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**Subject: State Aid SA.54472 (2019/N) – Ireland
National Broadband Plan**

Excellency,

1. PROCEDURE

- (1) Following pre-notification contacts, by letter of 17 October 2019, the Irish authorities notified to the Commission the measure '*National Broadband Plan*' ('the scheme' or 'the NBP') and the corresponding evaluation plan, pursuant to Article 108(3) TFEU.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. Context

- (2) Broadband connectivity is of strategic importance for European growth and innovation in all sectors of the economy and to social and territorial cohesion. It supports business efficiencies and growth, ensures that economies can remain competitive, and enables citizens to enhance their skills and learning and to benefit from online services and offerings, including key public services.
- (3) The Europe 2020 Strategy ('EU2020')¹ underlines the importance of broadband deployment as part of the EU's growth strategy and sets ambitious targets for

¹ EUROPE 2020 – A strategy for smart, sustainable and inclusive growth, COM(2010) 2020.

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broadband development. One of its flagship initiatives, the Digital Agenda for Europe ('DAE')² acknowledges the socio-economic benefits of broadband, highlighting its importance for competitiveness, social inclusion and employment. The DAE restates the objective of the EU 2020 Strategy with the following targets for broadband development in Europe: (i) to bring basic broadband to all Europeans by 2013; (ii) for all Europeans to have access to internet speeds of above 30 Mbps by 2020; (iii) for 50% or more of European households to subscribe to internet connections above 100 Mbps by 2020.

- (4) On 6 May 2015 the European Commission adopted a strategy to complete the creation of a digital single market in the European Union³. On 14 September 2016, the Commission adopted the Communication 'Connectivity for a Competitive Digital Single Market – Towards a European Gigabit Society' ('Gigabit Society Communication').⁴ The Gigabit Society Communication has confirmed the importance of Internet connectivity for the Digital Single Market and defined a strategy to build by 2025 a European Gigabit Society, where availability and take-up of very high capacity networks (VHCN) would enable the widespread use of products, services and applications in the Digital Single Market. Building on the DAE objectives, the Gigabit Society Communication defines as additional strategic objectives for 2025: (i) 100% coverage of all households with download speeds of at least 100 Mbps, upgradeable to 1 Gigabit speed; (ii) Gigabit connectivity⁵ for all main socio-economic drivers such as schools, transport hubs and main providers of public services as well as digitally intensive enterprises; (iii) uninterrupted 5G coverage for all urban areas and all major terrestrial transport paths, with as an intermediate objective for 2020, 5G connectivity available as a fully-fledged commercial service in at least one major city in each Member State, building on commercial introduction in 2018.
- (5) In order to progress towards the achievement of the goals of the EU2020 strategy and the DAE, in 2012 the Irish authorities defined their national broadband strategy in a policy measure entitled 'The National Broadband Plan (NBP) for Ireland - Delivering a Connected Society'.⁶ The plan, updated in 2015⁷, sets out the strategy to deliver high speed broadband throughout Ireland and in particular to ensure 100% coverage of minimum download speed of 30 Mbps by the end of 2020. A key principle of the National Broadband Plan is to first stimulate commercial investment through policy and regulatory measures and, as a

² Communication from the Commission to the European Parliament, the Council, the Social Committee and the Committee of the Regions, COM (2010) 245 final *A Digital Agenda for Europe*.

³ Communication from the Commission to the European Parliament, the Council, the Social Committee and the Committee of the Regions COM(2015) 0192 final *A digital single market strategy for Europe*

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2016) 587 final *Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society*

⁵ According to the Gigabit Society communication, in this context Gigabit connectivity is to be understood as cost-effective symmetrical Internet connectivity offering a downlink and an uplink of at least 1 Gbps.

⁶ <https://www.dccae.gov.ie/documents/National%20Broadband%20Plan.pdf>

⁷ <https://www.dccae.gov.ie/documents/Updated%20Strategy%20December%202015.pdf>

second step, to intervene with public support only in those parts of Ireland where the commercial sector has, to date, not invested nor has concrete plans to invest.

- (6) Ireland has made considerable progress in recent years in terms of broadband connectivity, which is reflected in improved broadband availability and take-up. There have also been improvements in the quality and speed of broadband connections. Further progress is however needed to make high speed broadband available to all households, especially in the more remote and rural, through the deployment of Next Generation Access (NGA) networks. According to the latest updated map⁸, approximately 535,000 premises did not have access to a NGA network. The problem is even more acute regarding the availability of ultrafast broadband: less than 5 % of rural premises were covered in Ireland by ultrafast broadband (against a 22 % EU average) by mid 2018.⁹ This is mainly due to Ireland having a low population density compared to rest of Europe: 67 inhabitants per km², compared to the EU average of 120 inhabitants per km². Especially rural Ireland has an extremely low population density of only 26 inhabitants per km². The Irish authorities explain that most of the commercial investments take place in urban areas and that private operators are reluctant to invest in the deployment of infrastructure supporting more advanced broadband connectivity in low population density areas due to the challenging business case they present. According to the Irish authorities, this is exacerbating the existing urban-rural digital divide and it is likely that this situation will continue in the long term, unless there is a public intervention to ensure the provision of these services in rural areas.
- (7) The Irish authorities envisage to subsidise the deployment of a new high speed broadband network in areas of the country where there is no commercial infrastructure in place or planned in the next seven years able reliably to deliver at least 30 Mbps download speed¹⁰ to all premises, i.e. in ‘white’ NGA areas within the meaning of the EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (‘the Broadband Guidelines’).¹¹ The NBP intends to reduce the digital divide between areas that benefit from high speed broadband connections and sparsely populated or deprived areas.
- (8) The Irish authorities are of the opinion that the problem of the lack of supply of high speed broadband networks cannot be solved by less distortive measures such as demand stimulation or regulatory interventions. While, in principle, demand-side measures could be an instrument of public intervention, these measures do not solve severe problems on the supply side. According to the Irish authorities, also *ex ante* regulation, despite its crucial role in ensuring effective and sustainable competition in the market for electronic communications, is not a sufficient instrument to enable the supply of high-speed broadband service in the

⁸ See recital (51).

⁹ 2019 Digital Economy and Society Index (DESI).

¹⁰ However, as explained in recital (13), based on the results of the competitive selection process, the new network will be able to provide to end-users speeds of at least 150 Mbps download and at least 30 Mbps upload.

¹¹ Communication from the Commission, EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (OJ C 25, 26.1.2013, p.1).

intervention areas, particularly because of inherent low profitability of such services in those areas. The cost of deploying NGA broadband to those areas is significantly higher than the cost of reaching urban densely populated areas. Moreover, the achievable revenue base is more limited due to low population density in those areas. The Irish authorities explain that regulatory measures (such as for instance regulation concerning significant market power in the wholesale local access market – for passive services and the wholesale central access market – for active services, as well as symmetric obligations under the Cost Reduction Directive) have not been enough to overcome obstacles to the deployment of NGA broadband infrastructure in the targeted areas.

- (9) Consequently, the Irish authorities consider that without public intervention it does not appear possible to reduce the ‘digital divide’ between the remaining NGA white areas and the rest of Ireland. The Irish authorities consider furthermore that in the intervention areas there is no alternative to granting public funding in order to incentivise the deployment of NGA infrastructures. The Irish authorities expect significant benefits from the deployment of subsidised network across all areas of Irish society. The Irish authorities intend to ensure that consumers and enterprises benefit from accessibility to improved broadband services, which would increase the economic competitiveness and attractiveness of the intervention areas for investors. The Irish authorities expect that the NBP will have a positive impact on job creation and will constitute a stimulus for development of the modern digital economy. Finally, the Irish authorities consider that the public intervention has further potential to support a broad range of other public policy priorities, including in the areas of social inclusion, tourism and public sector reform.

2.2. Description of the measure

- (10) **Objective:** The purpose of the scheme is to promote the deployment of a Next Generation Access network (‘NGA’) comprising access segments and where necessary related backhaul segments¹² in areas of the country where there is no broadband network in place capable of delivering reliably download speeds of at least 30 Mbps and where there are no plans for such coverage in the next seven years¹³ (i.e. ‘white’ NGA areas).
- (11) With the notified scheme, the Irish authorities intend to ensure a national high speed broadband coverage guaranteeing high quality and reliable broadband services to every residential and business user offering a choice of service providers and satisfying current and future demand. Finally, the scheme aims to incentivise additional commercial investment, stimulate growth and retention in jobs.

¹² Access segments correspond to the "last mile" and allow the connection of end-users with download speeds above 30 Mbps in the intervention area. Backhaul segments correspond to the "middle mile" and comprise the intermediate links between backbone and access segments.

¹³ The Irish authorities submit to have taken into consideration that, in line with paragraph 63 of the Broadband Guidelines, if the granting authority takes a longer time horizon than three years to deploy the subsidised infrastructure, the same time horizon should also be used to assess the existence of commercial investment plans. In the present case, the Irish authorities clarify that the expected time horizon for the deployment of the new subsidised infrastructure is seven years.

- (12) The Irish authorities have set the following principles: (i) achieving 100% coverage of high speed broadband to conclusively address connectivity deficits across Ireland; (ii) deploying an infrastructure that is capable of meeting current and future demands for bandwidth; (iii) ensuring that services are affordable, competitive and on a par with those available in commercial areas; (iv) adopting a technology neutral selection process that attracts multiple bidders over competing platforms to ensure value for money; (v) favouring a cost effective deployment by incentivising reuse of existing infrastructure; (vi) ensuring that quality and affordable services are continuously provided through a long term contract with stringent governance measures.
- (13) The NBP strategy initially set minimal requirements that any subsidised network must be capable of delivering at least download speeds of 30Mbps and upload speeds of at least 6Mbps (amongst other criteria) to all premises in the area covered by the State intervention. However, in practice, based on the results of the competitive selection process the new network will be predominantly a fiber-to-the-home (FTTH) network able to provide to end-users (households and businesses) minimum speeds of at least 150 Mbps download and at least 30Mbps upload and will fulfil other technical criteria such as latency, jitter, packet loss and service availability (see also recital (52)).
- (14) **Legal basis:** The notified State aid scheme is based on section 2 of the Ministers and Secretaries Acts 1924¹⁴ as amended by section 3 of the Ministers and Secretaries Act 1983¹⁵, and Section 184 of the Broadcasting Act 2009¹⁶. The Irish authorities have also confirmed that the present State aid decision is an integral part of the legal basis.
- (15) **Standstill obligation:** The Irish Authorities confirmed that the granting of the aid is conditional on the decision of the Commission on the notified NBP, pursuant to the standstill clause of Article 108(3) TFEU and to Article 3 of Council Regulation No 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 Union¹⁷, according to which new aid measures must not be put into effect before the Commission has taken a decision authorising it.
- (16) **Granting authority:** The granting authority is the Department of Communications, Climate Action and Environment (DCCAE) of the Irish government.
- (17) **Duration:** The State aid scheme will enter into force after approval by the Commission. The Irish authorities and the beneficiary selected via a competitive selection process to carry out the construction, maintenance and commercial exploitation of the subsidized network will enter into a long-term contract (the Contract or NBP Contract) of 25 years.
- (18) **Intervention and financing model:** The scheme will use a gap funding model relying on a beneficiary selected via a competitive selection process. The Irish

¹⁴ <http://www.irishstatutebook.ie/eli/1924/act/16/enacted/en/print.html>

¹⁵ http://www.irishstatutebook.ie/eli/isbc/1924.html#a16_1924
<http://www.irishstatutebook.ie/eli/1983/act/40/section/3/enacted/en/html#sec3>

¹⁶ <http://www.irishstatutebook.ie/eli/2009/act/18/section/184/enacted/en/html#sec184>

¹⁷ OJ L 248 of 24.9.2015, p.9.

authorities consider that, considering the specificities of the NBP, this approach provides the most affordable option in terms of being the least expensive for the State as well as having the lowest upfront cost, whilst achieving all of the objectives and minimising the risks. The selected bidder will construct and operate the subsidised network as its owner. The Irish authorities confirm that the aid under the notified measure will not be granted to companies against which an open recovery order for incompatible aid exists. It also will not be granted to companies which, on the basis of the Guidelines on State aid for rescuing and restructuring non-financial undertakings, have to be considered as companies in financial difficulties.

