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Subject: SA. 31729 (former State aid N 451/2010) – Germany Creation of Next Generation Access Infrastructure in *Landkreis Rotenburg (Wümme)*

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure "*Aufbau einer Next Generation Access Infrastruktur im Landkreis Rotenburg (Wümme)*" (hereafter: "the measure") and decided not to raise objections as the State aid contained therein is compatible with Article 107 (3) c of the Treaty on the Functioning of the European Union (TFEU).

II. PROCEDURE

- (2) Germany notified on 15 October 2010 the above mentioned measure to the Commission, pursuant to Article 108 (3) of the TFEU and supplemented the notification with additional information on 18 October 2010. On 15 November 2010, the Commission requested additional information which was supplied by letter of 3 December 2010. Germany later provided some clarifications to that submission by email dated 9 December 2010.

III. DESCRIPTION OF THE MEASURE

- (3) **Context:** The region (*Landkreis*) of Rotenburg (Wümme) and its 57 municipalities are currently insufficiently provided with broadband.

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- (4) Investments in infrastructure are expensive and necessitate a certain customer base to be profitable. The prospects for investments in broadband are poorer in more sparsely populated areas. The need for broadband is, however, just as great in these areas as in other parts of the country. Private operators have so far decided not to invest in these areas in the construction of high speed broadband connections, resulting in a "*digital divide*" between the urban and the peripheral areas.
- (5) **Objective:** The measure aims at closing the digital gap between rural and other adequately supplied areas and enabling access to very high speed internet throughout the *Landkreis Rotenburg*, which is characterised by a lot of rural areas. Objective is to increase social cohesion and to meet the challenges of economic growth, competitiveness and innovation. Germany recognises the significance of modern communication infrastructure for the regional economy and expects access to very high speed internet as a key factor in achieving economic growth consisting of many rural areas and smaller towns (*Kleinstädte*). With the measure the *Landkreis* would like to ensure improved working and living conditions of its citizens, improve the competitive chances of its undertakings and ensure that a maximum number of telecommunication operators can offer their services via the subsidised infrastructure. The *Landkreis* stresses that its initiative is in line with the federal broadband strategy, which foresees that until 2014 75% of households should have broadband connection of minimum 50 MBit/s.¹ The German authorities underline the importance of deploying NGA² networks in order to achieve very high speed internet connections, as people will increasingly use services like eCommerce, eGovernment, eHealth, eCommerce, online games and data exchange, multimedia applications like HDTV, IPTV, VOD, streaming and in particular business user applications such video conferencing, saving and hosting services, cloud computing, design and construction software. The services will also be used to integrate older citizens and to enhance and supplement educational activities for people of all ages.
- (6) Germany further outlined that it became clear during the project planning that while most rural areas had only very insufficient internet connectivity, it would not make sense to aim only for an upgrade with mere basic broadband speeds. In the interest of the consumers, but also in view of spending public money in the most targeted manner, it was decided to opt for a sustainable solution and therefore aim at the creation of a NGA network.
- (7) Germany set out that despite great efforts on regulatory and information measures, it is not possible to achieve – in particular for rural areas - the objective of the wide availability of high speed internet provision without State aid, as no infrastructure investment took or is going to take place within the near future.
- (8) **Legal basis:** The legal basis is the *Landeshaushaltsordnung Niedersachsen* as well as the administrative provision on the *Landeshaushaltsordnung* and its side laws (*Verwaltungsvorschriften zur Landeshaushaltsordnung und ihren Nebenbestimmungen*).³
- (9) **Targeted areas:** Large parts of the *Landkreis Rotenburg* constitute so-called white areas already for basic broadband provision⁴, whereby the broadband provision is defined at a

¹ Breitbandstrategie der Bundesregierung vom 18.2.2009, <http://www.zukunft-breitband.de/>

² Next generation access networks, for a definition and description, see paragraph (9).

³ To be found under the following link

http://www.niedersachsen.de/live/live.php?navigation_id=6813&article_id=20080&psmand=1000

⁴ See Breitbandatlas Niedersachsen, <http://www.breitband-niedersachsen.de/>

speed of less than 2 MBit/s.⁵ Nevertheless, the support measure aims at the construction of a NGA network, so target areas will be defined as to the availability of NGA provision in a given area.

