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Subject: State aid SA.37904 (2014/NN) – Germany
Alleged State aid to medical centre in Durmersheim

Sir,

1. PROCEDURE

- (1) On 6 December 2013, the Commission services received a complaint by several doctors as well as one professional organisation alleging that an old school building, which was renovated by the municipality of Durmersheim ("the municipality") to accommodate medical practitioners, is now being rented to the Klinikum Mittelbaden MVZ GmbH ("Klinikum Mittelbaden") below market rent.
- (2) By letter of 17 July 2014, the Commission services forwarded the complaint to the German authorities and requested information on the measure, to which Germany replied by letter of 13 August 2014.

2. DESCRIPTION OF THE MEASURE

- (3) Klinikum Mittelbaden is owned by the city of Baden-Baden and the county of Rastatt, both of which are located in the west of the Land of Baden-Württemberg, in the region Mittelbaden. Klinikum Mittelbaden is regionally active in the region Mittelbaden. It operates four hospitals (in the cities of Baden-Baden, Rastatt, Bühl and Forbach), three medical centres and several

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care facilities in that region. It has no other commercial activities beyond those listed here.

- (4) The municipality has approximately 12 000 inhabitants and is located in the region of Mittelbaden. The municipality renovated an old school building (Hilda-Schule) owned by it to accommodate medical practitioners. By contract of 24 May 2013, the municipality agreed to rent that building to Klinikum Mittelbaden.
- (5) Klinikum Mittelbaden currently operates a medical centre in the building. The surface area rented out is 950 m². The rental agreement was concluded for 15 years. The monthly rent (excluding all utilities and charges) is EUR 7 980 per month, i.e. EUR 8,40 per m² per month.
- (6) The complainants allege that that rent is below market rates. They consider that a normal monthly rent for a comparable building without any installations for medical services would be approximately EUR 10 per m² per month. Given the installations for medical services present in the building at stake, the rent should, according to the complainants, be higher than EUR 10 per m² per month.

3. POSITION OF THE GERMAN AUTHORITIES

- (7) The German authorities consider the measure not to constitute State aid within the meaning of Article 107(1) on the Treaty on the Functioning of the European Union ("TFEU"). They consider that the measure does not confer an advantage on the beneficiary because the rent paid is in line with normal market rents. They also consider that the measure does not have an effect on trade within the meaning of Article 107(1) TFEU.

4. ASSESSMENT OF THE MEASURE

4.1. Presence of State aid within the meaning of Article 107(1) TFEU

- (8) According to Article 107(1) of the TFEU, *"save as otherwise provided in the Treaties, 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"*.
- (9) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be

selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

- (10) An advantage granted to an undertaking operating in a market which is open to competition will normally be considered to distort competition and also be liable to affect trade between Member States. The Union courts have ruled that “where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-[Union] trade, the latter must be regarded as affected by the aid”.¹
- (11) It is settled case-law that the Commission is not required to carry out an economic analysis of the actual situation on the relevant markets, of the market share of the undertakings in receipt of the aid, of the position of competing undertakings or of trade flows between Member States.² In the case of aid granted unlawfully, the Commission is not required to demonstrate the actual effect which that aid has had on competition and on trade. It must however be explained how and on what market competition is affected or likely to be affected by the aid,³ based on the foreseeable effects of the measure.⁴
- (12) Public support can be considered capable of having an effect on intra-Union trade even if the recipient is not directly involved in cross-border trade. For instance, the subsidy may make it more difficult for operators in other Member States to enter the market by maintaining or increasing local supply.⁵
- (13) Even a public subsidy granted to an undertaking which provides only local or regional services and does not provide any services outside its State of origin may nonetheless have an effect on trade between Member States where undertakings from other Member States could provide such services (also through the right of establishment) and this possibility is not merely hypothetical.
- (14) Nevertheless such an effect cannot be merely hypothetical or presumed. It must be established why the measure distorts or threatens to distort

¹ Case T-288/97 *Regione autonoma Friuli-Venezia Giulia v Commission* ECLI:EU:T:1999:125, paragraph 41.

² See for instance Case C-279/08 P *Commission v Netherlands* ECLI:EU:C:2011:551, paragraph 131.

³ Case T-34/02 *Le Levant 001 and others v Commission* ECLI:EU:T:2006:59, paragraph 123.

⁴ See for instance Case C-494/06 P *Commission v Italy and Wam* ECLI:EU:C:2009:272, paragraph 57, and Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and others v Commission* ECLI:EU:T:1995:130, paragraph 141.