- (19) **Network characteristics:** The new network will consist of passive and active elements (including ducts, poles, dark fibre, exchanges, active equipment). In line with the EU2020 strategy for more growth, the DAE, as well as the Gigabit Society Communication, the proposed State aid scheme aims to support the roll-out of NGA networks. The scheme targets NGA white areas. The Irish authorities explain that while they encourage the reuse of existing infrastructure (see also recital (53) and following), limited backhaul deployment may be necessary to achieve the objectives of the scheme in certain situations.¹⁸ The Irish authorities clarify that *such* backhaul is exclusively ancillary to the deployment of the NGA network¹⁹ and therefore will be built and used only insofar as needed for the coverage of the target white NGA areas and not to support services provided outside the intervention area.
- (20) **Competitive selection process:** The Irish authorities indicate that the beneficiary of the scheme was selected by way of an open, transparent and non-discriminatory selection procedure, based on objective evaluation criteria. The Irish authorities formally launched the procurement process on 22 December 2015 as a competitive dialogue procedure in line with the spirit and principles of Directive 2014/24/EU²⁰. The Irish authorities have considered the competitive dialogue procedure the most suitable competitive procurement model for the NBP given the nature and complexities associated with the proposed intervention. Five prospective bidders responded by the deadline of 31 March 2016, three of which pre-qualified to commence dialogue with the Irish authorities, namely eir, SIRO and the current preferred bidder. Bidders were given the option to bid for individual geographic lots (Lot A (Southern Lot) or Lot B (Northern Lot)) or for the two lots combined (Lot C (Combined Lot)). The purpose of having multiple

¹⁸ Aid may thus be used to build limited backhaul in order to reach the intervention area where it is appropriate e.g. to traverse the eir 300,000 area (see recital (43)) and to get from small remote local exchanges back to the access network.

¹⁹ However, the typical structure of the Irish countryside causes the distinction between the backhaul and access networks to fade. According to Analysys Mason (2015) Technical report, Section 6.3.1, Annex 8: ‘The ‘ribbon pattern’ distribution of premises in rural Ireland also means that it would be more cost effective to consider both backhaul and plans for a wired access network as a whole when designing and deploying the network (as the demarcation between backhaul and access network is blurred). If the operator considers deploying the backhaul in isolation of the access network, it may lead to infrastructure duplication as two cables may need to be deployed at different points in time (one to address the backhaul need and one to address the access network need). If the backhaul and access network are deployed as a single network, cables could be dimensioned to provide both backhaul and access network infrastructure which would lead to a more efficient use of resources and a faster deployment.’

²⁰ OJ L 94, 28.3.2014

lots was to attract more bidders and enhance competition. The three shortlisted bidders were furnished with a first draft of the contract in July 2016. In September 2017, SIRO withdrew from the competitive selection process, whereas eir withdrew in February 2018. The Irish authorities inform that the main reasons for withdrawing were of a commercial nature. This left one remaining bidder in the process.

- (21) Following the exit of the incumbent, eir, from the procurement process, the Irish authorities engaged an independent expert (KPMG) to undertake a re-appraisal²¹ of the NBP project in line with the Irish Government's Public Spending Code. The re-appraisal identified eight possible options for delivering the NBP project including continuing 'as is' with the one remaining bidder. Having assessed these options, KPMG concluded that the preferred option was to continue with the current process 'as is'. From 2018 to 2019, the Irish authorities and their consultants prepared various other reports²² assessing the viability of the project and protections for the State in the context of a single bidder outcome.
- (22) Furthermore, after receiving the final bid and with a view to comply with the recommendation of the Broadband Guidelines²³, the Irish authorities engaged KPMG to carry out an assessment of the remaining bidder's final tender. This detailed assessment can be found in the Single Bidder Solution Assessment report in December 2018²⁴.
- (23) The Irish authorities have also declared that with regard to the competitive selection process and the resulting contract they are satisfied that no changes have been made or will be made since the withdrawal of each bidder which, had they been known in advance, would have reasonably changed their decision to withdraw.
- (24) ***Most economically advantageous offer:*** The Irish authorities consider that the above described competitive selection process has led to identifying the most economically advantageous offer on the basis of clear, transparent and objective economic and qualitative criteria. The Irish authorities inform that detailed award criteria were made available to all bidders in advance of the competitive dialogue procedure and no specific technology or platform was defined or favoured or excluded *a priori*. The award criteria include provisions concerning technical solutions (solution design, deployment plans and outcomes including reliability, speeds, and coverage), criteria assessing how operators 'future-proof' their offer and adhere to essential requirements, for example in relation to the availability and pricing of a range of wholesale access products to the subsidised network. These criteria were weighed against the requested aid amount such that, all else

²¹ The report was published in May 2018 can be consulted under the following link: <https://s3-eu-west-1.amazonaws.com/govieassets/8584/9279b0fe0ff14ab889ba83b35b5d8f94.pdf>

²² Contingency Planning Report 2018; Technical Solution Assessment Methodology Report November 2018; Single Bidder Solution Assessment December 2018; Benefits Report February 2019; Cost Benefit Analysis Report April 2019; Contingency Plan Report 2019. A link to each of these reports can be found here: <https://www.gov.ie/en/publication/dcb962-documents-relating-to-nbp/?referrer=/nbp/>

²³ Footnote 100 of the BGLS reads: '*in the case that a competitive selection process does not generate a sufficient number of bidders, the cost calculation proposed by the winning bidder may be put to examination by an external auditor.*'

²⁴ <https://www.gov.ie/en/publication/dcb962-documents-relating-to-nbp>

being equal, a bidder that required a lower amount of subsidy for otherwise comparable if not identical quality and quantity would receive most priority points.

- (25) **Technological neutrality:** The Irish authorities recognise that a range of technologies exists to provide high speed broadband services and their capabilities are constantly evolving. The NBP strategy and the NBP plan specify the outcomes that the Irish authorities consider necessary to achieve in favour of end users and identify certain qualitative criteria which must be met, e.g. minimum upload and download speeds, open access conditions, etc. The NBP objectives have been set in such a way to include the widest possible range of technologies. The Irish authorities inform that during the selection procedure, bidders were encouraged to come up with innovative and cost-effective ways of achieving the NBP's objectives and, as specified in recital (24), no specific technology or platform was defined or favoured or excluded in the selection procedure.²⁵
- (26) **Beneficiary:** Under the terms of the procurement process, all bidders were required to put forward a special purpose wholesale open access company incorporated and taxed in Ireland, with the sole purpose of carrying out the design, build and operational obligations under the contract with the Irish Authorities. As a result of the competitive dialogue process the remaining bidder was a consortium comprising Granahan McCourt, enet, KNN, Kelly Networks, Actavo and Nokia. The consortium was awarded Preferred Bidder status on 7 May 2019. The winning bidder, Granahan McCourt established the required company and chose to name it National Broadband Ireland (NBI). The procurement conditions also required bidders to put forward a name/brand that was not associated with any existing retail broadband operator in the market. The contract to be awarded will be between the Irish authorities and NBI and all revenues, costs, aid and clawback will be accounted for by NBI over the 25 years. NBI is 100% owned by Granahan McCourt and its equity partners. The Irish authorities consider NBI as direct aid beneficiary.²⁶ The Irish authorities confirm that the contract will be awarded to the aid beneficiary after approval of the measure by the Commission.
- (27) The beneficiary will enter into an agreement with the Irish authorities. This agreement will set out minimum operational performance requirements, assessed by reference to key performance indicators. Accordingly, the beneficiary will be required to deliver the required services and to abide by certain conditions relating to service quality, pricing, etc. The beneficiary must meet the specific needs of businesses as well as ensure scalability in terms of future anticipated growth in demand for bandwidth. The beneficiary will have an ongoing obligation throughout the contract period to future-proof²⁷ and continuously improve the subsidized network, wholesale products and operational environment. The

²⁵ Accordingly, the requirements set for the proposed network had foreseen that the network could comprise one or more of a variety of different wireless and wireline technologies to meet the NBP objectives. However, as explained in recital (52), in the competitive selection process, de facto all bidders chose to propose predominantly FTTH solutions.

²⁶ This decision only addresses the aid to the direct beneficiary NBI, as notified by Ireland.

²⁷ Future proof means that the subsidised infrastructure must ensure scalability in terms of future anticipated growth in demand for bandwidth.

beneficiary has also designed, developed and specified a comprehensive, detailed, well-structured and well thought out future-proofing plan. Should the beneficiary fail to comply with the requirements set out in this agreement, the Irish Authorities reserve the right to step in and take back the funded assets and where necessary the foreseen wholesale business of the beneficiary.

- (28) ***Special provisions regarding network operation at wholesale and retail level:*** NBI will act mainly as a wholesale provider. NBI is allowed to provide retail services in the intervention area only under certain strict conditions as a retailer of last resort (RoLR) which is also subject to strict regulatory requirements. A RoLR may only arise where a consumer cannot get a retail service from the market.²⁸ The Irish Authorities note that they consider it highly unlikely that NBI will engage in providing RoLR services in the intervention area during the lifetime of the contract.
- (29) NBI will not be allowed to sell wholesale access products to a connected entity for resale without the prior written approval of the Irish authorities. The Irish authorities explain that the purpose of this provision is to avoid a situation where the connected entity unduly replaces NBI as the wholesaler of NBP products (leaving NBI as a legal vehicle only to receive subsidy within a group). According to the Irish authorities, such a situation, if permitted, would have the effect of circumventing or making difficult to enforce safeguards including clawback under the NBP Contract.
- (30) NBI will be subject to accounting separation obligations. This aims to: (i) reflect the performance of parts of its business and associated wholesale products and other products as if they had operated as separate businesses; and (ii) where NBI is engaging with a connected retail or wholesale service provider, to prevent discrimination in favour of that retail or wholesale service provider and prevent unfair cross-subsidisation. NBI will be required to ensure that its financial records and accounting systems are sufficiently detailed and supported by sufficient data, information and documentation to ensure compliance with the principles of transparency, non-discrimination, accounting separation, price control, and cost accounting obligations. Each document must be supported by an auditor's report and opinion.
- (31) ***Aid amount:*** The Irish authorities have calculated the aid amount based on a gap funding model through a sizing of the nominal subsidy required to bridge the gap between what the bidder²⁹ forecasted to build, operate and maintain the network over 25 years (including any residual value thereafter) and what the bidder estimated as required to achieve a commercial return. To do this the bidder was required to propose a project financial model³⁰ which included projected revenues, capital costs, operating costs, taxation and financing costs over a 25 year period. This resulted in a base subsidy payment requirement at final bid

²⁸ The Irish authorities indicated they may only authorise NBPco to act as RoLR for a specified end user, if the end user in question has been denied service by at least three retail service providers for valid reasons.