A NGA network is defined as a network which is able to achieve a minimum of 40 MBit/s download speed. However, for budgetary constraint reasons, the German authorities introduce a threshold of 30 MBit/s download speed (*Eingriffsschwelle*). This means that in areas where networks of a minimum of 30 MBit/s are available or will be available within the next three years on commercial terms, no support will be granted to upgrade them to 40 MBit/s download speeds.⁶

- (10) Support can be granted only in 'white' NGA areas, which are either 'white' basic broadband areas or 'grey' basic broadband areas (for a definition, see Community Guidelines for the application of State aid rules, hereafter Broadband Guidelines).⁷ Support in so-called NGA 'black' areas or NGA 'grey areas cannot be granted.⁸
- (11) For NGA white/grey basic broadband areas, the German authorities have also submitted a feasibility study analysing the needs of customers.
- (12) A special case is the support however in certain areas of the core town (Kernstadt) of Rotenburg, which is a NGA white but 'black' area for basic broadband purposes and for which NGA network construction support should still be envisaged due to the particular circumstances in that area. Rotenburg town is the more populated area within the Landkreis Rotenburg, but compared to other towns in Germany it still has a rather small population of 20 000 inhabitants and a population density of 221 inhabitants/km². The download speeds currently provided in the areas for which support is envisaged – as confirmed by the German authorities and documented by a map of the core town – are at a maximum download speed of 16 MBit/s. There are some streets within that area which are served by a DOCIS 2 infrastructure offered by Kabel Deutschland, which is able to provide a speed of 32 MBit/s. However, as explicitly confirmed by Germany, in line with the threshold (*Eingriffsschwelle*) of 30 MBit/s, these areas will not receive any support at all.

For the remaining areas not served by such speeds (but only by maximum speeds of 16 MBit/s), the Landkreis examined carefully whether any operator, in particular the two existing network operators Deutsche Telekom and Kabel Deutschland GmbH envisage a NGA rollout in the next five years. This, as confirmed in writing, is not the case. There is no evidence, as testified by the two interest calls that any other operator would engage in the construction of a NGA network within the next three years.

⁵ Based on studies, the German authorities argue that many undertakings that only have access of less than 2 Mbps – given the rapidly increasing bandwidth need of the internet services - are not able to sufficiently participate in the economy. See for instance „*Breitband für jedermann – Infrastruktur für einen innovativen Standort*“, WIKConsult of January 2008; available at : http://www.wik.org/content/breitbandkonzeption%20RLP%20Gesamtttext%20Stand%2027_2_081.pdf. The European Commission has accepted the 2 MBit/s threshold e.g. in decisions N 368/2009 Amendment of the State aid broadband scheme N 115/2008 - Rural areas in Germany and decision N 238/2008 – Broadband infrastructure deployment in Germany.

⁶ Such areas would of course be grey or – depending on the number of operators – black areas for basic broadband purposes.

⁷ Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, OJ C 235 of 30.9.2009, p.7. Paragraphs 41,43,44 and for NGA networks paragraphs 65 seq.

⁸ Broadband Guidelines, see above fn. 7 , paragraph 76, 77 and 78.

The citizens and businesses in that area however express a need for such a very high speed connection, in order to profit from the same services (see paragraph 5 above) as the end users in the rest of the Landkreis, which will profit from the subsidised network.⁹ The inadequacy of the existing broadband connections will prove to be a serious bottleneck for providing citizens and companies in that area and hamper their activity.

