges that in connection with the 2015 cost report for non-commercial/institutional HPC activity, Cineca asked for reimbursement from the MIUR for HPC activities carried out for private clients such as ENI. Proof for this, according to the complainant, is a list in Cineca's 2015 financial statements, which contains ENI as a company with which Cineca cooperates in the HPC field and carries out HPC activities.
- (111) Other inconsistencies also render the number of staff working on the non-commercial/institutional HPC activities in 2015 non-credible. As explained in recital (104), the first two reports relating to this activity indicates 82 persons being employed full time on this type of projects, whereas in the years 2016, 2017 and 2018, the corresponding figures were 21,87, 19,1 and 19,06 FTE (Full Time Equivalent), respectively, i.e. fewer than 82 persons. According to the complainant, this is conducive to the finding that in 2015, there was overcompensation based on the staffing costs.
- (112) Further, in 2015, Cineca allegedly allocated the entire HPC personnel for the non-commercial/institutional HPC activity for reimbursement by the MIUR, while, at least partially, the same personnel costs (relating to 7 specific workers) were reported as FTE employed in the framework of EuHIT, an EU co-financed project running between 2014 and 2016. Thus, according to the complainant, Cineca engages regularly (and certainly did in 2015) in double accounting of its non-commercial/institutional HPC related costs.
- (113) The complainant alleges other examples for possible double accounting of costs. For example, the 2015 accounts for scientific calculation (or FERMI and Galileo + Pico) show that EUR 1 541 380,40 electricity cost was allocated for reimbursement by the MIUR for non-commercial/institutional HPC activity. The same figure is indicated for EU projects, such as the PRACE or for services for private clients like ENI. Hence, this electricity cost item represented an overstatement.

⁽⁸¹⁾ Some of these inaccuracies and inconsistencies are also described in the Bologna Tax Report, which stated that the new accounting methodology (i.e. the one in use since 2016) also failed to properly separate the costs of EU projects from the costs to be reported to the MIUR. The report in fact said this: "The Italian Tax Police confirms that even with the 2017 accounting methodology, costs arising from research activities funded by the EU were not properly separated from the ones covered by the HPC contribution granted by the Ministry."

- (114) As regards Cineca's 2015 reimbursement claim with respect to the same HPC related cost reimbursement from the MIUR as well as from the EU, the complainant also draws attention to a legal opinion the Milan law firm, Granelli, prepared on the question of reimbursement rules of EU financed and of non-commercial/institutional HPC projects ("the Granelli opinion"). The opinion states that all HPC related personnel costs can be reported to the MIUR "regardless of whether the costs had been considered, in whole, or in part, to be eligible in the framework of EU projects." From this, the complainant concludes that in the 2015 non-commercial/institutional HPC cost report, Cineca reported the same cost for reimbursement by the EU as well as the MIUR ⁽⁸²⁾.
- (115) Further, there are other inconsistencies in the reporting of the relevant cost figures. For example, the cost of amortisation/depreciation for non-commercial/institutional HPC services was reported as EUR 972 703,04 for the year 2015 and EUR 8 575 000 for 2016. However, Cineca's financial statements indicate a somewhat lower amount for these figures: EUR 932 703 and 7 830 720, respectively.
- (116) The complainant also claims that (at least from 2016), the costs of EU co-founded HPC projects are deducted from the cost reports submitted to the MIUR for non-commercial/institutional HPC services. However, costs for private clients covered by consideration received by these clients, like the EUR 6 million from ENI in 2015, are not deducted from the said reports ⁽⁸³⁾.
- (117) According to the complainant, there are inconsistencies relating to the reporting of personnel costs also in years other than 2015. For example, the 2016 and 2017 reports for the non-commercial/institutional HPC activity only contained "average" personnel costs, and not "the actually reported" personnel costs like the 2018 report (in the 2018 report, the average personnel costs exceed the actually reported personnel costs).
- (118) As regards personnel costs in 2018, the cost report for that year reveals that for indirect personnel costs of the "Administrative Structure and General Management" unit, the calculation involves 35 persons (relating to the non-commercial/institutional HPC), which, in addition to being only a portion of the 2015 year personnel cost of 82 persons, is inconsistent with the figure of 19,06 FTE reported relating to the direct personnel cost (see recital 111). Besides, the 2018 timesheets allegedly covering only the non-commercial/institutional HPC activity, contain the names of 59 persons who allegedly worked on non-commercial/institutional HPC activity, while the corresponding FTE for 2018 was 19,06.
- (119) The 2018 accounting report (for the non-commercial/institutional HPC activity for the MIUR) contains an electricity cost item of EUR 1 977 835,09 for "HPC General", whereas the HPC business unit is composed of three operating areas: "Institutional (i.e. non-commercial) supercomputing activities" (financed by the MIUR); "Project financed" (EU projects) and "Technical calculations" (i.e. clients). This likely indicates that the non-commercial/institutional HPC costs sent for reimbursement to the MIUR actually covers all three HPC areas and the report contains an overstatement leading to a "triple reimbursement" ⁽⁸⁴⁾.

⁽⁸²⁾ The complainant further alleges that the Granelli opinion interprets the EU reimbursement rules as if they allowed reimbursement by the EU of costs that are born by a third party whereas the rules clearly state that in order to be eligible, actual costs must be actually incurred by the beneficiary (i.e. real, and not estimated, budgeted or imputed and defined and genuinely borne by the beneficiary) not by any other entity. The complainant further alleges that according to this legal opinion, there is permissible double reimbursement of EU related project costs in as much as labour costs are reimbursed despite the fact that labour force participating in EU projects are paid salaries by third parties, such as university professors being paid by the State, and employees' wages paid by private firms. However, Cineca employees wage costs are reimbursed by the MIUR.

⁽⁸³⁾ The complainant believes that the proof of this is a statement in Cineca's 2017 balance sheets which says the following: "The final 2017 data on revenues for fees and services of the various market segments in which Cineca operates show (...) as far as revenues from High Performing Computing activities are concerned, an increase of about 10 % in particular thanks to the increase in activities with ENI, due to a greater request for support for technology assessment activities for the purchase of a new calculator."

⁽⁸⁴⁾ The complainant points out that Cineca was able to separate the indirect personnel costs according to the institutional/non-commercial HPC and commercial HPC. Therefore, it would have been able to separate the electricity costs also along the various HPC activities.

- (120) Finally, the complainant points to an internal document obtained during another legal dispute between the complainant and Cineca, in which Cineca stated that all four areas of its activities, which were divided into “Supercomputing”, “Universities”, “MIUR” and “Other” had generated positive margins of an average of 13 % in the years between 2017 and 2019. It would be important, according to the complainant, that Cineca explains what this 13 % means. This contradicts the notion that the contributions to Cineca for the activities carried out constituted mere compensation for the activities”⁽⁸⁵⁾.

3.2. Comments from other third parties

- (121) The Commission received comments from three additional interested parties in the formal investigation phase: from Tempo s.r.l., (“Tempo”) operating in the university IT sector in Italy since 2008, Space s.r.l. (“Space”) offering products and services in the ITC sector since 1991, and Stazione Zoologica Anton Dohrn (“Stazione Zoologica”), a public research body overseen by the MIUR and a member of the Cineca consortium since 2015.
- (122) Tempo markets a number of software and IT products for universities, such as for accounting activities, e-learning software, human resources management and web portal development. Tempo claims to be the only competitor to Cineca in the university accounting sub-sector. The undertaking states that despite the high quality of its products, only 11 public universities adopted its accounting software, and no university has adopted any of its other software products. Tempo also points out the entrepreneurial nature of Cineca’s IT service activities and the high market share of Cineca in the university software market despite its high prices.
- (123) On this basis, Tempo also states that the public payments to Cineca in the form of State aid enabled Cineca to establish a quasi-monopoly situation in the university software market. Further, Tempo believes the necessary element articulated in the *HIS Decision*, i.e. that the service in question must be “of a peculiar nature” including “effectiveness”, is not satisfied in this case because Cineca’s products are not more effective than Tempo’s. Finally, Tempo argues that the economic nature of the products is supported by the legal interoperability requirement imposed on the products in question and the fact that Cineca obtained it from others instead of developing them itself, and that it outsources maintenance of some of its software to outside parties. Finally, Tempo suggests that the judgment in case C-159/11 of 19 December 2012⁽⁸⁶⁾ does not permit the avoidance of public procurement legislation for the purpose of placing certain private service providers in a position of advantage vis-à-vis competitors.
- (124) Space is active in the public administration IT segment. A strategic part of the company’s business is the supply of IT products and services to universities. Space’s main client is the University of Milan. Space also complains about a stalled growth of the market, as a result of Cineca’s dominance in the university software segment. It states that universities in fact closed completely to Space’s products⁽⁸⁷⁾. As a result, Space entered into a strategic partnership with BeSmart, in particular in the promotion of its “international mobility” application, in which Cineca failed to make enough progress. Despite the success of this product, universities have declined acquiring the product stating that they could not decide until they saw Cineca’s comparable product to be finalised in the future.
- (125) Space further explains that the University of Milan used to use Space’s services up until 2017, when the university changed to Cineca’s U-Gov products. The relations between Space and the University of Milan illustrates the situation in the university software segment. After discontinuing some of Space’s products, other products were continued to be supplied by Space to the University of Milan. This demonstrates that Cineca entered a well-functioning market, i.e. it was not eliminating a market failure. Cineca has, in fact, gradually established an exclusivity in supply of university software.

⁽⁸⁵⁾ The complainant also makes other statements the relevance of which is not explained. These include the following statements: Cineca also accounts for investment/purchase costs of the supercomputers; Cineca accounted for 75 % of the total production costs of the FERMI system in 2015 and that Cineca also purchases supercomputers with the help of other public and private parties.

⁽⁸⁶⁾ C-159/11 of 19 December 2012, *Azienda Sanitaria Locale di Lecce, Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others*, ECLI:EU:C:2012:817, paragraphs 35 and 40.

⁽⁸⁷⁾ At the same time, Space states that it can still market its “student secretariat” software. In addition, Space has developed a number of applications in the university management field, in particular in the procurement and human resources area, and web services.

- (126) Cineca's software, Space continues, is less effective than the previously existing services provided by Space. Cineca's U-Gov modules are inferior, and universities need other providers, such as Space, to fill the functional gaps. Cineca's software products are in fact standardised⁽⁸⁸⁾ and the tailoring of the products are carried out by these other suppliers which are sometimes needed in order to provide a cheaper solution than Cineca's. Therefore, the argument that the prices of Cineca's university software products are consistent with the effort to develop the functionalities is false. The prices do not reflect market values.
- (127) Further, Space states that there is in fact no obstacle for universities to switch suppliers for all or part of their IT services needs. There is complete interoperability between the various Cineca and non-Cineca modules and the ministerial databases. Cineca's products, even if they are used in the education sector, are not different from ordinary software products and do not constitute input different from chairs, pencil, etc., that are also indispensable for fulfilment of a public mandate in the field of education.
- (128) Finally, Space argues that the same applies to the public administration software segment. These are pure support functions which can easily be purchased from the market. In sum, these services are not intrinsically linked to the exercise of an essential function of the MIUR or the universities, hence Cineca is an undertaking for the purposes of State aid control.
- (129) Stazione Zoologica points out that the various university and research related modules⁽⁸⁹⁾ of Cineca IT products and services are inseparable from the functions that Stazione Zoologica is called upon to perform, which is free scientific research. There is, therefore, an intrinsic link between Cineca's services and the public goal of the research system. Stazione Zoologica's decision to use Cineca's services are the result of its decision to join the consortium and not the result of the MIUR's or the consortium imposing the services upon Stazione Zoologica either legally or otherwise.
- (130) Stazione Zoologica argues that it would not be feasible to obtain from the market IT solutions with the same degree of integration as Cineca's. There are of course other suppliers on the market, but they only offer partial solutions which do not fully meet the functional requirements of the research body. Efficiency and cost-effectiveness led, in the case of Stazione Zoologica, to the conclusion that Cineca should be engaged for the services in question. Stazione Zoologica identified all advantages of Cineca's products and concluded that these could not have been achieved without facing very high transition and transaction costs.

3.3. **Comments from the Italian authorities**

3.3.1. *Introduction*

3.3.1.1. The competences of the Italian government in the area of higher education

- (131) The Italian authorities explained the essential functions (public tasks) of the MIUR in the field of higher education and the way Cineca's services are inseparable from the performance of these tasks. They first referred to the rule that activities that intrinsically form part of the prerogatives of the official authority and are performed by the State do not constitute economic activities.
- (132) The assignment of State power in the educational field is based on Article 33 of the Italian Constitution which states that the "Republic guarantees the freedom of the arts and sciences, which may be freely taught. The Republic lays down general rules for education and establishes state schools (...)". The Ministry is tasked with implementing this constitutional provision and primary legislation implementing it.

⁽⁸⁸⁾ In the case of the University of Milan, the Cineca's products relate to accounting and personnel. These modules are not linked to a specific educational objective.

⁽⁸⁹⁾ Such as for the management of 1) recruitment of teaching staff, 2) calls for funding of research projects, 3) syllabi of the universities; 4) National Research Portal, 5) of web portals, 6) internal communication with the MIUR and 7) e-signature for e-documents.

- (133) The Ministry and universities both have public functions. Universities are bodies vested with their own statutory, regulatory, financial, didactic, organisational, and disciplinary systems ⁽⁹⁰⁾ (see Article 6 of Law No 168 of 9 May 1989 (“the university law”). Universities are ‘the principal seat of free research and free training within their respective systems and are places of learning and the critical development of knowledge; they operate, by combining research and teaching in an organic manner, for the cultural, civil and economic progress of the Republic’ (Article 1 of Law No 240/2010). Universities, thus have the essential duty of providing university education and ensuring the promotion and conducting of scientific research.
- (134) The Ministry is responsible for defining the objectives and strategic guidelines for the university system ⁽⁹¹⁾ and its members. It is responsible for establishing universities, for the supervision and approval of their articles of association and main regulations, the authorisation and activation of courses of study, verifying and assessing universities’ results in accordance with criteria of quality, transparency, and the promotion of merit, guaranteeing the distribution of public resources in keeping with the objectives, policies and activities carried out by each university.
- (135) It also guarantees the actual implementation of the right to study, thus putting into practice the provisions of Article 34 of the Italian Constitution ⁽⁹²⁾ by measures to support the right to study. The universities would not be able to provide tertiary education and conduct university research activities without the guidance and coordination from the Ministry.
- (136) Therefore, the Italian authorities disagree with the complainant’s characterisation of the Ministry’s role, as “provid[ing] (...) administrative and management services to Italian universities” (see recital 49).
- (137) The overall framework of State competences in the higher education field are divided (from the perspective of the range of services) between the Ministry and the universities. In the following table, the Ministry’s tasks are presented as macro-category of functions, with the corresponding tasks at the level of the universities as presented in the following table.

MINISTRY OF UNIVERSITIES AND RESEARCH	UNIVERSITIES
— Supervision of institutional arrangements and balancing the budget	— Tasks set out in their articles of association, regulations, and accounts
— Guidance and planning of system objectives	— Strategic university planning in consideration of the objectives set by the Ministry
— Public funding (e.g. operations, wages, construction)	— Programming and acquisition of goods and services, planning and execution of public works, recruitment of personnel
— Accreditation of sites and courses of study	

⁽⁹⁰⁾ Article 6 of Law No 168 of 9 May 1989 provides for the autonomy of universities. It states that “universities possess legal personality, and in implementation of Article 33 of the Constitution, enjoy didactic, scientific, organisational, financial, and accounting autonomy; they establish autonomous organisations with their own articles of association and regulations”.

⁽⁹¹⁾ Article 1 (4) of Law No 240/2010: “The Ministry, in compliance with the freedom of teaching and autonomy of the universities, shall indicate the objectives and strategic guidelines for the system and its components and, through the National University and Research System Assessment Agency (ANVUR) for matters within its remit, shall verify and assess its results in accordance with criteria of quality, transparency and the promotion of merit, including based on best practices at international level, while guaranteeing a distribution of public resources in keeping with the objectives, policies and activities carried out by each university, in compliance with the principle of national cohesion, and in line with the assessment of the results achieved”.

⁽⁹²⁾ Article 34 of the Constitution: “Schools are open to everyone. Primary education, given for at least eight years, is compulsory and free of tuition. Capable and deserving pupils, including those lacking financial resources, have the right to attain the highest levels of education. The Republic renders this right effective through scholarships, allowances to families and other benefits, which shall be assigned through competitive examinations.”

— Planning of student access to limited-number courses at national level	— Teaching programme, organisation and carrying out of courses of study and issuing of qualifications
— Assessment of teaching and research results	— Conducting of access tests for locally developed courses
— Measures to ensure the right to study	— Management of student careers and data on the scientific output of teaching staff
— National scientific qualification for the role of university	— Management of student careers and student contribution (merit and income)
	— Recruitment policies and careers of individual lecturers

- (138) The public prerogatives assigned to the Ministry and those assigned to the individual universities, although distinct, are inextricably linked and aimed at exercising an essential function of the State, namely, to guarantee the provision of university education and the development of research to citizens.

3.3.1.2. Cineca and its public service mission

- (139) Cineca was initially established as a computing centre to support the university and research system. Subsequently, it assumed the role of producing, on behalf of its members and their interests, highly efficient services aimed at performing the institutional activities of its members. The Ministry joined Cineca in 2006, but the Ministry contributed to its establishment and financing of its operations from the very beginning. Today, all Italian State universities are members of Cineca, which is subject to supervision by the MIUR and auditing by Italy's Court of Auditors.
- (140) The primary aim of Cineca, as a tool for the higher education system ⁽⁹³⁾, has always been the provision of its members with integrated and efficient computing systems and IT services, thus enabling the higher education system to perform their public function (see Article 3 of Cineca's Articles of Association ⁽⁹⁴⁾). More specifically, Cineca has been tasked with creating high quality, innovative IT services necessary for the performance of the public function of its members. These services have been planned and produced for the public function purpose through the development of customized technologies that have been integrated over time according to the specific needs of the institutions of the higher education system. Comparable services cannot be found on the market with the same operating conditions.
- (141) The specific features of the relationship between the consortium members and Cineca have determined and reinforced the efficiency of the solutions proposed by the consortium. The supervision and guidance that the consortium members exercise over Cineca and which are based on the possibility of issuing directives that guide its activities towards specific objectives have enabled the entity to continuously tailor its operations to the needs of the consortium members and therefore the entire higher education system. These needs are constantly changing both due to regulatory changes and to technical and technological innovation. Over time, Cineca has managed to consolidate this efficiency, alongside its capacity to respond swiftly to these new demands.

⁽⁹³⁾ Higher education refers to the whole network of institutions and entities, other than the Ministry, operating in the sector of research (universities and public research bodies), university education (universities) and arts, music and dance training (conservatories, fine arts academies, ISIA (Higher Institutes for Artistic Industries)) which are provided with structured IT services by Cineca for the functions that such entities must carry out in the performance of their public mandate, as determined by law, and advanced computing services for the management of their activities.

⁽⁹⁴⁾ Article 3 of Cineca's Articles of Association contains, in all its versions throughout the time period 2006 to 2019, a reference to Cineca's obligation to provide information technology services.

- (142) According to the Italian authorities, Cineca's activities are so integrated with the Ministry's functions, that it operates virtually as a Ministry department. No other undertaking would be able to provide all the support services that the Ministry needs.
- (143) Cineca's services have thus become the means through which the Ministry and the universities fulfil their public mandate. Its purpose is functionally related to the State's duty to guarantee higher education.

3.3.1.3. Regulatory framework governing relations between Cineca and the Consortium members

- (144) Article 1 of Cineca's articles of association refers to Consolidated Law No 1592/1933, which, in its articles 60 and 61, provides for the establishment of consortia with the task of coordinating initiatives for the functioning of the university system ⁽⁹⁵⁾.
- (145) The aim of the merger of CILEA and CASPUR into Cineca through Article 7 (42) bis of Law No 95 of 6 July 2012, was to establish a single entity at national level tasked with providing adequate support in terms of innovation and offer of services for the needs of the ministry, the university system as well as for the research sector.
- (146) The so-called "salva Cineca" law set up an in-house model between Cineca and the Ministry, which was further detailed through ministerial decree No 245 of 26 March 2018 on the basis of discussions with the European Commission and the Italian national anticorruption agency (ANAC). The Italian anticorruption agency, based on Decision No 1172 of 19 December 2018, entered Cineca in the national list of entities that can operate through direct awards ("in-house" companies). The Italian authorities claim that the Commission, in recital 13 of the opening decision, made the erroneous assumption that parties that are part of the education, universities and research system may satisfy their need for IT services essential for their operations directly or through entities that have the same characteristics as Cineca. Universities enjoy autonomy in determining whether to use the market, or to directly award Cineca a contract for the provision of the IT services necessary for carrying out their activities. The so-called salva Cineca law does not oblige parties that are part of the education system to use Cineca or parties with the same characteristics if they are unable to provide such services alone, but merely grants them the possibility of choice.
- (147) Equally incorrect is the Commission's assumption that universities gain access more easily to State support (from the FFO, see recital 31 of the opening decision, and recital 24 and footnote 19 of this decision) if they use Cineca's IT services. Access to the fund is governed by regulations which cannot be influenced by the organisational choice of universities.

⁽⁹⁵⁾ Article 60. "The deans and directors are responsible for promoting any form of involvement or financial contribution by entities or private individuals for the universities and institutions which they respectively head; in particular, **they are obliged to promote the forming of consortia with the aim of coordinating initiatives as practically and effectively as possible to support and facilitate the functioning of universities and institutions** [emphasis added]. Article 61: "University consortia are vested with a legal personality. Each consortium is established through an agreement that governs relations between the entity and the private individuals with a stake in the consortium and has articles of association that govern its organisation and functioning. The agreement and the articles of association are approved through a Royal Decree issued following a proposal from the Minister for National Education, having consulted the Council of State, and are published in the Official Gazette of the Kingdom."

3.3.1.4. Functions of the Ministry of Universities and Research

- (148) Article 51 ter of Decree 300/1999 assigns functions to the MIUR in the following major areas: guidance, planning and coordination of scientific and technological research; general standardisation and financing of universities; promotion of merit and right to study; accreditation and assessment of training; implementation of EU standards relating to university education; European harmonisation and integration of the system into cultural agreements; streamlining conditions of access to universities; managing national operational programmes financed by the European Union.
- (149) Article 2 of Law 168/1989, the “university law” (see recital 133), which established the Ministry, stipulated further duties, in particular for the minister. These include publishing a university development plan; proposing and adopting research guidelines; distributing allocations intended for universities on the basis of objective criteria aimed at ensuring balanced development of universities; submitting a report to Parliament every three years on the state of scientific and technological research; coordinating activities connected to Italy’s participation in EU and to national university education and scientific and research programmes; coordinating university education with other levels of public education ⁽⁹⁶⁾.

3.3.1.5. Services to the MIUR

3.3.1.5.1. Economic activity

Intrinsic nature of the activities carried out by Cineca from the exercise of the Ministry’s essential duties

- (150) The Italian authorities refer to paragraph 17 of the Commission Notice on the notion of State aid ⁽⁹⁷⁾, according to which “[a]n entity may be deemed to act by exercising public power where the activity in question forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject” ⁽⁹⁸⁾. Italy also adds that where the economic activity cannot be separated from the exercise of public powers, the activities exercised by that entity as a whole remain connected with the exercise of those public powers and therefore fall outside the notion of undertaking. It is irrelevant whether there are other undertakings in a position to carry out the same activity ⁽⁹⁹⁾.
- (151) Cineca’s IT services (see more details in footnote 105) are intrinsically linked to the State’s functions in the field tertiary education through the MIUR’s activity of supervising the organisation of university education and research, the provision of which constitutes an indispensable activity for the implementation of a State competence. These services are not limited to the mere provision of administrative services.
- (152) Italy disagrees with the opinion of the complainant that for an ‘intrinsic link’ the public body must *internalise* (i.e. decide to self-produce without recourse to a third party) the platforms necessary for the function in question. According to Italy, the judgment of the European Court of Justice in *Commission v. Italy* ⁽¹⁰⁰⁾ made clear that from the point of view of whether or not the State carries out an economic activity, “it is of no importance that the State carries out the said economic activities by way of a distinct body over which it may exercise, directly or indirectly, a dominant influence (...) or that it carries out the activities directly through a body forming part of the State administration.”. It follows from this that the State may carry out a non-economic activity or public function also

⁽⁹⁶⁾ The Italian authorities also point out that, contrary to the complainant’s assertion, Cineca started providing IT services to universities in the 1980s and not in 2001. Cineca became the operational tool for the Ministry beginning the mid-1980s when certain government functions were already assigned to the administration. It was necessary to develop platforms essential for the performance of the Ministry’s task. The first tasks assigned to Cineca were databases for the programming, monitoring, coordination, and financing of universities, including the teaching staff database (1986), the national research register (1987), administrative staff database (1989), universities accountancy data (1989), database for educational systems (1989).

⁽⁹⁷⁾ OJ C 262, 19.7.2016, p. 1.

⁽⁹⁸⁾ See, in particular, Judgment of the Court of Justice of 19 January 1994, *SAT/Eurocontrol*, C-364/92, ECLI:EU:C:1994:7, paragraph 30 and Judgment of the Court of Justice of 18 March 1997, *Cali & Figli*, C-343/95, ECLI:EU:C:1997:160, paragraphs 22 and 23.

⁽⁹⁹⁾ Commission Decision in State aid SA.25745 (2013/NN) (ex-CP 11/2008) – Germany – *National websites for auctions in insolvency proceedings* (ZVG Portal) (OJ C, 167, 13.6.2013, p. 1).

⁽¹⁰⁰⁾ C-118/85, judgment of the Court of 16 June 1987, ECLI:EU:C:1987:283, paragraph 8.

through a separate entity. If the intrinsic link exists, it does not matter whether Cineca is an internal entity of the Ministry. Italy holds that Cineca, on the basis of its structure, its purpose and the control exercised by its members, can be regarded as an internal department within the State administration. In this sense, the Ministry and the universities *did* decide to self-produce the IT services in question.

- (153) As to the argument that Italy decided to introduce a market mechanism in the market of public-administration IT services (and university IT services for that matter), the Italian authorities point out that Italy did not introduce market mechanisms with respect to the IT services provided to the Ministry and to the universities. It utilises the market (i.e. through Consip) only for standardised services, i.e. non-customized services, that are actually available through Consip. Such services include simple connectivity or cloud services, etc. The highly specialised services as provided by Cineca were not available through Consip.
- (154) Further, the complainant argues that the link between the activity and the public function of the State must be particularly pervasive/intensive. The Italian authorities disagree with the interpretation given by the complainant according to which the means must be *unique*, i.e. there cannot be another means available to carry out the activity. This is not in line with the case law which seems to associate the concept of inseparability with that of 'indispensability' of the means of carrying out the function, regardless of the presence of a market and thus of other instruments that are capable of enabling the same function to be exercised. In none of the cases the complainant refers to was the service the only existing means.
- (155) Italy argues that in the *HIS* case, the Commission, referring to the *TenderNed* judgment, expressly acknowledged that there were other operators on the market, but these operators "only offered parts of the services required by the [universities]" ⁽¹⁰¹⁾. In the present case, continues Italy, it is impossible to imagine the management of the IT services to the Ministry through external parties who do not know the rules and procedures to which the Ministry is subject and the purpose for which the system is needed. The planning of specific applications for the Ministry, such as the management of national science and education or the distribution of university funding, requires ongoing timely adaptation and updates. An outside party, even if one could be found, would need to devote a lot of time to study rules of the underlying procedures and operational processes which would cause unpredictable delay. The Cineca software has nothing in common with generic applications available on the market. In fact, setting up a platform for the management of each highly specialised service would not be feasible. In this sense, the provision of the software is not an *input* into the education system, but a condition of their operation.
- (156) The complainant's argument that a non-economic activity must be free of charge or at least cannot be rewarded by a genuine remuneration is not decisive. This was not a factor that was relevant to the characterisation of the activities as having an intrinsic link in the cases cited in the preceding recital (see *HIS Decision*).

⁽¹⁰¹⁾ See recital 126 of the *HIS Decision*: "The *TenderNed* judgment established inseparability between the service *TenderNed* provided and the public task at issue in that case even though there were indications that the e-procurement in question merely contribute[d] to the effective operation of the [service] that was connect[ed] with the exercise of public power" (see recital 90 of the judgment). Similarly to the *TenderNed* judgment, in the present case there have also been market operators that offered parts of the service that *HIS* offered. However, as the General Court explained in the *TenderNed* judgment, the authorities could "best manage the entire public procurement process" with *TenderNed*'s services (recital 90 of the judgment) and that "existing commercial platforms did not offer the conditions relating to price, objective quality characteristics, continuity and access to the services provided that would be necessary to fulfil" the objectives of the authorities (recital 107 of the *TenderNed* judgment). "This reasoning can be fully applied to the case at hand. As argued by a number of interested parties, no other provider of university software offered the entire range of services that *HIS* offered. The complainant itself admits that private providers only offer parts of the services required in the college software field."

- (157) In the *HIS Decision*, the Commission acknowledged that the provision of customised software products and related services are linked to a public task of the State in the field of tertiary education ⁽¹⁰²⁾. The activities and status of HIS fully overlaps with those of Cineca in connection with the Ministry and the universities. Finally, Italy points at recital 3 of Council Regulation (EU) 2015/1589 ⁽¹⁰³⁾, according to which overlapping cases must be treated the same way.
- (158) In addition, there is nothing that prevents an entity from simultaneously performing an economic and a non-economic activity. In the absence of cross-subsidisation of economic activities, support for the non-economic activities does not constitute State aid. The fact that Cineca engages in economic activities does not disqualify its “institutional” activities as non-economic. The Council of State judgment declaring the source code of Cineca’s software to be of Cineca’s property (see recital 55) assigning an economic value of Cineca’s product does not mean that the related activity is separable from the “institutional” activity of Cineca.
- (159) The Italian authorities disagree with the complainant’s view that there must be a statutory obligation that imposed on the State entities not only an obligation to carry out an activity, but also the *means/medium* through which the activity was to be carried out (see recital 48). In Italy’s view, it is not the presence of a legal ‘medium’ obligation that rules out an economic activity, but a functioning of the medium in the performance of an essential task. The intrinsic link arises from the fact that the public function assigned by law to the public entity cannot be exercised in the absence of the means provided by the beneficiary. Similarly to the conclusion in the *HIS Decision* ⁽¹⁰⁴⁾, the State, without the IT-support services Cineca provides, could not fulfil its obligation to guarantee the constitutional right to tertiary education ⁽¹⁰⁵⁾.

⁽¹⁰²⁾ Recital 17 of the *HIS Decision* states: “The activities of HIS in question, more specifically the provision of tailor-made college software products and related services, satisfy the requirement of being connected, by their nature, their aim and the rules to which they were subject, to carrying out the State’s non-economic activity in the public tertiary education field in a way analogous to the relevant case law.”

⁽¹⁰³⁾ 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). Recital 3: “Article 107 of the TFEU should be applied effectively and uniformly throughout the Union.”

⁽¹⁰⁴⁾ See recital 68 of the *HIS Decision*: “[W]ithout an efficient IT-based university administration, the constitutional right to free access to higher education could not be guaranteed and the constitutionally enshrined obligation of the State to ensure a functioning higher education system within the meaning of the first sentence of Art. 12(1) of the Basic Law could thus not be fulfilled.”