²⁹ I.e. the bidder to which the Irish authorities appointed preferred bidder status as a result of the competitive dialogue procedure.

³⁰ The project financial model is a spreadsheet showing all projected revenues, costs, funding requirements and subsidy requirements of the project over the full 25-year projected contract period. It also shows the agreed assumptions and methodologies used.

stage, net of tax of about EUR 2.1 billion to which was added a provisional subsidy of about EUR 480million resulting in an overall estimated maximum aid amount of about EUR 2.6 billion.³¹ The Irish authorities are currently seeking the EU Commission's approval to allocate funding of EUR 75 million from the European Regional Development Fund to the NBP; if approved, this will reduce the amount of financing allocated from the national budget to the NBP, not leading to an increase in the overall budget of the scheme. The Irish authorities clarified that the conditional subsidy includes: (i) EUR 380 million (in nominal terms) where the beneficiary can demonstrate that the beneficiary has incurred additional unanticipated and exceptional costs above its base case assumption, for example higher than expected labour inflation, higher regulated rental changes, higher than forecast fibre material costs etc.; (ii) EUR 100 million (in nominal terms) where the 'gap' required in the bidder's funding model over the 25 years is affected by a reduction to the number of addressable premises in the intervention area post contract award as a result of FTTH or equivalent build by a commercial operator, which the beneficiary can demonstrate results in a net loss to them compared to their bid IRR. The Irish authorities clarified that providing for this conditional subsidy lowered the overall aid amount as well as provided for a cap for unexpected costs. Thus, should the beneficiary be at loss by more than the pre-allocated amount under (i) and/or (ii) above, it will have to bear all the extra costs. The Irish authorities clarified that the possibility to introduce a mechanism relating to base case assumptions and a conditional subsidy as outlined in (i) was developed once the draft bid submissions were received in September 2017. The concept was subsequently dialogued with eir and the Granahan McCourt consortium, to mitigate the unanticipated and exceptional costs identified by bidders in their draft submissions. The Irish authorities clarified that the possibility to introduce such a conditional subsidy as outlined in (ii) was developed through the competitive dialogue phase of the procurement during 2017 and was clear before SIRO and the incumbent eir decided to withdraw from the competitive dialogue (see recital (23)). The aid will be paid as a direct grant. The majority of the aid will be paid out between 2019 and 2029, with the balance being paid throughout the duration of the 25-year contract.

- (32) **Aid intensity:** The Irish authorities indicate that the above mentioned aid amount represents an aid intensity of less than 95% of capital related costs of the project over the 25 year contract term. The Irish authorities submit that such aid intensity will not result in the beneficiary having profits higher than in the original business plan or the industry average. Any extra profit will be shared between the beneficiary and the State according to the clawback mechanisms set out in the contract to be signed with the beneficiary (see recital (66 and following)).
- (33) **Payment of the aid:** Aid payments are broken down into four categories: (i) deployment milestone payments that are payable upon achievement of certain network deployment milestones up to 7 years; (ii) connection milestone payments that are payable upon achievement of connection milestones; (iii) on-going capital payments that are payable on a quarterly basis upon achievement of programme level milestones up to 10 years; (iv) conditional subsidy payment in case unexpected costs arise during the deployment or post-deployment phase which

³¹ Corresponding to EUR 2.461 billion in Net Present Value terms using as discount rate the 10 year EURIBOR rate of -0.11% (rate at 14/10/19) plus 100 basis points (0.89%).

were not foreseen in the initial project financial model or to cover exceptional unforeseen cost items that fulfil requirements set out in the contract.

- (34) Aid cannot be used to support services provided outside the intervention area (i.e. the aid can only be used to support the connection of the NGA white areas). The Irish authorities submit that they have foreseen post contract governance measures such as accounting separation and audit provisions to ensure maximum transparency around the use of State aid (see also recital (30)).
- (35) The Irish authorities indicate that they will make aid payments only following submission of documentation showing that permitted expenditure has actually been incurred by NBI and its key sub-contractors.³² Aid payments may be reduced in case of claw-back (see recital (66) et seq.). On-going aid payments will also be subject to deductions for failure to achieve performance objectives during the term of the contract. The cumulative payments of the aid paid or payable cannot exceed the cumulative permitted expenditure that has been properly incurred and evidenced in accordance with the NBP contract. For clarity, the Irish authorities confirm that total aid payments are capped at the value of the aid amount described in recital (31) and the aid intensity is capped at 95% (see recital (32)).
- (36) **Mapping and public consultation process:** The measure only targets white NGA areas where no NGA network is available and where there is no credible and concrete plan for further commercial deployment of NGA networks in the next seven years (see recital (10) et seq.).
- (37) In relation to the time horizon of seven years, the Irish authorities have indicated they have relied on paragraph (63) of the Broadband Guidelines, according to which *‘If the granting authority takes a longer time horizon for the deployment of the subsidised infrastructure, the same time horizon should also be used to assess the existence of commercial investment plans’*. In this case, the Irish Authorities have clarified that the expected time horizon for the deployment of the new subsidized infrastructure is seven years. The Irish authorities indicated that NBI will commence parallel deployment activities in all intervention areas to realise cost and resource management efficiencies. The deployment will commence in all counties within the first two years. In particular, the first year will include significant preparatory activities to design the entire network deployment (FTTH) to each specific premise in the intervention area.
- (38) The Irish Authorities explained that for the purposes of the mapping and public consultation process, they have assessed the existence of NGA networks and the credibility of operators’ announced investment plans against an assessment framework, which included technical, deployment and financial criteria. Notably, in order to verify the credibility of announced investment plans, the Irish authorities requested investors to enter into binding commitments to ensure the timely delivery of their investment plans and respect reporting and monitoring obligations. In order to ensure a clear and transparent review of existing and planned infrastructures, the Irish authorities published the assessment framework and related assessment criteria in October 2015.³³ The Irish authorities confirm

³² For example, advanced payments to sub-contractors for work, supplies or services are not eligible for the public support.

³³ The relevant document ‘Mapping Future High-speed Broadband Networks’ can be found at the following link:

that the assessment framework and related assessment criteria were not challenged by operators following publication. The Irish authorities confirm they have systematically used the framework in the assessment of the submissions provided in public consultations.

- (39) The Irish authorities sought to establish the availability of NGA services at a premise level based on premises passed. The Irish authorities have also organised various consultation processes in order to verify the results of mapping with operators and other interested stakeholders.
- (40) Since July 2013, the Irish authorities, in consultation with the relevant Irish national regulatory authority (NRA), *Commission for Communications Regulation* ('ComReg'), undertook an extensive process of mapping of existing and planned NGA infrastructure in order to identify geographic areas where a State intervention may be necessary. For the purposes of identifying the relevant geographical area, Ireland identified both existing and planned infrastructure. Initially, existing infrastructure was defined as infrastructure in place by 1 July 2013 and planned infrastructure was defined as infrastructure which would be in place within three years as of 1 July 2013. The process started with a *request for information*³⁴ on existing and planned networks, followed by continued engagement with industry. The notice on the project was published on the granting authority's central website. In June 2014 interested stakeholders were invited to participate in a *call for input*³⁵ on key aspects of the public intervention, in which 32 submissions were provided mainly by the industry, including fixed wireless access and fixed line operators.
- (41) On 24 November 2014, the Irish authorities published the preliminary NBP map and launched a *public consultation*,³⁶ in which 29 submissions were provided by operators, public authorities and other organisations. The Irish authorities inform that responses were largely in line with the views of the Irish authorities in relation to reliability, quality, affordability, assessment of operator plans and coverage represented on the consulted map. The Irish authorities also inform that all comments were taken into consideration to further develop the map of the intervention in order to minimise distortions of competition with existing providers and with those who already have investment plans for the near future.
- (42) In March 2015, the Irish authorities issued a *supplementary request for information* with the aim to obtain more detailed information, including operators' investment plans up to 2020.³⁷ The Irish authorities received 6 submissions from operators announcing private investment plans. The Irish authorities did not consider any of these plans sufficiently credible at that time and therefore did not make changes to the intervention area. The Irish authorities

<http://www.dccae.gov.ie/enie/communications/consultations/Documents/77/consultations/Annex%20%20-%20PwC%20oct%202015%20Report%20Assessment%20Criteria%20Investment%20Plans.pdf>

³⁴ Letters were issued to all registered authorised operators in the State.

³⁵ <http://www.dccae.gov.ie/en-ie/communications/consultations/Pages/NBP-Call-for-Input-Public-Consultation.aspx>

³⁶ <https://www.dccae.gov.ie/en-ie/communications/consultations/Pages/NBP-Mapping-Public-Consultation.aspx>

³⁷ <http://www.dccae.gov.ie/documents/SupplementaryInformationRequest.pdf>

informed the 6 operators of the result of this consultation in December 2015, and only the incumbent wireline network operator eir provided further comments.

- (43) Engagement between eir and the Irish Authorities continued as eir materially changed and refined its investments plan. In October 2016, eir submitted an updated 'rural' investment plan recording eir's intention of covering around 300,000 rural premises with NGA infrastructure, including a detailed deployment timeline and milestones. Based on defined milestone targets and corresponding reporting obligations for eir's planned deployment, in December 2016 the Irish authorities concluded a commitment agreement with eir. According to the Irish authorities, the objective of this agreement was to certify eir's commitment to ensure the timely delivery of this private investment to the benefit of consumers before deferring public intervention from the areas concerned, in line with paragraph (65) of the Broadband Guidelines. Based on this, and with the support of an independent technical advisor, the Irish authorities concluded that eir's updated 'rural' plan was credible from a technical, deployment and financial perspective. Consequently, in April 2017, the Irish authorities issued a decision mapping the area covered by eir's investment plan as 'grey' NGA areas, excluding them from the planned NBP intervention area. In 2016, the Irish Authorities reviewed also eir's 'urban infill extension plan' investment plan previously submitted in 2014. Such review led the Irish authorities to further adjust the map in order to add to the intervention area approximately 84,500 premises which would otherwise not be covered by NGA infrastructure as eir's original plan did not materialize. The Irish authorities at that time defined a resulting intervention area including approx. 542,000 premises, evidenced on the updated High Speed Broadband Map published by the Irish authorities in April 2017. On 15 July 2015, in parallel to the above process, the Irish authorities launched a *public consultation on the national strategy*,³⁸ in which 41 responses were provided relating to the overall strategy, to the technical and financial aspects of the plan. The Irish authorities have set out the summary of these responses as well as the actions undertaken to address them in annexes to the broadband strategy published on the central website³⁹. Subsequently, the Irish authorities updated and (re-)published the intervention strategy and supporting reports on 22 December 2015.⁴⁰
- (44) Between October and December 2015, *another public consultation* was carried out⁴¹. The purpose of this public consultation was to seek the views of industry,