- (13) While it might be possible for a third party, using the Kabel Deutschland network to upgrade the network and provide NGA services, it must be noted that Kabel Deutschland does not grant access to its infrastructure¹⁰. Germany stated that Kabel Deutschland GmbH is not an undertaking with significant market power and as such not subject to regulation with the German regulatory law, i.e. the access cannot be enforced under German law. The network of Deutsche Telekom, to which such regulatory access could be enforced, is a copper network which does not enable third party to achieve a NGA upgrade.
- (14) **Description of the envisaged support:** The measure aims at supporting investment in NGA infrastructure. The support can cover the backhaul part of the network and the last mile. The backhaul (regional) network is to be understood as the connection from the nearest suitable access possibility to the area which should receive broadband coverage as well as the distribution within that area via main distribution frames (*Hauptverteiler*) and other distribution points, e.g. access points such as street cabinets (*Kabelverzweiger*) and wireless base stations (*Mobilfunkstationen*). Backbone infrastructures will not be supported.
- (15) Germany confirmed that in a situation where the tender might result only in the support of the construction of a backhaul network (and not the last mile), special care will be taken that in areas where traditionally basic broadband services are offered (i.e. grey and black basic broadband areas), the higher speed of 40 MBit/s for offering NGA services will reach the end consumer. In the tender proceedings, bidders will be made aware that if they are awarded the contract for the construction of a mere backhaul network, they need to demonstrate that the desired speed of 40 MBit/s will reach the final customer. Where such evidence cannot be produced¹¹ – e.g. because the distance between the backhaul network and the final consumer is too far – the operator has to ensure to take all necessary measures to achieve the transmission of such higher speed to the customer (e.g. by making appropriate last mile arrangements).
- (16) The State support will be given in the form of grants which are supposed to cover the so-called profitability gap (*Wirtschaftlichkeitslücke*).¹²
- (17) **Identification of the target areas (mapping) and consultation with operators:** To identify the areas in which State support should be granted, the Landkreis carried out two calls of interest¹³. In addition, an announcement in the TED publication organ was conducted to ascertain which broadband operators have already deployed or intend to

⁹ Germany submitted a study by consultancy Seim and Partner, which investigated the demand of the town Rotenburg. According to page 9 of that study, 51% of the population in Rotenburg Stadt see a need for higher internet capacities. According to the study, only a third of the population is satisfied with the current speeds.

¹⁰ Letter by the German authorities of 15 November 2010, attaching a copy of the letter of Kabel Deutschland.

¹¹ According to estimates, that could be the situation for 2% of the population.

¹² The profitability gap is defined as the delta between the discounted investment costs and discounted revenues of the project.

¹³ On 24.8.2009, published in the gazette of the Landkreis, Jahrgang 33, No. 16. Call of interest of 18.11. 2009 published in the gazette of the Landkreis, No 22. Both calls have also been published on the internet pages of the Landkreis Rotenburg, www.lk-row.de and on the webpage of the 'Broadband competence center Niedersachsen', <http://www.breitband-niedersachsen.de/>

deploy broadband in the respective areas within the near future.¹⁴ The map is published and will be updated on the internet side of the Broadband atlas Niedersachsen, but was offered to any interested party on request in the call for interest. There was further a feasibility study which demonstrated that there was a strong demand of citizens and undertakings for higher broadband speeds.¹⁵

- (18) **Duration of the measure/cumulation:** The scheme will be put into *effect as soon* as possible after the Commission's decision to approve the aid scheme. The duration is until 31.3.2016. The aid will be paid in four or five yearly tranches, depending on the progress of the works.

The support cannot be cumulated with any other state aid programmes, whether they are on the federal level or on the level of the Bundesland.

- (19) **Budget, granting authority and aid intensity:** The granting authority is the *Landkreis Rotenburg*. The total budget is EUR 15 million. The profitability gap can be covered with 100%, however the bidder is invited in the tender to contribute 40% to the profitability gap.
- (20) **Tender procedure:** The tender will be conducted in line with national and EU procurement rules.
- (21) **Award criteria:** The German authorities have informed the Commission about the award criteria and their respective weighting. These criteria include *inter alia* the profitability gap, the network connection points, open access, scope of the coverage. One of the award criteria will also be the own contribution which the bidder is willing to pay, as this amount will reduce the profitability gap and thus the corresponding State aid. The criteria and their weighting will be published in the tender documents.
- (22) **Technology:** The selection procedures will be technology neutral, allowing applicants to propose any suitable technological solution in the bidding process. The call for interests explicitly noted that the state support is available for land based and wireless technologies.
- (23) **Wholesale access and wholesale pricing:** The chosen bidder is obliged to grant access to the subsidised infrastructure (LLU, sup-loop and bitstream) and also, as far as the support for areas are concerned, which are grey or black for basic broadband purposes¹⁶, for ducts, street cabinets and dark fibre¹⁷ in a non-discriminatory and transparent manner on all levels of the network. The access will be granted for a period of at least seven years. The infrastructure chosen will support effective and full unbundling. The German government also clarified that effective access to the network also covers the chosen operator's own infrastructure which he might bring into the project as existing infrastructure.