⁽¹⁰⁵⁾ Italy submitted a list of the IT support services which, according to Italy, enable the Ministry to fulfil its tasks (main functionalities), and the legal bases for these services. The list of functionalities includes: 1) the “National Register of Students and Graduates” (NSAS) serving the purpose of identifying all university students; assessing the effectiveness of university training processes; promoting student mobility; identifying incentives to encourage demand for specific student services; monitoring and supporting the work experience of students; 2) “training offer database” for publishing the educational rules of universities; activating courses of study and providing information on the training offer of universities; 3) “Universitaly” to provide all information on universities and study courses to enable people to decide where to study and what to study; 4) “accessoprogrammato” that gathers information to enable the Ministry to plan and organise national admission tests in certain disciplines, such as medicine; 5) “ASN” “abilitazione” for the assessment and recruitment of teaching staff; 6) “Proper”, for a three year planning programme for university staff; 7) “dalia” or “data bank for alia”, a national database for the collection of career information and salary data for university staff; 8) application for uniform preparation of accounts to collect the budgetary data from universities; 9) portal for the accounting for profit and loss to provide interpretative clarifications relating to accounting rules; 10) “AFAM” for monitoring the supply of teachers and contracts as well as their recruitment and mobility; 11) “ordinary financing fund” for storing all parameters relating to the distribution of the FFO allocated to universities; 12) three year programming (PRO 3) for managing all information necessary for distributing funds to universities for the three-year programming of universities, for the accreditation of universities, and for the ministerial evaluation of the universities’ three year programming; 13) “projects of significant interest” for application procedures and reports for calls for research of national interests; 14) “REPRISE” – register of Expert Peer Reviewers for Italian Scientific Evaluation for the registration of independent scientific experts; 15) National Register of Research to collect all information relating to funded research.

The respective legal bases for the main functionalities are as follows: 1) Law No 170 of 11 July 2003; and other legal provisions; 2) Article 17 (95) (b) of Law 127 of 15 May 1997 which was later expanded by further legislative provisions; 3) Article 17 (95) (b) of Law 127 of 15 May 1997 and further legislative provisions; 4) Law No 264 of 2 August 1999; 5) Law No 240/2010 and successive legislation; 6) Law No 311 of 30 December 2004 (and later provisions, including Law No 43/2005); 7) Legislative Decree No 29/1993; 8) Article 7(6) of Law 168 of 9 May 1989, completed by later legislation; 9) Article 9 of Legislative Decree No 18 of 27 January 2012; 10) Legislative Decree No 297 of 16 April 1994 and other provisions, including Presidential Decree No 212/2005; 11) Law No 537/1993; 12) Article 5(1) of Law 537/1993, Presidential Decree No 25/1998 and Article 1-er of Decree Law No 7 of 31 January 2005; 13) Article 65 (1) of DPR 382/1980, Article 5 (4) of Law No 537/1993 and other subsequent provisions; 14) Decree-Law No 83 of 22 June 2012; 15) Presidential Decree No 382/1980 and Article 2 of Law No 168/1989.

- (160) Some regulations specifically confer the obligation on the Ministry to perform a certain task using IT platforms. For example, Article 16 (2) (e) of Law No 240/2010 assigns to the Ministry the regulation of deadlines and procedures for carrying out approval procedures, including identification of IT procedures for scientific qualification of university lecturers. There are other regulations obliging the Ministry to register certain data in information systems ⁽¹⁰⁶⁾.
- (161) All this indicates that Cineca has created and managed numerous databases for the Ministry, which are also interoperable with one another, and which are used by the Ministry to perform its public function. Cineca, in the absence of an internal IT support structure, has always represented the body with which IT services have been designed and tailored to the specific functions of the Ministry. These services have been developed and further developed over time, and provided through the dedicated structure within Cineca that mirrors the internal structure of the Ministry.
- (162) Cooperation with Cineca provided the Ministry with operational flexibility and enabled it to be responsive in a timely manner. Regulatory acts often require interventions that are difficult to schedule and necessitate short implementation times. Cineca's knowledge of the operating procedures makes it possible to function in an environment of unpredictability and redefined priorities and plans. It enabled the Ministry to comply with strict business continuity requirements minimising phase-in/phase-out disruptions. Cineca provided tailored solutions based on its understanding of the Ministry as well as of the stakeholders interacting with the Ministry.
- (163) Without Cineca's services, the Ministry could not carry out the majority of its functions that are intrinsically linked to the support services of Cineca and cannot be found elsewhere. Building up from scratch the IT services by a provider other than Cineca would result in the suspension of the public functions assigned to the Ministry. Given that the Ministry's needs are not standardised with respect to IT services, there are no operators on the market that were able or willing to structure their services around this specific and complex field. This would require extraordinary investment from the provider and would result in incalculable costs for the Ministry. In sum, Cineca's activities do not fall within the plain category of the provision of IT services.
- (164) As regards the national court ruling mentioned by the complainant in recital 45, Italy states the following: It is true that judgment No 6009/2018 of the Council of State found for the complainant holding that the Italy should have notified to the Commission the measures to Cineca for the provision of the IT services to the Ministry, as they constituted State aid. Other actions, however, such as CdS judgment 10528/2019 of the regional court TAR Lazio have been decided in favour of the Ministry (see recital 63 and footnote 45 ⁽¹⁰⁷⁾).
- (165) Further, the Italian competition authority's cases, Case A490-*Telematics Civil Process* and Case I1778-*Electronic School Register* the complainant refers to (see recital 46) are irrelevant. Those cases focus on anticompetitive conduct by contracting entities aimed at influencing customer choice in markets downstream to the contracting entities' market.

3.3.1.5.2. Advantage

- (166) The amounts allocated to Cineca for the provision of the IT services to the Ministry cannot be considered to constitute a non-refundable grant. The payment to Cineca for the IT services to the Ministry is consideration for specific cutting-edge IT services.

⁽¹⁰⁶⁾ See Article 1-bis of Decree Law No 105/2003 converted into Law No 170/2003, and Article 63-64 of Presidential Decree No 382/1980.

⁽¹⁰⁷⁾ The judgment of the Regional Administrative Court of Lazio, No 10528/2019 found that the contribution to Cineca for the services to the Ministry of EUR 14 000 000 did not constitute State aid, as the Ministry adequately demonstrated on the basis of market prices, that the amount was economically appropriate. (Section 3.3.1.).

- (167) According to the Italian authorities, the purpose of the payments has been to cover Cineca's costs of providing the service. It is subject to registration by the Court of Auditors and verified by the State's General Accounts Department in the Ministry of the Economy and Finance. The level of payments has been considered to be adequate by public supply contracts supervisory authorities, i.e. the Digital Italy Agency (AGID) and the Court of Auditors. These payments were generally lower than the costs Cineca incurred in providing the service to the Ministry.
- (168) Since the early 2000s, MIUR has considered Cineca as a quasi "in-house entity" of the Ministry. However, in 2016, Cineca was reorganised and thus became a proper "in house entity". Prices for the IT services have been subjected to prior assessment for economic adequacy by the MIUR ⁽¹⁰⁸⁾. In 2018, ANAC (national anti-corruption agency) placed Cineca and the consortium members on the list of contracting authorities and entities operating through direct awards with respect to "in-house" entities. A challenge of this qualification by the complainant at the regional Administrative Court of Lazio was dismissed (see recitals (63) and (164)). The reference market in these circumstances is similar "in-house" arrangements between IT service companies and public administration entities. Providers in other "market segments", which can be engaged via Consip, are not a good benchmark, since undertakings available through Consip do not offer the same level of all-inclusive services.
- (169) Only after the implementation of the 2014 Public Procurement Directive ⁽¹⁰⁹⁾ (Art 192 of Decree 50/2016) was it decided to restrict the in-house provision to situations where an efficiency-assessment showed that there was a market failure, and the use of the "in-house" provider became necessary.
- (170) A market study ⁽¹¹⁰⁾ (the so-called "Corso study on the MIUR services") showed that the contribution for the provision of the MIUR IT services between 2006 and 2018 were significantly below average market values ⁽¹¹¹⁾. Had the Ministry purchased the services in question from a third party, it would have paid on average over EUR 2 million more per annum in the time period in question ⁽¹¹²⁾.
- (171) Italy submitted a table showing revenues resulting from payments to Cineca for the IT services it provided to the Ministry (see table in recital 209) showing the revenues (viewed "cumulatively" at the end of the time period 2006 to 2014, amounted to EUR -208 000, even if the payments exceeded costs in the individual years of 2006, 2007, 2008, 2009 as well as in 2013 and 2014 ⁽¹¹³⁾). Italy also stated that the amounts due for the services in 2015 to 2017 have still not been paid. For years 2018 onward, payments were made following reporting.

⁽¹⁰⁸⁾ Italy explains that MIUR carried out a certain type of *ex-ante* analysis even prior to 2016. This was based on various legal provisions in force which permitted the use of a pre-existing, previously selected provider, like Cineca under circumstances, such as unforeseen circumstances, for new services, consisting of repetition of earlier services, etc. The award was therefore based on the verification that, first of all, from the point of view of technical functionalities, all the services offered by Cineca guaranteed management advantages of efficiency and quality that could not be achieved otherwise and were economically viable. In the assessment of appropriateness, the costs of Cineca solutions were compared with the replacement costs of the product, in accordance with the Total Cost of Ownership (TCO) logic, which takes into account the entire life cycle of the good/service that is intended to acquire and estimate all direct and indirect costs.

⁽¹⁰⁹⁾ Directive 2014/24/EU.

⁽¹¹⁰⁾ Commissioned by Cineca from Prof. Mariano Corso [School of Management at the Politecnico di Milano]. Given that there has not been a "market" for the IT services Cineca has been providing to the Ministry, the values the study arrived at were hypothetical, in essence relying on Assinter prices and international benchmarks by the International Software Benchmarking Standards Group (ISBSG).

⁽¹¹¹⁾ Apart from the years 2006 to 2008 in which payments to Cineca for the IT services to the Ministry were moderately above market values, i.e. since 2009, there was an increasing difference between market value of the services and what Cineca was receiving as compensation. As regards the contributions for the services being well below market levels for a number of years, the Corso study refers to much higher productivity levels which can be obtained from the well-established knowledge of the ministerial context and from a strong expertise in resources. In this way, Cineca manages to maximise the amount of work needed to provide development, maintenance, and support services.

⁽¹¹²⁾ It is to be noted that overall, the prices are not only below market level as demonstrated by the market study carried out by Professor Mariano Corso but were also below the level of cost of the service.

⁽¹¹³⁾ Italy explained that the payment for the years 2013, 2014 and 2015 were higher than the costs as two other State-owned IT service providers were merged into Cineca (see recital 10) and new tasks imposed by Law 240/2010 necessitated the development of new IT services.

- (172) The complainant's argument that a report should have always been prepared for the purposes of submitting the costs to the Ministry (see recital 59), the Italian authorities point out that the obligation only existed after 2016. The absence of the submission of a cost report prior to 2015 did not mean that there was no *ex-ante* examination of the payments to be made to Cineca for the services provided. The amounts to be paid were always quantified by the Ministry in relation to the costs incurred by Cineca for the provision of the services. The payments were always checked by the Ministry in detail and the services were specified in the individual payment orders. Given the absence of a relevant market, the payments were determined on the basis of the costs incurred by Cineca as well as the quality and quantity of the services provided.

3.3.1.5.3. No distortion of competition

- (173) According to the Italian authorities, the opening decision incorrectly states (in recitals 31, 104 and 105) that the IT services to the Ministry by Cineca distorts competition because there is an obligation or technical constraints relating to interoperability between the Ministry's IT services and the universities' IT services that compel both the Ministry as well as the universities to use Cineca's services.
- (174) No such technical constraints exist. The input data copied by universities into the Ministry's databases – created by Cineca – can be transferred using computer applications that the universities can also acquire from other market operators.
- (175) As the complainant points out, competitors' IT services to universities are often used together with Cineca products, and do not encounter difficulties in acquiring certain software components from alternative providers. Some universities do switch to other providers, including the complainant (see recital 69). In view of this, the statement in the opening decision, that Cineca may be able to sell services that it would not normally be able to sell, is inaccurate.

3.3.1.6. Services to the universities

3.3.1.6.1. Economic activity

Activities carried out by Cineca being inseparable from the exercise of the essential duties of universities

- (176) As stated in the opening decision in recital 113, in providing and organising higher public education, universities perform an essential state function.
- (177) According to the Italian authorities (and confirmed by 58 replies the Ministry received from universities to a questionnaire addressed to universities in connection with the issues raised in the opening decision), Cineca offers universities a wide range of services to satisfy all the IT services needs that universities may have. Undertakings were able to join the university IT services market from around year 2000. Universities have the liberty to obtain these services from Cineca's competitors. However, competitors' service offers only cover certain specific parts of the IT services needs of universities. In view of this, it is entirely understandable that universities tend to select a provider that offers a complete and integrated service, rather than a provider that only offers services in specific areas.
- (178) According to the Italian authorities, universities argue that the services Cineca provides for them do not constitute an economic activity due to the intrinsic link with the exercise of the essential task carried out by the universities. They stated that the IT solutions provided by Cineca are, by their very nature, indispensable for the organisation and management of the administrative activities aimed at providing public university education and conducting the related research activities carried out within the university system.

- (179) Universities cooperate with the Ministry in fulfilling these essential tasks and endorsed the establishment of the consortium in 1967 which was tasked with producing information services to enable them to fulfil the essential functions assigned to them: the Consortium “represents the specialised organisational tool, duly established to carry out the activities indicated in Article 3” which, in turn, states that “[t]he primary aim of the Consortium is to produce innovative IT services for the Consortium members, in order to make them more efficient and modern, in the most economically advantageous manner, through the development of technologies and the sharing of development goals” (see Article 1(2) of the Consortium’s Articles of Association).
- (180) Italy further argues that Cineca cannot even be qualified as an undertaking. It would rather be an internal structure within the university education system, or an internal structure tasked with producing and managing the HPC and ICT services essential for the university and research system.
- (181) On behalf of universities, Cineca first developed services related to advanced calculation activities for research purposes. Over time, further information systems were added that were tailored to the specific needs of the universities enabling the performance of their essential functions, including the following core functionalities:
- a) Management of the enrolment process, student careers, and the issuing of qualifications;
 - b) Management of the design of training offers connected to accreditation;
 - c) Management of post-graduate activities (activation of research doctorate courses and specialised courses);
 - d) Management of admission process for academic staff;
 - e) Accounting management of the administration and research projects;
 - f) Legal and economic management of careers of academic and administrative staff (payment of wages; contributions, etc.);
 - g) Collection of scientific output of academic staff;
 - h) Document management and registration of administrative acts to ensure compliance with regulatory provisions.
- (182) These services could, in theory, be purchased on the market. They are, however, intertwined with, and thus essential for the universities’ functioning. According to the Italian authorities, the universities also indicated that Cineca’s service is the sole complete and integrated system for managing the universities’ essential institutional functions (see previous recital). It covers almost 100 % of sectoral needs and enables constant technical and ‘regulatory’ maintenance of the platforms, through the continuous updating of systems in line with the requirements of the other consortium members. There is also an advisory body consisting of information system directors of the member universities to discuss technological problems and the teaching staff also provides input into the products/services. Hence services are self-developed in an integrated way by the joint input of Cineca and universities, to achieve a level of efficiency that cannot be reached by procuring the services from the market. Even universities that engaged operators other than Cineca confirmed that no other operator on the market is capable of offering the complete range of services offered by Cineca.

- (183) The relevant legal bases include the following: Law 341/1990 defining the structure of university courses and requirements for the award of qualifications; Law 264/1999 regulating access to closed-number university courses; Ministerial Decrees 509/1999 and 270/2004 modernising and adapting the university education by introducing educational credits; Ministerial Decree 130/2017 and Ministerial Decree of 16 September 2016 (and predecessor laws) for management of post-graduate studies; Law No 240/2010, Legislative Decree No 49/2012, Ministerial Decree 159/2012, legislative Decree 102/2001; Law 168/1989, et. al.

3.3.1.6.2. Imputability

- (184) Italy disagrees with the preliminary conclusion of the opening decision that “[t]he presence of both MIUR and the representatives of Italian universities on Cineca’s board might be an indication that the State had an influence over the Italian universities’ decision as to whether or not to purchase Cineca IT systems. Furthermore, universities used Cineca’s software to access public financing” (recital 124 of the decision). This preliminary conclusion is reinforced by the allegation, as Italy points out, that the interoperability of the university software with the software to the Ministry enable universities to obtain the funding from the university more easily.
- (185) However, Italy argues, pursuant to Law 168/1989 ⁽¹¹⁴⁾, universities enjoy full educational, scientific, organisational, financial, and accounting autonomy. Universities can have their own resources, such as student or third-party contributions. Hence, the resources eventually paid out to Cineca for its services only partially derive from the State. Further, universities also confirmed that both prior to as well as after the entry into force of the so-called *salva Cineca* law, the choice of Cineca as provider was made freely, without any obligation or conditioning by the State. It was also confirmed that the disbursement of funding to the universities is not related to the universities’ choice of an IT service provider but are based on objective criteria set by the Ministry, such as size of the university and student population as well as its scientific output.
- (186) The universities using Cineca confirmed, according to the Italian authorities, that their choice of Cineca was not imposed by the Ministry but was a consequence of their decision to join the consortium and use its services. The choice of Cineca as the service provider is not imputable to the universities and through them to the State. The universities also explained that the fees paid to Cineca for the IT services are derived from a consortium tariff (determined according to set parameters) which encompasses the assistance and evolutive maintenance costs. The customisation costs are valued based on the tariffs needed to cover costs. These elements may also undermine the finding of imputability, as the tariffs are not determined by the State.
- (187) As the opening decision itself stated, some universities decided to purchase IT services from operators other than Cineca and they had reported no problem with accessing the funding. They are perfectly capable of communicating with the information system of the Ministry. Had the Italian State wanted to force universities to use Cineca as their provider, it would have asked Cineca to develop a system for the entire education sector and would have paid Cineca directly for the development of information systems. Instead, the Ministry does the opposite: it pays the operational costs directly to the universities which they can manage freely, and it gives the universities the freedom to decide whether they want to use Cineca or another provider.

⁽¹¹⁴⁾ “Universities possess a legal personality and, in implementation of Article 33 of the Constitution, enjoy didactic, scientific, organisational, financial, and accounting autonomy; they establish autonomous organisations with their own articles of association and regulations.”. The autonomous nature of State universities was also confirmed by Italian court judgments ruling that university employees are not State employees. See e.g. Court of Cassation in judgment No 10700 of 10 May 2006.

- (188) The complainant errs in considering that the *Stardust Marine* case law for the determination of imputability (see recitals 78 *et seq.*) is inapplicable to the case. It can be inferred from the case law ⁽¹¹⁵⁾ that the *Stardust* criteria are applicable by analogy when analysing imputability in the case of public bodies having “autonomy including as regards the management of funds, in relation to interventions by public authorities”. It is also unclear why the application of *Stardust Marine* criteria would be different relating to the activities of bodies governed by public law that are distinct from the state ⁽¹¹⁶⁾. Italy believes that for a finding of imputability, it would be necessary to prove, on a case-by-case basis, the involvement of the State in the decision to select Cineca for IT services contracts.

3.3.1.6.3. Advantage

- (189) Italy disagrees with the preliminary conclusion in recital 132 of the opening decision that “to the extent that the State influenced the purchasing behaviour of universities with respect to Cineca, [this latter] was able to sell IT services that it could not have sold without State intervention and thus derived a profit from them”.
- (190) The Italian authorities maintain that the real beneficiaries of the payment were the members of the Consortium which contributed only the costs that were necessary for the production of the services and otherwise would have needed to develop the services themselves.
- (191) As regards the application of a selective competitive procedure, i.e. the application of appropriate public procurement procedure, Italy points out that it in fact had made the selection of Cineca (a proper in-house provider according to Italian legislation) even more demanding than is required by EU public procurement legislation. It is because Article 192(2) of Legislative Decree No 50/2016 requires an “enhanced efficiency assessment” of a planned award to Cineca prior to allowing such an “in-house” award to Cineca. The EU legislation (Article 12 (3) of Directive 2014/24/EU) provides for an essential equivalence between the various procedures for entrusting a service of interest to public administration.
- (192) Italy also explained that the universities have always carried out a prior assessment of the benefits of engaging Cineca for their IT services by evaluating whether they could produce the same results internally, and then comparing the functionalities and characteristics of Cineca’s services with those of competitors’ offers ⁽¹¹⁷⁾.

⁽¹¹⁵⁾ V. T-98/16, T-196/16 e T-198/16, Italia/Commissione “Banca Tercas”, ECLI:EU:T:2019:167, paragraph 67. “Where [the body which granted the aid in question] (...) is autonomous, including as regards the management of its funds, by comparison with intervention by the public authorities and with public funds...”, the Commission is (...) subject to an even more significant obligation to specify and substantiate its reasons which justify its conclusion that the resources used are under public control and the measures are imputable to the State”. Italy (in fact Cineca) adds that imputability to public universities could not be well founded nor can they be classified as “emanations of the Italian State” since that concept has been developed in order to enable individuals to rely on unconditional and sufficiently precise provisions of a directive, which has not been transposed or transposed correctly, in respect of bodies or entities subject to the authority; or State control or powers which exceed the limits of the rules applicable to relations between private individuals. The concept cannot, therefore, be extended to the question of imputability.

⁽¹¹⁶⁾ Contrary to the complainant’s argument in recital 81 that universities are a non-economic public body fully in line with the concept of ‘public administration’, the universities are defined as entities within the public administration. Hence, they do not support the State but are autonomous entities with their own prerogatives conferred upon them by the Constitution. The Court of Cassation in its judgment No 10700 of 10 May 2006 observed, “universities no longer [function] as an organ of the State (...) and teachers and researchers are to be regarded as employees of the university rather than State employees.”. Italy also argues that Art 2(1) of Law 240 of 2010 mandated that universities reorganise themselves so that governing bodies are staffed by professors and others that are independent from the state.

⁽¹¹⁷⁾ Italy explains that, similarly to the MIUR (see footnote 108), State universities carried out a certain type of *ex-ante* analysis even prior to 2016. This was based on various legal provisions in force which permitted the use of a pre-existing, previously selected provider, like Cineca under certain circumstances, such as unforeseen circumstances, for new services, services consisting of repetition of earlier services, etc. The award was therefore based on the verification that, first of all, from the point of view of technical functionalities, all the services offered by Cineca guaranteed management advantages of efficiency and quality that could not be achieved otherwise and were economically viable. In the assessment of appropriateness, the costs of Cineca solutions were compared with the replacement costs of the product, in accordance with the Total Cost of Ownership (TCO) logic, which takes into account the entire life cycle of the good/service that is intended to acquire and estimate all direct and indirect costs.

- (193) Italy provided a technical report (see recitals 318 et seq.), an expert study by Professor Corso, that showed the value of Cineca's IT services to the universities broken down to three components in comparison to the market price in the years 2004 to 2018 ⁽¹¹⁸⁾. The study shows the data relating to two of three subsegments of the sector, including "application services" and "other services", and not including "hosting services" ⁽¹¹⁹⁾. Cineca's revenues, i.e. the compensation it received for the services in question, were below market prices in most of the years between 2004 and 2019. Further, AGID also certified the economic consistency of the values associated with the infrastructure component. As to the third subsegment of "other services" (i.e. planning and advisory services) the report demonstrates that Cineca's offer was in line with the market value.
- (194) On the basis of this, the services offered by Cineca represented the most complete and most economical solution on the market for university IT services.

3.3.1.7. Measures constitute existing aid

- (195) Italy also argues that to the extent that the measures in question would qualify as State aid, it is existing aid pursuant to Article 1(b) (v) of Regulation (EU) 2015/1589 ⁽¹²⁰⁾. In other words, the measures would constitute existing aid because Italy can prove that at the time they were put into effect, they did not constitute aid, and became an aid due to the evolution of the internal market and without having been altered by the Member State. Such measures enjoy legal protection as long as the Commission has not established their incompatibility with the internal market and ordered appropriate future-oriented measures ⁽¹²¹⁾.
- (196) Italy argues that at the time of the establishment of Cineca in 1967, there was neither a market for university IT services, nor for public administration IT services. Both markets started to develop in the 1980s. There has been no significant alteration to the measures, Italy argues, as there has been no significant change to the nature and source of the Ministry's financing, the legal basis, the objective of the financing or the range of beneficiaries that might affect the essence of the measures. Therefore, the measures satisfy the parameters of "significant change" as defined by case law ⁽¹²²⁾.

3.3.1.8. Absence of cross-subsidisation from the payments to Cineca

- (197) The Commission indicated in the opening decision that it intended to assess whether the public funding for the non-commercial/institutional HPC activities and for the IT services to the Ministry could lead to cross-subsidisation of Cineca's commercial activities, see recital 78(c) of the opening decision.

⁽¹¹⁸⁾ "Evidence from the study on "valorisation" (evaluation) of the services provided by Cineca to Italian universities" of 15 April 2021, by Professor Mariano Corso.

⁽¹¹⁹⁾ An infrastructure hosting service provides a combination of IT solutions such as web development, web hosting and email, infrastructure, and application over the internet.

⁽¹²⁰⁾ Regulation (EU) 2015/1589, Article 1(b)(v): "[E]xisting aid" means "aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the internal market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Union law, such measures shall not be considered as existing aid after the date fixed for liberalisation."

⁽¹²¹⁾ Decision (EU) 2020/391, recitals 83 and 142.

⁽¹²²⁾ Judgment of the General Court of 30 April 2002, *Government of Gibraltar v. Commission*, T195/01 and T-207/01, ECLI:EU:T:2002:111, paragraph 111.

- (198) According to the Italian authorities, Cineca has changed its accounting methodology since 2004. In a submission of October 2019, Italy explained that in the years 2004 to 2006, Cineca used a financial accounting system which was based on expenditure headings that ensured that the resources acquired, and the related expenditures were balanced. Since 2006, Cineca's financial statements were prepared in accordance with the principles of economic asset accounting. This system recorded costs and earning by their nature, i.e. by dividing them according to the economic cause of the event that triggered them. In addition, beginning in 2006, Cineca started to use "analytical accounting/management control accounting procedures" using increasingly sophisticated IT tools that ensured that costs and revenues were correctly and precisely allocated to individual areas of activity, namely to 1) HPC services, 2) services to the Ministry, 3) services to public universities and 4) economic activities as regards revenues, and personnel, depreciation, third party suppliers as regards costs. In this system, contributions Cineca received for the IT services provided were used to cover the costs incurred to produce these services and contributions received for the non-commercial activities are to cover the related operating costs. The revenues from the economic activities are used to cover the costs of these economic activities. This system has therefore been adequate to exclude completely the use of public funds for purposes other than for what they were awarded. This conclusion has been confirmed by judgment No 6009/2018 (relating to a challenge to the support for the 2015 non-commercial/institutional HPC and the services to the MIUR) ⁽¹²³⁾.
- (199) In its submission in October 2019 (see reference to it in recital (198), Italy already submitted a description of its cost allocation methodology that explained the "analytical accounting procedure" in the following manner: the system consisted of profit centres, cost centres and orders, broken down by reference to the first-level operational units of the consortium's organisational structure. This system was intended to determine the "contribution margin", or "direct costs" in other words. It was a "direct costing control system" which provided only for the allocation of direct costs to profit centres. The direct costing system is widely used and makes it possible to determine the contribution margin by comparing costs and revenues ⁽¹²⁴⁾.
- (200) In 2015, a new analytical accounting procedure was introduced that provided a more detailed classification of revenue and significantly increased the proportion of costs directly attributable to profit centres, cost centres and contracts. In addition, the allocation of costs to individual organisational units/profit centres has been extended also to indirect costs. It thus constituted a shift from "contribution margin" to "full costing". The shift from a "direct cost" model to a "full cost model" minimised the level of discretion typical of the processes for allocating common costs on an indirect basis.
- (201) Since 2016, Cineca's analytical accounting procedure, on the basis of which the costs of the areas of activities are determined, has allocated the costs and revenues to the first-level organizational units, i.e. the "Business Units" (BUs) and "Support Structures". These organisational units constitute the profit and cost centres.

⁽¹²³⁾ See section 1.4: of the judgment "Evidence of due allocation of costs, funding and revenues can consist of annual financial statements of the relevant entity. In this respect too, it must be considered that it has been satisfactorily established that Cineca uses analytical accounts capable of separating and specifying the consortium's main activities by cost centre (destination) and by type/nature of revenue and expense, as well as by business department. This is in accordance with the numerous statutory and regulatory rules which require accounting separation between activities of an economic nature and activities of a non-economic nature (cf. Article 15 (3) of the articles of association, and Cineca's rules of 27 March 2015 on the organisation and governance of in-house activities). Compliance with the separation of accounts requirement is also reflected in the reporting submitted by Cineca to the MIUR for 2015." The judgment of the Council of State of 19 July 2019 (No 10528/2019) also found that in the 2018 report relating to the services to the Ministry and the non-commercial/institutional HPC activity, "Cineca has also adequately demonstrated that the [HPC] activity is subject to a separate form of accounting and reporting." See section 3.2 of the judgment.

⁽¹²⁴⁾ Italy also added in the opening decision (see recital 73 of that decision) that even this system was characterised by an accounting separation between the operational units, with the only specific feature being that the proportion of indirect costs and/or costs of a general nature, rather than being directly allocated to the business units, were rolled over to the operational units on the basis of specifically identified criteria and drivers.

- (202) These first-level organisational units have been made up of the BUs “Universities”, “HPC”, “MIUR”, “Health and Public Administration”, and the supporting organisational units “DSET Function” (Systems and Technologies in support of the BU functions), “Facility General Services”, “Administration” and “Directorate-General”. The direct costs of production are directly attributable to the reported activities of the BUs: personnel and associated costs and third-party services, such as electricity costs and depreciation. These are allocated directly to the cost centres’ orders for the services of the specific business area. Staff costs (salaries) are determined on the basis of timesheets. In addition, some personnel, third part services and depreciation costs of the “DSET Function” is also added on the basis of time sheets and contracts. Indirect overhead costs relate to the costs of the Support Structures. The indirect costs relating to these support structures in terms of labour, third party services, maintenance of equipment and buildings, utilities and depreciation are allocated to the cost centres of the BUs on the basis of roll-over drivers specifically defined by the support structures on the basis of the capacity and resources allocated to the various BUs.
- In the case of the “DEST Function”, the costs are charged to “infrastructure services” where the mode of use is in the form of “virtual machine”, consisting of storage services, connectivity services and system management. The driver here is user’s element, i.e. use of the capacity attributable to a contract.
 - The indirect costs of administrative support of the “Administration” are determined on the basis of the share of personnel dedicated to the various BUs;
 - The indirect costs of the “Administration” and the “Directorate-General” are determined on the basis of headcount assignable to the various BUs;
 - The indirect costs of “General Services” are determined in a two-step procedure. In the first step, the costs are allocated on the basis of the surface area (m²) the racks (the supporting framework that holds hardware modules) occupy in the percentage of dedication to the various BUs. In a second step, the costs not directly attributable to the various BUs, such as costs for staff, depreciation, utilities, cleaning, and security are determined in proportion of the area occupied by the various BUs. Costs for security and safety installations are allocated on the basis of kilowatts; and residual costs are allocated on the basis of the proportion of staff dedicated to the various BUs.
- (203) It should also be borne in mind that the services provided to the MIUR, on the one hand, and the Supercomputing (HPC), on the other hand, are two separate B.U.s and are therefore separated from the costs and revenues relating to other activities.
- (204) Italy explained that the accounts are also subject to a number of audit procedures. All financial statements of Cineca are subject to verification by Cineca’s Board of Auditors of which one member is appointed by each of the Ministry of Research in agreement with the Ministry of Education, the Ministry of Finance and the Cineca’s consortium Assembly. Cineca is also under the control of the Court of Auditors of Italy, which extends to the entire financial management of the consortium and the result of which are communicated to the Parliament. In addition, the consortium’s annual accounts are independently certified by the company Deloitte S.p.A.⁽¹²⁵⁾. As to the transfer of annual compensation for the IT services Cineca provided to the Ministry (compensation established by ministerial decree, i.e. the FFOs⁽¹²⁶⁾), this payment to Cineca is subject to ex ante registration by the Court of Auditors of Italy and to verification by the general National Accounts Department of the Ministry of the Economy and Finance⁽¹²⁷⁾. For each year of the time frame 2006 to 2019, the budgets were scrutinised for their legality by these bodies which established their full compliance with the applicable laws.

⁽¹²⁵⁾ The financial reports relating to projects financed by the European Union follow guidelines set out in the individual project notice and are accompanied by an audit certificate issued by an external certifier. They are also subject to random checks by the European Commission. The risk of cross-subsidisation is also ruled out by Cineca’s adoption of an analytical accounting system which, together with checks by auditors, the consortium meeting (when approving the budget), and the Court of Auditors (given that Cineca is a body financed on an ordinary basis from public resources), has made it possible to keep the costs and revenues generated by non-economic activities and those generated by commercial activities clearly separate.

⁽¹²⁶⁾ Since 2019, the allocation of the compensation is no longer carried out via a ministerial decree.