³⁸ <https://www.dccae.gov.ie/en-ie/communications/consultations/Pages/NBP-Strategy-Intervention-Public-Consultation.aspx>

³⁹ <https://www.dccae.gov.ie/documents/Analysys%20Mason%20technical%20updated%20report%2022Dec%202015-%20redacted%20version.pdf>,
[https://www.dccae.gov.ie/documents/NBI%20Final%20Funding%20post%20consultation%2021122015%20\(redacted\).pdf](https://www.dccae.gov.ie/documents/NBI%20Final%20Funding%20post%20consultation%2021122015%20(redacted).pdf),
[https://www.dccae.gov.ie/documents/NBI%20Final%20Updated%20Ownership%20Report%20\(Redacted\)%2021122015.pdf](https://www.dccae.gov.ie/documents/NBI%20Final%20Updated%20Ownership%20Report%20(Redacted)%2021122015.pdf),
[https://www.dccae.gov.ie/documents/NBP%20Governance%20Revised%20Final%2021-12-15%20\(redacted\)%20\(3\).pdf](https://www.dccae.gov.ie/documents/NBP%20Governance%20Revised%20Final%2021-12-15%20(redacted)%20(3).pdf)

⁴⁰ <https://www.dccae.gov.ie/en-ie/communications/topics/Broadband/national-broadband-plan/state-intervention/Pages/Strategy%20Dec%202015.aspx>

⁴¹ <https://www.dccae.gov.ie/documents/Managing%20IA%20Map%20-%20Consultation%20Paper%20FINAL%2021-12-15.pdf>

stakeholders and members of the public on the proposed approach to managing the map. The Irish authorities inform that the majority of the 16 submissions received were broadly supportive of the proposed methodology. There was no response from fixed wireless operators and no substantive response from the larger industry operators.

- (45) A *further open public consultation* took place between 2 January 2018 and 9 February 2018.⁴² The consultation was publicly announced on the DCCAE's website and an advertisement was placed in a national newspaper, to enable any potentially interested operator to announce existing or planned infrastructure. The Irish authorities indicated they received and assessed 18 responses, but that these did not result in a change of the intervention area as they primarily dealt with general industry comments and suggestions for future improvements to update the map. Responses were also received from consumers who expressed high interest in the process and highlighted the lack of availability of high speed broadband in their areas.
- (46) In addition, the Irish authorities submit they have constantly maintained an *open door policy* outside specific consultations, organising meetings and open discussions with operators across Ireland. The Irish authorities also continued to monitor the investment plans of the main fixed line operators on a monthly basis. According to the Irish authorities, these operators informed that their investments in the foreseeable future will be focused on urban (i.e. grey or black NGA) areas. According to the Irish authorities, in early 2019, the wireline incumbent eir and fixed wireless operator Imagine publicly announced new investment plans in high-speed broadband across Ireland but did not seek an amendment to the specific intervention area. Another fixed wireless operator submitted that it had an existing NGA network in the intervention area and requested the area covered by its network to be carved out from the intervention area. The Irish authorities requested the technical/financial and commercial information necessary to assess this network, carefully examined all information received and sought expert technical advice for this purpose. On this basis, the Irish authorities concluded that the submission would not justify a change of the intervention area. In particular, the Irish authorities explain that it was not demonstrated that the fixed wireless network was able to provide reliable minimum download targeted speeds per subscriber in a given area to qualify as a NGA network (see also recital (49)).
- (47) In May 2019, the Irish Authorities announced the preferred bidder (see recital (26)) and published a significant amount of information and documents, including the intended scope of the proposed intervention area.
- (48) On this basis, the Irish authorities carried out a further *public consultation* between 26 July 2019 and 30 September 2019⁴³ to verify the proposed intervention areas before signing the contract with the preferred bidder. In particular the public consultation aimed to verify future private investment plans for the next seven years.

⁴² In addition to the publication on the central website (<https://www.dccae.gov.ie/en-ie/communications/consultations/Pages/SEAAA-Public-Consultation.aspx>), an advertisement was placed in a national newspaper, which aimed to enable potentially interested operators to announce its existing or planned NGA infrastructure.

⁴³ Interested parties had initially four weeks (until 23 August 2019) to respond to the consultation. However, following requests to extend this period, the Irish authorities fixed the deadline for 30 September 2019.

- (49) Seven wireline operators, 22 fixed wireless network operators, a group representing 28 fixed wireless operators as well as 155 consumers responded to this public consultation. The Irish authorities undertook a careful assessment of all the submissions from operators, supported by the consultancy company Analysys Mason. The Irish authorities indicate they also forwarded all the submissions to the NRA and that the NRA did not object to the assessment of the Irish authorities.
- (50) Thus, the Irish authorities indicated that three wireline operators requested specific changes to the intervention area and all fixed wireless operators requested changes to the intervention areas. Operators seeking to have the intervention area reduced referred to networks they had built in recent years. The Irish authorities explained that most operators did not provide any substantial detail and/or supporting evidence of their future investment plans. Concerning the Fixed Wireless Access operators, the Irish authorities clarify that after having carried out a thorough assessment of their submissions, in line with the criteria set out in assessment framework, the opinion of Analysys Mason and of the NRA, the Irish authorities concluded the networks concerned did not qualify as NGA broadband networks. Therefore the Irish authorities did not make adjustments to the intervention area in relation to these submissions. The Irish authorities further indicated that two wireline operators provided information credibly demonstrating the existence of NGA infrastructure in the intervention area therefore, the Irish authorities removed approximately 53 000 premises from the intervention area. The Irish Authorities also clarified that they assessed the 155 submissions from consumers who experienced difficulties accessing NGA broadband against the revised mapping and public consultations, regarding the existence of current or planned NGA networks in the area. On this basis, the Irish authorities consider that no NGA broadband network is in place or planned as concerns circa 60% of the premises concerned by these submissions estimated to represent a maximum of 1000 premises. Therefore the Irish authorities decided to add these premises to the intervention area.
- (51) **Intervention area:** Based on information provided in the public consultations and after having consulted ComReg, the Irish authorities have updated the NBP map taking into account existing infrastructure in place as well as credible plans for future private investments. The current intervention area comprises approximately 535,000 white NGA premises. The Irish authorities have published an updated map, available on the public website via the following link: <http://www.dccae.gov.ie/en-ie/communications/topics/Broadband/national-broadband-plan/high-speed-broadband-map/Pages/Interactive-Map.aspx>. The intervention area spreads across the entire territory of Ireland. Aid will be granted only to support the deployment of the planned NGA network to cover white NGA areas, where currently no NGA network is in place or expected to be deployed in the next seven years. The Irish authorities consider that the intervention area accurately depicts white NGA areas in the country and will therefore rely on it for the purposes of the NBP deployment over the next seven years.
- (52) **Step change:** The Irish authorities consider that the measure ensures a ‘step change’ within the meaning of paragraph 51 of the Broadband Guidelines. The measure only targets white NGA areas where the current or planned infrastructure can support only basic broadband speeds. The NBP will trigger significant new investment in the intervention area, and the new network will deliver significant new capabilities in terms of broadband service availability, capacity, speeds and competition compared to other existing and planned networks. The minimum

requirement for the new network, as set out in the invitation to potential bidders, was to provide to end-users reliable minimum speeds of at least 30Mbps download and at least 6Mbps upload. However, as the Irish authorities explain, during the competitive selection process, bidders have chosen to propose predominantly fibre-to-the-home (‘FTTH’) solutions to satisfy the long-term nature of the measure. As a result of the competitive selection process, the selected bidder committed to offer higher upload and download speeds and better performance than the minimum required, in line with the needs identified in the Gigabit Society Communication (see recital (4)). Thus, the subsidised network will be able to provide to end-users (households and businesses), in areas where networks able to support download speeds above 30 Mbps are not currently in place or planned, minimum speeds of 150Mbps download and 30Mbps upload, while fulfilling other technical criteria such as latency, jitter, packet loss and service availability, as also shown in the following table:⁴⁴

	Year	Downlink Speed	Uplink Speed
Minimum Bitstream	1	150Mbps	30Mbps
Minimum Bitstream	6	300Mbps	50Mbps
Minimum Bitstream	11	500Mbps	100Mbps

- (53) *Use of existing infrastructure:* As broadband infrastructure is very capital intensive, the Irish authorities encourage the re-use of suitable existing infrastructure. This helps avoid unnecessary and wasteful duplication of resources and reduce the amount of public funding. The following initiatives have been undertaken by the Irish authorities in order to incentivise the use of existing infrastructure:
- (54) *Engagement with organisations that own infrastructure in the intervention area:* In 2015, the Irish Authorities set up a register of infrastructure owners⁴⁵ in order to encourage bidders to have recourse to available existing infrastructure wherever possible and appropriate. The register has also served as a mechanism to facilitate engagement between bidders and infrastructure owners. The register was made available in advance of bidders developing their own detailed plans and remains open for interested infrastructure owners.
- (55) *Engagement with bidders:* During the procurement planning phase, the Irish authorities initiated an infrastructure information gathering exercise. A letter was sent to each operator that had previously indicated that it was considering bidding. The letter provided background information about the NBP measure and set out requirements regarding infrastructure sharing. The letter also contained a set of questions which operators were invited to respond to in order to facilitate a timely engagement between potential bidders and third-party physical infrastructure providers including those intending to participate in the bidding process.

⁴⁴ I.e. maximum latency: 100 ms; maximum jitter: 50 ms; maximum packet loss: 0.1%; minimum end-to-end service availability 99.95%.

⁴⁵ <http://www.dccae.gov.ie/en-ie/communications/topics/Broadband/national-broadband-plan/state-intervention/Pages/Infrastructure-Sharing.aspx>

- (56) *Ensuring procurement design facilitates infrastructure re-use*: The NBP aims to encourage bidders owning or controlling infrastructure in the intervention area and wishing to participate in the procurement process to supply all relevant information regarding such infrastructure to other bidders. The Irish authorities clarified that the tender documents provide for the obligation to make such information available to other bidders at a point in time which would allow the latter to include such infrastructure in their bid. As part of the procurement prequalification, bidders were required to sign a declaration that they would comply with the principles and obligations of infrastructure sharing, including the above. Additionally, bidders were required to comply with relevant laws and regulations relating to access to existing infrastructure that they own or control.
- (57) Furthermore, the Irish authorities will ensure access to information on existing and planned physical infrastructure through the implementation of Directive 2014/61/EU⁴⁶, in particular the requirement under Articles 4 and 6 to ensure access to certain minimum information. This will provide a swift and effective mechanism for communications providers to obtain information about another communications provider's network (as well as a range of other infrastructure networks) for the purposes of sharing existing infrastructure or coordinating new civil works.
- (58) **Wholesale access and products**: The Irish authorities indicate that passive and active wholesale access products must be offered by NBI in the intervention area in an open, transparent, non-discriminatory manner in respect of the principle of technological neutrality to all retail and wholesale service providers that wish to provide services in the intervention area.
- (59) The Irish authorities have foreseen safeguards to prevent any conflict of interest, undue discrimination towards access seekers and any other hidden indirect advantages, including structural and behavioural requirements as well as Equivalence of Inputs (EoI). On the basis of the EoI requirements NBI must provide all wholesale products and associated information and services to all service providers in the same timescales, at the same price, functionality, service and quality levels and on the same terms and conditions and through the same systems and processes. NBI will also have to provide reference offers for each of the wholesale products, describing the operational processes required for the service provider to manage the lifecycle of the wholesale products. This will include pre-service availability check, ordering, service provisioning, operational support, migration of services, test validation and cessation of services.
- (60) The Irish authorities indicate that the new network will provide all the access products imposed in Ireland by the NRA on the SMP operator. The Irish authorities indicate that passive and active infrastructure financed under the scheme shall be sufficient to cater for providing wholesale access to at least three operators. Wholesale access will include but not be limited to: access to ducts, poles, dark fibre, exchanges, including full and effective physical unbundling, as well as bitstream access, in line with the requirements of the Broadband Guidelines. Effective wholesale access to all active and passive infrastructure whether new or existing will be granted for the duration of the contract.⁴⁷ The

⁴⁶ OJ L 155, 23.5.2014 'Measures to reduce the cost of deploying high-speed electronic communications networks'.