¹⁴ European public procurement journal Tenders Electronic Daily (**TED**) 215346-2010. Under the Broadband Guidelines, the perspective is normally 3 years, but the German authorities consulted on an even larger perspective of 5 years deployment plans.

¹⁵ Machbarkeitsstudie Landkreis Rotenburg vom 19.7.2009.

¹⁶ See paragraph 79 first paragraph of the Broadband Guidelines according to which enhanced access requirements do not apply to NGA white areas, which are also white for basic broadband purposes.

¹⁷ The access obligations apply as far the chosen operator has placed and owns the ducts, street cabinets, etc. or has disposal over the last mile (*Verfügungsgewalt über Teilnehmeranschlussleitung or sub-loop*). Often, cabinets, ducts, etc or the last mile will belong to the incumbent and the chosen operator has no possibility of ensuring access. However, the incumbent is required by regulatory law to grant such access.

Germany confirmed that the wholesale prices will set in a manner that they are based on the average published prices in more competitive areas or on prices set or approved by the national regulator. The pricing conditions will form part of the tender documents.

- (24) **Use of existing infrastructure:** Germany explained that the use of existing infrastructure is beneficial in order to avoid duplication of resources. Existing infrastructure can be identified by the infrastructure atlas Germany (*Infrastrukturatlas Deutschland*). The incumbent should however not get an undue benefit in the tendering process. In this regard Germany outlined that via regulation the incumbent with significant market power will be obliged to give access to its infrastructure. Bidders in the current tender and award procedure can thus rely on the incumbent's existing infrastructure for their bid.
- (25) **Retail pricing:** The prices for end consumers should be within the same price range as those present in non subsidised areas. This condition will be part of the tender and the monitoring (see below).
- (26) **Beneficiaries:** The direct beneficiaries of the aid will be electronic communications operators rolling out the broadband infrastructure and offering broadband services. Indirect beneficiaries will be electronic communication operators utilising the new network for offering retail services to end users, residential users and primarily SMEs in the areas concerned who will benefit from better broadband services. Furthermore, the measure aims at improving the provision of existing broadband services to business users and residential users. Whereas residential users are not subject to State aid rules, businesses in the targeted areas will therefore ultimately benefit from the improved broadband services and coverage in comparison with what would be provided on a purely commercial basis.
- (27) **Monitoring and claw back mechanism:** The project will be regularly monitored by the auditing department (*Rechnungsprüfungsamt*) Rotenburg, which will *inter alia* assess the number of regions covered, the number of expected new NGA subscriptions, number of connected businesses as well as end consumer prices. If the provider does not comply with the requirements stipulated in the award contract, the award authority can reclaim the aid.
- (28) In addition, a clawback mechanism will be established. The contract with the successful bidder will contain a reverse payment mechanism, according to which excess revenue has to be paid back if the demand for broadband connections in the target area grows 25% beyond the anticipated number of new customers within three years after the completion of the investment (based on a credible business plan which will be assessed in the selection procedure). Additional revenues exceeding the 25% threshold will have to be paid back, however, the respective costs might be deducted.
- (29) **Consultation of the regulator:** The national regulator, the *Bundesnetzagentur*, was consulted on the project by letter dated 12 November 2010 and replied by letter 26 November 2010. The regulator did not raise any objections to the project and pointed out that he will observe the relevant markets for bitstream access and local loop unbundling. The regulator assured to monitor very closely the competition conditions in the broadband market and will take the appropriate remedies provided by the applicable regulatory framework.

IV. PRESENCE OF AID

- (30) The support envisaged by Germany for the investment in broadband infrastructure constitutes aid in the sense of Article 107 (1) TFEU, according to which support by a Member State to undertakings qualifies as State aid, which has to be notified, if it meets the cumulative conditions that 1) the measure has to be granted out of State resources, 2) it has to confer an economic advantage to undertakings, 3) the advantage has to be selective and distort or threaten to distort competition, and 4) the measure has to affect trade between Member States.
- (31) The current measure will be directly financed from the budget of the Landkreis and the municipalities and thus involves State resources. It will provide a selective economic advantage to the electronic communication operators and infrastructure investors selected via the tender procedure and also for third party electronic communication operators that will be able to offer their services via wholesale access to the subsidised network. It also enables undertakings to subscribe to the services offered via the subsidised network instead of more expensive market-based solutions. Thereby the support from the state strengthens the position of a selected number of beneficiaries of a specific sector in relation to their competitors and has the potential to distort competition. The principle beneficiaries are active in deploying and operating broadband networks, a market which is, at least potentially, subject to trade between Member States. Therefore this support is also likely to affect trade between Member States.