⁵ See for instance Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* ECLI:EU:C:2003:415, paragraph 78; Joined Cases C-197/11 and C-203/11 *Libert and Others* EU:C:2013:288, paragraph 78; and Case C-518/13 *Eventech* ECLI:EU:C:2015:9, paragraph 67.

competition and is liable to have an effect on trade between Member States. It must also, however, be explained how competition is affected or liable to be affected by the aid, based on the foreseeable effects of the measure.⁶

- (15) In that respect, the Commission has in several cases⁷ considered that certain activities, due to their specific circumstances, have a purely local impact and no such effect. It seems appropriate to check in particular whether the beneficiary supplies goods or services to a limited area within a Member State and is unlikely to attract customers from other Member States, and whether it can be foreseen that the measure will have more than a marginal effect on the conditions of cross-border investments or establishment.
- (16) In the present case, the Commission observes, first of all, that the alleged beneficiary of the measure is owned by the city of Baden-Baden and the county of Rastatt and is only active in the region of Mittelbaden (in the cities of Baden-Baden, Rastatt, Bühl and Forbach). As regards the local zone within which the alleged beneficiary operates, the services offered in the medical centre at stake are standard medical services aimed at the local population, such as out-patient paediatric care, orthopaedics care and surgery. Moreover, the services offered by Klinikum Mittelbaden in its other facilities are also aimed at the population of the respective area. The fact that Klinikum Mittelbaden also offers, for example, orthopaedics care services in its medical centre in Baden-Baden (approximately 20 km from Durmersheim) further demonstrates the local attractiveness and local catchment area of the individual centres operated by it.
- (17) In addition, standard health and medical services, which the alleged beneficiary provides, show specific characteristics that distinguish them from other health and medical services. For instance, the choice of the health provider is strongly influenced by the language spoken and by the features of the national health or reimbursement system, which might make treatment within the same Member State administratively easier for patients. Those features make cross-border competition particularly unlikely for standard health and medical services that are available locally. In that respect, the Commission has, in several cases, considered that certain activities, due to their specific circumstances, have a purely local impact and consequently no such effect on trade between Member States if the following criteria are met.

⁶ See Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and others v Commission* ECLI:EU:T:1995:130, paragraph 141.

⁷ See for instance, the Commission decisions in State aid cases N 258/2000 *Leisure Pool Dorsten*, OJ C 172, 16.6.2001, p. 16; C10/2003 *Netherlands – Non-profit harbours for recreational crafts*, OJ L 34, 06.02.2004, p. 63; N 458/2004 *Editorial Andaluza Holding* OJ C 131, 28.5.2005, p. 12; SA.33243 *Jornal de Madeira*, OJ C 131, 28.05.2005, p. 12; SA.34576 *Portugal – Jean Piaget North-east Continuing Care Unit*, OJ C 73, 13.03.2013, p. 1; and N 543/2001 *Ireland – Capital allowances for hospitals*, OJ C 154, 28.6.2002, p. 4.

First, the beneficiary supplies goods or services to a limited area within a Member State and is unlikely to attract customers from other Member States. Second, it cannot be foreseen, with a sufficient degree of probability, that the measure will have more than a marginal effect on the conditions of cross-border investments or establishment. Thus, the Commission has already previously considered that standard health and medical services normally provided within a relatively small geographic area should not be considered to affect trade between Member States, since competition between such services only occurs at a local level.⁸ Although the Commission acknowledges that Durmersheim is located close to the French border, based on the characteristics of the services provided by the clinic, the Commission considers that the measure cannot reasonably be foreseen to affect trade between Member States.

- (18) With regard to the effect of the measure on the conditions of cross-border investments or establishment, as set out in recital (16), the alleged beneficiary is not active on markets other than the local generalised health services market. Therefore, the alleged aid cannot indirectly strengthen the position of an undertaking active in a transnational market. The fact that the complainants are individual doctors with their offices, in Germany, in close vicinity to the medical centre in question is further evidence that, if at all, the measure affects mainly local competition and not trade between Member States.
- (19) Finally, the Commission observes that the amount of the advantage alleged by the complainants to have been conferred upon Klinikum Mittelbaden by the municipality as a result of the rental agreement, assuming that the rental price agreed between them is indeed below market price, is rather limited, since Klinikum Mittelbaden paid a rent of EUR 8,40 per m² per month, which is only EUR 1,60 per m² per month below the alleged market rent without installations for medical services. The Commission observes, in this regard, that Regulation (EC) No 1998/2006 of 18 December 2013 on the application of Articles 107 and 108 TFEU to *de minimis* aid sets a general *de minimis* ceiling of EUR 200 000 per beneficiary over a period of three fiscal years, while Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 TFEU to *de minimis* aid granted to undertakings providing services of general economic interest sets a special *de minimis* ceiling of EUR 500 000 over any period of three fiscal years. Advantages granted to undertakings below those ceilings are deemed not to affect trade between Member States and/or not to distort or threaten to distort competition within the meaning of Article 107(1) TFEU.

⁸ Commission decisions in State aid cases SA.34576 Portugal – Jean Piaget north-east continuing care unit and N 543/2001 Ireland – Capital allowances for hospitals.

4.2. Conclusion

- (20) Based on the above, the Commission considers that neither the situation of the relevant market, nor the position of the undertaking in that market nor the pattern of trade in the services in question show that the measure could reasonably be foreseen to have more than a marginal effect, if any, on competition and on the conditions that determine the provision of health services across Member States.

5. DECISION

- (21) The Commission has accordingly decided not to raise objections to the measure since, on the basis of the foregoing assessment, it does not constitute State aid pursuant to Article 107(1) of the TFEU.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent by registered letter or fax to:

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Yours faithfully,
For the Commission

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Member of the Commission