⁴⁷ The Irish Authorities explained that a limitation to 25 years applies as the NBP measure will only subsidise pole infrastructure, for which 25 years represents the useful economic life across industry

same access conditions will apply on the entirety of the network including on the part of it where existing infrastructure will be used. The access obligation shall be enforced irrespective of any change in the ownership, management or operation of the subsidised infrastructure. The Irish authorities also clarify that should NBI act as retail provider (see also recital (28)), in any case NBI will be required to grant access at least 6 months before the launch of its retail services, in line with the recommendation of the Broadband Guidelines (paragraph 78.(g) and footnote 108).

- (61) Electronic communication operators will be able to use the wholesale access purchased from NBI and will be able to connect end users in the intervention area via any access technology of their choice.
- (62) NBI is required to publish on the NBI website⁴⁸ a reference wholesale offer describing all supported wholesale products, conditions and prices. The Irish authorities are responsible for conflict resolution in relation to wholesale access products, conditions and prices. Disputes regarding wholesale access products conditions and pricing will be submitted to the NRA for advice.
- (63) **Provisioning of basic broadband services:** the Irish authorities indicate that they will not permit the provision of basic broadband services and products over the subsidised network at least over the first 15 years of the contract. According to the Irish Authorities, basic broadband provision over the subsidised network could lead to undue distortions of competition in the basic broadband market and fail to achieve the objective of the NBP.
- (64) **Wholesale prices:** The NBP uses benchmarking as an important tool for ensuring that the aid granted will serve to replicate market conditions prevailing in competitive broadband markets. If a comparable regulated wholesale product exists, the wholesale access pricing will be comparable to the price of that regulated product. The complete benchmarking process has been set out and described in the tender documentation (including the contract to be signed with the beneficiary) which also includes clear governance arrangements post contract award. The Irish authorities confirm that the NRA has received copies of all relevant pricing documents and has been consulted on the pricing principles at all stages of the procurement process. The NRA will intervene in the event of pricing issues arising over the medium to long term. The NRA issued a positive opinion on 8 June 2018. All the information on wholesale products and related prices will be available on the NBI's website.
- (65) **Monitoring:** The measure will be monitored on a regular basis by the granting authority. The beneficiary will provide a report to the Irish authorities summarising performance against each of the pre-defined performance indicators. As indicated above in recital (30), NBI will be subject to an accounting separation obligation as regards the aid received to make it easier for the Irish authorities to monitor the implementation of the measure as well as any extra profit generated. Where that measurement period is also the last measurement period in a contract year, the Irish authorities will issue a report summarising the Irish authorities' assessment of performance over the relevant contract year. The Irish authorities

standards. Ducting, which would have a longer asset life than 25 years, will be rented by the selected operator from the incumbent Eir under access conditions overseen by the NRA.

⁴⁸ www.nbi.ie

will have the right, at any time, to undertake spot checks, monitoring and audits to assess compliance by the beneficiary with its obligations. Among others, the following aspects of the measure will be subject to monitoring: that services, wholesale products are provided and that they meet the wholesale product specifications and fully comply with the product benchmarking rules; that the wholesale products, services and subsidised network meet and satisfy the service requirements; that network coverage is provided in accordance with the draft contract; compliance with the wholesale and retail pricing rules; the integrity and content of any financial report; the accuracy of the payments of the aid; the permitted expenditure; the premises database and relevant maps.

- (66) **Clawback mechanism:** The Irish authorities indicate that, with the objective of complying with paragraph 78(i) of the Broadband Guidelines, the NBP contract will include the following clawback mechanisms: deployment clawback for the network build phase; periodic internal rate of return (IRR) - based clawback during the network operation phase; terminal value clawback at contract expiry; and sales of share in NBI clawback in the event of the sale of the shares in NBI by the existing shareholders. The Irish authorities clarify that should any of the clawback mechanisms indicate that the beneficiary/NBI has underperformed relative to the project financial model, these mechanisms will not result in additional top-up payments by the State to the beneficiary as clawback cannot be used to increase aid amount.
- (67) *Deployment clawback:* it concerns a possible clawback of savings during the network build phase if at network deployment completion, the comparison of actual and forecast permitted expenditure and subsidy payments indicates that the total actual NBI expenditure is below the total NBI expenditure forecast in the project financial model over that period (i.e. an under-spend). With respect to the forecast/estimated cost to pass a premise, the Irish authorities will be entitled to clawback 100% of the savings made against 80% of the overall costs and to clawback 50% of the savings made against 20% of overall costs where it was considered important for certain cost categories to provide clear commercial incentives to the NBI to maximise efficiencies. If there are any savings on the forecast/estimated cost to connect a premise the Irish authorities will be entitled to clawback 75% of the savings made, again providing the NBI with a commercial incentive to minimise costs and also to seek the most efficient method to connect high cost premises.
- (68) Also, during the deployment phase, NBI is required to notify the Irish authorities of all tenders issued over the deployment period for its main subcontractors and materials and demonstrate how NBI have achieved value for money. In addition, throughout the contract the Irish authorities can require NBI to benchmark its operational subcontract costs to ensure costs are kept to industry norms. If costs for operational subcontracts are not at industry norms, the Irish authorities can require NBI to retender to ensure value for money can be achieved for the operational subcontracts. The Irish authorities will claw back 100% of any savings achieved by NBI over the coming years from the procurement of key materials such as fibre cable and subcontractors.
- (69) *IRR-based clawback:* it concerns a possible clawback if NBI achieves equity IRR higher than the one that has been set based on the financial model submitted at bid stage (base case IRR). If the bidder exceeds the base case IRR plus between 1% and 2% depending on the review point, the Irish authorities will clawback 60% of excess IRR returns. The aforementioned review will occur at year 10, 15,

20 and year 25. The Irish authorities have clarified that the independent expert KPMG has provided an IRR benchmark report for broadly comparable investments. The level of return required by the beneficiary (submitted at bid stage) is within the benchmarks observed. The Irish authorities consider this to be in line with footnote 114 of the Broadband Guidelines.⁴⁹

- (70) *Terminal value clawback*: it concerns a possible clawback of benefits at contract expiry. Such benefits might arise where the terminal value of the wholesale network at the end of the contract term is significantly greater than the bid stage forecast as a result of higher-than-expected financial performance which is expected to continue after contract expiry. Terminal value clawback applies where the actual terminal value (i.e. value of ownership of NBI after contract expiry) is more than the forecast terminal value (i.e. that forecast at bid stage). In this case, there will be an appropriate sharing of financial benefits at contract expiry, on the basis that the operator should retain a reasonable share as it bears the normal commercial risks for wholesale services. Terminal value clawback to the Irish authorities will be 40% of any excess terminal value based on an independent valuation of the NBI business at end of contract term.
- (71) *Sales of Shares in NBI clawback*: it concerns the event of the sale of 50% or more of the shares in NBI by the existing shareholders within the first 10 years of the contract period. In this case, the Irish authorities will receive an upfront payment equal to 25%⁵⁰ of the amount by which the sales proceeds exceed the price at which the existing shareholders would achieve an IRR of 25%. The Irish authorities consider this an additional protection which acts as an acceleration of IRR clawback in the event of a sale of shares.
- (72) *Clawback - project accounts and financial records*: in order to support the above clawback mechanisms, NBI must, and must ensure that any related party subcontractors must, throughout the contract period, prepare and maintain detailed and transparent project accounts and financial records relating to the project. NBI must ensure that the project accounts incorporate transparency in relation to identification, validation and allocation of the various types of expenditure and revenues. They must also incorporate visibility and validation of data required to calculate the three types of clawback. The subcontractors' project accounts must, among other things, demonstrate and specify their profit margins related to the project, as these are also subject to clawback. The Irish authorities will also be in a position to recover some, or all, of the grant if NBI is in breach of the contract terms. The NRA may assist the Irish authorities in the implementation and enforcement of the monitoring and clawback mechanism.

⁴⁹ According to footnote 114 of the Broadband Guidelines '*Best practice examples suggest monitoring and clawback for a minimum of 7 years, and any extra profit (i.e. profit higher than in the original business plan or the industry average) to be shared between the beneficiary and the public authorities according to the aid intensity of the measure.*'

⁵⁰ The Irish authorities clarified that they believe the clawback mechanisms designed for the NBP to be compliant with spirit of footnote 114 of the Broadband Guidelines. The Irish authorities consider that while the percentage sharing does not directly relate to the state aid intensity they do allow for clawback of deployment cost savings, profits and business value over a much longer time horizon than the 7 years foreseen in the Broadband Guidelines. The time horizon set up in the NBP is 7 years for deployment clawback, over 25 years for IRR clawback and beyond 25 years (i.e. based on the future value of the business) for Terminal Value Clawback.

