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**Subject: State aid n° N 570/2007– Germany
Broadband in rural areas of Baden-Württemberg**

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the "*Eckpunkte für die Verwendung öffentlicher Mittel zur flächendeckenden Versorgung des Ländlichen Raums mit Breitbandanschlüssen in Baden-Württemberg*" (hereafter "the measure") and decided not to raise objections as the State aid contained therein is compatible with Article 87 (3) (c) of the EC Treaty.

II. PROCEDURE

- (2) Following informal pre-notification contacts between the Commission and the German authorities, the authorities notified the measure to the Commission by letter registered on 2 October 2007.

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III. CONTEXT

- (3) Broadband connectivity¹ is a key component for the development of knowledge-based economies and the development, adoption and usage of information and communication technologies.
- (4) Broadband is of strategic importance because of its ability to accelerate the contribution of these technologies to economic growth, to facilitate competitiveness, innovation and in order to enhance social inclusion.
- (5) Although broadband services are widely available in Germany, citizens and businesses in several municipalities in Baden-Württemberg (or parts of these communities) do not have access to broadband services. Typically, these unserved areas are mostly rural and have a low population density so that commercial providers have no economic incentive to invest in electronic communications networks to provide broadband services. This leads to a "digital divide" between the areas which have access to affordable broadband services and those that have not.
- (6) Confronted with this situation, municipalities are frequently engaging in initiatives to foster the provision of broadband services in non-covered areas. Although public subsidies are not necessary in all situations, in some cases there is no alternative to granting public funding to overcome the lack of service provision.
- (7) In order to increase legal certainty and to provide guidance for local authorities on the use of public funds in support of broadband provision, the authorities of Baden-Württemberg have issued *Eckpunkte für die Verwendung öffentlicher Mittel zur flächendeckenden Versorgung des Ländlichen Raums mit Breitbandanschlüssen in Baden-Württemberg* (hereafter "*Eckpunkte*") and have notified this scheme to the Commission.

IV. DESCRIPTION OF THE MEASURE

- (8) *Objective:* The objective of the scheme is to enable municipalities to grant financial support to operators for the provision of retail broadband services to citizens and businesses in those geographic locations of Baden-Württemberg (entire communities or part of a settlement) where no such services are currently available and where there are no plans for coverage in the near future ("white areas").
- (9) The *Eckpunkte* stipulate the context and general conditions for granting aid. The amount of public support for each of the projects will be determined and granted by the municipalities, without direct funding of the *Land* of Baden-Württemberg. Specific

¹ Broadband services can be delivered using various combinations of communications network technologies ("platforms"). Technologies can feature either fixed or radio based transmission infrastructure, and they can substitute or complement each other according to the individual situation. Current mass-market broadband services have generally download speeds starting from 512Kbit/s/ - 1Mbit/s. For business users, much higher speeds are needed.

local support measures will make reference to the *Eckpunkte* and follow the conditions set out in the scheme.²

- (10) Before aid is granted, municipalities have to carry out a market analysis and to consult operators of electronic communications networks, asking them whether they would be ready to provide broadband without public support. A subsidy may only be granted if, after such a consultation, there is no broadband offer provided by the market or expected to be provided in the near future. In this case, the municipality publishes the envisaged support plans in its official gazette and on its webpage as well as on the homepage of "*Clearingstelle Neue Medien im Ländlichen Raum*"³. The selection of projects shall be conducted in a transparent manner and in full compliance with the procurement rules (*Vergabeordnung*). On the basis of the technical specifications determined beforehand, the operator requesting the lowest aid amount shall be selected.
- (11) The scheme encourages operators to grant wholesale access to their networks. Such a wholesale access will enable third party operators to compete with the selected operators, thereby strengthening choice and competition in the areas concerned by the measure.
- (12) *Legal basis:* Based on their rights under Article 71 (2) of the constitution of the *Land* of Baden-Württemberg⁴, the municipalities may support infrastructural investments, to the benefits of their citizens, as outlined in § 1 (2) of the *Gemeindeordnung* of Baden-Württemberg⁵. In that context, the *Eckpunkte* have been drawn up by the Ministry of Nutrition and Rural Affairs of Baden –Württemberg based on its responsibility for structural policy for rural areas based on the *Landwirtschafts- und Landeskulturgesetz des Landes Baden-Württemberg*⁶ vom 14.03.1972 and the *Bekanntmachung der Landesregierung von Baden-Württemberg über die Abgrenzung der Geschäftsbereiche der Ministerien* vom 04.07.06.⁷
- (13) The associations of municipalities representing local authority interests in Baden-Württemberg (such as the *Gemeindetag Baden-Württemberg*) have been consulted on the scheme by the authorities of the *Land*. The *Eckpunkte* will be published after their approval by the Commission.
- (14) *Target areas:* The measure concerns geographic locations in Baden-Württemberg where no affordable broadband services (apart from expensive satellite or leased line solutions) are available to citizens and businesses.