V. COMPATIBILITY ASSESSMENT

- (32) The Commission has assessed the compatibility of the scheme according to Article 107 (3) (c) TFEU and in the light of the Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks¹⁸ which guide the application of Article 107(3)c TFEU by the Commission for aid with this objective.

The balancing test and its application to aid for broadband network deployment

- (33) As described in points 34 and 35 of the Broadband Guidelines, in assessing whether an aid measure can be deemed compatible with the common market, the Commission balances the positive impact of the aid measure in reaching an objective of common interest against its potential negative side effects, such as distortions of trade and competition.
- (34) In applying this balancing test, the Commission will assess 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:
 1. Is the aid measure an appropriate instrument, i.e. are there other, better placed instruments?
 2. Is there an incentive effect, i.e. does the aid change the behaviour of firms?

¹⁸ Reference above, fn. 7.

3. 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?

Objective of the measure

The aid is in line with EU policy

- (35) The scheme concerns the rollout of NGA infrastructure and of passive infrastructure for high speed broadband installations. This follows the Commission's Flagship Initiative: "A Digital Agenda for Europe" of the Europe 2020 strategy of 3 March 2010¹⁹, which has the aim to deliver sustainable economic and social benefits from a Digital Single Market based on fast and ultra fast internet and interoperable applications. The Strategy explicitly invites Member States to draw up operational high speed internet strategies and target public funding on areas not fully served by private investments. Accordingly, Germany pursues with the notified measure an important objective of EU policy.

Aid is the appropriate instrument

- (36) Despite efforts of the German authorities to address the identified problem by alternative instruments (such as regulatory measures concerning unbundling and third party access), no private investments have taken place in the targeted areas or will take place during the next three years. Without further public intervention, no progress could be expected in the reduction of the digital divide between rural and urban areas. As set out in the previous paragraph, Member States are invited to address public funding to non-served areas. Hence, State aid is an appropriate instrument to achieve the set objectives, pursuant to paragraphs 47 and 48 of the Broadband Guidelines.

The aid provides the right incentives to operators

- (37) As set out in paragraph 50 of the Broadband Guidelines, regarding the incentive effect of the measure, it needs to be examined whether the broadband network investment concerned would not have been undertaken within the same timeframe without any State aid. According to the results of the public consultation and market research conducted by the German authorities in the targeted areas no investment would take place without public funding, hence the aid will trigger a change in the investment decisions of the operators. Therefore, the aid should provide a real investment incentive for operators.

Design of the measure and the need to limit distortions of competition

- (38) As set out in paragraph 51 of the Broadband Guidelines, in assessing the proportional character of the notified measures in "white" or "grey" areas a number of conditions has to be met in order to minimise the State aid involved and the potential distortions of competition:
- (a) *Detailed mapping and coverage analysis, consultation with stakeholders:* Germany has undertaken an analysis of the existing broadband infrastructures in order to clearly

¹⁹ EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, page 12.

identify the areas where state intervention is necessary. By consulting existing operators and updating the target areas accordingly and by consulting with all the relevant stakeholders (such as the National Regulatory Authority) in an open and transparent manner as well as by conducting consumer surveys, the scheme ensures that public funds are used only in areas where it is necessary and limits the possibility of crowding out private investments and distortion of competition to the minimum possible. The map will be constantly updated and areas in which a commercial NGA solution exists or will exist within the next three years, no aid will be given.