- (73) **Transparency:** The Irish authorities commit to comply with the transparency requirements as laid down in paragraph 78(j) of the Broadband Guidelines (as amended by Commission Communication C(2014) 198/0237). The Irish authorities ensure that all stakeholders and interested parties are fully informed and kept up to date about all aspects of the NBP through its dedicated central website.⁵¹ The Irish authorities will continue to ensure the publication of at least the following information: objectives of the measure, the full text of the approved aid scheme and its implementing provisions or a link to these, the identity of the granting authority, the identity of the individual beneficiaries, the form and amount of aid granted to each beneficiary, the date of granting, the type of undertaking, the region in which the beneficiary is located (at NUTS level II) and the principal economic sector in which the beneficiary has its activities (at NACE group level). This information will be published on the relevant Commission internet site⁵² and on a national website⁵³. The Irish authorities will ensure that this information will be published after the decision to grant the aid has been taken, will be kept for at least 10 years and will be available to the general public without restrictions.
- (74) Furthermore, under the NBP contract, NBI will be required to provide wholesale and retail access seekers with comprehensive and non-discriminatory access to information on its infrastructure (including, inter alia, ducts, street cabinets and fibre) deployed under the NBP contract. NBI will be required to regularly update this information (at least every 6 months) and make it available in non-proprietary formats.
- (75) NBI must also, consistent with best industry practice, develop and maintain throughout the contract period an accurate, complete, detailed and up-to-date written inventory of the location, specific type and, where applicable, specification and configuration of all assets in a form and manner so that it is accessible and auditable by the Irish authorities in real time.
- (76) **Reporting obligation:** The Irish authorities will provide to the Commission every two years starting from the date when the network is put into use, for the duration of the aid measure a report with the key information on the application of the State aid scheme. This information will comprise as a minimum the information made public in line with transparency obligations as described above in recital (73), the date when the network is put into use, the wholesale products offered, the access conditions and pricing, the number of access seekers and service providers using the network, the number of houses passed and the take-up rates; information regarding any disputes regarding the project, if any, and in particular concerning wholesale access, as well as how such disputes were resolved. Furthermore, the Irish authorities will submit annually to the Commission the reports provided for by Article 26 of Council Regulation (EU) 2015/1589⁵⁴. The Irish authorities will maintain for at least 10 years from the date of award of the

⁵¹ <http://www.dccae.gov.ie/en-ie/communications/topics/Broadband/national-broadband-plan/Pages/National-Broadband-Plan.aspx>

⁵² <https://webgate.ec.europa.eu/competition/transparency/public/search/home>

⁵³ www.broadband.gov.ie

⁵⁴ 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).

aid detailed records containing the information and supporting documentation necessary to establish that all compatibility conditions are met. The Irish authorities commit to provide such to the Commission on a written request within a period of 20 working days or a different period as may be set in the request.

- (77) ***Consultation with the NRA (ComReg)***: The Irish Authorities indicate they have consulted regularly with ComReg and have in place a memorandum of understanding with ComReg. ComReg meets regularly with the Irish authorities to discuss various aspects of NBP measure, including for example mapping, wholesale access and pricing obligations, governance of NBI, open access obligations (e.g. equivalence of inputs) and dispute resolution. ComReg has also played an important role in the assessment of stakeholders' submission in the context of the public consultations (see also recital (39) et seq.). The Irish authorities has confirmed that ComReg has not raised any objection to the proposed measure. Finally, a representative from ComReg sits on the Steering Group for the NBP strategy as an observer and advisor, providing guidance to the Irish authorities on the delivery of the NBP's intervention strategy.

2.3. Evaluation plan

- (78) The Broadband Guidelines (paragraph 53) clarify that certain aid schemes may require an '...evaluation in order to verify (i) whether the assumptions and conditions which led to the compatibility decision have been realised; (ii) the effectiveness of the aid measure in light of its predefined objectives; (iii) its impact on markets and competition and that no undue distortive effects arise under the duration of the aid scheme that is contrary to the interests of the Union. Given its objectives and in order not to put a disproportionate burden on Member States and on smaller aid projects, this only applies for national aid schemes and aid schemes with large aid budgets, containing novel characteristics or when significant market, technology or regulatory changes are foreseen. The evaluation must be carried out by an expert independent from the State aid granting authority on the basis of a common methodology and must be made public. The evaluation must be submitted to the Commission in due time to allow for the assessment of the possible prolongation of the aid measure and in any case upon expiry of the scheme. The precise scope and modalities of the evaluation are defined in the approval decision of the aid measure. Any subsequent aid measure with a similar objective shall take into account the results of that evaluation.'
- (79) The present scheme fulfils the criteria of being a national aid scheme with a large budget; therefore it is subject to an evaluation. In light of this provision, and taking into account the best practices recalled in the Commission Staff Working Document on Common methodology for State aid evaluation⁵⁵, the Irish authorities have submitted an evaluation plan for the State aid scheme. The Irish authorities have described the main elements of the evaluation plan as follows.
- (80) The evaluation questions address the outputs and the effectiveness of the State aid scheme in the intervention area, the incentive effect of the aid, the demand-side effects as well as a selection of indirect impacts and effects on competition. The evaluation questions address the proportionality and appropriateness of the aid, the use of existing network infrastructures and the appropriateness of the State aid scheme.

⁵⁵ Commission Staff Working Document on Common methodology for State aid evaluation, Brussels, 28.5.2014, SWD(2014) 179 final.

- (81) The evaluation questions addressing the impact of the aid on the beneficiaries of the scheme will be answered by means of a difference-in-difference analysis between the treatment group and the identified control group.
- (82) The indirect effects on various types of end-users of NGA services in the intervention area will be assessed using surveys. The evaluation will use a difference-in-difference analysis between the treatment group and a control group of end-users in the intervention area who do not (yet) have access to NGA (i.e. rollout to their premises not planned until late in the period of deployment of the subsidised network). Indirect effects will also be measured by comparing the intervention area to comparable parts of the rest of the country (e.g. grey areas).
- (83) As no area will exist that will not obtain access to high speed broadband, the questions addressing coverage and take-up will compare the results obtained with the targets set forth in the bid, by the Irish authorities, and in similar areas in the commercial area.
- (84) To assess the quality of the service, the evaluation will compare the quality of service indicators for the services provided by the aid recipient to equivalent products/services available in the commercial areas.
- (85) Concerning the effect on competition and considering that no area will exist that will not obtain access to high speed broadband, the evaluation will compare retail prices and retail level competition in the intervention area with commercial areas.
- (86) To assess the incentive effect of the scheme, the evaluation will compare the financial models of NBI to available comparative costs models from other commercial operators in the market where available. It is likely for example that the NRA will have such information going forward from other players such as the regulated incumbent eir which can be used for comparison. Such comparisons will allow for an assessment of the viability of investments in NGA networks. .
- (87) The evaluation may also require additional and targeted data collection, including new surveys, *ad hoc* studies aimed at obtaining further information related to, for example, previous investment plans, state of progress of the projects, models used to assess the investments' profitability, as well as services delivered to final customers.
- (88) The evaluation will be conducted by independent experts with the necessary specific skills and evaluation expertise and independent from the granting authority.
- (89) Ireland has committed that the evaluation will be conducted in accordance to the agreed evaluation plan in order to identify the causal impact of the scheme, undistorted by other variables that may have had an effect on the observed outcome.
- (90) The Commission will receive yearly short updates concerning the developments of the scheme, progress with data collection and updates on the evaluation design. The Commission will be informed with the shortest delay if some of the hypotheses made (e.g. on the availability of data) were not confirmed in practice thereby hindering the foreseen evaluation.
- (91) The Irish authorities will submit an interim evaluation report to the Commission at the latest by year 3.5 from the adoption of the present decision. The interim evaluation report will be focused on the progress of the coverage/rollout. The Irish authorities will submit a further interim evaluation report when the rollout is complete, approximately in year 8, which will also analyse the indirect impacts of

the scheme. The Irish authorities will submit a final evaluation report to the Commission by 2030 at the latest.

- (92) The Commission will receive yearly short updates concerning the developments of the scheme, progress with data collection and updates on the evaluation design. The Irish authorities will provide the Commission with a detailed update on verified data availability in its second annual update.
- (93) The Commission will be informed with the shortest delay if some of the hypotheses made (e.g. on the availability of data) were not confirmed in practice thereby hindering the foreseen evaluation.
- (94) The Irish authorities confirmed that all the data used for the evaluation will be made available to the Commission in anonymised form for the purpose of verification and replicability.
- (95) The Irish authorities confirmed that the evaluation plan, interim evaluation report(s) and the final evaluation report will be published on the relevant website.
- (96) While not considering any successor scheme at this stage, the Irish authorities committed to take into account the evaluation results for the development of any future interventions of similar scope, with the aim of increasing the future measures' effectiveness and reducing any negative effects on competition.

3. ASSESSMENT OF THE MEASURE

3.1. Presence of aid

- (97) According to Article 107 (1) TFEU, '*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*'. It follows that in order for a measure to be qualified as State aid, it has to be granted by a Member State or through State resources, confer a selective economic advantage to undertakings, and it has to be capable to distort competition and affect trade between Member States.
- (98) **State resources:** As described in recital (31), the NBP is financed by the Irish Authorities using funds which are allocated to the beneficiary (NBI) under the control of the authorities as direct grants. Hence, State resources are involved and the measure is imputable to the State.
- (99) **Selective economic advantage:** In geographic areas where no equivalent commercial investment exist or is envisaged in the near future, the intervention of the public authorities cannot be perceived as being carried out on market terms. NBI will build and operate the NGA network in the public interest with a view to increasing NGA broadband access to the benefit of Irish citizens and businesses.
- (100) The measure at stake is selective:
 - The measure supporting the deployment of a NGA network is selective in nature in that it targets undertakings that are active only in one industry sector (telecommunications) and only in certain segments of the overall electronic communications market (deployment and operation of a next generation broadband network), to the exclusion of other electronic

communications services and other economic activities.⁵⁶ It does not concern general infrastructure (e.g. general civil engineering works regarding for example roads) which would be open on a non-discriminatory basis to all potential users, but it is limited to electronic communication operators.⁵⁷ The measure is therefore sector-specific. The measure is moreover territorially selective. The scheme is set up with the aim of improving next generation broadband coverage in certain underserved (white) areas in Ireland. The public authorities exercise discretionary power to determine the beneficiary and the conditions of the measure, allowing them notably to modulate the aid amount and/or the conditions for granting the aid in question.⁵⁸

- As concerns the identification of the particular legal framework against which selectivity can be assessed, it is noted that the construction and operation of broadband networks and the provision of broadband services is a liberalized economic activity conducted essentially by commercial operators on the basis of private investments in the market. The regulatory framework applicable to electronic communications services and networks seeks to promote competition, the internal market, end-user interests, and widespread access to and take-up of broadband networks for all citizens of the Union and Union businesses. The framework promotes sustainable investment in the development of broadband networks through efficient use of radio spectrum and predictable regulatory approaches, while safeguarding competition through targeted ex ante regulatory obligations imposed only where there is no effective and sustainable competition on the markets concerned. It also aims at reducing the cost of the deployment of high-speed networks, through the re-use of appropriate physical infrastructure, including of utilities, and coordination of civil works.
- Within this reference framework, the granting of aid – as under the notified scheme – to a selected individual operator for the deployment of high-speed networks, reduces the costs of this direct beneficiary as compared to operators investing into broadband networks and services merely on the basis of private funds. The broadband network operators which rely purely on

⁵⁶ See also Judgment of the Court of 15 June 2006 Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 31.

⁵⁷ See also N 383/09 – Germany – Amendment of N 150/08 *Broadband in the rural areas of Saxony*. See also Commission Decision 2003/227/EC of 2 August 2002 on various measures and the State aid invested by Spain in "Terra Mítica SA", a theme park near Benidorm (Alicante) (OB L 91, 8.4.2003r., ctp. 23–37).