² This is similar to the aid measure N526/2005 Framework scheme for regional aid granted by Polish communes for investments and job creation – Poland of 11.5.2006. In that measure, the scheme was operated by the respective municipal authorities.

³ See: <http://www.clearingstelle-bw.de> .

⁴ Verfassung des Landes Baden-Württemberg of 11 November 1953, last changed by law of 9 June 2000, see: <http://www.lpb-bw.de/bwverf/bwverf.htm>

⁵ http://www.rechtliches.de/BaWue/info_GemO.html

⁶ www.rechtliches.de/BaWue/info_LLK.html

⁷ www.landtag-bw.de/WP13/Drucksachen/0000/13_0127_d.pdf

- (15) *Beneficiaries:* The recipients of the funding will be electronic communications operators offering broadband services.
- (16) *Budget:* The amount of public support for each of the projects will be granted by the municipalities, without direct funding of the *Land* of Baden-Württemberg. The measure is limited to projects with a total amount of public funding up to €75.000 per single project. Depending on the number and size of the projects and the offers of the service providers, the authorities of Baden-Württemberg estimate that the overall annual budget will be in the range of €1 million.
- (17) *Aid intensity:* The aid intensity of each single project will depend on the outcome of the local selection procedures.
- (18) *Funding instrument:* Public funds will be paid to the selected operators mostly in the form of direct service grants but it is not excluded that other funding instruments are used as well.
- (19) *Duration of the measure:* The scheme will run from 01.11.2007 until 31.10.2012. The actual length of the contracts between the municipalities and the selected service providers will be determined between these parties.

V. STATE AID ASSESSMENT OF THE MEASURE

De minimis aid

- (20) According to the *de minimis* Regulation⁸, State funding of less than €200,000 over a period of 3 years in favour of one company is deemed to have no substantial effect on competition and trade between Member States, and therefore does not constitute State aid.
- (21) However, it is possible that certain service providers carry out several local projects and receive aid in excess of €200.000 over 3 years. For these cases, which are not covered by the *de minimis* Regulation, it is necessary to assess whether public funding entails State aid and whether this aid can be deemed compatible with the EC Treaty.

Presence of aid

- (22) According to the EC Treaty and consolidated case-law there is State aid within the meaning of Article 87 (1) when:
- there is an intervention by the State or through State resources;
 - it confers an economic advantage on the recipient undertaking;
 - it distorts or threatens to distort competition;
 - the intervention is likely to affect trade between Member States.

⁸ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid, Official Journal L 379 of 28.12.2006.

State resources

- (23) The measure is financed by resources of the concerned municipalities of Baden-Württemberg. Hence, State resources are involved.

Economic advantage

- (24) *Selected operators*: the selected operators will receive financial support which will enable them to enter the market and provide broadband services on conditions not otherwise available on the market. The selected operators will also be in ownership of the networks as well as other tangible and intangible assets acquired with State funds (e.g. equipment, customer relations) even after the lifetime of the projects and hence enjoy continuing benefits partly funded with State resources after the end of the project. In view of the above, it is clear that an economic advantage will be granted to the selected operators.
- (25) *Third party operators*: In the areas targeted by the measure, broadband services are currently not offered and thus no broadband wholesale offer exists. By using the wholesale access provision – if available - to the networks built under the measure, third party providers of broadband services will also benefit from the economic advantage through State resources as (wholesale) customers of the selected operators.

Distortion of competition

- (26) The intervention of the State alters the existing market conditions by allowing the provision of broadband services by the selected operators and, potentially, third party providers. A number of firms are likely to subscribe to the services provided by the selected suppliers instead of more expensive market-based solutions (for instance expensive satellite or leased line services). Therefore, the fact that a broadband service becomes available at a lower price than existing although expensive market offers has the effect of distorting competition.
- (27) In addition, while the German authorities decided to intervene precisely in view of the lack of private initiatives in the concerned areas, it cannot be excluded that market initiatives could become viable in some areas in the longer term. By securing this project, the selected operators will be capable of establishing their business and developing a customer base, thus enjoy a first mover advantage over prospective competitors.
- (28) The measure is also selective in that it is addressed to undertakings active only in the electronic communications sector which also induces a potential distortion of competition.