⁽¹²⁷⁾ Article 5 (1) of Legislative Decree No 123/2011 provides: “All acts giving rise to financial effects for the State budget shall be subject to prior administrative and accounting checks’, including, on a mandatory basis, ‘(a) acts subject to prior review of the legality of the Court of Auditors’ and ‘(f) acts and measures involving transfers of sums from the State budget to other bodies or bodies.”.

- (205) Italy argues that two conceptual issues should be clarified in approaching the cross-subsidisation question. First, the existence of overcompensation/cross-subsidisation should be ruled out if the costs of providing the services in question are equal or exceed the level of revenues/financing of the services. Second, in the notion of cross-subsidisation is inherent the idea that the alleged beneficiary of the cross-subsidisation charges prices that are below market value, and the costs incurred are covered by the cross-subsidisation. On the other hand, if prices charged enable the alleged beneficiary to cover at least the variable costs, a reasonable share of the common fixed costs, and a reasonable margin on the capital employed, cross-subsidisation can be ruled out.
- (206) To provide more detail, the Italian authorities transmitted three excel tables showing the cost/revenue data relating to the years under investigation (2006 to 2015) and from 2016 in each of the three areas in question: the financing of the 1) commercial activities 2) the non-commercial/institutional HPC activity; and 3) services to the Ministry.
- (207) The table summarising the costs and revenues for Cineca's commercial activities demonstrate that the overall profit, understood as the difference between revenues and costs amounted to EUR 30 930 424 at the end of the time period 2006 to 2019 ⁽¹²⁸⁾. Italy points out that there is a strong positive result in a "cumulative" viewpoint, but with the exception of one year (2009), each year's activity also resulted in a positive marginality. The negative result in 2009 was covered by the positive margins of previous years.

Commercial activities

ANNO	REVENUES ENTERED INTO BALANCE SHEET	COSTS ATTRIBUTABLE TO ECONOMIC ACTIVITIES	DIFFERENCE BETWEEN REVENUES AND COSTS		
2006	[...]	[...]	[...]		
2007	[...]	[...]	[...]		
2008	[...]	[...]	[...]		
2009	[...]	[...]	[...]		
2010	[...]	[...]	[...]		
2011	[...]	[...]	[...]		
2012	[...]	[...]	[...]		
2013	[...]	[...]	[...]		
2014	[...]	[...]	[...]		
2015	[...]	[...]	[...]		

⁽¹²⁸⁾ Regarding the complainant's comment that Cineca's subsidiary operating in the university software market, KION, is a real powerhouse (see recital 70 and footnote 50), the Italian authorities pointed out that circa 97 % of KION's activities were carried out for consortium members and only the remaining portion was carried out for commercial clients. The 20 % profit margin related to this commercial activity and the 1 % profit margin was in relation to consortium members. Cineca's profit margin in the public university IT segment was an average of 13,4 % in the years 2006 to 2019, up from 6 % in the years 2005 to 2015. The increase was the result of litigation initiated by the complainant that led to an accumulation of reserves as investments have been halted. Investments will have to resume; hence profitability will decrease. Profitability in the private university IT segment was 25 % in the time period 2006 to 2019. On the other hand, the public administration IT segment was deficit producing in 2006 to 2019, i.e. produced EUR - 4 162 000 cumulatively. The deficit is financed from Cineca's commercial activities which are profitable, (see table "Commercial activities"), and from equity reserves.

ANNO	REVENUES ENTERED INTO BALANCE SHEET	COSTS ATTRIBUTABLE TO ECONOMIC ACTIVITIES	DIFFERENCE BETWEEN REVENUES AND COSTS		
2016	[...]	[...]	[...]		
2017	[...]	[...]	[...]		
2018	[...]	[...]	[...]		
2019	[...]	[...]	[...]		
				30 930 424	Total difference: 2006 - 2019

- (208) A table submitted with the relevant figures in the years in question shows that the costs of providing the non-commercial/institutional HPC services were overall higher than the contribution by the Ministry: the result being EUR - 3 122 404 at the end of the time period 2006 to 2019. In reality, however, Italy argues that the actual difference at the same time was EUR - 89 607 514, in view of the fact that in the first nine years in the given time period (i.e. 2006 to 2014), contribution of the Ministry was disbursed not as earnings but as “net assets” or “captive reserves”) (Italian: “patrimonio netto”⁽¹²⁹⁾) in response to the Ministry’s request of considering the contributions membership fees. These amounts are allocated directly to equity and not as revenue are still recorded in the Endowment Fund and shown in the balance sheet⁽¹³⁰⁾.

Non-commercial/institutional HPC activities

			INCASSI TOTALI		DIFFERENZE	
	RICAVI ISCRITTI NEI BILANCIO CINECA HPC-MIUR	COSTI HPC	A PATRIMONIO NETTO SU LETTERA DEL MINISTERO (4)	A FRONTE DEI COSTI	TRA INCASSI TOTALI E COSTI	TRA INCASSI (ESCLUSI QUELLI A P.N.) E COSTI
2006		[...]	[...]		[...]	[...]
2007		[...]	[...]		[...]	[...]
2008		[...]	[...]		[...]	[...]
2009		[...]	[...]		[...]	[...]
2010		[...]	[...]		[...]	[...]

⁽¹²⁹⁾ Italy states that the “patrimonio netto” is budgeted and not yet used. It can only be used for non-commercial/institutional HPC activity. This makes sense as HPC development is very capital intensive.

⁽¹³⁰⁾ Italy explains that financial statements (balance sheet) is the tool for controlling and ensuring the accounting correctness and proper use of surpluses and more generally the reserves for equity. It is the instrument capable of certifying that any surpluses from non-commercial activities are not reinvested in commercial activities.” Profits in fact must be reinvested into the activities needed by the consortium members (technically speaking, first added to the net assets as reserves before being used for the consortium members) and cannot be shared among the members of the consortium. This applied also to the cumulative surplus of EUR 19 882 152 at the end of the year 2017 (see column 6 and line 15 of the table “Non-commercial/institutional HPC services”). This amount also forms part of the reserved equity for non-commercial/institutional HPC activities and are still in the balance sheet. It also applied to the EUR 2 771 888 profit for 2015, which is in the 2016 financial statements under the heading “Profit reserves of previous years”. Italy also points out in reply to the complainant’s remark relating to the alleged 13 % profit margin for all of Cineca’s activities in the years 2017 to 2019 (see recital 120), that the chart the complainant referred to related to revenues and not to profits. Besides, Cineca is not prevented from making profit, it is only the use of the profits that is regulated by law.

			INCASSI TOTALI		DIFFERENZE	
	RICAVI ISCRITTI NEI BILANCIO CINECA HPC- MIUR	COSTI HPC	A PATRIMO- NIO NETTO SU LETTERA DEL MINISTERO (4)	A FRONTE DEI COSTI	TRA INCASSI TOTALI E COSTI	TRA INCASSI (ESCLUSI QUELL A P.N.) E COSTI
2011		[...]	[...]		[...]	[...]
2012	[...]	[...]	[...]	[...]	[...]	[...]
2013	[...]	[...]	[...]	[...]	[...]	[...]
2014	[...]	[...]	[...]	[...]	[...]	[...]
2015	11 000 000	13 157 494		11 000 000	[...]	[...]
2016	9 500 000	[...]		9 500 000	[...]	[...]
2017	11 000 000	[...]	-	11 000 000	[...]	[...]
					19 882 152	[...]
2018	13 000 000	[...]			[...]	[...]
2019	[...]	[...]			[...]	[...]
					- 3 122 404	- 89 607 514

Column “patrimonio netto”/years 2006 to 2011: entered as “patrimonio netto” at the request of the Ministry; Coloumn “patrimio netto”/ years 2012-2014: entered as “patrimonio netto” without express request from the Ministry; Column “Costs of HPC”/year 2015: according to the restatement of the cost report to the Ministry. Continuing caption under table: Italy clarified that the deficits for years 2018 and 2019 (See column 6 and rows 16 and 17) are temporary; as the cost verification has not yet taken place.

- (209) With regard to the IT services provided to the Ministry, the table (see below) presents a very similar situation: the production costs for the time period 2006 to 2017 were higher than revenues in the same time period by EUR 66 018 871. More precisely, the difference between revenue and costs is already slightly negative when looking at the period 2006-2014 alone (EUR - 208 045). However, the 2006 to 2019 figure worsens significantly, leading to the final result of EUR - 66 018 871, if the annual contributions for the financial years 2015 to 2018, which, although entered in the balance sheet as revenue, were not actually paid, are taken into account ⁽¹³¹⁾.

IT services to the Ministry

YEAR	Revenue derived from the use of CINECA	COSTS FOR SERVICES TO THE MIUR	ACTUAL RECEIPTS FOR SERVICES TO THE MIUR ON FFO	Difference TRA receipts EFFETTIVI de MIUR AND COSTI		
2006	[...]	[...]	[...]	[...]		
2007	[...]	[...]	[...]	[...]		
2008	[...]	[...]	[...]	[...]		

⁽¹³¹⁾ Italy explains that the financing of the IT services provided to the Ministry took place partially from the equity reserves formed over the years 2006 to 2014. According to the 2014 balance sheet, Cineca had an equity of EUR 121 million, including EUR 86 million consisting of the contribution provided by the Ministry for the non-commercial/institutional HPC activity up to December 2014, which were added to the net assets and reserves that had already been formed prior to 2006. In addition, the commercial activities also generated positive marginality (see table “Commercial activities”).

YEAR	Revenue derived from the use of CINECA	COSTS FOR SERVICES TO THE MIUR	ACTUAL RECEIPTS FOR SERVICES TO THE MIUR ON FFO	Difference TRA receipts EFFETTIVI de MIUR AND COSTI		
2009	[...]	[...]	[...]	[...]		
2010	[...]	[...]	[...]	[...]		
2011	[...]	[...]	[...]	[...]		
2012	[...]	[...]	[...]	[...]		
2013	18 850 000	[...]	[...]	[...]		
2014	[...]	[...]	[...]	[...]	- 208 045	
2015	16 759 349	[...]		[...]		
2016	16 000 000	[...]		[...]		
2017	[...]	[...]		[...]		
2018	14 000 000	[...]		[...]		
2019	8 934 125	9 339 909		- 9 339 909	- 66 018 871	Total Differences 2006-2019

Column 4 and 5/year 2012: The difference of [...] million in revenue and receipts for services to the MIUR relate to an amount that the Ministry has explicitly declared to have been allocated to cover the merger costs of the three consortia (CASPUR, CILEA, CINECA), and not for the provision of the service. Columns 2 and 4/year 2013: The authorities explained that part of the financing (i.e. of EUR 18 850 000) must have been allocated against the merger costs, but the exact amount was not indicated. However, the financing for this year is certainly overstated.

- (210) In sum, both the provision of non-commercial/institutional HPC services and the provision of services to the Ministry were characterised by the under-compensation of costs through public contributions. This under-compensation totalled approximately EUR 156 million. The data show that the public service activities financed by the public authorities in favour of Cineca could not allow cross-subsidisation to the economic activities.
- (211) In reaction to the complainant's challenge of the accuracy of the 2015 reporting of the costs of the non-commercial/institutional HPC activity alleging double reporting of the personnel costs (recital 35 and footnote 24 of the opening decision and recital 109), Italy states that the report was restated (reworked) in 2019 on the basis of the even stricter application of Cineca's more advanced cost calculation methodology described in recitals 200 et seq, which resulted total costs in an amount of EUR 13 157 494 ⁽¹³²⁾ for 2015. This amount is significantly higher than the public contribution for 2015 which, even after the restatement of 2019, remained at EUR 11 million.

⁽¹³²⁾ Italy explains that at the recalculation, VAT costs relating to the non-commercial/institutional HPC services for the period 2012-2015, amounting to EUR 6 343 000, (due for the years 2012 to 2015) were added as a result of a tax inspection carried out by the Revenue Agency. The amount was allocated to the year 2015, as that was the first year for which these costs could be charged, given that Cineca's liability for them was not known in previous years.

- (212) As regards the allegation that Cineca claimed reimbursement for the same personnel costs from both the Ministry and from the EU (see recital 112), the Italian authorities point out that it is possible that the same person worked both on non-commercial/institutional HPC projects and EU financed HPC projects. Given that the calculation for personnel costs is based on timesheets, it is possible to separate costs related to non-commercial/institutional HPC activities and EU financed HPC projects, and report working time by the same person to both the Ministry and the EU, but it does not represent the same labour costs. Besides, the Italian authorities explain that the non-refunded part of reported costs for EU projects, such as the 25 % personnel costs are not refunded by the EU (see recital 108). Further, in reaction to the complainant's allegation that double reporting took place in connection with a 2016 EUROfusion project (see recital 106), Italy explains that the cost reporting was amended exactly in order to avoid double reporting. In any event, Italy points out that the cost reimbursement for the non-commercial/institutional HPC activity for 2016 amounted to EUR 9 500 000 (see second column in the table "Non-commercial/institutional HPC activities") which was below the incurred costs, i.e. EUR [...].
- (213) As regards the complainant's allegation that electricity cost items incurred in connection with commercial HPC activities in 2015 were reported to the Ministry for reimbursement (see recital 113), the Italian authorities refer again to the fact that the 2015 reporting was replaced by the restated cost report of 2019. The accounting for the electricity cost takes place in line with the cost allocation methodology described in the document dated October 2019 (see recital 199). As regards the allegation that in the 2018 cost report relating to the 2017 non-commercial/institutional HPC activity also contained a request towards the Ministry to reimburse electricity costs for electricity used for the benefit of private clients (see recital 119 is also incorrect. Only the electricity costs relating to the non-commercial/institutional HPC activity was reported to the Ministry ⁽¹³³⁾.
- (214) As regards the information about Cineca's investment into the FERMI system (see footnote 85), the Italian authorities explain that FERMI is owned by Cineca.

3.4. Additional comments from Cineca

3.4.1. Provision of IT services to the MIUR and universities

3.4.1.1. Economic activity

- (215) Cineca separates the accounts of economic and non-economic activities. An entity may be regarded as an undertaking solely for the purposes of part of its activities, if they correspond to those which must be qualified as economic activities ⁽¹³⁴⁾. The complainant's comments focusing on the fact the Cineca also carried out economic activities are, therefore, ineffective.
- (216) All the requirements for the provision of IT services to the Ministry and the universities by Cineca to be classified as a non-economic activity are met. Cineca's services constitute an essential component of the State's task within the Italian public university system, and the supply of personalised university software products and related services satisfies — by its nature, its purpose, and the rules to which it is subject ⁽¹³⁵⁾ — the requirement that it be linked to the exercise of a non-economic activity of the State in the field of public university education ⁽¹³⁶⁾.

⁽¹³³⁾ Italy provided information according to which electricity consumption of the non-commercial/institutional HPC activity was 1 901 560, and the total HPC activity's electricity consumption was EUR 3 689 130 for the year 2017. For 2018, the respective figures were EUR 1 977 835,09 and EUR 4 714 863.

⁽¹³⁴⁾ Judgment of the Court of Justice of 27 June 2017, *Escuelas Pías*, C-74/16, ECLI:EU:C:2017:496, paragraph 51. "In that context, it is possible that a single establishment may carry on a number of activities, both economic and non-economic, provided that it keeps separate accounts for the different funds that it receives so as to exclude any risk of cross-subsidisation of its economic activities by means of public funds received for its non-economic activities."

⁽¹³⁵⁾ The case law of the Court and the Commission's decision-making practice identifies a number of functional criteria relating to the intrinsic link between the means and the objective of a public task. Many, if not all, are applicable to Cineca's activities. The connection between the various functions and components of the software are to be understood as different sides of the same coin, so the separation of these components from one another would interfere with the functioning of the non-economic activities and the pursuit of the objective.

⁽¹³⁶⁾ See *HIS Decision* recital 117.

3.4.1.1.1. Legal obligation

- (217) Contrary to the complainant's view (see recitals 50 and 74), there is a legal obligation imposed on the authorities relating to the exercise of official authority. Article 60 of royal decree No 1592 of 31 August 1933 required university "rectors to promote the formation of consortia in order to promote universities in the most useful and effective way for their maintenance and operation." Cineca's articles of association (approved by Presidential decree No 1106 of 13 October 1969) were formed on the basis of this legislation. Thus, there is a mandatory rule in the form of a governmental act having the status of secondary legislation that provides for the establishment of Cineca.
- (218) Cineca is thus a key body linked to the Ministry and other public bodies responsible for higher education. It plays a key role in the organisation of the institutional functions within the education system as regards the management and development of ministerial databases in support of national assessment and other functions assigned to the Ministry by the legal system.
- (219) Article 3 of Cineca's articles of association (from 2012) describes the consortium's role, i.e. to "produce services with a high potential and efficiency and transfer technologies for the development and excellence of the higher education and research system ⁽¹³⁷⁾).
- (220) Thus, the complainant's claim that there is no legal obligation to provide advanced and highly personalised ICT services and goods to the Ministry and the universities but only a general objective is not substantiated. There is a legal obligation and the obligation in question is no more generic than that of *TenderNed*, *ZVG Portal* and *CompassDatenbank*. The complainant errs in considering that unlike in the *HIS* case, the purpose of the creation of Cineca was *not* to provide assistance to the Ministry and the universities in the free provision of the higher education. In sum, the requirement that the activity should be linked to the performance or exercise of a public task by virtue of the rules to which the activity is subject is satisfied. The precedent does not require that Cineca's task itself be a public task ⁽¹³⁸⁾.

3.4.1.1.2. Comments on the complainant's observations relating to the economic nature of the activities

- (221) The complainant claims that for a service to fall within the essential function of the state, it should be "self-produced" and not entrusted to a third party, and that in this case, MIUR and universities decided to outsource the services to a third party, Cineca. As regards the argument that according to the *Scattolon* judgment (see recital (48)), the transfer of cleaning and other support staff employed by a public undertaking to another public undertaking constituted a transfer of "undertaking" within the meaning of the Directive on the safeguarding of employees' rights ⁽¹³⁹⁾, Cineca argues that the *Scattolon* judgment is different and is not comparable to the present case.
- (222) The analysts and system architects of Cineca possess not only technical knowledge but also knowledge of administrative and legal matters relating to the specific needs of the system that were accumulated over decades.

⁽¹³⁷⁾ "To this end, the Consortium pursues the following objectives in relation to both the member entities and third parties, but still in the interest of the member entity: (...) d) managing a centre which, with its own facilities or appropriate links, provides IT management and processing services to all members of the consortium, with priority being given to the Ministry of Education, Universities and Research; (...) f) develop, prepare and manage, in the interest of the national education, university and research system, and without additional costs, without prejudice to the contribution provided for in Article 16 (1) (b), appropriate IT systems".

⁽¹³⁸⁾ Recital 121 of the *HIS Decision*.

⁽¹³⁹⁾ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001, p. 16).

- (223) As long as the functions/services are carried out in connection with the exercise of official authority by the State, there is no market transaction even if the activity is capable of being economic, as such an activity gives effect to the State's prerogatives. It is sufficient that the State has made a decision to give effect to its public power in a way that facilitates the exercise of that public power with the choice to that effect being reserved to the State. If the separation of the activities in question interferes with the functioning of the public power to an extent that it would jeopardise the attainment of the objectives, the activities cannot be separated and must be regarded as constituting the exercise of authority. This is so even if the activity, in and of itself, could be provided by another seller for remuneration.
- (224) As regards the complainant's argument relating to the payment of a consideration (see recital 48), Cineca further argues that paying remuneration for a service inherent in the exercise of a public function when the level of payment is established in law and not determined by the service provider, is not sufficient to classify the activity as economic⁽¹⁴⁰⁾. Cineca explains that the Consortium's bodies establish so-called pricing guidelines. However, universities are also participating in the formation of these guidelines, and the final tariff for the fees is determined in view of these guidelines.
- (225) Cineca was established to meet the functional needs of the education/research system which, in Cineca's absence, would have needed to develop on its own. Cineca was a reference body with which advanced, highly specialised services were designed that were tailored to the needs of the Ministry. The fact that Cineca is not part of the Ministry does not give rise to an economic activity. There is a dedicated structure within Cineca which reflects the internal structure of the Ministry and provides for specialised teams to support the Ministry. Cineca operates as an ecosystem: the consortium board consists of experts that functions as a technical advisory and support body actively involved in the implementation of the products. These experts participated in 33 thousand instances of personalisation, a huge jump from recent years.
- (226) In sum, Cineca points out that despite a lack of constraints on potential competitors, no entity other than Cineca could develop the full range of services needed by the Ministry and the universities. No competitor, including the complainant, has the company structure or the type of software suitable for the Ministry to manage centrally an integrated information system for the 1,7 million students, 4 800 courses, 80 universities and 150 000 staff employed in the system (see also *HIS Decision* and *Tendered* case law). For the universities, an integrated ecosystem is preferable to a patchwork of software. The university system requires the development of specific IT solutions tailored to universities' specific needs, and one which is continuously updated. This is what Cineca offers. The analysts and system architects of Cineca possess not only technical knowledge but also knowledge of administrative and legal matters relating to the specific needs of the system that were accumulated over decades.

3.4.1.2. Advantage and imputability

- (227) Cineca has been able to provide the services to the Ministry at cost level or below cost. In fact, the contributions for the services to the Ministry as well as for the non-commercial/institutional HCP services were lower in the relevant time period than the corresponding costs. Universities pay membership contribution to Cineca for the services which are not higher than market prices. As regards imputability to the State of the universities' payment to Cineca, Cineca also argues that in view of the jurisprudence cited in recital 122 of the opening decision referring to the *Stardust* assessment criteria, it is not the joint presence of the universities and the MIUR on Cineca's board that could be viewed as conducive to imputability of universities' selection of Cineca as IT services provider, but the presence of State officials on the State universities' administration. Finally, Cineca adds that jurisprudence puts the Commission under an increased obligation to substantiate imputability of a measure to the State when the "grantor" of the measure is autonomous⁽¹⁴¹⁾.

⁽¹⁴⁰⁾ Judgment of the European Court of Justice, *CompassDatenbank v. Republik Österreich*, C-138/11 of 12 July 2012, ECLI:EU:C:2012:449, paragraph 39: "In addition, the fact that a product or a service supplied by a public entity and connected to the exercise by it of public powers is provided in return for remuneration laid down by law and not determined, directly or indirectly, by that entity, is not alone sufficient for the activity carried out to be classified as an economic activity and the entity which carries it out as an undertaking (see, to that effect, *SAT Fluggesellschaft*, paragraph 28 et seq. and *Diego Calì & Figli*, paragraphs 22 to 25)."

⁽¹⁴¹⁾ Judgment of the General Court of 19 March 2019 in joined cases T-98/16, T-196/16, and T-198/16 *Italy v. Banca Popolare di Bari*, paragraph 67, ECLI:EU:T:2019:167; General Court stated in T-98/16, T-196/16, and T-198/16 *Italy v. Banca Popolare di Bari* "Where [the body which granted the aid in question] is autonomous, including as regards the management of its funds, by comparison with intervention by the public authorities and with public funds ... the Commission is (...) under an even more significant obligation to specify and substantiate the reasons which justify its conclusion that the resources used are under public control and the measures are imputable to the State."

4. ASSESSMENT OF THE MEASURES

4.1. Presence of State aid

- (228) Article 107(1) of the Treaty provides that 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.
- (229) For a measure to be regarded as State aid within the meaning of Article 107(1) of the Treaty, it must fulfil the following cumulative conditions: a) it must be granted from State resources and must be imputable to the State, b) it must confer an economic advantage on an undertaking; c) the advantage must be selective; and d) it must distort or threaten to distort competition in so far as it affects trade between Member States. If any one of these criteria is not fulfilled the measure does not constitute State aid.

4.1.1. Financing of Cineca for the provision of IT services to Italian universities

4.1.1.1. Economic nature of services provided

- (230) According to Article 107(1) of the Treaty, in order for State aid to be present, an economic advantage has to be provided to an undertaking. The concept of undertaking covers any entity engaged in an economic activity, i.e. in the offering of goods or services on a given market regardless of the entity's legal status and the way in which it is financed⁽¹⁴²⁾. However, Article 107(1) of the Treaty does not apply where the State acts by exercising public power or where the activity in question forms part of the essential functions of the State or is connected with those functions by its nature, its aim, and the rules to which it is subject⁽¹⁴³⁾. This notion is further described in the cited case law, including the existence of an “intrinsic link”, an “inextricable link”, a “close link”, an “inseparable link”, a “necessary link” or a “direct connection” between the supported activity and a State function.
- (231) Examples of such activities include the collection of data to be used for public purposes on the basis of a statutory obligation imposed on undertakings to disclose such data (*CompassDatenbank*)⁽¹⁴⁴⁾, offering a platform enabling public authorities to comprehensively manage the public procurement process (*TenderNed*)⁽¹⁴⁵⁾, and the publication of auctions in insolvency proceeding by ZVG Portal, an entity established by the German Länder and designated for this task (*ZVG Portal*)⁽¹⁴⁶⁾.
- (232) The cases cited in footnote 143 established the notion of “intrinsic link”, and appear to focus on legal obligations in support of a public task which applied to the State as well as to the beneficiaries of the State support; the commonality of the objectives (common purpose) pursued, and the finding that the service in question is essential to the State's ability to carry out the State task (the “necessity”, “indispensability”, “inseparable nature” argument).

⁽¹⁴²⁾ Judgment of the Court of Justice 12 September 2000 in *Joined Cases Pavlov and Others*, C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74. Judgment of the Court of Justice of 23 April 1991 in *Höfner and Elser*, C-41/90, ECLI:EU:C:1991:161, paragraph 21.

⁽¹⁴³⁾ See, in particular, Judgment of the Court of Justice of 19 January 1994, *SAT/Eurocontrol*, C-364/92, ECLI:EU:C:1994:7, paragraph 30, judgment of the Court of Justice of 18 March 1997, *Calì & Figli*, C-343/95, ECLI:EU:C:1997:160, paragraphs 22 and 23; judgment of the Court of Justice of 12 July 2012, *Compass Datenbank v. Austria*, C-138/11 ECLI:EU:C:2012:449, paragraph 41; *TenderNed* judgment of the General Court of 28 September 2017, Case T-138/15, *Aanbestedingskalender and Others v Commission*, ECLI:EU:T:2017:675.

⁽¹⁴⁴⁾ Judgment of the European Court of Justice, *CompassDatenbank v. Republik Österreich*, C-138/11 of 12 July 2012, ECLI:EU:C:2012:449.

⁽¹⁴⁵⁾ Judgment of the General Court of 28 September 2017, Case T-138/15, *Aanbestedingskalender and Others v Commission*, ECLI:EU:T:2017:675.

⁽¹⁴⁶⁾ *Commission decision of 2.5.2013 in State aid SA.25745 (2013/NN) (ex CP 11/2008) – German –National website for auctions in insolvency proceedings (ZVG Portal)* C(2013) 2361 final.

The intrinsic link must exist with respect to the totality of the functionalities (or modules) offered in the service, or with respect to each functionality ⁽¹⁴⁷⁾. Were some of the functionalities of the package, in isolation, not be linked to the exercise of a State task, it would be non-economic if without this functionality, the rest of the system would be largely useless ⁽¹⁴⁸⁾, or would not be operational. Under these circumstances, the functionalities must be considered as being linked to each other and form different facets of the same activity ⁽¹⁴⁹⁾. Once the links between the various functionalities are established, it can be examined whether the service with these functionalities is connected to the exercise of public power ⁽¹⁵⁰⁾. The findings in the cases cited were not affected by the presence of competitors on the market ⁽¹⁵¹⁾ and relied among other things, on the circumstance that the beneficiary was able to offer the most comprehensive range of products among competitors.

- (233) The task, therefore, is to establish whether there is an intrinsic link between the provision of IT services to Italian universities and the State's task in the tertiary education field. Pursuant to the cited case law, Cineca's provision of IT services to Italian universities would not be of an economic nature if it were found to be intrinsically linked to an essential function of the Italian State in the field of public tertiary education.
- (234) In the *HIS Decision* ⁽¹⁵²⁾, the Commission found, largely on the basis of the case law cited in footnote 143 and in particular *TenderNed* case law, that the IT services provided by the entity HIS GmbH to German public universities were intrinsically linked to the State's obligation to provide public tertiary education "by their nature, purpose and the rules to which the activity was subject" ⁽¹⁵³⁾.
- (235) The *HIS Decision* was based on the finding that the management of public tertiary education was an essential function of the State ⁽¹⁵⁴⁾ and there was therefore a public task implemented through the public universities, and that the provision of university software products and services constituted 'means' by which public universities are able to fulfil this legal obligation. The provision of tertiary education ⁽¹⁵⁵⁾, (i.e. the State task) would not have been possible without the means. It was not necessary to show that HIS GmbH itself pursued a public task.
- (236) First, the nature and the purpose of the services provided by HIS were found to be closely related to the State's task to provide public higher education, as universities cannot be managed without efficient software. The provision of the software services was therefore necessary for the educational tasks of the universities, i.e. the provision of free higher education to the public. The support of the higher education has been an explicit aim of HIS GmbH's creation and operation. These elements constituted the requirements of necessity and the existence of a legal obligation.

⁽¹⁴⁷⁾ Judgment of the General Court of 28 September 2017, Case T-138/15, *Aanbestedingskalender and Others v Commission*, ECLI:EU:T:2017:675, paragraph 41.

⁽¹⁴⁸⁾ See paragraph 49 of Judgment of the General Court of 28 September 2017, Case T-138/15, *Aanbestedingskalender and Others v Commission*, ECLI:EU:T:2017:675; Judgment of the Court of Justice, *CompassDatenbank v. Austria*, C-138/11 of 12 July 2012, Case C-138/11, ECLI:EU:C:2012:449, also cited in paragraph 44 of Judgment of the European Court of Justice of 7 November 2019 in C-687/17P, ECLI:EU:C:2019:932.

⁽¹⁴⁹⁾ See paragraphs 51 and 52 of Judgment of the General Court of 28 September 2017, Case T-138/15, *Aanbestedingskalender and Others v Commission*, ECLI:EU:T:2017:675.

⁽¹⁵⁰⁾ See paragraph 53 of Judgment of the General Court of 28 September 2017, Case T-138/15, *Aanbestedingskalender and Others v Commission*, ECLI:EU:T:2017:675.

⁽¹⁵¹⁾ See paragraph 90 of Judgment of the General Court of 28 September 2017, Case T-138/15, *Aanbestedingskalender and Others v Commission*, ECLI:EU:T:2017:675.

⁽¹⁵²⁾ Decision (EU) 2020/391.

⁽¹⁵³⁾ Recital 127 of the *HIS Decision*.

⁽¹⁵⁴⁾ Public education organised within the national educational system funded and supervised by the State may be considered as a non-economic activity. The Court of Justice held that the State, "by establishing and maintaining such a system of public education and financed entirely or mainly by public funds and not by pupils or their parents [...] does not intend to become involved in activities for remuneration but carries out its task towards its population in the social, cultural, and educational areas". Judgment of the Court of Justice of 11 September 2007, *Commission v Germany*, C-318/05, ECLI:EU:C:2007:495, paragraph 68, and Judgment of the Court of Justice of 27 June 2017, C-74/16, *Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe*, ECLI:EU:C:2017:496, paragraph 50.

⁽¹⁵⁵⁾ See recitals 124, 126, 127 of the *HIS Decision* referring to the *TenderNed* judgment of the General Court of 28 September 2017 *Aanbestedingskalender BV v. Commission*, recitals 90 to 97.