- (b) *Open tender process*: Germany will select the undertakings for the construction and the maintenance of the network in an open tender procedure ensuring transparency, and equal and non-discriminatory treatment, with the objective to minimise the aid necessary for the measure.
- (c) *Most economically advantageous offers*: Within the context of the open tender, Germany will select the most economically advantageous offers. The bidder which requests the lowest amount of aid for otherwise comparable quality and quantity will be chosen. Germany has, in line with paragraph 51 c) of the Broadband Guidelines communicated the criteria and the weighting parameters.
- (d) *Technology neutrality*: The current measure does not favour any particular technology or network platform leaving it to commercial operators to come up with the most appropriate technological solutions to provide broadband services to end users.
- (e) *Use of existing infrastructures*: Germany will ensure during the tender procedure that existing civil infrastructures are considered by the bidders in the design of their offers. The existing infrastructure of the incumbent will be useable via detailed regulatory access rights. This means that operators who intend to use existing infrastructure of the provider with significant market power for applying for state support under the programme, can avail themselves of his infrastructure.
- (f) *Open wholesale access*: The operator of the new network will be obliged to provide during 7 years following completion of the infrastructure open wholesale access to all interested parties in an open, transparent, non-discriminatory manner. The German government also clarified that effective access to the network also covers the chosen operator's own infrastructure which he might bring into the project as existing infrastructure.
- (g) *Price benchmarking for wholesale prices*: In order to ensure effective wholesale access and to minimise potential distortion of competition, wholesale prices on the subsidized network will be based on the average wholesale prevailing in more competitive areas of Germany and will be monitored by the National Regulatory Authority. In line with fn. 55 of the Broadband Guidelines, this requirement will be part of the tender documents.
- (h) *Retail prices*. The objective is to have an offer of retail access prices similar to those charged in non-subsidised areas.
- (i) *Claw-back mechanism to avoid over-compensation*: The project will be examined on a regular basis and the monitoring mechanisms implemented will ensure that if the beneficiary fails to comply with the rules, the granting authorities will be in the position to recover the aid granted. To avoid overcompensation, the contract with the successful bidder will contain a reverse payment mechanism, according to which excess revenue has to be paid back if the demand for broadband connections in the target area grows 25% beyond the anticipated number of new customers within three years after the completion of the investment.

The conditions listed in paragraph 51 of the broadband guidelines are therefore fulfilled.

Special conditions for NGA infrastructure

White NGA/ grey basis broadband areas

- (39) Regarding identified "white" NGA areas where already one basic broadband service provider is present (traditional grey area) and where operators do not have plans to invest in NGA networks during the coming three years, Germany intends to support an upgrade of the existing network or, where this is not feasible, the construction of new NGA infrastructure.
- (40) In line with paragraph 73 of the Broadband Guidelines, Germany firstly verified that such upgrade of existing or installation of new infrastructure is necessary to meet the needs of the areas not served by NGA networks.²⁰ Secondly Germany had demonstrated that there are no other, possibly less distortive, means to reach this goal. Regulation is a necessary, but not always sufficient instrument for the use of broadband services and it cannot in this case solve the problem of lack of infrastructure.
- (41) Furthermore, pursuant to paragraph 79 of the Broadband Guidelines, Germany requires effective third party wholesale access for 7 years, including the right to use ducts, dark fibre and street cabinets in order to allow third parties to have access to active and passive infrastructure. Germany also consulted the NRA, which is closely monitoring the competitive conditions on the broadband market and which may impose the necessary remedies provided by the applicable regulatory framework. Finally, the NGA architecture has to be designed in a way that it supports effective and full unbundling and satisfies all types of network access that operators may seek.
- (42) In NGA white areas, which are grey or black areas for basic broadband, the German authorities have taken measures to ensure that in line with the scheme's objective to provide higher internet speeds, these speeds will reach the consumer. In case that following the tender only backhaul support would be granted²¹, the operator has to prove that the speeds will reach the consumers or, in case that this evidence cannot be produced, take the necessary measures to ensure that, e.g. via an appropriate last mile connection, these speeds of a minimum of 40 MBit/s will be passed on.

White NGA/black basic broadband areas

- (43) For certain areas which should receive support within Rotenburg town, which is classified as NGA white, but black area for basic broadband purposes, it needs to be ascertained whether the conditions of Article 77 to 79 and 75 of the Guidelines are fulfilled. In line with paragraph 78 of the Broadband Guidelines, the German authorities demonstrated that the two existing network operators will not upgrade their infrastructure to enable the offer of NGA services within the next three years. The historical investment pattern of the existing network operators did not result in any additional investment in order to provide any higher speeds for end users, but was limited to maintenance work. In this context, the German authorities demonstrated that the networks of Dt. Telekom date from the 1960ies and the cable network from the early 1980ies. In the past three years the municipalities had several talks with the operators, trying to achieve an upgrade of the infrastructure

²⁰ Germany conducted a feasibility study, which established the existing infrastructure, the number of potential business and private customers. It further established the need for very high speed internet by conducting a consumer survey, which showed that far less than 50% of the user in the Landkreis have speeds of 6 MBit/s and more. 25% of the customers only have access to 1 MBit/s, according to indications by Deutsche Telekom.