Effect on trade

- (29) Insofar as the intervention is liable to affect service providers from other Member States, the measure has an effect on trade. The markets for electronic communications services are open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States.

Conclusion on the presence of aid

- (30) In view of the above, the Commission considers that the projects covered by the notified measure will grant an economic advantage to the selected operators and possibly to third party operators. The projects are publicly funded, have a potential of distorting competition and have an effect on trade between Member States. Therefore the Commission considers that, for those projects which are not covered by the remit of *de minimis* Regulation (see paragraphs 20 and 21 above), the funding covered by the scheme involves State aid within the meaning of Article 87 (1) of the EC Treaty.
- (31) Having established that the scheme involves aid within the meaning of Article 87(1) of the EC Treaty, it is necessary to consider whether the measure can be found to be compatible with the common market.

Compatibility Assessment

- (32) The Commission notes that the project aims at facilitating the provision of broadband services in specific geographic locations of Baden-Württemberg in which no such services are currently available and as such does not fall under one of the existing frameworks and guidelines.
- (33) The Commission therefore considers that the assessment of the compatibility of the measure with the common market needs to be based directly on Article 87(3)(c) of the EC Treaty⁹ which states that:

"aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest"

may be considered to be compatible with the common market.

- (34) In order to be compatible under Article 87 (3) (c) of the EC Treaty, an aid must pursue an objective of common interest in a necessary and proportionate way. In particular, the measure shall be assessed with respect to the following questions:
- (a) Is the aid measure aimed at a well-defined objective of common interest (i.e. does the proposed aid address a market failure or other objective)?
 - (b) Is the aid well designed to deliver the objective of common interest? In particular:
 - Is the aid measure an appropriate instrument, i.e. are there other, better-placed instruments?

⁹ See also, similar decisions for other cases of broadband support: N 199/2004 - Broadband Business Fund - United Kingdom; http://ec.europa.eu/community_law/state_aids/comp-2004/n199-04.pdf, N 264/2006 - Broadband for rural Tuscany – Italy, http://ec.europa.eu/community_law/state_aids/comp-2006/n264-06.pdf, N 263/2005 - Broadband for Kärnten – Austria, http://ec.europa.eu/community_law/state_aids/comp-2005/n263-05.pdf

- Is there an incentive effect, i.e. does the aid change the behaviour of undertakings?
 - Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
- (c) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

a. The support of broadband rollout is in line with the common interest

Community policy

- (35) Analogous to similar public funding measures in support of broadband assessed by the Commission in the past¹⁰, the scheme is clearly in line with Community policies to bring broadband to all Europeans¹¹. It will deliver broadband to citizens and businesses in unserved areas of Baden-Württemberg which would otherwise not have access to such services. Hence, the measure is in line with the common interest.

Market failure and cohesion considerations

- (36) Lack of broadband coverage is due, among others, to some of the typical economic characteristics of network industries such as high fixed costs. In particular, due to economics of density, broadband networks are generally more profitable to roll out where potential demand is higher and more concentrated. Therefore, in certain geographic areas, operators have no commercial incentive to roll out broadband services as high additional costs are not matched by additional revenues.
- (37) However, it would be beneficial for the communities concerned if such services would be available to citizens and businesses. Regional economic development benefits resulting from greater broadband deployment include job creation and retention, improved education and health systems and there is a specific significance of broadband access for rural and remote communities, where improved communications can address a variety of challenges posed by distance.
- (38) Therefore, by providing financial support for the provision of broadband services in areas where broadband is currently not available, the authorities of Baden-Württemberg pursue genuine cohesion and economic development objectives.

b. Well-designed aid

Aid is the appropriate instrument

- (39) The measure is part of the integrated strategy pursued by the authorities of Baden-Württemberg to bring broadband to all citizens and businesses in the German *Land*

¹⁰ See footnote 9.