- (237) The “necessity argument” in the *HIS* case was reinforced by a large number of comments submitted by interested parties (largely German State universities) during the formal investigation arguing that HIS GmbH’s products and services were used to execute essential, university specific business processes, the functionality of which was a prerequisite for the overall functioning of German public universities. The IT services had to be tailored and adjusted to the universities’ specialised needs, which, in the absence of HIS GmbH’s services, the German public universities or the Länder themselves would have needed to take care of ⁽¹⁵⁶⁾. Hence, HIS GmbH’s services were found to be indispensable for the fulfilment of the universities (i.e. the State’s) educational mandate. Due to this high degree of tailoring, the service was not comparable to a simple service also necessary for the operation of universities, such as purchasing chairs, or renting real estate property.
- (238) The requirement that the activity should be connected to carrying out the State’s non-economic activity in the public tertiary education field “by the rules to which [the activity] is subject”, as specified by the relevant case law ⁽¹⁵⁷⁾, was also found to be satisfied in the *HIS* case. The State’s constitutional obligation to provide citizens with a right to education is implemented by State universities and Section 2 of HIS GmbH’ articles of association, which govern the operation of HIS, clearly states that “the purpose of the company is to support higher education institutions and competent administrative bodies in their efforts to perform higher education tasks in a rational and cost effective manner”. On this basis, the Commission considered that the requirement of HIS GmbH being connected to the exercise of public tasks “through the rules to which [its activity] was subject” was satisfied.
- (239) The General Court’s judgment in the *TenderNed* case established that the service TenderNed provided and the public task at issue in that case were inseparable, even though there were indications that the e-procurement in question merely “contribute[d] to the effective operation of the [service] that was connect[ed] with the exercise of public power” (see recital 90 of the judgment). Similarly to the *TenderNed* judgment, in the *HIS* case, there were market operators that offered parts of the service that HIS GmbH offered, but “did not offer the conditions relating to price, objective quality characteristics, continuity and access to the services provided that would be necessary to fulfil” the objectives of the State task. No other provider of university software offered the entire range of services that HIS GmbH offered.
- (240) It was on this basis, that the Commission concluded that HIS GmbH’s provision of university IT services to German public universities were intrinsically linked to carrying out the non-economic activity of providing tertiary education by the State, and was therefore not economic.
- (241) On the basis of these elements, the Commission examined whether Cineca’s provision of IT services to Italian State universities are intrinsically linked to the State’s task in the tertiary education field.
- (242) The Commission first examines whether it is justified to examine the intrinsic link with respect to the totality of the functionalities (or modules) offered in the service (see recital 232). In other words, the question is whether it is possible to conclude that the functionalities are linked to each other and form different facets of the same activity, in a way that the system, as a whole, would not be operational without each individual functionality. The Commission finds that out of the eight functionalities listed in recital (181), the following five functionalities have a clear and unique link to university education: 1) Management of the enrolment process and the issuing of

⁽¹⁵⁶⁾ The way HIS GmbH was set up and operated was a method of collectively meeting these essential functional needs of the German public universities through the pooling of experience and expertise. HIS GmbH’s operation and management showed that it was governed as a quasi-State entity and its operation was entirely void of any profit making aspect and, in that respect, not essentially different from that of the universities themselves.

⁽¹⁵⁷⁾ See, for example, the *TenderNed* judgment of the General Court of 28 September 2017, Case T-138/15, *Aanbestedingskalender and Others v Commission*, ECLI:EU:T:2017:675, paragraph 38; recital 29 of the *Commission Decision ZVG Portal*; Commission Decision C(2013) 2361 final of 2 May 2013, SA.25745 (2013/NN) (ex- CP 11/2008) – *Germany – National Website for auctions in insolvency proceedings (ZVG Portal)* (OJ C 167, 13.6.2013, p. 1) http://ec.europa.eu/competition/state_aid/cases/247954/247954_1433360_92_2.pdf.

qualifications; 2) Management of the design of training offers connected to accreditation; 3) Management of post-graduate activities (activation of research doctorate courses and specialised courses; 4) Management of admission process for academic staff; 5) Collection of scientific output of academic staff. The functionalities of 1) Accounting management of the administration and research projects, 2) Legal and economic management of careers of academic and administrative staff (payment of wages; contributions, etc), and 3) Document management and registration of administrative acts to ensure compliance with regulatory provisions are functionalities with a more general role. However, some have specific education specific features such as the management of academic staff and the accounting management of research projects. Finally, even if the functionality of document management may have limited education specific features, the function “document management” is one without which the system could not function, and hence the universities could not fulfil their legal tasks of providing tertiary education.

- (243) The Commission can thus confirm Italy’s assertion that all these services are tailored to the specific needs of the universities and enable the performance of their essential functions (see recital 181). On this basis, the Commission finds that the various functionalities of the service are linked to each other and form different facets of the same activity, in a way that the system, as a whole, would not be operational without each individual functionality. Therefore, the totality of the various functionalities of the services in question as a whole could be intrinsically linked to the State’s task of providing tertiary education in State universities. In the following recitals, the Commission examines whether the intrinsic link can be established based on the factors described in recital 232.

4.1.1.1.1. Existence of a legal obligation in support of a public task which applied to the State Cineca and the State universities

- (244) As Italy explained (see in recital 132), the assignment of State power in the educational field is Article 33 of the Italian Constitution which states that the “Republic guarantees the freedom of the arts and sciences, which may be freely taught. The Republic lays down general rules for education and establishes state schools (...)”. This constitutional provision is implemented ⁽¹⁵⁸⁾ (among other things) through the functioning of the State universities.
- (245) As Italy explains, universities in Italy are bodies vested with their own statutory, regulatory, financial, didactic, organisational, and disciplinary systems ⁽¹⁵⁹⁾. They are ‘the principal seat of free research and free training within their respective systems and are places of learning and the critical development of knowledge; they operate, by combining research and teaching in an organic manner, for the cultural, civil and economic progress of the Republic’ (Article 1 of Law No 240/2010). These universities, thus have an essential duty, laid out in the laws, of providing university education and ensuring the promotion and conducting of scientific research.
- (246) Article 6 (3) of Law 168/1989 also provides for a legal basis for universities’ functions as it states that “[u]niversities carry out teaching activities and organise the relevant structures in accordance with the freedom to teach teachers and the general principles laid down in the rules governing university teaching systems. In accordance with these principles, the statutes determine the degree courses, [...] PhD courses and additional educational services.”.
- (247) Available information further shows (see recital (179) et seq.) that universities cooperate with the Ministry in fulfilling these essential tasks. Universities endorsed the establishment of the consortium in 1967 in order to provide services that enable the universities to fulfil the essential functions assigned to them. A legal obligation on the part of Cineca to support universities in fulfilling their tasks can be derived from Article 60 of Royal Decree No 1592 of 31 August 1933, which requires university “rectors to endorse the formation of consortia in order to promote universities in the most useful and effective way for their maintenance and operation.”. Cineca’s articles of association (approved by Presidential Decree No 1106 of 13 October 1969) were established on the basis of this legislation (see recital (217)).

⁽¹⁵⁸⁾ See reference to Article 33 of the Italian Constitution in Article 6 (1) of Law 168/1989.

⁽¹⁵⁹⁾ Article 6 of Law No 168 of 9 May 1989 provides for the autonomy of universities. It states that “universities possess legal personality, and in implementation of Article 33 of the Constitution, enjoy didactic, scientific, organisational, financial and accounting autonomy; they establish autonomous organisations with their own articles of association and regulations”.

- (248) As to a corresponding legal obligation on Cineca in the field of providing IT services to State universities, Italy explains that its primary aim and obligation have always been the provision of its members (including universities), with integrated and efficient computing systems and IT services, thus enabling the institution to perform their public function (see recitals 140, 249 and 250-251) for more information, including the various versions of Article 3 of Cineca's articles of association in force in the relevant time period). More specifically, Cineca has been tasked with creating high quality, innovative IT services necessary for the performance of the public function of its members.
- (249) Article 3 of Cineca's articles of association laid down, in all the six versions in existence between 2006 and 2019, the objective of Cineca in the field of IT services to universities. In the versions of 2006-2009, 2010-2011 and 2012, the text of Article 3 stated that the aim of the Consortium is, among other things, "to (...) (f) develop prepare and manage, in the interest of the national education, university and research system, and without additional costs, (...) appropriate IT systems."
- (250) The language of Article 3 in the versions of 2017, 2018 and 2019 referred to the "primary aim of the Consortium [as] to provide innovative IT services for [the members] in order to make them more efficient and modern (...)" and (a) "to provide information services and the organisation of procedures relating the implementation of these services to the MIUR, universities (...)".
- (251) As regards a general legal obligation mandating the State universities to carry out the State's task in tertiary education and specific legal bases for the carrying out of various functions in this field, please see details in recitals 246 and 183 respectively. There is thus a legal obligation on the Italian State to provide tertiary education which is implemented – among other entities – through the universities, and a legal obligation on the part of Cineca (see recitals 248 to 250 to support, through its activity, the State in carrying out this task.).
- (252) On the basis of these elements, the Commission considers that the requirement of the existence of a legal obligation in the context of an "intrinsically linked activity" on the part of the State, on the part of the universities as well as on the part of the beneficiary of the support is satisfied in this case. None of the complainant's arguments can put this conclusion in doubt.
- (253) The complainant argues that in the jurisprudence, the "intrinsic link" notion does not only impose a legal obligation on the State to carry out an activity, but also the *mediums* through which the activity was to be carried out (see recital 48). Such *mediums* include a tool to manage e-procurement procedures (*TenderNed*), to publish information about judicial auctions (*ZVG Portal*), and a publicly available database on undertakings (*CompassDatenbank*). According to this case law, the *mediums* in question are the ones that are inseparable from the public task.
- (254) The Commission considers that the arguments relating to the legal mandate specifying the medium of the service is erroneous. It is because none of these cases uses this element in its conclusion that the activity is intrinsically linked to a State task. The applicable legal provisions did not specify the *medium*, through which the activity was to be carried out. In the *TenderNed* case, for example, while the Dutch legal provision⁽¹⁶⁰⁾ mandated the setting up of an electronic system for the submission of tenders and for the publication of tender notices, the assessment expressly stated that the legal basis in question did not prescribe the creation of a central register or platform by the Member States for the management of public procurement (see recital 66 of the Commission's decision in the *TenderNed* case).

⁽¹⁶⁰⁾ It is to be noted that in the *TenderNed* case, the setting up of TenderNed in 2012 preceded the entry into force of the EU Public procurement directive of 2014.

- (255) Further, the complainant disputes that the versions of Cineca's articles of association prior to 2017 refer to Cineca's obligation to provide IT services to the universities (see recital 74) and claims that the 2012 law (Article 7 (42 bis) of Law 95 of 6 July 2012 ⁽¹⁶¹⁾) on the merger of CILEA and CASPUR also failed to provide for an obligation to supply IT services to the universities.
- (256) The Commission considers that the lack of specific reference to "IT services" in the language of Article 7 (42 bis) of Law 95 of 6 July 2012 does not make any difference as to the actual presence of a legal obligation on Cineca to provide IT services to the universities. It is because, as stated in this provision, the purpose of the newly created entity following the merger is abstractly described as "providing adequate support in terms of innovation and provision of services, for the needs of the Ministry, the university system, the research sector and the education sector.". It is to be noted that the language in the *HIS* case was equally abstract: "the purpose of the company is to support higher education institutions and competent administrative bodies in their efforts to perform higher education tasks in a rational and cost effective manner" (see recital 122 of the *HIS Decision*). It rather appears prudent to formulate such tasks in a sufficiently abstract manner, if it is difficult to determine beforehand the specific types of services that reasonably would be required to support tertiary education in the future, and the technologies on which they would be based. The complainant has not brought forward any arguments that would invalidate that conclusion.
- (257) As to the argument that the lack of a legal requirement on Cineca to provide IT services to the universities is demonstrated by the fact that Article 1 (512) of Law 208/2015 requires that ministries and public universities shall satisfy their needs exclusively through the purchase and negotiation tools of Consip or other entities "for goods and services available from Consip" (see recital 60), the Commission notes that this rule applies to services that *are* available from Consip (see recital 153). The university software services, however, are *not* available from Consip. In light of this explanation, the Commission considers that the fact that some IT services may need to be procured through Consip under Italian law, is not inconsistent with the possibility that Cineca has a legal obligation to satisfy the IT services needed by universities.

4.1.1.1.2. The commonality of the objectives pursued (common purpose)

- (258) The legal bases relating to the provision of tertiary education not only define a legal obligation, but also an essential State function, implemented through the State universities. This, coupled with Cineca's legal obligation to support universities in their task, also defines the common, converging purpose. This is demonstrated in the legal provisions described above, as well as the clear language of Article 3 of Cineca's Articles of Association (see recitals 219 and 249 to 250).
- (259) The Commission has no reason to doubt Italy's assertion (see recital 140) that the primary aim of Cineca was to serve as a tool for the higher education system by providing integrated and efficient computing systems and IT services, thus enabling the performance of their public functions.
- (260) The Commission also finds that the State and the universities have a joint objective, as explained above, and thus there is a "convergence" of objectives.

⁽¹⁶¹⁾ "The MIUR promotes a process of unification of the consortia Cineca, Cilea and Caspur in order to rationalise the expenditure for their operation through the establishment of a single entity at national level with the task of ensuring adequate support, in terms of innovation and service provision, to the needs of the Ministry, the university system, the research and education sector. The implementation of this paragraph shall not result in new or greater burdens for the public finance".

(261) As to the allegation that the objectives to be served by Cineca were general objectives related to the use of IT software and products by the MIUR and the universities and that these objectives were encompassed within the general objective of the computerisation of the entire Italian public administration allegedly to comply with an Italian national e-government plan (see recital 50), the Commission points to the fact that the objectives related to the provision of IT services to the universities and to the MIUR were articulated in the various documents of legal force long before the 2012 e-government plan came into existence. Therefore, the use of IT software and products by the MIUR and the universities is not encompassed within the general objective of the computerisation of the entire Italian public administration in the framework of the 2012 e-government plan as alleged by the complainant (see recital 50).

(262) In sum, the arguments provided by the complainant to question the existence of a common purpose or a convergence of objective between the State in the field of university education and Cineca are ineffective.

4.1.1.1.3. The essential/inseparable nature of the service in question with regard to the State's ability to carry out the State task through the universities

(263) As Italy explains (see recital 140), Cineca has been tasked with creating high quality, innovative IT services necessary for the performance of the public function of its members, including universities. The Italian authorities emphasized that Cineca's services are functionally related to the State's duty to guarantee higher education through the universities. In fact, according to the universities, Cineca's services are indispensable for the organisation and management of activities aimed at providing university education. The universities' core tasks are described in recital 181.

(264) The set of tools (see recital 181) covers all of the universities' sectoral IT service needs, and each and every one of these services is intertwined with the functioning of universities. Reducing Cineca's services by any one of these elements would leave the system of services, as a whole, non-functional within the meaning of the *TenderNed* case law (see recital 232 of this decision). Universities could not function without enrolment procedure. Without enrolment, it would be impossible to know how many students are in attendance. Lack of issuance of educational qualifications would question the very reason of the existence of universities as institutions. University education would of course be unimaginable without actual training offers, which universities have to offer (and which they typically design with a great degree of autonomy). Given that universities are places of scientific research, of post-graduate studies and specialised courses, continuing education and scientific output would not be possible at all, or its results would not be traceable and learnable without a proper management function. Without admission procedures for academic staff, the operation of universities would also be impossible. Managing the legal and economic implications of universities' operations, such as legal and economic management of staff's work and document management as well as registration of administrative acts to ensure legal obligations are complied with are also inherent in universities' operation. The separation of any one of these components would interfere with the functioning of the whole system. Hence all of these tools/services are essential for the universities' functioning.

(265) This set of services, moreover, covers almost 100 % of sectoral needs. They have been planned and produced through the development of customized technologies that have been integrated over time according to the specific needs of the universities. These needs are constantly changing both due to regulatory developments, typically increasing the number of duties assigned to universities in relation to their missions, and because of technical and technological innovation, relentless in the digital sector.

(266) This work is supported by an advisory body (see recital 182) consisting of information system directors of the member universities to discuss technological problems as well as the teaching staff who also provides input. Hence, these services are self-developed to achieve a level of efficiency that cannot be reached by procuring the services from the market.

- (267) Over time, Cineca has thus managed to consolidate this efficiency, alongside its capacity to respond swiftly to constantly new demands and its services have thus become the means through which the universities fulfil their public mandate.
- (268) The complaint argues that university IT products and services are said to be mere Enterprise Resource Planning ('ERP') products that are used in universities' organisational/administrative and management processes like in the case of any undertaking. These products could be offered by any undertakings with a transition period of three to four months. According to the complainant, there are plenty of providers, as the Italian competition authority confirmed, and the market, if anything, is negatively affected by Cineca, which entered the market in 2001. The services in question, (and in fact all input into university education, such as buildings, facilities) need to be customised and this does not differentiate university IT services from other input into university education. Customisation is a typical characteristic of the market, which is the reason why the IT services market is segmented. Hence, any operator on the market would be able to offer the services, including the complainant, that has a more complete university IT services product than Cineca, and which obtained a number of universities as clients in recent years. (See recitals 69 and 126 – this latter recital refers to clients of the undertaking Space.)
- (269) The complainant's position was allegedly confirmed by a number of court judgments leading to the conclusion that Cineca's provision of IT products and services to universities are of an economic nature (see recitals 45 and 57). The Court of Justice judgment of C-3/88 *Commission v. Italy* ⁽¹⁶²⁾ confirmed that operation of data processing systems constitutes an economic activity. The TAR Lazio court judgment No 2922/2017 concluded that the services in question could be obtained on the market for ICT products and services (see recital 57). Finally, the *Scattolon* judgment concluded that the supply of administrative, technical, and auxiliary staff to an educational institution was not an activity of an economic nature (see recital 48).
- (270) The complainant also cites the opinion of the Advocate General in case C-264/01 *AOK Bundesverband and Others* (see footnote 41) stating that the critical question as to whether an activity is economic, is whether it could be carried out by a private undertaking with a view towards making a profit.
- (271) The Commission would like to point out that the proposition in the opinion of the Advocate-General in case C-264/01 *AOK Bundesverband and Others* is rebutted by other jurisprudence that shows that it is irrelevant whether the service could be provided by a private undertaking ⁽¹⁶³⁾. To be noted that in the present case, no comparable product range for university administration software was offered by any private undertaking (see recitals 177 and 192).
- (272) As to the Court of Justice's judgment C-3/88, *Commission v. Italy*, the Commission is of the view that the judgment did not establish that software and IT services are *per se* separable from the exercise of public powers or the carrying out of public tasks. In addition, the case is related to rules about freedom of establishment and freedom to provide services. Finally, the justification argued for the Italian position in that judgment was the treatment of confidential data. The difference between the facts underpinning that judgment and the fact pattern in the current case is considerable and the Commission's finding in this case is not irreconcilable with the Court of Justice judgment C-3/88. The question in the Court of Justice judgment C-3/88 was whether Italy's practice of contracting IT services from undertakings in a range of economic sectors only with entities in public ownership was in line with the EEC Treaty's provisions of freedom of establishment. The judgement stated in a general fashion, in its recital 13, that "the design, programming and operation of data processing systems are of a technical nature and are thus unrelated to the exercise of official authority" (see recital 56). This finding constitutes a conclusion that is applied in

⁽¹⁶²⁾ See recital 56: Judgment of the Court in C-3/88 *Commission v. Italy* of 5 December 1989; ECLI:EU:C:1989:606.

⁽¹⁶³⁾ C-264/01, C-306/01, C-354/01 e C-355/01, *AOK Bundesverband e a.*, ECLI:EU:C:2004:150, § 56. C-262/18 P and C-271/18 P, *Commissione e Repubblica slovacca/Dôvera zdravotná poisťovňa*, ECLI:EU:C:2020:450, §§ 32-34 e 43, for case law showing that introducing elements of competition in a non-economic activity is not sufficient to alter the nature of the activity.

a blanket manner to IT services in general which is much broader than the Commission's finding in this case. The services in question in this case are not general IT services, but ones that must be tailored to the very specific needs of university administration which carries out a public task. There is nothing in Italy's reasoning, or the Commission's finding so far that would be the equivalent of claiming that the provision of IT services in general are non-economic. The Commission's opinion in this case about Cineca's services is not irreconcilable with the position that IT services, as such, do not involve "a direct and specific connection with the exercise of official [in the language of Article 55 of the EEC Treaty *public*] authority". In view of these considerations, the *Compass-Datenbank* judgment rightly failed to refer to the *Commission v. Italy* judgment.

- (273) As regards the judgment of the TAR Lazio court No 2922/2017 ⁽¹⁶⁴⁾ (which focused on the sale of IT services to the Ministry and not to universities) concluding that the services in question could be obtained on the market for ICT products and services, the Commission would like to point out that this conclusion was based on the preliminary finding in the Commission's *HIS* opening decision. This opening decision provisionally concluded that HIS GmbH's sales of IT services to universities could constitute an economic activity. As the administrative court points out, the Commission's preliminary conclusion in the *HIS* case was binding on the administrative court at the time of the issuance of the judgment. However, the *HIS Decision* of 20 September 2019 found that the provision of IT services in question did not constitute an economic activity ⁽¹⁶⁵⁾, hence the TAR Lazio court judgment lost its binding character for the purposes of the present case.
- (274) Regarding the *Scattolon* judgment, the Commission is of the view that judgment focuses on whether the transfer of certain administrative and cleaning functions between public entities are excluded from an EU directive safeguarding of employees' rights ⁽¹⁶⁶⁾. There is nothing in this judgment to suggest that the provision of services for the operation of complex IT systems is the same as the provision of human resources with certain qualifications for certain very specific tasks. Similarly to the Commission's view relating to the judgment C-3/88 (see recital 272), the Commission considers that its position relating to Cineca's service is not irreconcilable with the finding of the *Scattolon* judgment: it is not excluded that IT services, in general, fall within the category of administrative functions that the judgment views as "economic". The Commission's analysis in this case, however, focuses on a specific type of IT services that are intrinsically linked to the execution of a State task in the field of tertiary education in the specific context in which it is provided and which is based on jurisprudence. It is only a secondary consideration that the analysts and architects of Cineca possess entirely different qualifications for entirely different tasks (technical, administrative, and legal) relating to the specific needs of the system accumulated over decades.
- (275) Based on these considerations, the Commission is of the view that nothing in these judgments leads to the conclusion that the nature of the service provided to Italian public universities would be generic and/or economic.
- (276) The Commission would like to point out that the most relevant precedents, (notably the *TenderNed* case and the *HIS* case) clearly prove that the existence of competitors does not turn an activity automatically into an economic activity. This question must be decided in the context in which the activity takes place ⁽¹⁶⁷⁾. The *HIS* case representing an identical situation to the one in the present case, found that an activity can qualify as non-economic if it makes the achievement of the public task objective of the State more efficient (see recital 239). As Italy points out (see recital 177), there are competitors to Cineca in the market of IT services to universities, but none of these competitors has the same level of completeness and integration for managing the essential institutional functions of the universities.

⁽¹⁶⁴⁾ Section 7.1.1. Judgment of the Regional Administrative Court of Lazio No 2922/2017, published on 27 February 2017.

⁽¹⁶⁵⁾ Recital 127 of the *HIS Decision*.

⁽¹⁶⁶⁾ Directive 2001/23/EC.

⁽¹⁶⁷⁾ Commission Decision in State aid SA.25744 — *ZVG Portal*, recital 32.

- (277) The Commission should make efforts to assess similar situations in a similar manner⁽¹⁶⁸⁾ in order to ensure impartiality. This means that provided that the factual situations in two cases i.e. in the *HIS* case, and in this case, are similar or substantially identical in all key aspects, the Commission cannot assess the situations differently. The Commission is of the view that the provision of university IT services to State universities is substantially similar to the fact pattern of that case (see recitals 7 to 15 and 111, 114, 117, 118, 120 to 123, 126 and 127 of the final decision in that case). This circumstance also supports a finding that does not deviate from its assessment of the *HIS* case. The non-economic nature of the provision of IT services to universities is not contradicted by the fact that some universities did obtain their IT services needs from Cineca's competitors.
- (278) On the basis of these considerations, the Commission finds that Italy demonstrated the essential/inseparable nature of Cineca's IT services with respect to the State's ability to carry out the State task in providing tertiary education through the universities.
- (279) In view of the findings expressed in recital 252 relating to a legal obligation, recital 260 relating to commonality of purpose (or convergence of objectives), and recital 278 relating to the inseparable nature of the services, the Commission considers that Italy successfully demonstrated the existence of an intrinsic link between the IT services provided to the State universities and the State's task, implemented through the universities, of ensuring tertiary education.

4.1.1.1.4. Other allegations on the intrinsic nature of the services

1) *There is a market for Cineca's entrepreneurial activity*

- (280) The complainant's argument largely focuses on the allegation that Cineca is engaged in an entrepreneurial activity and is steadily working on expanding this activity in the IT sector serving a range of industrial companies (see recital 55). The complainant also points to a recent Italian judgment that confirmed that Cineca's source code is Cineca's property (see footnote 40).
- (281) The Commission agrees with the Italian authorities' position (see recital 158) that no legal rule prevents an entity from simultaneously performing an economic and a non-economic activity. As cross-subsidisation of economic activities however may occur in situations where an entity is engaged both in an economic, as well as a non-economic activity, that entity is obliged to separate the financing, costs, and revenues of the economic activity from those of the non-economic activity (account separation)⁽¹⁶⁹⁾. The Italian court's conclusion that Cineca's source code is Cineca's property and has an economic value is not irreconcilable with the notion that the related activity is inseparable from carrying out a State task.
- (282) Therefore, any and all allegations of the complainant relating to the entrepreneurial nature of Cineca, such as:
- (a) profit margins and the profit seeking character of Cineca and/or KION (see recital 70),
 - (b) the articles of association of Cineca permitting it to carry out an economic activity (recital 55),

⁽¹⁶⁸⁾ Overlapping cases must be treated the same way, as it is expressed in recital 3 of Regulation (EU) 2015/1589: "Article 107 of the TFEU should be applied effectively and uniformly throughout the Union."

⁽¹⁶⁹⁾ See reference to this notion in Article 5(9) of Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3): "Where an undertaking carries out activities falling both inside and outside the scope of the service of general economic interest, the internal accounts shall show separately the costs and receipts associated with the service of general economic interest and those of other services, as well as the parameters for allocating costs and revenues."

- (c) the enlargement of its client base and extension into serving foreign universities (see recital 14 and footnote 10),
- (d) the existence of a market even when Cineca entered the market (recital 70),
- (e) Cineca's market share in the Italian university IT services market (recital 72 and footnote 53) are irrelevant to the question of whether or not the provision of IT services to universities constitutes an economic activity.

2) *Nature of the service*

- (283) The decision of the Italian Competition Agency in 2010 AS 755 (see recital 72 and footnote 53) stated that providing university software products constitutes an economic activity, but the decision focused on the issue of whether or not universities should have used public procurement procedures to obtain such IT products. The *TenderNed* case law (on which the *HIS* case was based), however, since established that certain electronic communication services (establishing an electronic platform enabling public authorities to comprehensively manage public procurement procedures in the *TenderNed* case) that are intrinsically linked to a State task, do not constitute an economic activity. The current decision focuses exactly on the question on whether or not the criteria for “intrinsic link” established by this case law are satisfied.
- (284) The complainant's assertion that it was not Cineca that developed all the operational modules included in the university IT software but obtained several through the purchase of undertakings that had owned the product (see footnote 52) is ineffective. First, the complainant did not specify in this allegation which module or modules it meant. Secondly, even if some modules may have been purchased, Cineca has incorporated them into its offer of complete solutions. In addition, it does not change the conclusion that the provision of the service is intrinsically linked to a State task. Finally, this element does not put into question the existence of the intrinsic link between the provision of the service in question and the State task of providing tertiary education.
- (285) The complainant delivers further arguments questioning the Commission's application of the *TenderNed* and the *ZVG Portal* cases for the “intrinsic link” argument in the present case (see recital 48).
- (286) The more important elements include the following:
- (a) *TenderNed* and *ZVG Portal* require that the public authorities “internalise” the service, i.e., the entity engaged in the activity remains part of the State (recital 48(2)),
 - (b) On the basis of *ZVG Portal* and the SGEI Communication, it is necessary to show that the Member State did not decide to introduce a market mechanism in the field in question (see recital 48(3)). The Italian State, the complainant argues, decided to outsource the activity to a third party, Cineca,
 - (c) The link between the supported activity and the State function must be particularly pervasive or intense; indeed “inseparable”, as required by the *EasyPay* judgment, in the sense that it must be the only way of fulfilling a task (see recital 48(4)),
 - (d) The lack of consideration (or the payment of a symbolic fee, only) is a necessary element pursuant to the *TenderNed* case and the *ZVG Portal* case (see recital 48(5)).
- (287) With respect to the “internalisation” argument, the Commission concludes that according to jurisprudence, it is irrelevant from the point of view of classifying an activity as economic, whether the activity is carried out by the State through an internal department or another entity over which the State exercises control. The Commission cannot find either in *ZVG Portal* or in *TenderNed* any indication that the entities' being in State ownership would have had any relevance in the assessment of the Commission and the European Courts. In the *HIS* case, this issue did not arise at all. In conclusion, current case law does not stipulate an “internalisation” requirement.

- (288) As regards the lack of introduction of market mechanisms on the part of the State, the Commission has no reason to doubt the veracity of Italy's express statement (in recital 153) that it did not decide to introduce market mechanism in the market of providing IT services to the universities (and with respect to the services to the Ministry.) Further, the Commission notes that according to the *ZVG Portal* case, the mere fact that competitors exist does not automatically turn an activity into an economic one and does not cause the State to forego the right to carry out a task "when private operators (...) have already taken the initiative to the same end" ⁽¹⁷⁰⁾.
- (289) Regarding the argument that the link between the State task and the intrinsically linked activity must be "pervasive" or particularly intense, the Commission concludes that this requirement cannot be interpreted as a requirement of "uniqueness". In the *EasyPay* judgment ⁽¹⁷¹⁾, the activity was not found to be connected to an official authority as it was not the only means to carry out the State's task (i.e. the payment of pensions). The Commission is of the view that the *EasyPay* judgment referred back to the lower court the question of "separability", thus did not pronounce a judgment on whether or not there is a "uniqueness" quality or a "high intensity" link that is necessary for a finding of "intrinsic link".
- (290) Finally, the alleged requirement that there is no or only limited pay for the provision of the service, (common feature of *Tenderned*, the *ZVG Portal* case and the *HIS Decision*, see recital 48(5)), also fails to have any relevance to Cineca's supply of university IT services. Even if it was true that the compensation provided to Cineca or the university IT services could be considered as consideration, the factor was not a decisive element in any of the three cases the complainant refers to. The *CompassDatenbank* case determined that the provision of consideration to the service provider will not turn the supply of the product or service into an economic activity if the consideration is not determined by the provider of the service itself ⁽¹⁷²⁾. In this case, the compensation paid by the universities to Cineca for the IT services provided are determined by the universities on the basis of predetermined, objective parameters, and universities are participating in the formation of the pricing guidelines of Cineca (see recital 224). Cineca, therefore, does not determine the price level of the university IT services in a unilateral manner se.
- (291) The Commission considers on this basis that the complainant's arguments described in recitals (280) to (290) do not change the outcome of the Commission's assessment that the provision of IT services to Italian State universities do not constitute an economic activity, as the activity in question forms part of the essential functions of the State or is connected with those functions 'by its nature, its aim and the rules to which it is subject' ⁽¹⁷³⁾.

⁽¹⁷⁰⁾ Recital 32 of Commission decision of 2.5.2013 in *State aid SA.25745 (2013/NN) (ex CP 11/2008) – German – National website for auctions in insolvency proceedings (ZVG Portal)* C(2013) 2361 final.

⁽¹⁷¹⁾ Judgment of the European Court of Justice of 22 October 2015 in *EasyPay v. Republic of Bulgaria*, C-185/14, ECLI:EU:C:2015:716. Paragraph 43: "Those elements constitute an indication enabling the view to be taken that the activity of money order operations enabling the payment of retirement pensions may be separable from the national pensions system. It is for the national court to assess the relevance of those elements, in particular in the light of the other factual and legal elements before it."

⁽¹⁷²⁾ Judgment of the European Court of Justice, *CompassDatenbank v. Republik Österreich*, C-138/11 of 12 July 2012, ECLI:EU:C:2012:449, paragraph 39: "In addition, the fact that a product or a service supplied by a public entity and connected to the exercise by it of public powers is provided in return for remuneration laid down by law and not determined, directly or indirectly, by that entity, is not alone sufficient for the activity carried out to be classified as an economic activity and the entity which carries it out as an undertaking (see, to that effect, *SAT Fluggesellschaft*, paragraph 28 et seq. and *Diego Cali & Figli*, paragraphs 22 to 25)."