²¹ In case of a subsidised last mile network, it is clear that the speeds will reach the end consumer.

which was demanded by the citizens and business undertakings. As further demonstrated by a study ²² presented by the German authorities, many services demanded by small and middle sized undertakings are not present in the area, for example storage on demand, cloud storage services, possibilities for homeworking places, smart working centers, applications for planning and construction. However, as further supported by the a call of interest, in which operators had not only the chance to project future investment, but also to point to existing commercial investments of higher speeds, no adequate speed has become available.

- (44) As to the conditions of paragraph 75, the German authorities demonstrated to the Commission that the overall market conditions are not such that other operators than the two existing operators will enter the market in order to construct a NGA network on commercial terms. This has been factually supported by the two calls of interest, in which no operator came forward with a commercial deployment plan for NGA infrastructure in Rotenburg town. The demand by the users for new services, which was analysed by the German authorities, cannot be met by existing networks.

Since no NGA network exists, even in the presence of regulation, network access cannot be conducive for creating effective competition. As further demonstrated by the German authorities to the Commission, access to the existing network of Kabel Deutschland cannot be enforced via regulation and Kabel Deutschland has not any intention to provide such access at its own initiative. The technology (copper network) of the Deutsche Telekom infrastructure does not support such an upgrade, even if access would be granted by regulatory means. The Commission is therefore also satisfied that regulatory means imposed on the existing network operators cannot overcome the lack of NGA investment.

The German authorities also pointed out that due to the geographic character of the supported region as rural in nature and with a low population density, there are considerable entry barriers which do not invoke – as proven – any interest of broadband operators to invest on commercial terms. Due to long distances, investment costs for connecting customers are high and the number of customers too low to justify such an investment. The result of this is that within the next three years there is no perspective for the town of Rotenburg to achieve very high speed internet which the support programme envisages for the rest of the *Landkreis*, as operators are not proceeding in such an upgrade. In order not to leave the private users and business users of the town of Rotenburg behind compared to the remaining population in the *Landkreis* which would profit from the subsidy, the German authorities see a justification for State aid. Given the demonstrated market failure for the creation of NGA infrastructure present in that region and in view of the safeguards given by Germany on achieving these higher speeds, the Commission can agree to that proposal.

- (45) As to the fulfilment of the criteria of paragraph 79 of the Guidelines, the German authorities confirmed that all the above conditions of paragraph 79 of the Broadband Guidelines and the conditions mentioned in paragraph 42 of this decision regarding the speed requirements of this decision also apply to the envisaged support in certain areas of Rotenburg town.

Conclusion

²² Chapter 3, page 16 seq. of the background documentation 'Dokumentation' submitted by Germany as part of the notification.

- (46) The Commission concludes that the compatibility criteria set out in the Broadband Guidelines are met, hence the aid involved in the notified measure is compatible with Article 107(3) (c) TFEU.

VI. DECISION

- (47) On the basis of the foregoing assessment, the Commission has accordingly decided to consider the aid measure '*Aufbau einer Next Generation Access Infrastruktur im Landkreis Rotenburg (Wümme)*' to be compatible with Article 107(3)(c) of the Treaty on the Functioning of the European Union and not to raise objections to it.
- (48) Germany is reminded that, pursuant to Article 108(3) of the Treaty on the Functioning of the European Union, it is obliged to inform the Commission of any plan to extend or amend the measure.
- (49) 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/community_law/state_aids/state_aids_texts_en.htm.
- (50) Your request should be sent by encrypted e-mail to stateaidgreffe@ec.europa.eu or, alternatively, by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
Rue Joseph II 70
B-1049 Brussels
Fax No: +32 2 2961242

Yours faithfully,

For the Commission

Joaquín ALMUNIA
Vice-President of the Commission