¹¹ As outlined, inter alia, in the Commission Communication *i2010 – A European Information Society for growth and employment*, COM (2005) 229 of 1 June 2005 and the Commission Communication on *Bridging the broadband gap*, COM (2006) 129 of 20.03.2006.

which also includes demand aggregation, information and support services for municipalities as well as pilot projects¹².

- (40) Whereas regulation, for example, has facilitated broadband deployment in urban and more densely populated areas, it is unlikely to lead to sufficient investments for the provision of broadband services to unserved areas. Hence, in specific situations, there is no alternative to granting public funding to overcome the lack of service provision.
- (41) In view of these considerations, the Commission concludes that, in the case at hand, public funding for the provision of broadband services is an appropriate instrument to achieve the pursued objectives.

The aid provides the right incentives to operators

- (42) The measure will enable municipalities to ensure that operators requesting funding indicate the amount of public funding they consider necessary to carry out the required investment on the basis of the anticipated total investment, operating costs and revenues. The objective of the German authorities in this regard is that the public funding granted provides a direct and appropriate investment incentive limited to the amount required by the selected operators to offer broadband services.

Proportionality

- (43) The authorities of Baden-Württemberg have designed the scheme in a way which encourages municipalities to minimise the State aid involved and potential distortions of competition. In this respect, the Commission notes, inter alia, the following positive elements in the overall design of the measure:

a) Market analysis and consultation of operators: Before any aid is granted, the scheme foresees that municipalities have to carry out a market analysis. They have to consult operators of electronic communications networks, asking them whether they would be ready to provide broadband without public support. A subsidy may only be granted if, after such a consultation, there is no broadband offer provided by the market or expected to be provided in the near future.

b) Transparency and open selection of projects: Each municipality shall publish the envisaged measure in its official gazette and on its webpage as well as on the homepage of "*Clearingstelle Neue Medien im Ländlichen Raum*"¹³. The selection of projects shall be conducted in a transparent manner and in full compliance with the procurement rules (*Vergabeordnung*). On the basis of the technical specifications determined beforehand, the operator requesting the lowest aid amount shall be selected.

c) Technology neutrality: The scheme is technologically neutral, i.e. it does not favour a priori any given technology.

¹² See: <http://www.clearingstelle-bw.de>

¹³ Idem.

d) *Wholesale access*: The scheme encourages selected operators to grant wholesale access to their networks¹⁴. Such a wholesale access will enable third party operators to compete with the selected operators, thereby strengthening choice and competition in the areas concerned by the measure.

c. The distortions of competition and the effect on trade are limited and the overall impact of the measure is positive

- (44) On balance, the Commission concludes that the overall effect of the measure is deemed to be positive. The measure is clearly in line with the objectives of Article 87 (3) (c) of the EC Treaty as it facilitates the development of certain economic activities (retail and wholesale broadband services) in geographic areas where no broadband services are available.
- (45) The Commission concludes that the notified measure will offset a geographical and commercial handicap and is objectively justified to address the lack of availability of broadband services due to the insufficient density of potential and actual subscribers to make delivering broadband services economically viable on a purely market-driven basis. The authorities of Baden-Württemberg have designed the measure in a way which minimises the State aid involved and potential distortions of competition. Concerning the effect on trade, and in particular in view of the limited aid amounts and local nature of the projects, the Commission does not identify negative spill-over effects for other Member States.
- (46) In the light of the above, the Commission has come to the conclusion that the aid involved in the notified measure is compatible with Article 87 (3) (c) of the EC Treaty.

VI. DECISION

On the basis of the foregoing assessment, the Commission has accordingly decided that any aid envisaged and granted in conformity with the *Eckpunkte für die Verwendung öffentlicher Mittel zur flächendeckenden Versorgung des Ländlichen Raums mit Breitbandanschlüssen in Baden-Württemberg* is compatible with Article 87(3) (c) of the EC Treaty.

The Commission reminds the German authorities that any modification of the notified measure has to be submitted to the Commission.

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

¹⁴ Operators deemed to have significant market power are in any case obliged by regulation to offer wholesale access to their networks. Whereas wholesale access is encouraged by the scheme, it is possible that projects are funded which do not include a wholesale access obligation for economic reasons (for instance, a much higher subsidy would be needed). In view of the limited size of the local projects and the low aid amounts concerned, in this specific case, the Commission is of the opinion that this does not distort competition or affect trading conditions to an extent contrary to the common interest.

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http://ec.europa.eu/comm/competition/state_aid/register/ii/.

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Yours faithfully,
For the Commission

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