⁽¹⁷³⁾ See, in particular, Judgment of the Court of Justice of 19 January 1994, *SAT/Eurocontrol*, C-364/92, ECLI:EU:C:1994:7, paragraph 30, judgment of the Court of Justice of 18 March 1997, *Cali & Figli*, C-343/95, ECLI:EU:C:1997:160, paragraphs 22 and 23; judgment of the Court of Justice of 12 July 2012, *Compass Datenbank v. Austria*, C-138/11 ECLI:EU:C:2012:449, paragraph 41.

- (292) The Commission observes that the profit seeking character of the non-State Italian universities makes it likely that the educational activity carried out by those private organisations is an economic activity and not a public task ⁽¹⁷⁴⁾. As explained in the NOA, “public education services must be distinguished from services financed predominantly by parents or pupils or commercial revenues. For example, higher education financed entirely by students clearly fall within the latter category. In certain Member States public entities can also offer educational services which, due to their nature, financing structure and the existence of competing private organisations, are to be regarded as economic.”. Therefore, the activity of providing IT services to these universities is not intrinsically linked to the provision of the State’s task in the field of tertiary education.

4.1.1.2. State resources and imputability

- (293) State resources include all resources of the public sector ⁽¹⁷⁵⁾, regardless of whether or not an institution within the public sector is autonomous. Italian universities are financed through a State fund FFO (see recital 24). Without prejudice to the question of whether the provision of IT services to Italian universities constitutes an economic activity, the Commission concluded in the opening decision that the measure in question is therefore granted through State resources.
- (294) At the same time, the opening decision stated that the issue of imputability of the State universities’ decision to contract Cineca for IT services is more complex. On the one hand, the Commission considered the public entity nature of State universities and their representatives’ presence on Cineca’s board, as well as universities’ use of Cineca’s software to access public financing as a sign indicating imputability (see recital 124 of the opening decision.) On the other hand, the Commission stated that State universities are entities distinct from the State itself and enjoy a certain degree of independence from the point of view of financial management which is demonstrated by the fact that a number of State universities in fact engage entities other than Cineca for IT services (see recitals 186-187).
- (295) However, the opening decision did assume that imputability existed with respect to universities’ IT services. For the purposes of assessing imputability, the opening decision distinguished between the time period prior to the entry into force of the “salva Cineca” law and the time period thereafter and presumed for each period the existence of imputability.
- (296) As to the standard for determining imputability in the case at hand, the Commission considered in the opening decision that it was necessary to examine whether the public authorities have been involved, in one way or another, in the universities’ business conduct with Cineca ⁽¹⁷⁶⁾.
- (297) The complainant argues that imputability can be established in both time periods, i.e. prior to and following the adoption of the salva Cineca law. The complainant disputes, however, that the *Stardust Marine* criteria would be applicable to the case at hand, because State universities are not public undertakings, but constitute non-economic public bodies “in line with the concept of *public administration*” (see recital 78). The complainant argues that it is rather *France v. Commission* (T-358/94) and the Opinion of the Advocate General Whatelet (in *Commerz v. Netherland* (C-242/2013)) that govern the situation, i.e. “in case a public authority grants an advantage (...), the measure is imputable even if the authority (...) enjoys a legal autonomy from other public authorities” (see recital 77). In the complainant’s view, State universities, similarly to municipalities and regions, form part of the State apparatus in the broadest sense. (See recital 79). Finally, the complainant argues that imputability is also present due to the fact that State universities possess public powers, they are subject to supervision by the MIUR and the Finance Ministry, and their main source of funding is the State – even if they regulate their own income (see recital 82).

⁽¹⁷⁴⁾ See Point 30 of the NOA.

⁽¹⁷⁵⁾ Judgment of the General Court of 12 December 1996, *Air France v Commission*, T-358/94, ECLI:EU:T:1996:194, paragraph 56.

⁽¹⁷⁶⁾ Case C-482/99 *France v Commission (Stardust Marine)*, paragraphs 52 and 53.

- (298) The Italian authorities and Cineca argue that the State universities' decision to select Cineca for the provision of IT services are not imputable on the State. First, State universities enjoy full educational, scientific, organisational, financial, and accounting autonomy⁽¹⁷⁷⁾ (see recital 185). Universities confirmed to the Italian authorities that they indeed have full autonomy to enter into contractual relations with entities for IT services and such choices had been made freely both prior to as well as after the adoption of the *salva* Cineca law. Cineca also argues that in view of the jurisprudence cited in recital 122 of the opening decision referring to the *Stardust* assessment criteria, it is not the joint presence of the universities and the MIUR on Cineca's board that could be viewed as conducive to imputability of universities' selection of Cineca as IT services provider, but the presence of State officials on the State universities' administration (see recital 227).
- (299) Both the Italian authorities and Cineca argue that the *Stardust* criteria are applicable by analogy when analysing imputability in case of public bodies that have autonomy with respect to the management of funds and that are distinct from the State. The autonomous nature of State universities was also confirmed by Italian court judgments⁽¹⁷⁸⁾ ruling that university employees are not State employees. Equally irrelevant in their view is the *Air France* judgment⁽¹⁷⁹⁾, given that Cineca has not been set up for the purpose of circumventing the State aid rules. Finally, Cineca draws attention to the relatively recent judgment of the General Court in the case *Italy v. Banca Popolare di Bari* (joint cases T-98/16 and T-196/16) for the proposition that when an entity is autonomous with respect to the management of funds, the Commission is under an increased obligation to substantiate the imputability of a measure to the State (see recital 227 and footnote 141).
- (300) The Commission is of the opinion that it is not possible to derive a conclusion relating to imputability of the measure in question to individual State universities. It is because the factors described do not point to an unequivocal conclusion as regards the totality of State universities. Therefore, on the basis of these allegations, the Commission is not able to presume the existence of imputability, which normally needs to be examined on a transaction-by-transaction basis between a specific university and Cineca. However, the complainant did not bring to the Commission's attention any specific transaction where factors relevant to an imputability analysis could be examined.
- (301) In sum, the Commission is of the view that there is no definitive proof that the measures or any measure at issue in this decision with respect to the sale of IT services to State universities are imputable to the Italian State.
- (302) As explained in recital 292, the Commission observes that the profit seeking character of the non-State Italian universities makes it likely that the educational activity carried out by those private organisations is an economic activity and not a public task. Non-State universities are, by definition, not owned by the State. Their financing resources are not provided by the State, hence any funds they spend on the purchase of IT services do not constitute State resources. Services financed predominantly by parents or pupils, or commercial revenues do not act in accordance with a public mandate. However, public authorities designate some members of the governing bodies of the private universities. On the other hand, these members do not constitute a majority of the governing bodies of these universities and have no veto power in decision making. In addition, there is no specific information available to the Commission on the basis of which imputability with respect to individual transactions could be examined.
- (303) On this basis, the Commission considers that private universities' purchase of IT services from Cineca are not imputable to the Italian State.

⁽¹⁷⁷⁾ Article 6(1) of the aforementioned Law No 168 of 1989, 'Universities possess a legal personality and, in implementation of Article 33 of the Constitution, enjoy didactic, scientific, organisational, financial, and accounting autonomy; they establish autonomous organisations with their own articles of association and regulations'.

⁽¹⁷⁸⁾ See e.g. Court of Cassation in judgment No 10700 of 10 May 2006.

⁽¹⁷⁹⁾ *Air France v Commission* judgment, T-358/94, ECLI:EU:T:1996:194.

4.1.1.3. Selective advantage

- (304) In recital 59, the complainant claims (in connection with the two types of IT services in question in this case) that the MEO test is not applicable. The complainant further states (in recital 65) that no *ex-ante* determination of the economic rationality of the prices took place and that in any event, public procurement procedures should have been used for the procurement of the university IT services and the MIUR IT services (see recital 60). The Commission disagrees with this characterisation and considers that the MEO test (if the activity in question is economic) is applicable. Pursuant to the judgment of the ECJ of 5 June 2012 in C-124/10 P *Commission v. EDF*, “[t]he applicability of the private investor test ultimately depends on the Member State concerned having conferred, in its capacity as shareholder and not in its capacity as public authority, an economic advantage on an undertaking belonging to it”. In the scenario that the provision of the services in question were to be economic, the State does not act as a public authority and the MEO principle is applicable. As the opening decision explained in its recital 128, economic transactions carried out by public bodies (including public undertakings) do not confer an advantage on their counterpart if they are carried out in line with normal market conditions⁽¹⁸⁰⁾. In order to determine whether a transaction has been carried out under those conditions, the Commission applies the market economy operator (“MEO”) test. For the purpose of the MEO test, only the benefits and obligations linked to the role of the State as economic operator – to the exclusion of those linked to its role as a public authority – are to be taken into account. Indeed, the MEO test is not applicable if the State acts as a public authority rather than as an economic operator.
- (305) A lack of advantage can be demonstrated through a competitive, transparent, non-discriminatory, and unconditional tender procedure or other competitive methods⁽¹⁸¹⁾. Such method, among others, could be a cost study carried out *ex-ante* by an independent expert that demonstrates that the offer is the most suitable choice by the public authority. The results have to be robust, and the data has to be verifiable.
- (306) Prior to the opening of the formal investigation procedure, Italy had not demonstrated that the IT services to the universities were not sold at prices that exceeded market level (see recital 130 of the opening decision), thus Cineca had not received State aid in the form of the difference between the selling price and the market price. The Commission also considered that Italy had not proven the use of competitive tenders or of other methods which would have produced a result comparable to that of a tender procedure.
- (307) The opening decision also stated that to the extent that the State has influenced universities’ purchasing behaviour in favour of Cineca, such influence would have allowed Cineca to sell IT services which it may not have been able to sell absent the State interference, therefore providing an advantage to Cineca. In light of the above, the Commission provisionally concluded that, to the extent that the State influenced the universities’ purchases in favour of Cineca, Cineca received an advantage.
- (308) The complainant argues that there was no competitive selection procedure for the acquisition of university IT services on the part of the universities (see recitals 22, 83). In those few cases when alternative operators could provide offers, Cineca’s offer always turned out to be higher than the alternative providers.
- (309) The complainant also presents a number of arguments relating to the requirement that at least until 2018, Cineca was not a proper “in-house” entity of the universities and that it should therefore have used the public procurement procedures for the selection of an IT service provider for their IT service needs. The complainant argues that by not resorting to the use of public procurement, the Italian State breached the EU and Italian public procurement legislation (see recital 47).

⁽¹⁸⁰⁾ Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraphs 60 and 61.

⁽¹⁸¹⁾ Judgment of the General Court of 12 June 2014, *Sarc v. Commission*, T-488/11, ECLI:EU:T:2014:497, paragraph 98. *Land Burgenland v. Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, ECLI:EU:C:2013:682, paragraphs 94 and 95).

- (310) The complainant also refers to Article 1 (512) of Law No 208/2015 (see recitals 60 and 75) that requires that for the purpose of optimising and rationalising purchases of IT goods and services and connectivity, ministries and public universities should “satisfy their needs exclusively through the purchase and negotiation tools of Consip or [other entities] for goods and services available from Consip or [these other entities]”. Consip, the complainant continues, is widely used for the procurement of comparable specialised products. The Ministry of Justice also used Consip for the introduction of electronic civil procedure throughout Italy which is part of an essential function.
- (311) In reaction to these allegations, the Italian authorities explain that the so-called “salva Cineca” law set up an in-house model between Cineca and the Ministry (see recital 146), which was perfected through ministerial decree No 245 of 26 March 2018 on the basis of discussions with the Commission services and the Italian national anticorruption agency (ANAC). In 2018, the Italian anticorruption agency, based on Decision No 1172 of 19 December 2018, entered Cineca in the national list of entities that can operate through direct awards (“in-house” companies) (see recital 168).
- (312) Italy further explains that the universities use Consip only for standard products and services, not for the type complex products and services) that Cineca offers. The obligation of using Consip only applies to situation when the products and/or services *are* available on the market,
- (313) Italy first argues that there is no selective advantage benefitting Cineca with respect to the university IT services activity given that the activity is non-economic. Further, as regards the application of a selective competitive procedure, Italy points out that it had in fact made the choice of Cineca (a proper in-house provider according to Italian legislation) even more difficult than required by EU public procurement legislation. It is because Article 192(2) of Legislative Decree No 50/2016 requires an “enhanced efficiency assessment” of a planned award to Cineca prior to allowing such an “in-house” award to Cineca. The EU legislation (Article 12(3) of Directive 2014/24/EU ⁽¹⁸²⁾) provides for an essential equivalence between the various procedures for entrusting a service of interest to public administration.
- (314) The Commission considers that the salva Cineca law does not impose an obligation on any university to conclude an IT services contract with Cineca. The Commission also notes that several universities in fact selected IT service providers other than Cineca (see recital 187). Therefore, this legal provision did not allow Cineca to sell IT services which it may not have been able to sell absent the State interference (see recital 307). Therefore, Cineca did not receive an advantage in the form of obtaining more business opportunities as a result of State influence.
- (315) The Commission is also of the opinion that the selection procedure, i.e. the award of the contracts pursuant to Article 192(2) of Legislative Decree No 50/2016 may constitute compliance with Italian public procurement legislation at least with respect to the time period beginning 2016. It is evidenced by the judgment of the Italian Council of State (the highest Italian Administrative judicial instance) No 2947 of 17 March 2022. In its section 11.4, the judgment clarifies that “[p]rocurement by means of agreements and/or framework agreements with central purchasing bodies may certainly be one of the alternatives that can be assessed in the choice between in-house service award and market use; however, no strictly binding constraint on the decisions of the administration can be inferred from the legislative provisions referred to above, since those provisions do not affect the choice between in-house award and outsourcing but, on the contrary, presuppose it and therefore operate in the event that it is dissolved in the sense of recourse to the market.”. This judgment seems to indicate that the decision by the universities as to whether to tender out a contract (i.e. using Article 192 (2) of Legislative Decree 50/2016 or not) is a choice that can be made without any constraints as far as Italian public procurement legislation is concerned.

⁽¹⁸²⁾ OJ L 94 of 28.3.2014, p. 65.

- (316) With regard to the method of individual universities' selection of IT service provider which resulted in Cineca's choice, the Italian universities explain that they always entrust the services based on a prior assessment of the benefits (see recital (191). First, they evaluated whether the service could be produced internally, and once the use of the market has been decided, they compared Cineca's offer with those of other operators. (For further details see footnote 117). This appears to be in line with the interpretation of the applicable legislation that the Council of State provided (see recital 315). Hence, the Commission is of the view that that a competitive selection procedure with an element of an *ex-ante* assessment, was in fact utilised by State universities prior to the engagement of Cineca, in particular beginning with the year 2016, but to a certain degree also prior to 2016 (see footnote 117).
- (317) When it comes to the question of whether the universities paid prices that exceeded market level, the complainant alleges that the prices the Italian universities pay to Cineca for the provision of software and IT services are higher than market prices.
- (318) Relating to the complainant's other allegation relating to advantage, i.e. that universities, as a whole, pay prices above market level, Italy provided a technical report, an expert study by Professor Corso that showed the value of Cineca's IT services to the universities broken down to three components in comparison to the market price in the years 2004 to 2018 ⁽¹⁸³⁾.
- (319) In the report, the services offered by Cineca have been separated into three categories: 1) application services with reference to 'digital ecosystem', development and evolutive maintenance, other maintenance, and user support in return for the universities' payment of a services fee (fee-based services ⁽¹⁸⁴⁾); 2) infrastructure hosting services ⁽¹⁸⁵⁾ including application management, and 3) other services (planning, advice, and support).
- (320) For the amount of work provided in strand 3, the study relied on Cineca's internal survey of recorded man-days. For work under Point 1, the study relied on certified estimates of the overall size of the work carried out and utilised productivity standards provided by international organisations such as the International Software Benchmarking Standards Group.
- (321) Services under Points 1 and 3 were compared based on the annual contributions generated by Cineca's University Business Unit and the market value of those services using Assinter prices ⁽¹⁸⁶⁾.
- (322) As regards fee-based (application) services referred to in Point 1 representing over 70 % of the earnings of the University Business Unit, Cineca revenues have been systematically below market values. Regarding the services referred to in Point 3 representing around 20 % of overall earnings), there was substantial alignment with market values although in the years 2009 to 2013, contributions appear to have slightly exceeded market values. A comparison with market values of the combined Points of 1 and 3 (representing 90 % of the revenues of the business unit), the compensation Cineca received turned out to be significantly below market value.

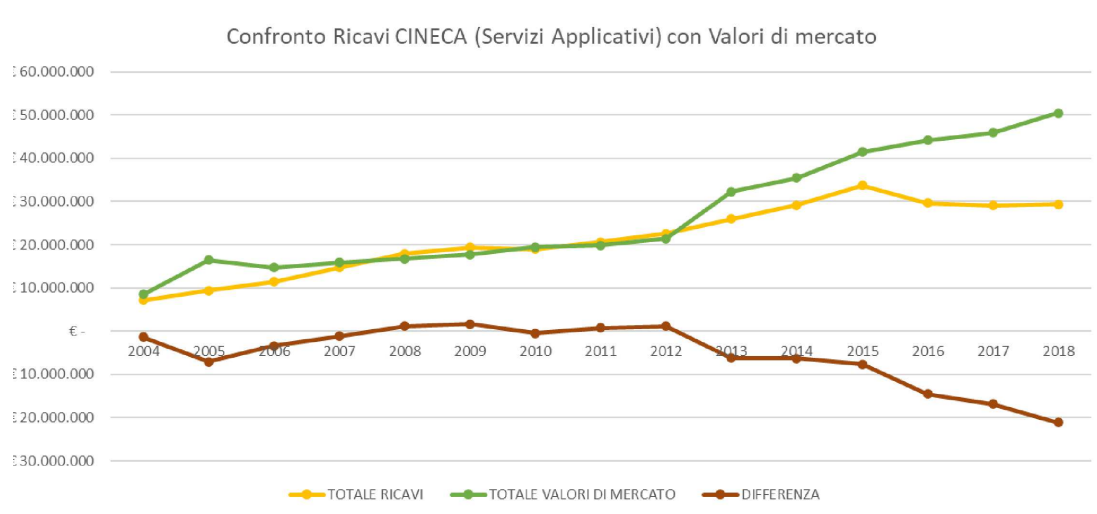
⁽¹⁸³⁾ "Evidence from the study on valorisation of the services provided by Cineca to Italian universities" of 15 April 2021, by Professor Mariano Corso.

⁽¹⁸⁴⁾ It is a service that you pay a fixed price to use.

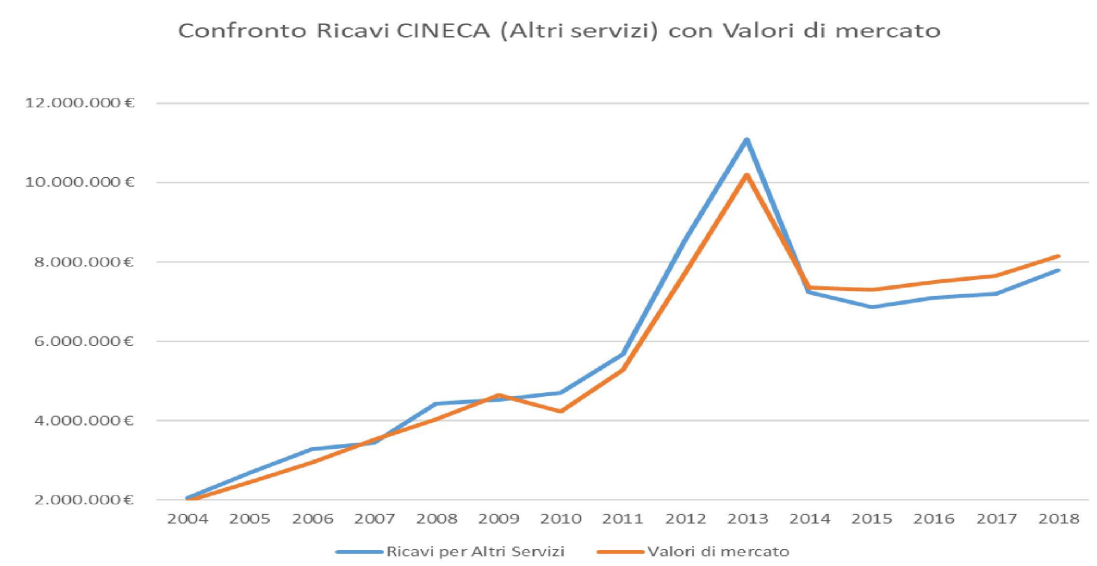
⁽¹⁸⁵⁾ The infrastructure component covers the physical hardware elements, the management of those physical elements and the services and projects related to those physical elements. These are called IAAS. The software component covers products such as operating systems, databases, etc. These are called SAAS.

⁽¹⁸⁶⁾ As Italy explains, Assinter encompasses 20 companies operating in accordance with the in-house provisioning model in the ICT sector for the public administration.

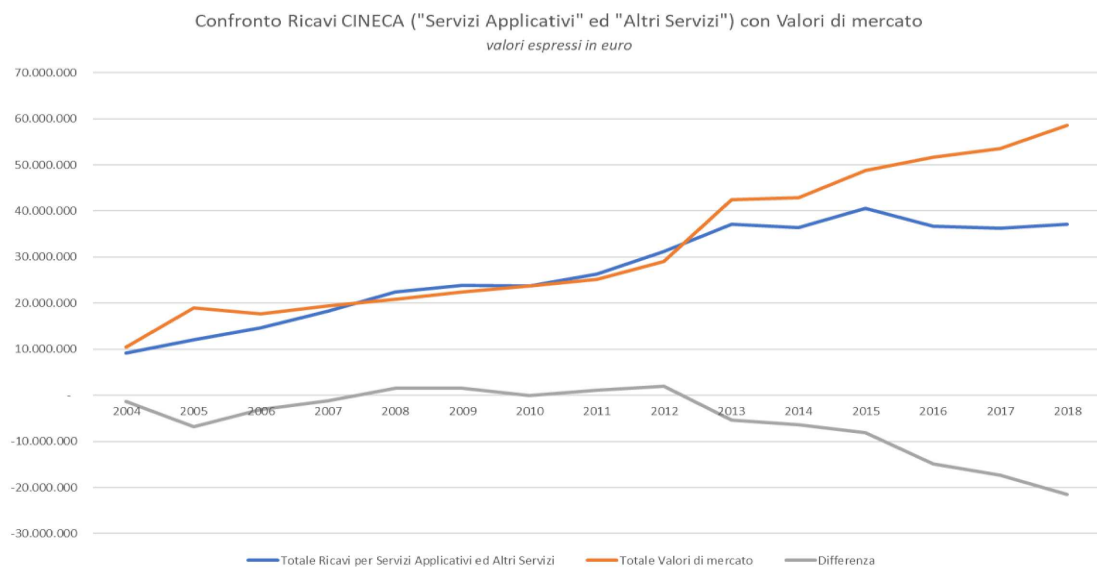
Graph No 1 showing market value of fee-based (application) services



Graph No 2 showing market value of “other services”



Graph No 3 showing combined area of fee-based (application) and “other services”



- (323) The Corso study only analysed “application services” and “other services” and only contained findings of other studies in connection with “infrastructure services”. One such study is prepared by Mr Aiello (the “Aiello study”). For the infrastructure hosting services segment ⁽¹⁸⁷⁾ the analysis conducted by Mr Aiello ⁽¹⁸⁸⁾ was to assess the technical feasibility and actual economic benefits for the MIUR and the Italian university system, once again according to an overall approach, rather than considering individual universities. According to the Aiello study, the infrastructure hosting services segment only developed by the year 2014, hence before, it would not have been possible to use the market.
- (324) For the year 2015, a comparative analysis was carried out with a cloud service proposed by IBM, then called ‘Softlayer’. The annual cost proposed by IBM to migrate the application hosting services to universities, amounting to EUR 1,37 million, was to be compared to the value of the IaaS CINECA component of EUR 0,48 million (which includes a 40 % increase over pure cost). In other words, it can be said that in 2015, the migration of hosting services to universities (the largest workload) would have cost approximately 2,8 times more than a service provided internally by CINECA.
- (325) The Aiello study also contained findings of Gartner, a research company. These findings also confirmed that the services Cineca provides to universities are offered at a price that is not higher than the market price. Gartner based this opinion on its annual survey of a benchmark indicator showing that in the context of the percentage of IT expenses relative to turnover of mid-sized undertakings, Cineca’s infrastructure costs were comfortably below the benchmark. Further, AGID also certified the economic consistency of the values associated with the infrastructure component.
- (326) In support of its argument that the prices the Italian universities pay to Cineca for the provision of software and IT services are higher than market prices, the complainant criticizes the two studies in question on a number of points. According to the complainant, the benchmark used by the Cineca’s expert opinions relating to the services to the MIUR and to universities is unrealistic because, similarly to the benchmark for the price of the services to the MIUR, the benchmark for the university IT service prices also uses Assinter prices (see recital 86). In addition, the study relating to the university service is based on the erroneous assumption that a competitor would limit its prices to managing corrective and evolving maintenance and user support and would not include the costs of developing and providing alternative and equivalent services. Thus, the hypothetical competitor would have the same costs as Cineca (see recital 86).
- (327) According to the complainant, the Aiello study relating to the market value of hosting services to MIUR and the university erroneously states that prior to 2014, no operator offered the management services relating to Cineca’s products (see recital (323)) in the public administration IT service segment). This statement ignores the fact that BeSmart was an operator and that Consip prices for such management services existed as a benchmark.
- (328) The Commission is of the view that these general allegations relating to an overall advantage benefitting Cineca through the totality of its sales of university software services to part of the Italian university system is not a viable allegation. It is because an actionable allegation of economic advantage in the form of paying prices above market level must necessarily be transaction specific. In this context, the allegation would need to refer to a specific purchase by a specific university of a specific product or a range of products from Cineca which in turn, would need to be compared to a “market price” for the same product(s), in the same volume and at the same time.

⁽¹⁸⁷⁾ An infrastructure hosting service provides a combination of IT solutions such as web development, web hosting and email, infrastructure, and application over the internet.

⁽¹⁸⁸⁾ A report prepared for Cineca by Mr Stefano Aiello of Partners4Innovation Srl of 14 April 2021.

- (329) The complainant provides details relating to one single transaction between a university and Cineca for IT services⁽¹⁸⁹⁾, in which it alleges the payment of above market level prices. As regards this allegation, the complainant states that the purchase of a package of university IT services from Cineca by the university of Molise, for the years 2018 and 2020 was made at a much higher price than a comparable purchase from the complainant by the University of “Cassino and Southern Lazio” for the years 2019 to 2021. In more detail, the complainant alleges that the price the University of Molise paid Cineca for a three-year contract for IT services for the years 2018 to 2020 amounted, annually, to EUR 374 966 (without VAT). The complainant on the other hand, that was selected through a European tender procedure for the contract with the University of “Cassino and Southern Lazio”, was paid EUR 85 140 annually for a highly comparable package of services for a university that is similar in size to the University of Molise. Then the complainant compares the elements of the two packages and concludes that the packages are not entirely similar, given that only a part of the offers have overlaps. In fact, out of the eight elements of the package offered by Cineca to the University of Molise, only the equivalent of four were included in the complainant’s offer to the University of Cassino and Southern Lazio. In addition, the complainant’s package included five items that Cineca’s offer did not include and Cineca’s offer included five other elements that the complainant’s offer did not include. In addition, the complainant attempts to attach a price to each of the elements of the package and to calculate two hypothetical prices: one for each package, in the event that these offers were identical. However, even if we assume that the complainant obviously knows its own prices in the specific tender it describes, when it comes to Cineca’s prices, it calculates with various elements of an earlier set of prices paid to Cineca by a third university at a time that is different from the time frame for the complainant’s contract.
- (330) The Commission is of the view that these allegations do not effectively demonstrate a payment of above market level price to Cineca by the university of Molise for the university IT services in the years 2018 to 2020. It is because the two offers are not comparable. First, it is admitted that the packages are far from being identical: half of the items in question only feature in one, whereas a number of elements feature only in the other offer. Hence, the service packages do not appear to be comparable. Second, the prices for the individual elements in Cineca’s package are derived from a transaction between Cineca and another university at a time that refers to a different timeframe (2018 to 2020 as opposed to 2019 to 2022). This element makes the calculation also speculative, making it entirely impossible to conclude which package was worth what at the relevant time period. Commission also observes that the evaluation procedure to be followed for the selection of IT service provider as described in recital (191) seems to have been applied in this specific transaction⁽¹⁹⁰⁾.
- (331) In sum, the Commission considers that the complainant’s allegations relating to the payment to Cineca of above market level prices by the university of Molise in the years 2018 to 2020 for IT services have not been proven.

⁽¹⁸⁹⁾ It is to be kept in mind that the example of the complainant relating to the University of Calabria (see recital 85 and footnote 62) is a transaction that did not materialise in the form of allegedly above market level price and hence does not constitute a sale of a service at a price above market level. Another allegation according to which tariffs to the university of Bergamo were also eventually lower than originally agreed price, as Cineca allegedly offered a discount (see footnote 62). These allegations therefore inherently fail to prove the charging of prices above market level.

⁽¹⁹⁰⁾ For example, the minutes of the meeting of the Board of Directors of the University of Molise on 25 May 2018 shows the following: “To this end, we hereby submit to the Board of Directors the attached report, prepared and endorsed by the heads of offices using the CINECA computerised services, which shows the following: 1) with a view to applying the provisions of Article 192 (2) of Legislative Decree No 50/2016 and ANAC Guidelines No 8, an analysis of other systems on the market has been launched, making contacts with companies operating in the sectors of interest; 2) contacts have been established with other university administrations that have already opted for alternatives to CINECA products; 3) in view of the difficulty of replacing all the systems in use at the same time, it is possible to organise a multiannual replacement plan in the different application areas. It should be noted that the planned timing (approximately 12 months for the analysis phase beyond the time needed to complete the tendering procedures, as well as the technical time needed to launch the new system) implies the need to ensure continuity of office activities in the short and medium term. In this regard, in view of the right of withdrawal provided for in the contract proposal of CINECA, we envisage the possibility of re-awarding in-house services to the Consorzio CINECA, while at the same time continuing the activities necessary to carry out appropriate tendering procedures for the procurement of individual systems. Therefore, in the light of the above, having examined the contractual proposal made by CINECA and taking note of the provision for the option of terminating the contract with at least 90 days’ notice (Article 10), the Rector invites the Board of Directors to decide whether it is appropriate to authorise the award of the relevant expenditure to CINECA for the use of U-GOV, esse3 and Titulus systems and associated management hosting and assistance services, in accordance with the proposal received, authorising the allocation of the relevant expenditure to the relevant budgets, authorising the Director-General to continue the work of analysing the services available on the market, and reserving the right to decide on the termination of the contract after assessing the results of that analysis.”. See Annex 2 to the complainant’s submission of 27 August 2019.

- (332) As a result of these considerations, the Commission is of the view that an advantage viable in the context of State aid control was not effectively alleged, let alone proven by the complainant.
- (333) However, in case a “system level” advantage for the benefit of Cineca would need to be assessed, the Commission is of the view that no such system level “advantage” can be proven in this case. It is for the following reasons: Although the market value in the Corso study for component 1 and 3 of the package (at the system level) appears to have been sold at above market prices, the values and compensation levels only include components 1 and 3 and fail to include the “hosting services” component (see charts in recital 322 and explanation in recital 323). Therefore, the figures are incomplete. In addition, as explained in recital 328 general allegations relating to an overall advantage benefitting Cineca through the totality of its sales of university software services to part of the Italian university system is not a viable allegation.
- (334) At the same time, should this type of allegation be a viable indication of advantage, the Commission considers that the complainant’s criticism of the studies is not effective. It is because the appropriateness of the alternative factors proposed by the complainant in place of the imperfect factors is not established. For example, the complainant claims that Assinter prices do not constitute an appropriate benchmark for the price level of labour used in the “Corso” study (see recital 86). However, the complainant fails to indicate what price level it would consider as the market price level. The complainant only refers solely to the lack of connection with the market, because Assinter members are all “in-house” IT service providers. Further, the complainant alleges that its products present a viable alternative (i.e. competition) for Cineca’s products/services and provides, at least for “application management” services (in the context of hosting services), a reasonable value of EUR 250 + VAT person day (see recital 86). However, there is no indication as to which year the reference is made to and what would have been the appropriate market price. The complaint states only that Cineca’s “advisors would have concluded that the rates charged by Cineca were certainly not in line with market prices”.
- (335) The Commission also considers that a competitor would be right to limit its prices to include only managing corrective and evolving maintenance that would not include the value of developing and providing alternative and equivalent IT products and services (see recital 86).
- (336) Based on these considerations, the Commission finds that Cineca did not receive an advantage in the form of prices above market level for the university IT services it sold to State universities.