⁵⁸ See also Judgment of the Court of 26 September 1996, *French Republic v Commission of the European Communities*, Case C-241/94, European Court Reports 1996 I-04551, ECLI identifier: ECLI:EU:C:1996:353; Judgment of the Court of 29 June 1999, *Déménagements-Manutention Transport SA (DMT)*, Case C-256/97, European Court reports 1999 Page I-03913, ECLI identifier: ECLI:EU:C:1999:332; Judgment of the Court of First Instance of 6 March 2002, *Territorio Histórico de Álava - Diputación Foral de Álava (T-127/99)*, *Comunidad Autónoma del País Vasco and Gasteizko Industria Lurra, SA (T-129/99)* and *Daewoo Electronics Manufacturing España, SA (T-148/99) v Commission of the European Communities*, Joined cases T-127/99, T-129/99 and T-148/99, European Court Reports 2002 II-01275, ECLI identifier: ECLI:EU:T:2002:59; Judgment of the Court of First Instance of 21 October 2004, *Lenzing AG v Commission of the European Communities*, Case T-36/99, Reports of Cases 2004 II-03597 (and Appeal - Case C-525/04 P: Judgment of the Court of 22 November 2007, *Kingdom of Spain v Commission of the European Communities*, OJ C 8, 12.1.2008, p. 2–2).

private funds and do not receive this aid are in a comparable factual and legal situation as the beneficiary since they operate in Ireland under the same technical, commercial and legal conditions in the field of broadband networks and services. Therefore, the granting of State support for the deployment and operation of high-speed broadband networks is not justified by the nature or economy of the liberalised market and the regulatory framework. In any event, the features of this legal framework cannot provide any justification for the granting of this type of subsidies.⁵⁹ It is the very purpose of the present measure to give - in line with national and European targets - an advantage to the selected beneficiary for the deployment and operation of an NGA network in underserved white NGA areas in Ireland.

- A selective economic advantage will be therefore conferred directly to the beneficiary selected in the selection procedures to build, maintain and operate the network. NBI will receive financial support, which will enable it to provide broadband services on conditions not otherwise available on the market.

(101) *Distortion of competition and effect on trade*: The markets for electronic communications services (including the wholesale markets and the retail broadband markets) are open to competition between operators and service providers, which generally engage in activities that are subject to competition and trade between Member States. By favouring the beneficiary, the notified State aid scheme is therefore liable to distort competition. The measure will create the availability of NGA infrastructure, which would not be provided under normal market conditions. At network operator level, State support may deter other operators from setting up or developing their own networks under commercial conditions. The State support may also encourage local undertakings to take advantage of services offered in the subsidised network rather than more expensive market solutions. Therefore, the intervention of the State in the present measure will alter existing market conditions. Insofar as the intervention is (at least potentially) liable to affect providers of electronic communications services from other Member States, the measure has an effect on trade. Therefore, the fact that an improved broadband service and additional wholesale capacity becomes available can distort competition and affect trade between Member States.

(102) In view of the foregoing, the Commission therefore concludes that the notified measure constitutes State aid within the meaning of Article 107(1) TFEU, as moreover confirmed by the Irish authorities in the notification. It has then to be assessed whether the measure can be found to be compatible with the internal market.

3.2. Legality of the measure

(103) As explained in recital (15), the Irish authorities have confirmed that the granting of the aid is conditional upon the decision of the Commission on the notified measure, pursuant to the standstill obligation of Article 108(3) TFEU and to Article 3 of 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, according to which new aid measures must not be put into effect before the Commission has taken a decision authorising it.

⁵⁹ See paragraph (13) of the Broadband Guidelines.

3.3. Compatibility assessment

- (104) The Commission has assessed the compatibility of the scheme according to Article 107(3)(c) of the TFEU, 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’* shall be considered to be compatible with the internal market. In its assessment, the Commission has taken into account the Broadband Guidelines, which contain a detailed interpretation of Article 107(3)(c) of the TFEU as it applies to that area of State aid law.
- (105) When assessing whether an aid measure can be deemed compatible with the internal market, the Commission conducts a two steps assessment.
- (106) First, as explained in paragraph 33 and following of the Broadband Guidelines, for aid to be found compatible with the internal market pursuant to Article 107(3)(c) TFEU, every aid measure has to comply with the below cumulative conditions:
- i. The aid must contribute to the achievement of objectives of common interest
 - ii. Absence of market delivery due to market failures or important inequalities
 - iii. The aid must be appropriate as a policy instrument
 - iv. The aid must have an incentive effect
 - v. The aid is limited to the minimum necessary (proportionality)⁶⁰
 - vi. Negative effects must be limited
 - vii. The aid measure must be transparent
- (107) Second, if all the above-mentioned conditions are fulfilled, 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.

The aid contributes to the achievement of objectives of common interest

- (108) In its EU2020 strategy, the Commission defined the DAE Flagship Initiative, 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, with broadband access for all by 2013, access for all to much higher internet speeds (30 Mbps or above) by 2020, and 50% or more of European households subscribing to internet connections above 100 Mbps’*. In pursuing this aim, *‘at EU level, the Commission will work /.../to facilitate the use of the EU's structural funds in pursuit of this agenda’*, and *‘at national level, Member States will need /.../ to draw up operational high speed internet strategies, and target public funding, including structural funds, on areas not fully served by private investments.’* Key Action 8 of the DAE calls Member

⁶⁰ The Commission examines in the context of the proportionality of the measure whether such measure fulfils the conditions listed in paragraphs 78 et seq. of the Broadband Guidelines.

States 'to use public financing in line with EU competition and State aid rules' in order to meet the coverage, speed and take-up targets.

- (109) In 2016 the strategic objectives of the DAE were complemented by the Gigabit Society Communication which, while restating the importance of Internet connectivity for the Digital Single Market sets out a vision for a European Gigabit society, where availability and take-up of very high capacity networks enable the widespread use of products, services and applications in the Digital Single Market. In its Gigabit Society Communication on common EU broadband targets for 2025, the Commission notably proposes that by 2025 all European households, rural or urban, should have access to networks offering a download speed of at least 100 Mbps, which can be upgraded to 1 Gigabit. The EU2020 strategy for more growth, the DAE and the Gigabit Society EU broadband targets for 2025 all address future broadband needs.⁶¹
- (110) A well targeted State intervention in the broadband field can contribute to bridge the 'digital divide' that sets apart areas or regions within a country. The present scheme aims to promote the deployment and operation of an NGA network in the intervention areas, where currently there is no coverage of NGA infrastructure and where private operators do not plan to invest in such infrastructure within the same time horizon as foreseen for the deployment of the new subsidized infrastructure (seven years). As explained in recital (52), in practice, based on the results of the competitive selection process, the new network will be predominantly an FTTH network able to provide minimum speeds of at least 150 Mbps download and at least 30Mbps upload and will fulfil other technical criteria such as latency, jitter, packet loss and service availability. This will therefore help Ireland achieve the EU2020 and DAE objectives of ensuring that consumers have access to internet speeds of above 30 Mbps by 2020 but also help address the objectives of the Gigabit Society Communication of reaching 100% coverage of all households with download speeds of at least 100 Mbps, upgradeable to 1 Gigabit speed. By providing ultrafast broadband coverage in these areas, the Irish Authorities intend to address the gap between rural and urban areas allowing all citizens and households in Ireland to have access to NGA services. The State aid scheme will therefore pursue genuine cohesion and economic development objectives, will make a significant contribution to the achievement of the objectives of the EU2020 and DAE, as complemented by the Gigabit Society Communication, and is therefore in line with the common interest.

Absence of market delivery due to market failures or important inequalities

- (111) According to paragraph 37 of the Broadband Guidelines, 'a market failure exists if markets, left to their own devices, fail to deliver an efficient outcome for society. This may arise, for instance, when certain investments are not being undertaken even though the economic benefit for society exceeds the costs. In such cases, the granting of State aid may produce positive effects and overall efficiency can be improved by adjusting the economic incentives for firms. In the broadband sector, one form of market failure is related to positive externalities. Such externalities arise where market players do not internalise the whole benefit of their actions. For example, the availability of broadband networks paves the way for the provision of more services and for innovation, both of these are likely to benefit more people than the immediate investors and subscribers to the

⁶¹ <https://ec.europa.eu/digital-single-market/en/broadband-europe>.

network. The market outcome would therefore generate insufficient private investment in broadband networks.’

- (112) The notified State aid scheme addresses a market failure as it targets only NGA white areas in the sense of paragraph 75 of the Broadband Guidelines (see recitals (10) et seq.), where there is no NGA network able of sustaining reliable download speeds above 30 Mbps and where also no such broadband network is planned within the same time horizon as foreseen for the deployment of the subsidised infrastructure. This has been confirmed by the results of mapping and public consultation exercises as described above in recitals (36) et seq. As shown in recital (6), the Irish authorities have demonstrated that despite progress in the past regarding broadband deployment, a digital divide between urban and rural areas remains. Those elements indicate that in the intervention area the market generates, in light of the targets of the DEA insufficient private investment in broadband networks and thus demonstrate the absence of market delivery due to market failures and/or important inequalities in the intervention areas, which justifies public intervention.

The aid is appropriate as policy instrument

- (113) When broadband coverage is considered insufficient, public intervention may be necessary. However, it should be assessed whether State aid is an appropriate policy instrument to address the problem or whether there are alternative, better-placed instruments. In the situation currently under assessment, efforts based on alternative instruments, including *ex ante* regulation, have not solved the problems related to the lack of supply of high speed networks (non-existence of adequate infrastructure) in the intervention areas and have so far not be sufficient to deliver the wider economic benefits of a widespread NGA network. The Irish authorities see no alternative but to grant State aid to the deployment of a NGA broadband network in the intervention areas.
- (114) The implementation of the State aid scheme will guarantee network roll-out according to Ireland’s broadband strategy. The State aid scheme will make it possible to achieve the objective of ensuring NGA network coverage efficiently and within the planned time scale.
- (115) Consequently, the Commission can agree that without further public intervention, reducing the ‘*digital divide*’ between urban and more rural areas does not appear to be possible, which could lead to the economic and social exclusion of the local citizens and undertakings. Hence in the current situation, State aid is an appropriate instrument to achieve the set objectives.

Existence of an incentive effect

- (116) As set out in paragraph 45 of the Broadband Guidelines, regarding the incentive effect of the NBP State aid scheme, it needs to be examined whether the broadband network investment concerned would not be undertaken within the same timeframe without any State aid.
- (117) The scheme ensures that aid can only be provided if it is established that in the intervention areas no comparable investment would take place without public funding within the time horizon for the deployment of the new subsidized infrastructure (see recitals (10) and. This is confirmed according to the results of the mapping exercise and public consultations carried out by the Irish authorities. The mapping and the public consultation described in recitals (36) et seq. have assessed that in the intervention areas no comparable investment would take place

without public funding within the time horizon for the deployment of the new subsidized infrastructure. It follows from this that the investment would not be made within the same timeframe without the aid, which thus produces a change in the investment decisions.

- (118) Therefore, the Commission is satisfied that the state aid scheme will provide direct and appropriate investment incentive.