4.1.1.4. Conclusion on the State aid nature of the State universities’ payment to Cineca for IT services

- (337) The Commission concludes that the payment by State universities to Cineca for the provision of IT services do not constitute State aid. It is because the provision of these services is intrinsically linked to the State task, and hence do not constitute economic activities. Cineca is, therefore, not an undertaking with respect to these activities. Finally, the investigation did not prove the prices paid for these services are above market level, hence Cineca did not obtain an advantage through these payments.

4.1.2. *Financing of Cineca in connection with the provision of IT services to the MIUR*

4.1.2.1. Economic nature of services provided

- (338) According to Article 107(1) of the Treaty, in order for State aid to be present, an economic advantage has to be provided to an “undertaking”. Pursuant to the case law described in recitals 230 et seq., Article 107(1) of the Treaty does not apply where the State acts ‘by exercising public power’ or where the activity in question forms part of the essential functions of the State or is connected with those functions ‘by its nature, its aim and the rules to which it is subject’ ⁽¹⁹¹⁾ (see explanation of the applicable case law in recitals 232 et seq.).

⁽¹⁹¹⁾ See, in particular, Judgment of the Court of Justice of 19 January 1994, *SAT/Eurocontrol*, C-364/92, ECLI:EU:C:1994:7, paragraph 30, judgment of the Court of Justice of 18 March 1997, *Calì & Figli*, C-343/95, ECLI:EU:C:1997:160, paragraphs 22 and 23; judgment of the Court of Justice of 12 July 2012, *CompassDatenbank v. Austria*, C-138/11 ECLI:EU:C:2012:449, paragraph 41.

- (339) Cineca's provision of IT services to the MIUR would not be of an economic nature ⁽¹⁹²⁾ if it were found to be intrinsically linked to an essential function of the Italian State in the field of public tertiary education. The most recent decision that found that a certain type of IT services was intrinsically linked to an essential function of the state was the *HIS Decision* which was based on the case law of the European Court of Justice (see recitals 232 to 240). A meaningful summary of the findings of the *HIS* case (including the underlying case law) can also be found in recitals 86 to 89 of the opening decision.
- (340) The opening decision referred to case law according to which services carried out in the public interest and without a profit motive and in competition with those offered by operators pursuing a profit motive are economic if they do not form part of the exercise of public tasks/powers (see recital 88 of the opening decision). Nevertheless, the opening decision preliminary concluded, based on the information at hand at the time of the adoption of the decision, that the IT services supplied by Cineca to the MIUR would also be intrinsically linked to an essential duty as Ministry of Education in the tertiary education field (see recital 91 of the opening decision).
- (341) On the basis of the *HIS Decision* (and the case law underpinning that decision), the Commission examined whether Cineca's provision of IT services to the MIUR are intrinsically linked to the State's task in the tertiary education field. As in the case of an intrinsic link in connection with the provision of university IT services, the examination focused on the elements of a legal obligation applicable to the State as well as the recipient of the financing (i.e. Cineca), the commonality of the objectives pursued (common purpose) and the essential/inseparable nature of the service in question from the State's ability to carry out the task through the MIUR.
- (342) The Commission first examines whether it is justified to examine the intrinsic link with respect to the totality of the functionalities (or modules) offered in the service (see recital 232). In other words, the question is whether it is possible to conclude that the functionalities are linked to each other and form different facets of the same activity, in a way that the system, as a whole, would not be operational without each individual functionality. The Commission finds that out of the 15 functionalities listed in footnote 105, the following nine functionalities have a clear and unique link to university education and the role of the MIUR to manage and support the tertiary State education system.
1. The "National Register of Students and Graduates" (NSAS) serving the purpose of identifying all university students; assessing the effectiveness of university training processes; promoting student mobility; identifying incentives to encourage demand for specific student services; monitoring and supporting the work experience of students;
 2. Training offer database" for publishing the educational rules of universities; activating courses of study and providing information on the training offer of universities;
 3. "Universitaly" to provide all information on universities and study courses to enable people to decide where to study and what to study;
 4. "Aaccessoprogrammato" that gathers information to enable the Ministry to plan and organise national admission tests in certain disciplines, such as medicine;
 5. "Proper", for a three-year planning programme for university staff;
 6. "Dalia" or "data bank for alia", a national database for the collection of career information and salary data for university staff;
 7. "Projects of significant interest" for application procedures and reports for calls for research of national interests;
 8. "REPRISE" – register of Expert Peer Reviewers for Italian Scientific Evaluation for the registration of independent scientific experts;
 9. National Register of Research to collect all information relating to funded research.

⁽¹⁹²⁾As regards the arguments that the activity in question is economic and public procurement procedures should be applied, the Commission would like to point out that these laws are not relevant to the issue of whether an activity is economic, hence, whether Cineca is an undertaking with respect to the provision of IT services to the MIUR (or the State universities).

(343) The functionalities of

1. “ASN” “abilitazione” for the assessment and recruitment of teaching staff;
2. Application for uniform preparation of accounts to collect the budgetary data from universities;
3. Portal for the accounting for profit and loss to provide interpretative clarifications relating to accounting rules;
4. “AFAM” for monitoring the supply of teachers and contracts; as well as their recruitment and mobility;
5. “Ordinary financing fund” for storing all parameters relating to the distribution of the FFO allocated to universities; and
6. Three-year programming (PRO 3) for managing all information necessary for distributing funds to universities for the three-year programming of universities, for the accreditation of universities and for the ministerial evaluation of the universities’ three-year programming.

appear to be more general, although most of them have a clear educational aspect.

(344) This set of functionalities covers all of the MIUR’s IT service needs in the sector, and each and every one of these services is intertwined with its functioning. Reducing Cineca’s services by any one of these elements would leave the system of services, as a whole, non-functional within the meaning of the *TenderNed* case law (see recital 232 of this decision). The MIUR could not function without NSAS as it could not identify and monitor student enrolment, assess the effectiveness of education, promote student mobility. Without the “Training offer database” and the “University”, it could not activate courses and provide information about training courses and assist people to decide what to study and where to study. Without “Aaccessoprogrammato”, it could not organise admission tests. Without “Proper”, it could not provide a three-year programming of university staff and without “data bank for alia”, it could not collect career and salary information about university staff. Without “Projects of significant interest”, “REPRISE” and the “National Register of Research”, it could not initiate research projects, evaluate research staff, and collect information about national research. The remaining 5 functionalities of “abilitazione”, Application for uniform preparation of accounts, portal for the accounting for profit and loss, “AFAM”, the “Ordinary financing fund” and three-year programming (PRO 3), operate on more general fields, such as HR and accounting, but they still contain specific tertiary education relevant features and as such, are all necessary for the complete and lawful functioning of the MIUR. The separation of any one of these components would interfere with the functioning of the whole management function of the MIUR. Hence all these tools/services are essential for the universities’ functioning.

(345) The Commission can thus confirm Italy’s assertion that the primary aim of Cineca, as a tool for the higher education system, has always been the provision of its members with integrated and efficient computing systems and IT services, thus enabling the higher education system to perform their public function (see recital 140).

(346) On this basis, the Commission finds that the various functionalities of the service are linked to each other and form different facets of the same activity, in a way that the system, as a whole, would not be operational without each individual functionality. Therefore, the totality of the various functionalities of the services in question as a whole could be intrinsically linked to the State’s (i.e. the MIUR’s) task of providing tertiary education through State universities. In the following recitals, the Commission examines whether the intrinsic link can be established based on the factors described in recital 232.

4.1.2.1.1. Existence of a legal obligation in support of a public task which applied to the State as well as to the beneficiary of the support

- (347) As Italy explains, the assignment of State power in the educational field is Article 33 of the Italian Constitution which states that the “Republic guarantees the freedom of the arts and sciences, which may be freely taught. The Republic lays down general rules for education and establishes state schools (...)”. On the behalf of the Republic, the Ministry will guarantee the actual right to study, thus putting into practice the provisions of Article 34 of the Italian Constitution ⁽¹⁹³⁾ by various measures.
- (348) As explained in recitals 148, 149 and 160, a wide range of tasks have been assigned to the Ministry in the tertiary education field by Article 51 ter of Decree 300/1999, by Law 168/1989, and, since 2010, Law 240/2010.
- (349) As explained in recital 134, the Ministry is responsible for defining the objectives and strategic guidelines for the university system ⁽¹⁹⁴⁾ and its members. It is responsible for establishing universities, for the supervision and approval of their articles of association and main regulations, the authorisation and activation of courses of study, verifying and assessing universities’ results in accordance with criteria of quality, transparency, and the promotion of merit, guaranteeing a distribution of public resources in keeping with the objectives, policies and activities carried out by each university.
- (350) Already Article 51 ter of Decree 300/1999 assigned functions to MIUR in the following major areas: guidance, planning and coordination of scientific and technological research; general standardisation and financing of universities; promotion of merit and right to study; accreditation and assessment of training; implementation of EU standards relating to university education; European harmonisation and integration of the system into cultural agreements; streamlining conditions of access to universities; managing national operational programmes financed by the European Union (see recital 148).
- (351) The Article 2 of Law 168/1989 – the “university law” (see recital 133) - which established the Ministry, stipulated further duties, in particular for the minister. These include publishing a university development plan; proposing and adopting research guidelines; distributing allocations intended for universities on the basis of objective criteria aimed at ensuring balanced development of universities; submitting a report to Parliament every three years on the state of scientific and technological research; coordinating activities connected to Italy’s participation in EU and to national university education and scientific and research programmes; coordinating university education with other levels of public education (see recital 149).
- (352) As indicated in footnote 105, Italy also provided a list of the legal provisions which form the basis of the 15 technical functions that the MIUR has to fulfil, along with the details of the technical functions that the legal bases support. The Commission has verified that the legal bases indicated indeed served as the legal foundation of the technical functions in question.
- (353) On this basis, the Commission is of the view that Italian legislation defining the tasks of the MIUR does contain language clearly indicating a legal obligation to establish and manage an information system for the higher education in Italy.

⁽¹⁹³⁾ Article 34 of the Constitution: “Schools are open to everyone. Primary education, given for at least eight years, is compulsory and free of tuition. Capable and deserving pupils, including those lacking financial resources, have the right to attain the highest levels of education. The Republic renders this right effective through scholarships, allowances to families and other benefits, which shall be assigned through competitive examinations.”

⁽¹⁹⁴⁾ Article 1 (4) of Law No 240/2010: “The Ministry, in compliance with the freedom of teaching and autonomy of the universities, shall indicate the objectives and strategic guidelines for the system and its components and, through the National University and Research System Assessment Agency (ANVUR) for matters within its remit, shall verify and assess its results in accordance with criteria of quality, transparency and the promotion of merit, including based on best practices at international level, while guaranteeing a distribution of public resources in keeping with the objectives, policies and activities carried out by each university, in compliance with the principle of national cohesion, and in line with the assessment of the results achieved.”

- (354) The Commission then examined the existence of corresponding legal obligation in Cineca's Articles of Association beginning 2004. In Article 3 of the 2004 Articles of Association, the reference to information technology systems is embodied in the sentence: "foster technology transfer in the information technology field for public (...) sector scientific (...) research" and to "manage a center, (...) that provides an information processing service" and "establish a connection network to facilitate the use of the Centre's resources by the consortium members and the ministries concerned". One must keep in mind that in the *HIS Decision*, the corresponding obligation in the Articles of Association of HIS was significantly more general as it said the following: "the purpose of the company is to support higher education institutions and competent administrative bodies in their efforts to perform higher education tasks in a rational and cost effective manner" (Article 2 of HIS GmbH's Articles of Association described in recital 122 of the *HIS Decision*).
- (355) Beginning in 2006, the reference in Cineca's Articles of Association to IT services is even clearer: Pursuant to Article 3 (f) of the Articles the consortium "manages a centre which (...) provides IT management and processing services to all members of the consortium with priority given to the Ministry of Education, University and Research". The Articles of Association of 2010 and 2012 maintained this language, whereas the relevant language in the 2017 Articles (Article 3(a)) returns to the language of "information technology" as it mandates the provision of "information technology services, and organise the procedures involved in producing them for the MIUR and for universities (...)".
- (356) In view of the above, the Commission concludes that Cineca's Articles of Association contain a legal provision binding on Cineca to provide IT services to the MIUR. Hence, there is a legal obligation applicable to the State (and to MIUR) as well as the recipient of the support, Cineca, within the sense explained in the *HIS Decision* (see recital 238 of this decision and recital 122 of the *HIS Decision*).

4.1.2.1.2. The commonality of the objectives pursued (common purpose),

- (357) The legal bases relating to the provision of tertiary education and the related legal obligation of the MIUR (recitals 148-149 and 160 and footnote 105), the foundation of MIUR's legal obligations, coupled with Cineca's legal obligation to support the MIUR (see recitals 140 and (219) also define the common, in other words "converging", purpose of the MIUR and Cineca.
- (358) As it was explained by Italy (see recital 140), the primary aim of Cineca was to serve as a tool for the higher education system by providing integrated and efficient computing systems and IT services, thus enabling the performance of its public functions. More specifically, Cineca has been tasked with creating high quality, innovative IT services necessary for the performance of the public function of its members. These services have been planned and produced for the public function purpose through the development of customized technologies that have been integrated over time according to the specific needs of the institutions of the higher education system. These services cannot be found on the market with the same operating conditions.

4.1.2.1.3. The essential/inseparable nature of the service in question to the State's ability to carry out the State task in the tertiary education field

- (359) As Italy explained, the MIUR is responsible for guaranteeing the actual implementation of the right to study by measures to support this right. It is responsible for establishing universities, for their supervision and for the approval of their articles of association and their main regulations. It defines their objectives and strategic guidelines. In addition, it is in charge of the authorisation and activation of courses of study, verifying and assessing universities' results in accordance with criteria of quality, transparency, and the promotion of merit, guaranteeing a distribution of public resources in keeping with the objectives, policies and activities carried out by each university.

- (360) As detailed in recital 137, the competences are divided between the MIUR and the universities, with macro-category functions defined at the level of the Ministry and the corresponding tasks are defined at the level of the universities. The most important macro-categories extend to at least eight areas where the MIUR provides funding, guidance, supervision, or assessment ⁽¹⁹⁵⁾ and where the universities carry out in practice the various tasks. The purpose of this system is to enable the universities to provide a unified and multifaceted education throughout Italy.
- (361) Italy explains that these activities, although distinct, are inextricably linked and aimed at exercising an essential function of the State (see recital 138). These functions, the Italian authorities point out, do not constitute activities of a merely administrative nature, as the complainant argues, but they define and ensure the efficiency of the higher education system.
- (362) For the advancement of these functions, Cineca has created and managed numerous databases for the Ministry, which are also interoperable with one another, and which are used by the Ministry to perform these technical functions and thus its general public function. (For a recount of the assistance Cineca provided beginning in the 1980s, see footnote 96). In the absence of an internal IT support structure, in the Ministry itself, Cineca has always been the reference body for the Ministry with which IT services have been designed and tailored to the specific functions of the Ministry. In addition, the services have been further developed over time, and provided through the dedicated structure within Cineca, that mirrors the internal structure of the Ministry ⁽¹⁹⁶⁾.
- (363) In this manner, Cineca provided the Ministry with operational flexibility, and enabled it to react to frequently changing regulatory requirements in a timely fashion. Cineca's knowledge of the legal background, the needs of all the stakeholders and relevant operating procedures enabled the Ministry to comply with strict business continuity requirements minimising phase-in/phase-out disruptions.
- (364) There are no other parties that are able to provide all the support services that the Ministry needs ⁽¹⁹⁷⁾, i.e. there is no market for the services. Building up from scratch the IT services by a provider other than Cineca would result in the suspension of the public functions assigned to the Ministry. Given that the Ministry's needs are not standardised with respect to ITC services, there are no operators on the market that were able or willing to structure their services around this specific and complex field. The same situation in the *HIS* case was quite similar and was an important factor in finding that the services in that cases were intrinsically linked to a State task (see recitals 126 and 127 of the *HIS Decision* and paragraphs 84 and 90 of the General Court's judgment in the *TenderNed* case to the effect that the task can be best managed with TenderNed's service). The Commission also finds the argument convincing that a change to an alternative provider would require extraordinary investment from that provider and would result in incalculable costs for the Ministry.
- (365) Cineca's services have thus become the means through which the Ministry fulfils its public mandate. Its purpose is functionally related to the State's duty to guarantee higher education.
- (366) As explained in recital 344, the set of functionalities of the MIUR IT services covers all of the MIUR's IT service needs in the sector, and each and every one of these services is intertwined with its functioning. They provide support for MIUR for its role in the tertiary education system in a way that, without them, it could not function as required by the legal bases referenced in recitals 347 to 353. Reducing the totality of the services by any one of the functionalities would leave the system of services, as a whole, non-functional within the meaning of the *TenderNed* case law (see recital 232 of this decision). The MIUR could not function without NSAS as it could not identify and monitor student enrolment, assess the effectiveness of education, promote student mobility. Without the "Training offer database" and the "Universitaly", it could not activate courses and provide information about training courses and assist people to decide what to study and where to study. Without "Aaccessoprogrammato", it could not organise admission tests. Without "Proper", it could not provide a three-year programming of university staff and

⁽¹⁹⁵⁾ For specific functions for the funding, guidance, supervision, and assessment, please see recital 148).

⁽¹⁹⁶⁾ As Italy explained, (see recital 142) Cineca's activities are so integrated with the Ministry's functions, that it operates virtually as a Ministry department.

⁽¹⁹⁷⁾ The fact that no other parties are able to provide all the support services that the Ministry needs, i.e. there is no market for these services, means that the sole reference benchmark for the type of relationship between Cineca and the MIUR would be similar in-house type relationships between other ministries and their providers. (One such example is the relationship between the provider of the Ministry of the Economy and Finance, SOGEL, and the Ministry of the Economy and Finance.)

without “data bank for alia”, it could collect career and salary information about university staff. Without “Projects of significant interest”, “REPRISE” and the “National Register of Research”, it could not initiate research projects, evaluate research staff, and collect information about national research. The remaining 5 functionalities of “abilitazione”, Application for uniform preparation of accounts, portal for the accounting for profit and loss, “AFAM”, the “Ordinary financing fund” and three-year programming (PRO 3), operate on more general fields, such as HR and accounting, but they still contain specific tertiary education relevant features that are all necessary for the complete and lawful functioning of the MIUR. The separation of any one of these components would interfere with the functioning of the whole management function of the MIUR. Hence all these tools/services are essential for the universities’ functioning. In sum, the Commission is convinced that Cineca’s services are inseparably linked with the MIUR’s task in the tertiary education and the research fields and do not fall within the plain category of the provision of IT services.

- (367) In view of the findings expressed in in recital 356 relating to a legal obligation, recitals 357 and 358 relating to commonality of purpose, and recital 359 at seq. relating to the inseparable nature of the services, the Commission considers that Italy successfully demonstrated the existence of an intrinsic link between the IT services provided to the MIUR and the State’s task of ensuring tertiary education.

4.1.2.1.4. Other allegations on the intrinsic nature of the services

- (368) The Commission also considers that the complainant’s numerous other allegations (presented and addressed below) do not change this conclusion.

1) *Services can be found on the market – Italian national court judgments*

- (369) The complainant also argues that the judgment No 6009/2018 found that the IT support services for the MIUR can be found on the market for I.C.T. services and products through the common public tendering procedures and thus do not fall within the prerogatives of the public authorities” (see recital 45). Further, the Italian Competition Agency found in two procedures that such activities are distinct and separate from the exercise of State power ⁽¹⁹⁸⁾ (see recital 46).
- (370) Italy is of the position that the judgment No 6009/2018 found that the payment by the MIUR for services from Cineca should have been notified, but the matter No 10528/2019 of the regional court TAR Lazio had been decided in favour of MIUR ⁽¹⁹⁹⁾ (see recital 164). The cases of the Italian Competition Agency are irrelevant as they focus on anticompetitive conduct by contracting entities aimed at influencing customer choice downstream to the contracting entities’ market (see recital 165).
- (371) The Commission is of the view that the Italian national court judgments cited by the complainant ultimately do not support the complainant’s position. The judgment No 6009/2018 found that the IT support services for the MIUR can be found on the market and do, therefore, constitute an economic activity. This judgment, however, is an appeal of the judgment of TAR Lazio No 2922/2017, which considered the services to the MIUR to be of an economic nature largely based on the Commission’s decision to open the formal investigation procedure in the *HIS* case (see recital 273) As it was explained in recital 273, the final decision of the Commission has found in the meantime (in September 2019), that the provision of IT services to State universities did not constitute an economic activity. It follows from this that the findings of the judgment No 6009/2018 are not binding. This position is in fact reinforced by the judgment of the Administrative Court of TAR Lazio No 10528/2019, which, unlike the judgment No 6009/2018, did not conclude that the payment for the MIUR IT services constitute State aid automatically (see section 8.2. (d) of this judgment) but made this finding dependent on a possible finding of an advantage in connection with the payment (see section 3.3.2 of the judgment) (see recital 164 and footnote 107). As regards the cases of the Italian Competition Agency, the Commission agrees with the Italian authorities that the fact pattern of those cases is too different from the one at hand to serve as a proper precedent.

⁽¹⁹⁸⁾ A490 – *Telematics Civil Process* and 1778 – *Electronic School Register*.

⁽¹⁹⁹⁾ In this court case, the complainant asked the court to annul the grants by the MIUR to Cineca for the provision of services to the MIUR and for supercomputing activities for the year 2018. The judgment of the Regional Administrative Court of Lazio, No 10528/2019 found that the contribution to Cineca for the services to the Ministry of EUR 14 000 000 did not constitute State aid, as the Ministry adequately demonstrated on the basis of market prices, that the amount was economically appropriate (section 3.3.1).

2) Possible further requirements of the case law

- (372) The complainant further argues that the *TenderNed* and *ZVG Portal* cases require that the Member State authorities *internalise* the service, i.e. that they own the entity carrying it out. Further, the complainant states that according to the *ZVG Portal* case and the SGEI communication, an activity is non-economic if the Member State have not decided to introduce market mechanisms, but Italy decided to outsource the activity.
- (373) The Italian authorities are of the view that the judgment of the European Court of Justice in *Commission v. Italy* (C-118/85) made it clear that “it is of no importance that the State carries out the said economic activities by way of a distinct body over which it may exercise, directly or indirectly, a dominant influence (...) or that it carries out the activities directly through a body forming part of the State administration” (see recital 152 citing paragraph 8 of the judgment). It follows from this that the State may also carry out a non-economic activity or public function through a distinct entity. If the intrinsic link exists, it does not matter whether Cineca is an internal entity of the Ministry. Further, Italy insists that it did not introduce market mechanisms for the IT services for the MIUR (or the universities). Italy demonstrated anyway, the authorities continue, that Cineca, on the basis of its structure, its purpose and the control exercised by its members, can be regarded as an internal department within the State administration (recital 152).
- (374) The complainant also claims that the 1) the link between the non-economic activity and the public function must be particularly pervasive (based on the *EasyPay* judgment) in the sense of the method being the *only* way of providing the service, and 2) the service must be provided free of charge or for a symbolic fee (see recital 48).
- (375) According to the Ministry, however, it is sufficient that Cineca’s services constituted the means that enabled the Italian authorities to fulfil their legal obligation with respect to the exercise of guidance, supervision, and implementation of policies, thus enabling the functioning of the higher education system (for the Ministry) (see recitals 140 to 143).
- (376) In connection with these arguments, the Commission would like to refer to recitals 271 to 275 and 283 to 290 of this decision, where the relevance or the existence of these elements in the cited cases or judgments was explained. The Commission finds, on the basis of the findings in those recitals, that the complainant’s arguments relating to these elements do not change the opinion of the Commission relating to the economic nature of the activities in question.

3) The nature of the service

- (377) The complainant argues (see recital 49) that the services provided to the MIUR are not technically complex, and they constitute classic services of operating systems, such as updating, redesigning web portals, providing consultancy and regulatory analysis, maintenance of servers, ISDN lines, workstations, smartcards. These can easily be obtained on the market. These services do not require personalisation and cannot be regarded as essential or indispensable. They are no more than mere provision of qualified human resources such as project leaders, functional analysts, system architects, system engineers, programmers, advisors, and consultants.
- (378) Italy disagrees with this characterisation. As explained in recitals 139 et seq., Cineca was to serve as a tool for the higher education system by providing integrated and efficient computing systems and IT services, thus enabling the performance of its public functions. These services have been planned and produced for the public function purpose through the development of customized technologies that have been integrated over time according to the specific needs of the institutions of the higher education system, and which cannot be found on the market with the same operating conditions. In addition, these needs are constantly changing due to regulatory changes and the ever-increasing number of duties assigned to the MIUR.

- (379) It would be impossible, Italy argues further, to imagine the management of the IT services to the Ministry through external parties who do not know the rules and procedures to which the Ministry is subject and the purpose for which the system is needed. An outside party would need to devote a lot of time to study rules of the underlying procedures and operational processes which would cause unpredictable delay. The Cineca software has nothing in common with generic applications available on the market (see recital 155). In fact, setting up a platform for the management of each highly specialised service would not be feasible. It is in this sense that the system in question cannot be compared to supply of simple objects used in university education, such as chairs, and desks. In this sense, the provision of the software is not an *input* into the education system, but condition of their operation (see recital 155).
- (380) Italy reiterates that the applicable case law (*ZVG Portal*, *TenderNed*, *HIS*) made clear that the existence of competitors – even if there had been one for the services in question, which Italy denies – does not negate the existence of intrinsic link between a given service and a State function (see Commission's reasoning in recital 288).
- (381) Further, Italy argues that the Council of State judgment declaring the source code of Cineca's software to be of Cineca's property (see recital 158) assigning an economic value of Cineca's product does not mean that the related activity is separable from the "institutional" activity of Cineca.
- (382) The Commission finds the argument of the Italian authorities convincing about the indispensable nature of Cineca's IT services package that is needed for the proper functioning of the MIUR as well as the State university system, see more details relating to the Commission's reasoning in recitals 359 et seq. The Commission is also convinced that the various elements of the service have been tailored together, have been developed over time in a symbiosis between the MIUR and Cineca and that the system's development and continued operation necessitates a detailed knowledge of the regulatory requirements as well as the constant change of this regulatory environment. It is plausible that the interrelated tasks of the MIUR and the State universities cannot be managed without Cineca's package of IT services and that this set of services could hardly be reciprocated by providers in the open market. The symbiotic relationship that is the foundation of the proper functioning of this system is also demonstrated by the fact that MIUR has been structured in a way to mirror the MIUR structure to make the cooperation as smooth as possible.
- (383) The Commission notes that even the complainant admits that a change to a different provider of IT services would only be possible after a transition period of three to four months (see recital 49). It is not unreasonable to think that a transition phase of three to four month is not acceptable for a system that has to operate year-round, even if in a reduced scope in the summer vacation period.
- (384) In addition, there is no reason for the Commission to doubt that the interrelated nature of the Cineca's offer for IT services to the MIUR makes it more efficient than what other providers could (in theory) offer. The relevance of this issue is explained in recital 126 of the *HIS Decision*: "The *TenderNed* judgment established inseparability between the service *TenderNed* provided and the public task at issue in that case even though there were indications that the e-procurement in question merely contribute[d] to the effective operation of the [service] that was connect[ed] with the exercise of public power" (see recital 90 of the judgment). Similarly to the *TenderNed* judgment, in the present case there have also been market operators that offered parts of the service that *HIS* offered. However, as the General Court explained in the *TenderNed* judgment, the authorities could "best manage the entire public procurement process" with *TenderNed*'s services (recital 90 of the judgment) and that "existing commercial platforms did not offer the conditions relating to price, objective quality characteristics, continuity and access to the services provided that would be necessary to fulfil" the objectives of the authorities (recital 107 of the *TenderNed* judgment)." The factual situation with respect to the IT services to the MIUR is exactly the same as the one in the *HIS* case and the *TenderNed* case: other, existing IT service providers do not offer the same conditions relating to price (see recital 163), objective quality, continuity, and access to the service that would be necessary for the MIUR to fulfil the public task assigned to it.

- (385) Based on these considerations, the Commission finds that the IT services provided to the MIUR are indispensable for carrying out the MIUR (i.e. the State) task in managing the tertiary education system.
- (386) As regards the Commission's conclusion relating to the intrinsic nature of the link between Cineca's provision of the IT services to the MIUR and MIUR's duty to provide tertiary education in implementing the state's task in this field, the Commission considers that the Italian authorities successfully demonstrated the existence of this link (see recital 346): 1) there is a legal obligation supporting the public task which applies both to the MIUR as well as to Cineca (see recitals 356 et seq.); 2) there is a commonality of purpose (see recitals 357 and 358), and 3) the services in question are essential to and inseparable from the State's ability to carry out its task of providing tertiary education (see recitals 359 et seq.).
- (387) The Commission is of the view that the IT services to the MIUR are comparable to the characteristics of the IT services to the universities, and that the *HIS Decision* is an appropriate precedent for a finding of an intrinsic link between this type of IT services and the State function exercised through the MIUR. It is because the *HIS Decision* does not need to be narrowed down to university IT services per se. The *HIS Decision* can well be interpreted as suggesting that customised IT services related to the provision of higher education are intrinsically linked to the State's task of providing tertiary education.
- (388) The court judgments the complainant refers to in support of its argument that the university IT services constitute an economic activity (see recital 45) would not lead to a conclusion with respect to the MIUR services that is different from the one the Commission reached in connection with the services to the universities (see recital 275). The Commission already explained in recital 272 its approach to this case. The ECJ judgment of C-3/88 *Commission v. Italy*, which according to the complainant confirmed that operation of data processing systems constitutes an economic activity, did not establish that software and IT services are *per se* separable from the exercise of public powers or the carrying out of public tasks. In addition, the case related to rules about freedom of establishment and freedom to provide services. Finally, the justification argued for the Italian position in that judgment was the treatment of confidential data. The difference between the facts underpinning that judgment and the fact pattern in the current case is considerable and the Commission's finding in this case is not irreconcilable with the ECJ judgment C-3/88. The question in the ECJ judgment C-3/88 was whether Italy's practice of contracting IT services from undertakings in a range of economic sectors only with entities in public ownership was in line with the EEC Treaty's provisions of freedom of establishment. The judgement stated in a general fashion, in its recital 13, that "the design, programming and operation of data processing systems are of a technical nature and are thus unrelated to the exercise of official authority". This finding constitutes a conclusion that is applied in a blanket manner to IT services, in general, which is much broader than the Commission's finding in this case. The services in question in this case are not general IT services, but ones that must be tailored to the very specific needs of the MIUR which carries out a public task. There is nothing in Italy's reasoning, or the Commission's finding so far that would be the equivalent of claiming that the provision of IT services in general are non-economic. The Commission's opinion in this case about Cineca's services is not irreconcilable with the position that IT services, as such, do not involve "a direct and specific connection with the exercise of official [in the language of Article 55 of the EEC Treaty public] authority". In view of these considerations, the *Compass-Datenbank* judgment rightly failed to refer to the *Commission v. Italy* judgment.
- (389) The opinion of the Advocate-General in case C-264/01 *AOK and Others* stating that the critical question as to whether an activity is economic, is whether it could be carried out by a private undertaking with a view towards making a profit is contradicted by other jurisprudence. As explained in recital 271, this other jurisprudence shows that it is irrelevant whether the service could be provided by a private undertaking ⁽²⁰⁰⁾.
- (390) The Commission already explained its view relating to the *Scattolon* judgment in recital 274.

⁽²⁰⁰⁾ C-264/01, C-306/01, C-354/01 e C-355/01, *AOK Bundesverband e a.*, ECLI:EU:C:2004:150, § 56. C-262/18 P and C-271/18 P, *Commissione e Repubblica slovacca/Dôvera zdravotná poisťovňa*, ECLI:EU:C:2020:450, §§ 32-34 and 43 for case law showing that introducing elements of competition in a non-economic activity is not sufficient to alter the nature of the activity.

- (391) Finally, the Commission is of the view that the case law and precedents on which the current assessment is carried out (building on the *CompassDatenbank*, *TenderNed*, *ZVG Portal* and the *HIS* case) sufficiently clarified the requirements for assessing situations such as those in the present case relating to the nature of the MIUR IT services (and of the university IT services).
- (392) Based on these considerations, the Commission has found that the provision of the MIUR with IT services constitutes an activity which forms part of the essential functions of the State or is connected with those functions 'by its nature, its aim and the rules to which it is subject' ⁽²⁰¹⁾ and hence it is not of an economic nature.

4.1.2.2. State resources and imputability

- (393) As stated in recital 93 of the opening decision, the public financing provided to Cineca with respect to the IT services provided to MIUR originate from the budgetary resources of the Italian State. The decision to provide that financing is taken by the MIUR, which is a ministry of the Italian government. The Commission therefore confirms its preliminary conclusion that the payment to Cineca for IT services to the MIUR constitutes State resources and is imputable to the Italian State.

4.1.2.3. Selective advantage

- (394) The complainant argues, as explained in recital 60, that Cineca is not a proper in-house entity of the MIUR and should use proper public procurement procedures. It also argues that Law No 208/2015 ⁽²⁰²⁾ requires that for the purpose of optimising and rationalising purchases of IT goods and services and connectivity, ministries and public universities should "satisfy their needs exclusively through the purchase and negotiation tools of Consip or [other entities] for goods and services available from Consip or [these other entities]" (see recital 60). Consip, the complainant continues, is widely used for the procurement of comparable specialised product. For example, the Ministry of Justice also used Consip, for the introduction of electronic civil procedure throughout Italy which is part of an essential function (see recitals 51 and 61).
- (395) The Italian authorities point out that the MIUR utilises the market (i.e. through Consip) only for standard services (recital 153). Consip is not a good benchmark, since undertakings available through Consip do not offer the same level of all-inclusive services (recital 168). Finally, Italy explains that Consip only applies to situations when the products and/or services *are available* on the market (recital 257) ⁽²⁰³⁾. However, the services in question are not available on the market in their completeness. Finally, as explained above, Italy confirms that the so-called *salva Cineca* law set up an in-house model between Cineca and the MIUR, which was perfected through Ministerial Decree 245 of 26 March 2018, and that Cineca has been entered into the Italian national list of entities that can operate through direct awards. (See recitals 146 and 168).
- (396) Lack of advantage through a transaction can also be established through the application of the MEO test. As explained in recital 304 for the purpose of the MEO test, only the benefits and obligations linked to the role of the State as economic operator – to the exclusion of those linked to its role as a public authority – are to be taken into account. Indeed, the MEO test is not applicable if the State acts as a public authority rather than as an economic operator.

⁽²⁰¹⁾ See, in particular, Judgment of the Court of Justice of 19 January 1994, *SAT/Eurocontrol*, C-364/92, ECLI:EU:C:1994:7, paragraph 30, judgment of the Court of Justice of 18 March 1997, *Calì & Figli*, C-343/95, ECLI:EU:C:1997:160, paragraphs 22 and 23; judgment of the Court of Justice of 12 July 2012, *CompassDatenbank v. Austria*, C-138/11 ECLI:EU:C:2012:449, paragraph 41.

⁽²⁰²⁾ Article 1 (512).

⁽²⁰³⁾ The lack of advantage to Cineca in connection with the services was also confirmed by the judgment by the Regional Administrative Court of Lazio, (Section Terza Bis) which stated, as Italy explained in recital 164 and footnote 107, the contribution to Cineca for the services to the Ministry of EUR 14 000 000 did not constitute State aid, as the Ministry adequately demonstrated on the basis of market prices, that the amount was economically appropriate (section 3.3.1).

- (397) As stated in recital 94 of the opening decision, the Commission needs to assess whether Cineca received an economic advantage only if Cineca were to be considered as an undertaking within the meaning of Article 107(1) TFEU in relation to the provision of IT services to MIUR. The Commission would need to assess whether it received an economic advantage. The Commission disagrees with the complainant's assertion that the opening decision rightly stated that the lack of competitive selection procedure provided Cineca with an economic advantage as a lack of a competitive selection procedure does not automatically lead to an economic advantage. The lack of advantage can also be proven through other means⁽²⁰⁴⁾. The question of the existence of an economic advantage is, in any event, only relevant if the provision of IT services to the MIUR would be of an economic nature.
- (398) Although the Commission considers that the IT services to the MIUR do not constitute an economic activity, it assessed whether or not, should the activity constitute an economic activity, Cineca would have received an economic advantage.
- (399) An advantage, within the meaning of Article 107(1) of the Treaty, is any economic benefit, which an undertaking could not obtain under normal market conditions, that is to say in the absence of State intervention⁽²⁰⁵⁾. Economic transactions carried out by public bodies (including public undertakings) do not confer an advantage on their counterparts if they are carried out in line with normal market conditions⁽²⁰⁶⁾. In order to determine whether a transaction has been carried out under those conditions, the Commission applies the market economy operator ("MEO") test.
- (400) In the complainant's view, the MEO test is not applicable for the determination of the advantage in this case (see recital 59). It argues that the grants cannot be considered as contribution for services because there is no contract to regulate the transaction, the payment items are booked in the wrong section of MIUR's annual cost estimate, and no VAT was paid relating to the services. On this basis, the complainant believes the Council of State judgment No 6009/2018 was accurate in holding that the public funding granted to the MIUR (for the year 2015) constituted State aid⁽²⁰⁷⁾.
- (401) The Commission disagrees with this characterisation and considers that the MEO test (if the activity in question is economic) is applicable. Pursuant to the judgment of the Court of Justice of 5 June 2012 in *C-124/10 P Commission v. EDF*, "[t]he applicability of the private investor test ultimately depends on the Member State concerned having conferred, in its capacity as shareholder and not in its capacity as public authority, an economic advantage on an undertaking belonging to it". In the scenario that the provision of the services in question were to be economic, the State does not act as a public authority and the MEO principle is applicable. On this basis, the opening decision correctly stated in recital 101 (at the time), that "Italy did not demonstrate that [the] payments for IT services to the MIUR did not exceed market prices". Given that Cineca did provide a service in return for the payment, the payment constituted consideration and does not constitute an advantage in its entirety. Only the part of the payment that exceeded market prices could be viewed as an advantage. This is so, regardless of whether or not there was a VAT payment on the basis of these transactions, or where exactly the payments were booked and whether or not there was a contract relating to the payment.

⁽²⁰⁴⁾ "If a transaction has not been realised through a tender, or if the intervention of the public bodies is not 'pari passu' with that of private operators, this does not automatically mean that the transaction does not comply with market conditions." See point 97 of the NOA citing Judgment of the General Court of 12 June 2014, *Sarc v Commission*, T-488/11, ECLI:EU:T:2014:497, paragraph 98.

⁽²⁰⁵⁾ Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 60; Judgment of the Court of Justice of 29 April 1999, *Spain v Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 41.

⁽²⁰⁶⁾ Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraphs 60 and 61.

⁽²⁰⁷⁾ Section 9 (d) of Judgment of the Council of State of 21 December 2007 and 2 May 2018 No 6009/2018 (No 0267/2017 REG), published on 22 October 2018.

- (402) The complainant also argues that it provided unambiguous proof that the consideration for Cineca's services exceeded market level. According to one such piece of evidence, an economic adequacy report ⁽²⁰⁸⁾ operated with a combination of Consip and Assinter prices for the consideration for IT services to the MIUR, but this consideration was, according to the complainant, not at the market level as it did not use the correct price benchmark. The correct benchmark would have been the prices quoted by Consip for the various specialists in a tender for "integrated management systems for public administration" which is comparable to Cineca's services, and which had been won by a group of well-known IT providers. Cineca's prices exceeded these Consip prices by an average of 96 %, according to the complainant (see recital 63.) According to the complainant the Corso report's exclusive use of Assinter prices (see recital 64) also constitutes the wrong benchmark.
- (403) The Commission is of the view that these allegations are not conducive to a conclusion that an advantage was provided to Cineca through the payment for the MIUR services. It is because Assinter prices (used in the Corso study (see recital 64) do constitute an appropriate benchmark given that Assinter prices are applicable in the context of a relationship between entities and Ministries comparable to the relationship between MIUR and Cineca with respect to the services in question. Therefore, there is no proof of an advantage having been provided to Cineca in connection with the provision of IT services for the MIUR based on the findings of the Corso report. As regards the Lazio Regional administrative court judgment (and the benchmark used in that case (see recital 63), it is important to see that, according to the court, the report provided by the MIUR (see footnote 45) furnished "adequate information to conclude that Cineca's tender was economically reasonable, compared with market prices and expected to be paid within the limit of the maximum amount allocated by the decree at issue (...) after reporting the annual amount due." Hence, according to the court, no advantage was going to be provided to MIUR through the payment for the services in question relating to the 2018 award for the IT services to the MIUR.
- (404) The complainant also articulates certain criticism with respect to the "Notes on the valorisation (i.e. assessment) of Cineca services to the former MIUR" (see recital 64). These include the following: hypothetical estimates for certain elements, such as work for the development and evolutionary maintenance of activities, the "degree of turbulence" for the extrapolation of values for year 2018 for certain functions from the years 2019, etc (see recital 66).
- (405) The Commission does not need to address these elements, because the report itself says that two of the four categories of services that Cineca provides to MIUR (i.e. "Application services", "Infrastructure services", "Service Desk function" and "Projects"), namely "Infrastructure services" and "Projects", could not be valued adequately and hence do not feature in the market value estimate. It is, however, part of the cost calculation of Cineca's service offer, thus the value of Cineca's service offer and the market value estimates are not comparable. In these circumstances, the Commission does not consider the Corso expert opinion to be reliable enough. From this perspective, it does not matter what criticism the complainant articulates relating to the Corso study and the market study relating to hosting services segment by Mr Aiello (see e.g. recital 327).
- (406) In connection with the complainant's argument that no *ex-ante* analysis was carried out relating to the value of the MIUR IT services prior to awarding it to Cineca (see e.g. recital 65), and that the MIUR did not use the market for the services, the Italian authorities advance a number of arguments: at the time of Cineca's establishment in 1967, there was no market for the type of services that the MIUR needed. Therefore, it was not possible to create an "adequacy of financing". (Consip, as such, did not even exist until 1997, well after Cineca started to produce the IT services to the MIUR.) Further, the legal obligation to prepare an adequacy assessment only exists since 2016 (when the Decree 50/2016 entered into force). This does not mean that the payments to Cineca for the services in question were not examined for adequacy prior to being made. The costs were checked in detail and services were verified. The payments were determined on the basis of the costs, and as explained in recital 168 and footnote 108, a limited *ex-ante* assessment of the costs was in place. In addition, the payments were subject to registration by the Court of Auditors and verified by the General Accounts Department in the Ministry of Economy and Finance. The amounts were considered as adequate by the Digital Italy Agency (AGID) and the Court of Auditors (see recitals 167 and 204).

⁽²⁰⁸⁾ See requirements under Article 192 of Legislative Decree 50/2016 cf recital (191) which was used for the award of the grant for 2018. The 2018 award was subject to a legal dispute between the complainant and Cineca at the Lazio Regional Administrative Court. See Judgment of the Regional Administrative Court of Lazio (Chamber III bis) of 21 May 2019, No 10528/2019 published on 13.8.2019.

- (407) Italy refers to the “Notes on the valorisation of Cineca services to the former MIUR” shows that the payments to Cineca for the MIUR services were significantly below the average market value in these years (see recital 170 et seq. and footnotes 110, 111 and 112). In addition, apart from the years 2006 to 2010, the costs of providing the MIUR IT services were EUR 208 000 higher (on a cumulative basis) than the payments for the services (see table in recitals 209 and 409).
- (408) The Commission is of the view that in the specific circumstances of the case, in particular the fact that the services in question are not available on the market (see e.g. recital 153), the MIUR was not in the position to carry out a fully-fledged *ex-ante* market value analysis. According to jurisprudence, such special circumstances in fact can be taken into account when assessing whether the *ex-ante* analysis of a market value has taken place ⁽²⁰⁹⁾. On this basis, and in view of the fact that the subject matter of any possible analysis in this case is similar to a contract for services and does not concern an investment by the State, it is acceptable that only a limited *ex-ante* examination of the market value of the services took place. In these circumstances, any possible advantage can be assessed largely on the basis of a comparison of the costs and revenues Cineca was paid for the MIUR services, especially as the analysis was based on contemporaneous data. Italy submitted a table showing these costs and revenues as well as the raw data on which these summary figures are based. The Commission has verified that these figures are indeed based on the submitted raw data.
- (409) The table submitted shows the figures relating to Cineca’s revenues for the provision of IT services to the MIUR and the associated costs in the years 2006-2019:

YEAR	Revenue derived from CINECA's balance sheet	COSTS FOR SERVICES TO THE MIUR	ACTUAL RECEIPTS FOR SERVICES TO THE MIUR ON FFO	Difference btw effective receipts from the MIUR and the costs		
2006	[...]	[...]	[...]	[...]		[...]:[...]= 18,6%
2007	[...]	[...]	[...]	[...]		[...]:[...]= [...]%
2008	[...]	[...]	[...]	[...]	[...]	[...]:[...]=[..]%
2009	[...]	[...]	[...]	[...]	[...]	[...]:[...]= .4,4%
2010	[...]	[...]	[...]	[...]	[...]	
2011	[...]	[...]	[...]	[...]	[...]	
2012	[...]	[...]	[...]	[...]	[...]	
2013	18 850 000	[...]	[...]	[...]	[...]	
2014	[...]	[...]	[...]	[...]	— 208 045	
2015	16 759 349	[...]	[...]	[...]	[...]	
2016	16 000 000	[...]	[...]	[...]	[...]	
2017	[...]	[...]	[...]	[...]	[...]	
2018	14 000 000	[...]	[...]	[...]	[...]	
2019	[...]	[...]	[...]	[...]	— 66 018 871	Total Differences 2006-2019

⁽²⁰⁹⁾ See Judgment of the General Court of 25 June 2015 in *SACE v. Commission*, T-305/13, ECLI:EU:T:2015:435. “Thus, in a context of an economic crisis, the assessment of the required evidence of a prior evaluation must be made in the light of, as the case may be, the inability to make reliable, detailed forecasts of developments in the economic situation and the performance of different operators. In those circumstances, it cannot be concluded from the mere absence of a detailed business plan for the subsidiary, containing accurate, full estimations of its future profitability and detailed cost/profit analyses, that the public investor did not act as a private investor would have done.”, paragraph 179.

- (410) As it can be seen from the table above, the costs exceeded the compensation provided by MIUR to Cineca for the services in question, except in the years 2006, 2007, 2008, 2009, 2013 and 2014. The Commission, however, is of the view that in a scenario where the provision of IT services to the MIUR were to constitute an economic activity, the provider, i.e. Cineca, would be entitled to a reasonable amount of profit. For this purpose, the Commission calculated the percentage that the surplus demonstrated in the context of the revenues and arrived at numbers, (shown in the last column of the table) that are between 4,4 % and 18,6 %. (It is to be noted that payments for the years 2015 to 2019 have not been granted as a result of national litigation in Italy between the parties.)
- (411) Profit margins for IT services vary considerably by industry. The average margin for managed services is approximately 40 to 45 % and professional services is in the 50 to 60 % range⁽²¹⁰⁾. Keeping in mind that profit margins for IT services are showing an average downward trend, it can be assumed that a profit margins for the services in question between 18,6 % and 4,4 % in the years 2006 to 2010 and from 2013 to 2014 were not excessive.
- (412) On the basis of these considerations, the Commission is of the view that no advantage has been granted to Cineca through the payment for the IT services in question during the time period in question.

4.1.2.4. Distortion of competition and effect on trade

- (413) A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient⁽²¹¹⁾.
- (414) On the basis of the information available pointing to a lack of advantage to Cineca through the payment by the MIUR for IT services, the Commission concludes that the measure was not liable to improve the competitive position of Cineca and therefore did not distort competition.
- (415) Support to undertakings only constitutes State aid under Article 107(1) of the Treaty insofar as it 'affects trade between Member States'.
- (416) The Commission considers that that it cannot be excluded that there are undertakings in the EU that could provide products and services similar to those provided by Cineca to the MIUR. In view of these considerations, the Commission concludes that the measure (were other elements of the definition of the State aid present) could affect trade between Member States.

4.1.2.5. Conclusion on the State aid nature of the MIUR's payment to Cineca for IT services

- (417) The Commission concludes that the payments by the MIUR to Cineca for the provision of IT services do not constitute State aid. It is because the provision of these services is intrinsically linked to a State task, and hence does not constitute an economic activity. Cineca is, therefore, not an undertaking with respect to this activity. Further, the investigation did not prove that the compensation for the prices paid for these services are above the costs of providing the service plus a reasonable profit, hence Cineca did not obtain an advantage through these payments.

4.1.3. *Possible cross-subsidisation of activities where the complainant is a competitor through the payment for the MIUR services and for the HPC services*

- (418) In the opening decision, the Commission raised the question of whether Cineca has used public funds received for the non-commercial/institutional HPC activity and/or for IT services to the MIUR (see recital 36 of the opening decision) in order to support its sales of university software services and IT services to State administration entities (i.e. in sectors where the complainant is a competitor to Cineca).

⁽²¹⁰⁾ <https://www.cloudzero.com/blog/rule-of-40/#:~:text=The%20Rule%20of%2040%20is,casj%20flow%20liquidity%20issues>.

⁽²¹¹⁾ Judgment of the Court of Justice of 17 September 1980, *Philip Morris*, 730/79, ECLI:EU:C:1980:209, paragraph 11; Judgment of the General Court of 15 June 2000, *Alzetta*, Joined Cases T-298/97, T-312/97 etc., ECLI:EU:T:2000:151, paragraph 80.

- (419) The opening decision noted that a formal accounting separation system was introduced only in 2016. Before 2016, Cineca used a cost accounting procedure of “direct cost allocation” consisting of profit centres, cost centres and commitments, broken down by reference to the operational units of Cineca’s organisational arrangements. Since 2016, a ‘formal’ accounting separation system has been in place which allowed for a more detailed cost/revenue correlation procedure with costs fully attributed to the relevant business units.
- (420) The opening decision referred to Italy’s redrafting of the 2015 cost report for the non-commercial/institutional HPC services applying the criteria introduced in 2015 and operational since 2016 (see recital (35) of the opening decision). The redrafting resulted in higher costs than the costs incurred and billed to the Ministry at the time of the original billing report for the non-commercial/institutional HPC (i.e. the first full year report for 2015 prepared in 2016). However, the Commission did not have sufficient data to verify the accounting methodology used by Cineca for its recalculation and the actual data to which this methodology was applied.
- (421) On this basis, the Commission sought to establish whether sufficient safeguards with respect to effective account separation were established within Cineca before 2016 and whether the account separation methodology established in 2016 were effective. In the alternative, the Commission sought to establish whether any system was put in place that prevented cross subsidisation and / or overcompensation (see recital 149 of the opening decision).
- (422) The complainant stated that the financial resources made available to Cineca for the services in question constituted all resources of Cineca, which could have been used to cross-subsidise economic activities where Cineca faces competition by the complainant (see recital (90)). The Italian authorities interpreted the opening decision as intending to assess whether the public funding for the non-commercial HPC activities and the IT services for the MIUR could have led to cross-subsidisation of Cineca’s commercial activities where the complainant is active.
- (423) The Commission confirms that the question that the opening decision sought to clarify was whether the financing of the non-commercial HPC activities and of the IT services to the MIUR could have served as a basis of cross-subsidisation of Cineca’s activities where it competes with the complainant.
- (424) The complainant’s arguments in support of its position that cross-subsidisation may have taken place is based on a number of arguments: first, the complainant claims that there was no method in place for cost allocation *ex-ante* as required by Article 4 of the Directive 2006/111/EC (“the Transparency Directive”) which mandates that public undertakings financed by the State keep separate accounts between their activities⁽²¹²⁾. The complainant argues that any cost allocation is a simple *ex-post* reconstruction of the costs incurred by Cineca in providing the services in question instead of an *ex-ante* method as also required by the EDF case⁽²¹³⁾ (see recital 65).
- (425) The Commission considers that there is no legal provision that would impose an obligation on Cineca to establish an accounting methodology that allocates costs in an *ex-ante* manner. It is because the Transparency Directive is not applicable to the case at hand given that according to Article 2 (d) of the Transparency Directive, only undertakings which are granted special or exclusive rights or are entrusted with the provision of a service of general economic interest are encompassed in the scope of the Transparency Directive⁽²¹⁴⁾.

⁽²¹²⁾ The complainant also states that 1) up until 2015, Cineca did not send any cost report relating to the non-commercial/institutional HPC activity and the MIUR IT services (see recital 59), 2) the reports were prepared on the basis of the profit & loss accounts (recital 66 and 96), without any verification of the actual costs (see footnote 75), and 3) Cineca had only a single register of internal accounts (see recital 97). The complainant itself provides and the Bologna Tax Police Report contains rebuttals of these arguments: first, the complainant claims that Cineca’s accounting reports were submitting were accompanied by a one-page document drafted *ex-post* titled ‘MIUR Supercomputing Reporting’ (see footnote 74) second, the Tax Police Report states that the system in place (until 2015) Cineca subdivided the costs on the basis of relevant criteria identified autonomously: direct, indirect and related costs and subdivided them for the MIUR and the HPC services.

⁽²¹³⁾ Judgment of the Court of Justice of 5 June 2012, *Commission v. EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraph 95.

⁽²¹⁴⁾ See Article 2(d): “undertaking required to maintain separate accounts” means any undertaking that enjoys a special or exclusive right granted by a Member State pursuant to Article 86(1) of the Treaty or is entrusted with the operation of a service of general economic interest pursuant to Article 86(2) of the Treaty, that receives public service compensation in any form whatsoever in relation to such service and that carries on other activities”.

- (426) In fact, a legal requirement relating to an *ex-ante* method for the demonstration of an efficient cost-allocation system for the avoidance of cross-subsidisation cannot be deducted from any case law, either. According to a recent court case confirming a Commission decision ⁽²¹⁵⁾ about cost separation in the context of the provision of services of general economic interest (SGEI), (*První novinová společnost a.s. v. Commission*), “from an accounting point of view, the Commission cannot be criticised for not having carried out a more detailed examination of the measure at issue [i.e. whether SGEI accounts were kept separately from non-SGEI accounts] and for relying on the accounts submitted, since those accounts showed separately the costs and revenues relating to the activities connected with the USO and those relating to other activities, in accordance with an allocation key approved by the national regulatory authority and subject to annual review by an independent auditor” ⁽²¹⁶⁾.
- (427) The Commission decision State Aid SA.45281 (2017/N) and State Aid SA.44859 (2016/FC) – Czech Republic – *State compensations granted to Czech Post for the provision of the universal postal service over the period 2013-2017*; (the Czech Postal SGEI case”) states, in its recital 80 ⁽²¹⁷⁾, that the determination of the costs through the net avoided cost methodology and an *ex-post* verification of the avoidance of overcompensation are sufficient factors for the conclusion that overcompensation did not take place.
- (428) Nevertheless, the opening decision in its recital (149) made it clear that Italy is free to demonstrate the lack of cross-subsidisation either through the existence of an effective cost accounting separation or a system that was in place to prevent cross-subsidisation or overcompensation. In the current final decision, the Commission has therefore focused on 1) an *ex-post* verification of cost and revenue figures that the Italian authorities submitted, and 2) an assessment of Cineca’s cost allocation methodology introduced in 2015 and operational since 2016 (see recital 152 of the opening decision and recitals 39, 42, 198 to 202 of this decision). The Commission then will address the complainant’s main arguments as well as Italy’s comments relating to those points.

4.1.3.1. Cost allocation system

- (429) In connection with the required proof, Italy advanced the argument (described in recital 198) that between 2004 and 2006 Cineca used a “system of expenditures” that ensured that the resources acquired and the related expenditures were balanced. This is a widely used and accepted method.
- (430) As it was explained in recitals 198 and 199, since 2006, an “analytical accounting procedure” has been used, consisting of profit centres, cost centres and orders, broken down by reference to the first-level operational units of the consortium’s organisational structure. This system was intended to determine the “contribution margin”, or “direct costs” in other words. It was a “direct costing control system” which provided only for the allocation of direct costs to profit centres. The direct costing system is widely used and makes it possible to determine the contribution margin by comparing costs and revenues.
- (431) In 2015, a new analytical accounting procedure was introduced that provided a more detailed classification of revenue and significantly increased the proportion of costs directly attributable to profit centres, cost centres and contracts ⁽²¹⁸⁾. In addition, the allocation of costs to individual organisational units/profit centres has been extended also to indirect costs ⁽²¹⁹⁾. It thus constituted a shift from “contribution margin” to “full costing”. The shift from a “direct cost” model to a “full cost model” minimised the level of discretion typical of the processes for allocating common costs on an indirect basis (for further details, see recitals 198 to 202).

⁽²¹⁵⁾ State Aid SA.45281 (2017/N) and State Aid SA.44859 (2016/FC) – Czech Republic – *State compensations granted to Czech Post for the provision of the universal postal service over the period 2013-2017*; (the “Czech Postal SGEI case”).

⁽²¹⁶⁾ Judgment of the General Court of 15 October 2020, *První novinová společnost a.s. v. Commission*, T-316/18, ECLI:EU:T:2020:489, paragraph 198.

⁽²¹⁷⁾ Recital 80: “The abovementioned procedure ensures that compensation is calculated and reviewed *ex post* by the CTO, thus averting the risk of overcompensation.” The procedure referred to in the sentence consists of determining the net costs of the SGEI service using the net avoided cost methodology, submitting the request for reimbursement, verification of the costs by the paying authority and reimbursement.

⁽²¹⁸⁾ With respect to the complainant’s argument that the 2020 Bologna Tax Police Report concluded that Cineca’s removal from 2016 on, from the reported costs all costs related to other activities means that prior to 2016 this was not the case, (see footnote 75), the Commission would like to point out that the report does not contain any such conclusion.

⁽²¹⁹⁾ Italy’s description of the cost allocation method (see 2016 report Annex 20 page 12 in EN version) clearly explains that (at least the direct costs) are allocated to the three subdivisions of the HPC BU. There is also an explanation as to how the indirect costs are determined. They are added “on the basis of criteria and parameters defined by the specific support units and explained in the reports accompanying the individual annual reports.”

- (432) The Commission considers this cost allocation methodology for the allocation of indirect cost acceptable because
- a) it is based on the well-established cost allocation methodology i.e. Activity-Based Cost (ABC). ABC is a costing method that assigns overhead costs to products/services based on cost pools and cost driver activity. Subsequently, these cost pools are allocated to products based on the cost driver for that specific cost pool;
 - b) ABC enhances the reliability of cost data, thereby yielding nearly accurate costs and better categorisation of expenses incurred by the company during its production process;
 - c) Identifying the appropriate cost pools and cost drivers is crucial for a meaningful allocation of overhead costs. Cineca has provided a detailed description of the cost pools and cost drivers used. The Commission acknowledges that they have been properly identified by Cineca, as they are based on well-established cost pools and drivers (e.g., personal salaries) while also being specific to the services provided by Cineca i.e., the utilization of Virtual Machine.
- (433) The Commission considers it reassuring, too, that as described in recital (198) and footnote 123, the cost accounting method applied to the 2015 HPC and MIUR IT services costs, as well as the (new) method applied to the 2018 costs had been found to be adequate by two Council of State judgments to exclude completely the use of public funds for purposes other than what they were awarded. (See judgment No 6009/2018 relating to the financing request for the contribution for the year 2015 and judgment of the Council of State of 19 July 2019 (No 10528/2019 ⁽²²⁰⁾)).
- (434) The Commission agrees with the Italian authorities' position that overcompensation/cross-subsidisation could be ruled out if the costs of providing the services in question are equal to or exceed the level of revenues/financing of the services (see recital 205).
- (435) Therefore, in addition to assessing the accounting methodology applied since 2016, and accepting that according to the judgment No 6009/2018, the method used prior to 2016 was adequate, the Commission resorted to an *ex-post* verification of costs and revenue figures for the MIUR services and for the non-commercial/institutional HPC activities for the years 2006 to 2019. The purpose of this examination is to determine whether the system (including the one in place prior to 2016) could in practice effectively ensure that the cost and revenue figures did not provide a "pool" for any possible cross-subsidisation, therefore the system in place was sufficient to rule out cross-subsidisation/overcompensation.
- (436) The Commission received three summary tables from the Italian authorities showing the cost/revenues data relating to the years under investigation (see recitals (207) to (209)) in each of the three areas in question: the financing of the 1) commercial activities 2) the non-commercial/institutional HPC activity; and 3) IT services to the Ministry.
- (437) The table summarising the costs and revenues for Cineca's commercial activities demonstrate that the overall profit, understood as the difference between revenues and costs, amounted to EUR 30 930 424 at the end of the time period 2006 to 2019.

⁽²²⁰⁾ "Evidence of due allocation of costs, funding and revenues can consist of annual financial statements of the relevant entity. In this respect too, it must be considered that it has been satisfactorily established that Cineca uses analytical accounts capable of separating and specifying the consortium's main activities by cost centre (destination) and by type/nature of revenue and expense, as well as by business department. This is in accordance with the numerous statutory and regulatory rules which require accounting separation between activities of an economic nature and activities of a non-economic nature (cf. Article 15 (3) of the articles of association, and Cineca's rules of 27 March 2015 on the organisation and governance of in-house activities). Compliance with the separation of accounts requirement is also reflected in the reporting submitted by Cineca to the MIUR for 2015." The judgment of the Council of State of 19 July 2019 (No 10528/2019) also found that in the 2018 report relating to the services to the Ministry and the non-commercial/institutional HPC activity. Section 1.4 of the judgment. "Cineca has also adequately demonstrated that the [HPC] activity is subject to a separate form of accounting and reporting." See section 3.2 of the judgment.

Economic activities

ANNO	REVENUES ENTERED INTO BALANCE SHEET[...]	COSTS ATTRIBUTABLE TO ECONOMIC ACTIVITIES	DIFFERENCE BETWEEN REVENUES AND COSTS		
2006	[...]	[...]	[...]		
2007	[...]	[...]	[...]		
2008	[...]	[...]	[...]		
2009	[...]	[...]	[...]		
2010	[...]	[...]	[...]		
2011	[...]	[...]	[...]		
2012	[...]	[...]	[...]		
2013	[...]	[...]	[...]		
2014	[...]	[...]	[...]		
2015	[...]	[...]	[...]		
2016	[...]	[...]	[...]		
2017	[...]	[...]	[...]		
2018	[...]	[...]	[...]		
2019	[...]	[...]	[...]		
				30 930 424	Total difference: 2006 - 2019

- (438) A table submitted with the relevant figures in the years in question shows that the cost of providing the non-commercial/institutional HPC services was overall greater than the contribution by the Ministry: the result being EUR - 3 122 404 (cumulatively) at the end of the time period 2006 to 2019. However, the actual difference between the contribution/revenues dedicated to the institutional/non-commercial HPC and the costs in the same time period was EUR - 89 607 514. This is because in the first nine years in the given time period (i.e. 2006 to 2014), contribution of the Ministry was disbursed not as earnings but as net assets ("patrimonio netto") in response to the Ministry's request of considering them membership fees (see recital 208 and footnotes 129 and 130). These amounts are still recorded in the Endowment Fund, and as such could be viewed as a "surplus" – at least until 2017. However, they were not used for covering the operational costs of the non-commercial/institutional HPC services. See further details in recital 444.

Non-commercial/institutional HPC activities

			INCASSI TOTALI		DIFFERENZE	
	RICAVI ISCRITTI NEI BILANCIO CINECA HPC- MIUR	COSTI HPC	A PATRIMONIO NETTO SU LETTERA DEL MINISTERO (4)	A FRONTE DEI COSTI	TRA INCASSI TOTALI E COSTI	TRA INCASSI (ESCLUSI QUELL A P.N.) E COSTI
2006		[...]	[...]		[...]	[...]
2007		[...]	[...]		[...]	[...]

			INCASSI TOTALI		DIFFERENZE	
	RICAVI ISCRITTI NEI BILANCIO CINECA HPC- MIUR	COSTI HPC	A PATRIMONIO NETTO SU LETTERA DEL MINISTERO (4)	A FRONTE DEI COSTI	TRA INCASSI TOTALI E COSTI	TRA INCASSI (ESCLUSI QUELL A P.N.) E COSTI
2008		[...]	[...]		[...]	[...]
2009		[...]	[...]		[...]	[...]
2010		[...]	[...]		[...]	[...]
2011		[...]	[...]		[...]	[...]
2012	[...]	[...]	[...]	[...]	[...]	[...]
2013	[...]	[...]	[...]	[...]	[...]	[...]
2014	[...]	[...]	[...]	[...]	[...]	[...]
2015	11 000 000	13 157 494		11 000 000	[...]	[...]
2016	9 500 000	[...]		9 500 000	[...]	[...]
2017	11 000 000	[...]	-	11 000 000	[...]	[...]
					19 882 152	[...]
2018	13 000 000	[...]			[...]	[...]
2019	[...]	[...]			[...]	[...]
					- 3 122 404	- 89 607 514

Column “patrimonio netto”/years 2006 to 2011: entered as “patrimonio netto” at the request of the Ministry; Column “patrimonio netto”/ years 2012- 2014: entered as “patrimonio netto” without express request from the Ministry; Column “Costs of HPC”/year 2015: according to the restatement of the cost report to the Ministry. The deficits for years 2018 and 2019 are temporary; as the cost verification has not yet taken place.

- (439) With regard to the IT services provided to the Ministry, the tables present a very similar situation: the production cost for the relevant period was higher than revenue by EUR 66 018 871 at the end of 2019 in a cumulative view. More precisely, the difference between revenue and costs is already slightly negative when looking (cumulatively) at the period 2006-2014 alone (EUR - 208 045). However, the 2006 to 2019 figure worsens significantly leading to the final result of EUR - 66 018 871. This is because the annual contributions for the financial years 2015 to 2018, which were not actually paid, are taken into account. Cineca did continue to provide the services at the cost of the services.

IT services to MIUR

YEAR	Revenue derived from the use of CINECA	COSTS FOR SERVICES TO THE MIUR	ACTUAL RECEIPTS FOR SERVICES TO THE MIUR ON FFO	Difference TRA receipts EFFETTIVI de MIUR AND COSTI. ..		
2006	[...]	[...]	[...]	[...]		
2007	[...]	[...]	[...]	[...]		
2008						
	[...]	[...]	[...]	[...]		
2009	[...]	[...]	[...]	[...]		
2010	[...]	[...]	[...]	[...]		
2011	[...]	[...]	[...]	[...]		
2012	[...]	[...]	[...]	[...]		
2013	18 850 000	[...]	[...]	[...]		
2014	[...]	[...]	[...]	[...]	— 208 045	
2015	16 759 349	[...]		[...]		
2016	16 000 000	[...]		[...]		
2017	[...]	[...]		[...]		
2018	14 000 000	[...]		[...]		
2019	[...]	[...]		[...]	— 66 018 871	Total Differences 2006-2019

Column 4 and 5/year 2012: The difference of [...] million in revenue and receipts for services to the MIUR relate to an amount that the Ministry has explicitly declared to have been allocated to cover the merger costs of the three consortia (CASPUR, CILEA, CINECA) and not for the provision of the service. Columns 2 and 4/year 2013: part of the financing must be allocated against the merger costs, but not indicating the amount. However, the financing for this year is certainly overstated.

- (440) The Commission would like to point out that the Italian authorities submitted the raw data that underpinned the figures in the tables. The Commission has verified whether these numbers are backed up through this raw data and found that the summary figures provided in these tables accurately reflect the raw data. The method of verifying the cost items for the years prior to 2016 focused on establishing whether the proportion of revenues in the sub-areas in question reflected the proportion of the stated costs of the various subareas vis-à-vis the total of the costs in the individual years.

- (441) Italy also explained that the accounts are also subject to a number of audit procedures. All financial statements of Cineca as well as all administrative and accounting activity (both *ex-post* and *ex-ante*) are subject to verification of Cineca's Board of Auditors, of which the president is appointed by the Ministry of Research in agreement with the Ministry of Education, the Ministry of Finance, and the Cineca's Consortium Assembly. Cineca is also under the control/review of Italy's Court of Auditors based on Law No 259/1958 by Decree of the President of the Council of Ministers of 26.8.2016, which extends to the entire financial management of the consortium and the result of which are communicated to the Parliament. In addition, the consortium's annual accounts are certified by the company Deloitte S.p.A ⁽²²¹⁾. As to the transfer of annual compensation for the IT services to the Ministry (via ministerial decree, i.e. the FFOs ⁽²²²⁾), the transfer to Cineca was subject to *ex-ante* registration by Italy's Court of Auditors and to verification by the general National Accounts Department of the Ministry of the Economy and Finance ⁽²²³⁾. For each year of the time frame 2006 to 2019, the budgets were scrutinised for their legality by these bodies which established their full compliance with the applicable laws.
- (442) On this basis, the Commission considers that the figures submitted to the Commission which formed the basis of the summary figures in the tables above are accurate.
- (443) As regards the notion that the compensation of the costs of providing the non-commercial/institutional HPC services in the years 2006 to 2014 were disbursed as "net assets" (*patrimonio netto*) (see recitals 208, 438 and footnote 129), the Commission finds credible the explanation that this form of compensation was not to finance the annual operation of the non-commercial/institutional HPC activities but to form part of the reserved equity for these activities ⁽²²⁴⁾. These funds are still recorded in the Endowment Funds as assets. The Commission in fact verified that the total of these amounts, circa EUR 86 million, is recorded in Cineca's Bilancio (financial statements) in 2014 and 2015. The financial statements (balance sheet), as the Italian authorities explain (see recital 208 and footnote 130), are the tool for controlling and ensuring the accounting correctness and proper use of surpluses and, more generally, the reserves for equity. It is the instrument capable of certifying that any surpluses from non-commercial activities are not reinvested in commercial activities.
- (444) The Commission considers that Italy sufficiently demonstrated that the financing of the IT services to the MIUR could not serve as a source for cross-subsidisation of commercial activities where the complainant is a competitor to Cineca, given that the financing did not produce a surplus (see recitals 439). With respect to the non-commercial/institutional HPC activity, the Commission finds that the revenues did exceed the costs of the service, by circa EUR 19 million at the end of 2017 viewing the results in the years 2006 to 2017 in a cumulative manner (see explanation in footnote 130) and the table in recital 438 in column 6 and row 15). However, the Commission also verified that the EUR 19 million surplus was not spent on activities other than the non-commercial/institutional HPC activity.

⁽²²¹⁾ The financial reports relating to projects financed by the European Union follow, in addition, guidelines set out in the individual project notice and are accompanied by an audit certificate issued by an external certifier. They are also subject to random checks by the European Commission.

⁽²²²⁾ Since 2019, the allocation of the compensation is no longer carried out via a ministerial decree.

⁽²²³⁾ Article 5 (1) of Legislative Decree No 123/2011 provides: 'All acts giving rise to financial effects for the State budget shall be subject to prior administrative and accounting checks', including, on a mandatory basis, '(a) acts subject to prior review of the legality of the Court of Auditors' and '(f) acts and measures involving transfers of sums from the State budget to other bodies or bodies'.

⁽²²⁴⁾ In reflection to the complainant's observation that the 2020 Bologna Tax Police Report found that the difference between the financing prior to 2014 and post 2014 provided Cineca with a wide margin of discretion in using the funds for cross-subsidisation (see recital 99, the Commission is of the view that this opinion of the Tax Police is too speculative and clearly only indicates a theoretical possibility based on the quality of the assets.

- (445) The Commission notes that in certain individual years (such as the years 2006 to 2010 and 2013 to 2014 in the case of the financing of the provision of IT services to the MIUR, there were slight surpluses (see column 5 and rows 2 to 5 and rows 9 and 10 in recital 439). These slight surpluses are more than offset by deficits in the years 2010 to 2012. Given that the deficit for a number of years immediately preceding and succeeding these years is also proven, and the very significant overall deficit ⁽²²⁵⁾, it is most sensible from the point of view of economics that the mild surpluses (in fact any surpluses) were directed at moderating the deficit that the activity in question is producing.
- (446) The Commission also notes that the cross-subsidisation of Cineca's commercial activities in the field where the complainant is active, i.e. regarding the university IT services and the public administration IT services, is unlikely because the profit margins of Cineca in these activities are not excessive.
- (447) Cineca's profit margin in the public university IT segment (for Consortium members) ⁽²²⁶⁾ was an average of 13,4 % in the years 2016 to 2019, up from 6 % in the years 2005 to 2015 ⁽²²⁷⁾. The increase was the result of litigation initiated by the complainant that led to an accumulation of reserves as investments have been halted. Investments will have to resume hence profitability is expected to decrease again in the future. Cineca's profitability in the private university IT segment was 20 % in the time period 2006 to 2019, (see footnote 128), whereas profitability in the IT segment is at least 40 % according to publicly available information. The public administration IT segment was deficit producing in 2006 to 2019, i.e. produced EUR - 4 000 000 (although without the MIUR figures).
- (448) In sum, the Commission considers on the basis of this information that Cineca did not cross-subsidise its commercial activities in the public administration segment and the university IT services segment from public financing that was provided for IT services for the MIUR and for non-commercial/institutional HPC services.
- (449) The complainant's arguments and the information it provided are not sufficient to put this conclusion into doubt. The Commission will now present the complainant's further allegations in support of cross-subsidisation, along with Italy's counterarguments. Finally, the Commission will address these allegations and information in detail below.
- (450) The complainant attempts to prove that cross-subsidisation took place from the financing for the MIUR IT services and non-commercial/institutional HPC businesses based on a number of arguments. One such argument is that Cineca achieved an average of 13 % profitability in its four major areas of activity between 2017 and 2019 (see recital 120). Relating to the 13 % figure, Italy points out that the information was based on a misunderstanding: the chart the complainant refers to shows revenues and was not a profit related figure.

Methodological deficiencies

- (451) As explained in recitals 94 to 99, the complainant makes a number of allegations relating to the general lack of account separation, some of which have been addressed above (see recitals 424 to 427). The main allegation is that that there is no separate accounting between the sub-units of the HPC activity i.e. the non-commercial/institutional HPC activity, EU HPC activity and commercial HPC activity (the "single register of internal account" argument in recital 97). The complainant provided the following supporting allegations: 1) prior to 2015, Cineca did not submit accounting reports for the MIUR IT services; 2) the analytical accounting procedure is carried out *ex-post* instead of *ex-ante*, and 3) according to the Bologna Tax Police report (see recital 92) the difference between the contribution for the non-commercial/institutional HPC activity in the form of the "patrimonio netto" (see recital 208) until 2014 and the subsequent way of financing (i.e. through grants) was too substantial and allowed Cineca to use public funds at a wide discretion (recital 99).

⁽²²⁵⁾ This is explained by the fact that the amounts due for the years 2015 to 2018 were withheld as a result of the judgment No 6009/2018. The Italian authorities explained that financing of the provision of the IT services to the MIUR partially took place from equity reserves (of which Cineca had over EUR 120 million in 2014).

⁽²²⁶⁾ This figure does not encompass non-consortium member public universities to which Cineca may have provided IT services.

⁽²²⁷⁾ Regarding the profit margin of KION being 20 % in the commercial market and 1 % for projects for consortium members, Italy points out that 97 % of KION's sales are to consortium members.

- (452) As regards the allegation that the HPC activity is not subdivided into sub-areas, there is evidence, to refute this notion. For example, the complainant itself explains that the HPC area is divided into three areas: "Institutional (i.e. non-commercial) supercomputing activities"; "Project financed" (EU projects) and "Technical calculations" (i.e. clients) (see recital 119). Italy also explains (in its reply to the Commission's information request Number 4) that in the HPC field, "orders are managed in the accounts using the "project based accounting" method, which allows for the tracing project related costs per individual order.
- (453) Regarding the "single register of internal account" argument, the Commission is convinced that the complainant failed to prove that the HPC activity was not subdivided into various sub-activities. As regards the *ex-post* nature of the accounting methodology (instead of an *ex-ante* methodology), no requirement can be deduced from the Transparency Directive or from case law that an *ex-post* methodology would be necessary (see recitals 425 to 427). In addition, it was explained in recital 428 of this decision (and recital 149 of the opening decision) that Italy is free to demonstrate the lack of cross-subsidisation either through the existence of an effective cost accounting separation or a system that was in place to prevent cross-subsidisation or overcompensation. None of these provisions indicated that an *ex-ante* methodology for the cost allocation was necessary for the proof of a lack of cross-subsidisation. Finally, as regards the Bologna Tax Police report's observation regarding the "patrimonio netto" method of contribution, the Commission points to the fact that the report did not establish any infringement of any of the accounting rules relating to the financing of the non-commercial/institutional HPC activity⁽²²⁸⁾. On this basis, it is not possible to question the adequacy of the application of the method. Finally, Italy expressly denied the allegation that prior to 2015, no cost report was submitted to the Ministry for the services rendered. Italy explains that the costs incurred by Cineca were expressly listed and checked prior to the contribution that was granted for them. From 2015, however, the cost reports were subjected to more complex reporting procedures.

Ex-post restatement of accounts (recitals (100) to (107))

- (454) A large number of the complainant's arguments relate to Cineca's cost report to the MIUR for requesting reimbursement for the MIUR IT services and for the non-commercial/institutional HPC activities for the year 2015 ("the 2015 report") which were restated⁽²²⁹⁾ by Cineca in 2019. The complainant's arguments relate to the facts that the restated report contained 1) an increased figure for indirect costs while the number of direct costs for personnel engaged for the non-commercial/institutional HPC activity decreased⁽²³⁰⁾ significantly in the years 2016 onward (see recitals (102) and (104)) and that 2) a VAT payment figure was included as indirect cost in the restated report, which was not included in the first report (see recital (105)). With regard to the VAT, the complainant further alleges that Cineca asked for the reimbursement of the VAT twice. All these elements are alleged to put the accuracy of the reporting in doubt.
- (455) The complainant also refers to *ex-post* adjustment of cost reimbursement requests in connection with EU financed HPC projects (see recitals (100), (101), (106) - including a deduction of EUROfusion project costs from the cost report for 2016 - and (106))⁽²³¹⁾. In these allegations, the complainant points to an alleged practice of *ex-post* restatements of HPC related cost reports

⁽²²⁸⁾ As explained in footnote 70, the report also compared the original 2015 non-commercial/institutional HPC related cost report with the restated version of this report in 2019 (see recitals (40) and (102) et seq.) and concluded that neither one can be considered to be incorrect, given that they were drawn up using two different methods.

⁽²²⁹⁾ There is disagreement as to how many times the report had to be restated. According to the complainant, there are a total of three reports (i.e. two restatements), but the Italian authorities and the Commission could verify only one restatement, i.e. in 2019 and there was a report for the first half of 2015 and another one for the full year of 2015.

⁽²³⁰⁾ The complainant explains that the FTE of 82 persons for working on the non-commercial/institutional HPC activity in the original 2015 cost report was an overstatement (see recitals 104, 111 and 118) also in view of the much lower FTEs for the same activity in the years 2016, 2017 and 2018 (with values of 21,87, 19,1 and 19,06, respectively (see recital 111)). The complainant also explains that the number of personnel reported for direct costs is not the same as the number of personnel calculated for indirect costs. However, there is no explanation as to how the complainant arrived at the figures and there is no explanation as to why the figures should be the same. The Commission also notes that the appearance of seven names (as work force) both for the purposes of cost reports to the MIUR as well as to the EU (see recitals 112 and 212) is not mutually exclusive, (see also example of 59 persons equalling 19,06 FTE) as the same staff could have worked on multiple projects.

⁽²³¹⁾ Based on the report by the Bologna Tax Police of 2020 (see recital 92), the complainant makes two further statements: 1) the report claims that the 2016 cost report had to be restated in 2018 and an item of EUR 3 872 315 had to be deducted as a result of reimbursement from the EU in the meantime; and 2) the report shows that in 2016, costs for acquisition of supercomputers and electricity costs have been double reported to the MIUR and the EU in a way that 100 % of costs were reported to the MIUR and 55 % reimbursement was granted by the EU resulting in a reimbursement rate for Cineca of 155 %.

- (456) In reaction to the complainant's challenge to the accuracy of the 2015 reporting of the costs of the non-commercial/institutional HPC activity alleging double reporting of the personnel costs (recital 35 and footnote 24 of the opening decision) as well as recitals 104 and 111 of this decision, Italy (on behalf of Cineca) stated the following: The report was reworked in 2019 on the basis of an even stricter application of Cineca's more sophisticated cost calculation methodology used since 2016, which resulted in the amount of EUR 13 157 494 of total costs for 2015 (see recital 211). This latter amount is significantly higher than the public contribution for that year which remained EUR 11 million. Italy is of the view that the 2015 cost report for the non-commercial/institutional HPC activity is therefore no longer relevant. With regard to the allegation of the double claim submitted for the VAT reimbursement, Italy explains that at the recalculation, VAT costs relating to the HPC services for the period 2012-2015, amounting to EUR 6 343 000, (due for the years 2012 to 2015) were added as a result of a tax inspection carried out by the Revenue Agency. The amount was allocated to the year 2015, as that was the first year for which these costs could be charged, given that Cineca's liability for them was not known in previous years (see footnote 132). As regards the allegation that the VAT was claimed twice, Italy denies the allegation of submitting it twice for reimbursement.
- (457) The Commission is of the view that the restatement of the 2015 cost report is not problematic. This is because the restatement led to an even higher amount of the cost of the projects, (i.e. circa EUR 13 157 494 (see recital 211) while the level of reimbursement remained the same. i.e. EUR 11 million (see recital 211), therefore the restatement does not prove any possibility of cross-subsidisation of other (HPC or non-HPC) activities. The Commission finds Italy's assertion that the VAT payment was not claimed twice also credible.
- (458) The Commission also concludes that *ex-post* requests for reimbursement in view of partial repayment of the costs incurred from other sources does not lead to double reimbursement, as the restatement serves exactly the purpose of avoiding double reimbursement.
- (459) Finally, the Commission also observes that the specific examples of the complainant relating to lack of separation between the non-commercial/institutional HPC activities and EU financed projects (see recitals 100 and 107), by their nature, do not allege cross-subsidisation of activities other than possible cross-subsidisation between the non-commercial/institutional HPC activities and EU projects. As such, any possible cross-subsidisation (even if it had occurred) could only have affected competition in the HPC sector where the complainant is not active.

Overcompensation, inaccuracies, and inconsistencies (recitals 108 and to 119)

- (460) The complainant makes a number of claims alleging overcompensation, inaccuracies, and inconsistencies. Some of this relates to personnel costs. For example, the complainant claims that Cineca reports 100 % of EU project costs to the EU and gets reimbursed at the rate of 75 % but claims the 25 % of the staff costs also from the MIUR (see recital 108). It also claims that the 2015 report used an incorrect algorithm for the calculation of indirect personnel costs (see recital 109) which, in the specific example given by the complainant, would result in a 50 % overstatement of HPC project costs. Another allegation relates the significantly lower number of staff working on non-commercial/institutional HPC in the years 2016 to 2018 in comparison with the original 2015 staff cost report (recital 111), and the reporting of the cost of seven staff both to the MIUR and the EU in the same time period (recital 11). The complainant also makes allegations relating to the cost reports of 2016 and 2017, pointing out that the personnel costs are "average" personnel costs, whereas in the 2018 reports of the same kind, there are "actually reported personnel costs", which were higher than the "average" costs in 2016 and 2017 (see recital 117).

- (461) Italy denies that overcompensation takes place. As regards the allegation significantly lower number of staff working on non-commercial/institutional HPC in the years 2016 to 2018 in comparison with the original 2015 staff cost report, (recital 111), and the reporting of the cost of seven staff both to the MIUR and to the EU (recital 112), Italy explains that no double accounting of costs is carried out by Cineca. In particular, Italy points out that the personnel costs of HPC related activities are calculated based on timesheets (see recital 212). It is therefore possible that the same person is employed on various HPC projects, but the same labour costs will not be submitted to multiple clients and no double accounting occurs.
- (462) Italy also explains (footnote 125) that financial reports relating to projects financed by the European Union follow, in addition, guidelines set out in the individual project notice, are accompanied by an audit certificate issued by an external certifier and are subject to random checks by the European Commission.
- (463) The Commission also finds Italy's explanation credible, namely the practice of registering labour costs on the basis of timesheets ⁽²³²⁾, which allows for a calculation of partial working times for a number of projects a worker works on in parallel.
- (464) As far as the 25 % personnel costs having been reported to the EU but not reimbursed (see recital 108), the Commission concludes that the allegations did not lead to a conclusion that there was a double reimbursement of the same cost. This is because the factual scenario describes exactly a system in which the 25 % personnel costs are *not* reimbursed by the EU. In this respect, even if the MIUR did reimburse this 25 %, the amount is reimbursed only once. The Commission also finds that the auditing procedures in place at the European Union financed projects are adequate to prevent fraudulent conduct.
- (465) As regards the allegation relating to the use of an incorrect algorithm (see recital 109) for the allocation of project costs for the non-commercial/institutional HPC costs and other HPC costs for the year 2015, the Italian authorities state that the 2015 cost report was restated (see recital 211) and therefore the any such question relating to the algorithm lost its purpose.
- (466) The Commission agrees with Italy's observation that in view of the restatement of the 2015 cost report, the question of the accuracy of the algorithm for the original 2015 cost report is not relevant and is ineffective. In addition, the Commission would also like to point out that the complainant's argument relating to the overstatement of indirect costs in the 2015 report appears to be contradictory. On the one hand, the complainant claims that the overstatement is due to the fact that not all client related indirect costs are deducted from the indirect costs and illustrates this through the specific example of a specific project for a client which resulted in a 50 % overstatement of the total cost of a project (see recital 109). On the other hand, the complainant claims that the driver for indirect cost allocation is 33,33% (see also recital 109).
- (467) The following allegations relate to double reporting of other costs. The complainant claims that in connection with the 2015 cost report for HPC activity, Cineca asked for reimbursement from the MIUR for costs (including electricity costs) of also commercial HPC services (e.g. for ENI) (see recitals 110 and 113). Further, ENI related HPC costs were allegedly not deducted either from the reported non-commercial/institutional HPC cost report from 2016 onwards ⁽²³³⁾ (recital 116). The complainant also alleges that the 2015 cost report relating to the non-commercial/institutional HPC activity, electricity costs of EUR 1 541 380,40 were marked for reimbursement that were in fact incurred in connection with an EU HPC project (see recital 113). Further, the complainant argues that in the 2018 cost report, the electricity costs (i.e. EUR 1 977 835,09) were overstated, as they were designated as "HPC General" electricity costs, (i.e. they were not separated into sub-categories of the HPC activity) while, at the same time, the personnel costs were clearly separated according to non-commercial/institutional HPC activity and commercial HPC activity (see recital 119).

⁽²³²⁾ As regards the Bologna Tax Police Report's showing a double reporting in connection with the EUROfusion project (see recital 106), the Commission would like to point out that the Report also explains that the 1) reimbursement for participation in EU projects is based on "integrated timesheets", and 2) given that EU project costs are often only partially reimbursed, there is often need for funding from national resources. Finally, as regards the alleged double reporting and 155 % reimbursement of EUROfusion related HPC costs (see recital 106 and footnote 80), the tables submitted by the complainant as evidence only demonstrate a reimbursement rate for depreciation of 55 % and labour costs of 40 %. It does not prove that the same costs were submitted for reimbursement to the MIUR.

⁽²³³⁾ This allegation is based on a statement in Cineca's 2017 balance sheets which says the following: "The final 2017 data on revenues for fees and services of the various market segments in which Cineca operates show (...) as far as revenues from High Performing Computing activities are concerned, an increase of about 10 % in particular thanks to the increase in activities with ENI, due to a greater request for support for technology assessment activities for the purchase of a new calculator."

- (468) As regards the claim that in the 2015 cost report for HPC activity (and from 2016 onward) Cineca asked for reimbursement from the MIUR of costs (including electricity costs of 2015 of EUR 1 541 380,49) relating to commercial (i.e. ENI) and EU HPC projects (see recitals 110, 113 and 116), Italy disputed the allegations. Italy also reiterated that the 2015 reporting was replaced by a restated cost report (see recital 213). Italy added that the accounting for the electricity cost takes place in line with the cost allocation methodology described in recitals 202 et seq. As regards the allegation of the overstated electricity costs of EUR 1 977 835,09 in the 2018 cost report (see recital 119), Italy provided the actual figures for electricity consumption and submitted the relevant part of the cost report for 2018 stating that the costs of electricity are allocated on the basis of the power used by the equipment of the Bologna Data Center's machine rooms dedicated to supercomputing. The Italian authorities explain that the alleged amount of EUR 1 977 835,09 only related to the non-commercial/institutional HPC activity. The total cost was about EUR 3,7 million hence the figure was not overstated (see recital 213 and footnote 133). The Italian authorities further explain that for the 2016 cost report, the reimbursement for the non-commercial/institutional HPC activities by the MIUR was below the costs of the activity (costs of EUR [...] versus EUR 9 500 000 reimbursement).
- (469) The Commission considers the complainant's allegations fail to prove that double/accounting/double reimbursement or overstating of costs took place in connection with the 2015 cost report, the 2016 cost report or the 2018 cost report. First, any retroactive correction/restatement of the costs is not problematic as long as it leads to the correct figures in connection with the reclaimable costs. The complainant itself admits, repeatedly, that overcompensation would have occurred, had a correction not taken place⁽²³⁴⁾. Second, the Commission considers the 2015 cost report to be no longer relevant given that it was restated⁽²³⁵⁾. There is no rule that would prohibit such a restatement. In addition, the Commission found that the 2015 balance sheet clearly marks ENI activity as private commercial activity, which is a further sign that the accounts relating to commercial HPC activity must have been kept separately. The claim relating to the 2016 cost report (see footnote 83) based on a statement that Cineca's HPC related revenues increased in 2017 by 10 %, is only proof for what it states, i.e. the increase in Cineca's revenues. It does not prove that ENI's accounts were not separated from those of non-commercial/institutional HPC activities.
- (470) Further, the Commission believes the Italian authorities' clarification relating to the electricity costs for the year 2018 and is reassured that the new cost accounting methodology was applied to the electricity costs following 2018, which was suitable to allocate the costs realistically (see recitals 432 and 433).
- (471) In addition to finding no proof of a double reimbursement of identical costs in the given examples, the Commission is reassured by the fact that, as Italy explains (footnote 125), financial reports relating to projects financed by the European Union follow, in addition, guidelines set out in the individual project notice, are accompanied by an audit certificate issued by an external certifier, and are subject to random checks by the European Commission. On this basis, the Commission considers that there is no proof that double reimbursement occurred in connection with any of the examples specifically mentioned by the complainant.
- (472) As regards proof of methodological deficiencies in general, the complainant further submitted a legal opinion by the Milan law firm Granelli which, according the complainant, states that all HPC related personnel costs can be reported to the MIUR "regardless of whether the costs had been considered, in whole, or in part, to be eligible in the framework of EU projects" (see recital 114).

⁽²³⁴⁾ For example, in section ii) of Point 138 of the complainant's comment on the opening decision, the complainant states the following, in connection with an ex-post correction of cost items: "Had this update not been made, the Consortium would obviously have received its internal costs twice, with an overcompensation of 100 %, to the benefit of all its other business units, especially those that carry out commercial activities, in competition with Be Smart."

⁽²³⁵⁾ The Commission has verified that the restated electricity cost in the 2015 cost report was EUR 1 078 231 and not EUR 1 541 380,40, as the complainant claims.

- (473) From this statement in the Granelli opinion, the complainant also concludes that in the 2015 HPC cost report, Cineca reported the same costs for reimbursement to the EU as well to the MIUR. However, the Commission is of the view, that the word “eligible” in the expression “regardless of whether the costs had been considered, in whole, or in part, to be eligible in the framework of EU projects” means that a certain cost can be viewed as the *basis* of a payment. This does not mean that the cost item itself will be reimbursed. Eligibility (i.e. for the purposes of forming the *basis* of payment) of a cost item does not mean that the entire cost can be reimbursed. Eligibility and reimbursement are not synonyms. Reporting of all costs that are eligible for consideration is necessary to determine the reimbursement rate. For example, if the reimbursement rate is 50 %, the eligible cost (the cost to be considered as the basis for the calculation) is 100 %. In this example, the 50 % is the amount that will be reimbursed and the 100 % is the eligibility basis. This is not changed by the fact that the Granelli opinion could be interpreted to suggest that “eligible costs” are the same as “reimbursable costs”. This is an erroneous interpretation.
- (474) The complainant further alleges that according to this legal opinion, there is another manner of permissible double reimbursement of EU related project costs in as much as labour costs related to an EU project are reimbursed despite the fact that labour force participating in EU projects are being paid salaries by third parties (e.g. the State), such as university professors or employees of private firms. However, Cineca employees’ wage costs are reimbursed by the MIUR through the FFO (see footnote 82). The Commission is of the opinion that this does not constitute overcompensation because the regular wage costs are cost items for the universities or for private employer as they are given to employees. In other words, these costs are not “kept” by the entities. The Commission would also like to point out that the legal opinion itself states that the question was asked in connection with the non-commercial /institutional HPC costs report relating to the first half of 2015. Given that the 2015 cost report has been restated, the opinion is of no relevance at this point.
- (475) Finally, the Commission would like to address the allegations made in connection with the two investigative reports submitted by the complainant in July and in September 2023 (see recital 92).
- (476) As far as the allegations made in connection with the two investigative reports submitted by the complainant in July and in September 2023 (see recital 92) are concerned, the Commission would like to draw attention to the following: in the initial fact finding from Lazio published on 24 July 2020, the prosecutor decided, by order of 14 April 2021, to close the investigation, as there was insufficient evidence to establish accounting or administrative liability, while mentioning that the MIUR suspended the payment to Cineca for the years 2016 to 2018 for the MIUR IT services. The final conclusion of the Bologna Tax Police Report of 15 June 2020 was that the investigation did not “reveal a clear concealment or recklessness in connection with the 2015 reporting in order to mislead MIUR, or the use false or untrue statements or documents.”. Based on these statements and the considerations explained above, the Commission considers that the content of these two investigative reports fails to prove the occurrence of double reimbursement of HPC project related costs.
- (477) On this basis, the Commission has no reason to question the accuracy of two judgments reached by the Council of State: the judgment of 2 May 2018 No 6009/2018 relating to the cost reports of the year 2015 and the judgment of 19 July 2019 No 10528/2019. The first judgment states in its section 1.4 that “[e]vidence of due allocation of costs, funding and revenues can consist of annual financial statements of the relevant entity. In this respect too, it must be considered that it has been satisfactorily established that Cineca uses analytical accounts capable of separating and specifying the consortium’s main activities by cost centre (destination) and by type/nature of revenue and expense, as well as by business department. This is in accordance with the numerous statutory and regulatory rules which require accounting separation between activities of an economic nature and activities of a non-economic nature.”.
- (478) The second judgment also found, in its section 3.2, that in the 2018 report relating to the services to the Ministry and the non-commercial/institutional HPC activity, “Cineca has also adequately demonstrated that the [HPC] activity is subject to a separate form of accounting and reporting.”. It is important to note that the judgment No 6009/2018 analysed the cost separation system that was in place in 2015 (i.e. prior to the introduction of the more sophisticated, analytical accounting separation system), and the second judgment analysed the cost separation of the system introduced post-2015. On this basis, the Commission concludes that the two judgments found both account separation systems to be adequate.

4.1.3.2. Conclusion on cross subsidisation

- (479) On this basis, as well as in view of the information above, the Commission considers that no cross-subsidisation occurred from the funding Cineca received for the MIUR IT services and the non-commercial/institutional HPC activities to the detriment of activities in sectors where Cineca faces competition from the complainant (i.e. the university IT services market or the public administration IT services market).

4.2. Conclusion on the presence of aid

- (480) The Commission has concluded that the alleged measures do not constitute State aid.

HAS ADOPTED THIS DECISION:

Article 1

The measure which the Italian Republic has implemented for Cineca does not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Italian Republic.

Done at Brussels, 21 November 2024.

For the Commission
Margrethe VESTAGER
Executive Vice-President