Proportionality - Aid limited to the minimum necessary

- (119) The Irish authorities have designed the NBP in such a way as to minimise the State aid involved and potential distortions of competition arising from the public intervention. In this respect, the Commission notes the following elements in the design of the State aid measure, which are necessary to the design of a measure that is in line with the Broadband Guidelines (paragraph 78 of the Broadband Guidelines):

(a) *Detailed mapping and coverage analysis, public consultation with stakeholders:* as described in recitals (36) to (50), the Irish authorities have demonstrated that they have conducted a thorough analysis of the existing broadband infrastructures as well as investment plans for the next seven years in order to identify the areas where public intervention is necessary. The Irish authorities have engaged continuously since 2013 in an extensive process of mapping broadband availability in Ireland. The results of the mapping process were verified in numerous public consultations involving all stakeholders and published on a central online portal, ensuring a high degree of transparency. The last public consultation was carried out between 27 July 2019 and 30 September 2019. The Irish authorities have confirmed that when implementing the measure, only NGA white areas will be targeted. Consequently, public funds will be used only where it is necessary because there is no existing NGA infrastructure in place and where there is no private interest in deployment of the NGA infrastructure of equivalent or comparable features. This will help ensure no overlapping infrastructures are created and will serve to avoid risks of crowding out private investments and distorting competition vis-à-vis existing operators. The Commission therefore considers that the State aid scheme fulfils the conditions regarding mapping and public consultation.

(b) *Competitive selection process:* as described in recitals (20) to (23), in order to minimise the amount of aid involved, a preferred bidder has been appointed further to an open, transparent and non-discriminatory competitive selection procedure, with objective evaluation criteria, respecting the compatibility conditions of the Broadband Guidelines.⁶² The NBP selection process has been conducted as a competitive dialogue procedure in line with the spirit and principles of Directive 2004/18/EU. In May 2019, the Irish Authorities announced the preferred bidder (see recital (26)) and published a significant amount of information and documents, which ensured further transparency. The Irish Authorities have confirmed that with regard to the competitive selection process and the resulting contract no conditions and/or modifications have been introduced which, had they been known in advance by any potentially interested bidders, may have (i) reasonably changed decisions to withdraw or (ii) triggered interest from other potential bidders to

⁶² See paragraph 78(c) of the Broadband Guidelines.

take part to the competitive dialogue. The Commission therefore considers that the State aid scheme fulfils the condition regarding a competitive selection process.

- (c) *Most economically advantageous offer*: as described in recital (24), the preferred bidder status was awarded on the base of the most economically advantageous offer, based on pre-established and weighted technical and qualitative criteria, weighted against the required aid amount, in line with paragraph 78(d) of the Broadband Guidelines.⁶³ As explained in recital (20), the Irish authorities considered a competitive dialogue the most suitable competitive selection procedure for the NBP given the complexities associated with the proposed intervention. While three bidders pre-qualified to commence dialogue with the Irish authorities, only the current preferred bidder remained after the withdrawals of the SIRO and the incumbent eir. To assure a proper assessment of the only remaining bid, the Irish authorities engaged an independent expert (KPMG) to carry out an assessment of the remaining bidder's final tender. This detailed assessment can be found in the Single Bidder Solution Assessment report in December 2018.⁶⁴ The Commission therefore considers that the State aid scheme fulfils the condition regarding the selection of the most economically advantageous offer.
- (d) *Technology neutrality*: The selection process complied with the technological neutrality principle as stated in paragraph 78(e) of the Broadband Guidelines. The preferred bidder was selected on the basis of objective awarding criteria having submitted the most suitable solution to achieve the objectives of the measure (see recital (25)). The NBP documentation specified the outcomes that must be achieved for end users, but did not favour or exclude the use of any particular technology or network platform. The tender documents were technology neutral, leaving it to commercial operators to propose the technological solutions they find most effective and efficient to achieve the desired objectives. The preference expressed by bidders in the competitive selection process in favour of predominantly FTTH solutions was without any intervention from the Member State in this regard, and does not change the non-discriminatory, technologically neutral nature of the NBP. Furthermore, wholesale access products will be offered on open and non-discriminatory terms in line with the principle of technological neutrality, and thus various alternative platforms will be able to use the new network to offer their own services to end users. The Commission therefore considers that the State aid scheme fulfils the condition regarding the principle of technology neutrality.
- (e) *Step change*: A step change can be demonstrated if, as the result of the public intervention: (1) significant new investments in the broadband network are undertaken by the beneficiaries (i.e. investments that must include civil works and installation of new passive elements) and (2) the subsidised infrastructure brings significant new capabilities to the market in terms of broadband service availability, capacity, speeds and/or competition. The scheme does not foresee the grant of aid for marginal investments related merely to the upgrade of active components of the network, which, as indicated in paragraph 51 and footnote 64 of the Broadband Guidelines, do not normally

⁶³ See paragraph 78(d) of the Broadband Guidelines.

⁶⁴ <https://www.gov.ie/en/publication/dcb962-documents-relating-to-nbp/>

ensure a ‘step change’ and are therefore not eligible for State aid. As described in recital (52), the Irish authorities will make State aid available to support a ‘step change’ compared to existing as well as concretely planned network roll-outs. Thus, not only interventions will only be made in NGA white areas, i.e. areas where there are no current or planned infrastructures able to support download speeds above 30 Mbps, but also in practice the new network will be predominantly an FTTH network able to provide minimum speeds of at least 150 Mbps download and at least 30Mbps upload and will fulfil other technical criteria such as latency, jitter, packet loss and service availability. Therefore, in meeting these speed requirements, all projects will meet the step change requirements as set out in the Broadband Guidelines.

- (f) *Use of existing infrastructure:* as explained in recitals (53) to (57), the Irish authorities have encouraged bidders to have recourse to existing infrastructure by setting-up a registry of infrastructure owners. The register was made available in advance, in order to enable bidders to develop their own detailed plans on this basis, to avoid unnecessary and wasteful duplication of resources, thereby minimising the public funding. Furthermore, the Irish authorities will ensure access to information on existing and planned physical infrastructure through the implementation of Directive 2014/61/EU, in particular the requirement under Articles 4 and 6 to ensure access to certain minimum information. This will provide a swift and effective mechanism for communications providers to obtain information about another communications provider’s network (as well as a range of other infrastructure networks) for the purposes of sharing existing infrastructure or coordinating new civil works. On this basis, the Commission considers that the scheme meets the requirements and recommendations set out in the Broadband Guidelines.
- (g) *Wholesale access:* the selected operator must ensure full and effective unbundling and provide full open access to the subsidised network (including but not limited to access to ducts, dark fibre, exchanges, and bitstream and full and effective unbundled access) on equal and non-discriminatory terms (see recital (58)). The limitation concerning basic broadband services described in recital (63)) is aimed at reducing the risk of distortion of competition in the basic broadband market, while supporting competition in the NGA market. This is in line with paragraph 78(g) of the Broadband Guidelines, which clarifies that wholesale access enables third party operators to compete, thereby strengthening choice and competition in the areas concerned by the measure. Electronic communication operators will be able to use such wholesale access in order to connect end users via any access technology of their choice. Effective wholesale access to the subsidised network will be granted for 25 years, which corresponds to the lifetime of the new passive infrastructure that will be built under this measure (i.e. poles – see also recital (60)). The same access conditions will apply on the entirety of the network including on the part of it where existing infrastructure will be used. Access obligations will apply irrespective of any change in ownership, management or operation of the subsidised infrastructure. The Commission therefore considers that the wholesale access conditions are in line with paragraphs 78(g) and 80 of the Broadband Guidelines.
- (h) *Wholesale access pricing:* As described above in recital (64) and in line with the provisions of the Broadband Guidelines, the wholesale access prices will be based on the regulated prices where comparable regulated wholesale

products exist: the NBP contract ensures that wholesale access pricing is limited to the price of such regulated products. In the absence of such regulated wholesale prices, wholesale prices to the subsidised infrastructure will be benchmarked against the average wholesale prices which prevail in other, more competitive, parts of the country for the same or comparable access services. The price benchmarking mechanism has been incorporated in the tender documentation (see recital (64)). The Irish authorities will be responsible for conflict resolution in relation to wholesale access products, conditions and prices. The Commission considers therefore that the wholesale pricing conditions are in line with paragraph 78(h) the Broadband Guidelines.

- (i) *Monitoring:* As described in recital (65), the Irish authorities have committed to closely monitor the implementation of the NBP during the entire duration of the contract in accordance with paragraph 78(i) of the Broadband Guidelines. The Irish authorities have put in place a monitoring and audit mechanism in order to assess and verify compliance by the beneficiary with their obligations under the NBP contract. The implementation of the scheme will be examined on a regular basis during the 25 years duration. The monitoring mechanism 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. The output of the monitoring mechanism will also be used for clawback purposes.
- (j) *Clawback mechanism:* As described in recitals (66) et seq., the NBP contract will include detailed clawback mechanisms. Four mechanisms will be used to properly take into account the construction phase (deployment clawback), the operational phase (IRR-based clawback), the expiration of the NBP contract (termination value clawback) and the event of the sale of the shares in NBI (sales of shares clawback) The Irish authorities will ensure that the recipients of the aid will not benefit from overcompensation and will minimise *ex-post* and retroactively the amount of aid initially deemed to have been necessary in line with the conditions set out in paragraph 78(i) of the Broadband Guidelines. Any re-investment of clawed-back amounts to fund new projects under the scheme has to comply with the terms of this decision(.
- (k) *Reporting:* as described in recital (76), the Irish authorities will provide to the Commission information on the application of the State aid scheme every two years, starting from the date when the network is put into use and for the duration of the aid measure, all relevant information on the scheme to the European Commission, as provided for in paragraph 78(k) of the Broadband Guidelines. The Irish authorities also committed to submit to the Commission annual reports, as required under Article 26 of Council Regulation (EU) 2015/1589 and maintain for at least 10 years from the date of award of the aid detailed records containing the information and supporting documentation necessary to establish that all compatibility conditions are met, and provide them, on a written request, to the Commission within a period of 20 working days or a different period as may be fixed in the request.
- (l) *Transparency:* As explained in recital (73), the aid will be awarded in a transparent manner, through an open competitive selection process, and it will be ensured that the public authorities, economic operators, the interested public and the Commission have easy access to all relevant acts and pertinent information about the aid. In line with paragraph 78(j) of the Broadband

Guidelines, all relevant information regarding the scheme and aid granted will be published on a central online website.

The aid has limited negative effects

- (120) Given the design of the measure and its compliance with the conditions of the Broadband Guidelines (see recitals (106) to (119) above), the scheme is unlikely to lead to a crowding out effect on private investments.
- (121) In particular, the aid is confined to white NGA areas, where no operator is willing to invest in NGA infrastructure without State aid within the time horizon for the deployment of the new subsidized infrastructure. As described above, the Irish authorities confirmed that in line with the paragraph 51 of the Broadband Guidelines the planned network will ensure a ‘step change’, in that the selected operator will make significant new investments and the subsidised infrastructure will bring significant new capabilities to the market in terms of broadband service availability and capacity, speeds and competition (see recital (52)). More specifically, the present measure supports the deployment of infrastructure supporting at least 150 Mbps download and at least 30 Mbps upload, while fulfilling other technical criteria such as latency, jitter, packet loss and service availability⁶⁵ for which significant investments are needed. Therefore, the subsidised infrastructure will bring significant new capabilities to the market in terms of broadband service availability and capacity, speeds and the level of competition. The scheme will support connectivity in the target white areas via wholesale access. The design of the measure guarantees an equal and non-discriminatory open access to the network’s resources of telecommunications operators that may thus develop their own businesses for instance by offering retail services (see recital (58)). In addition, there are mechanisms in place to ensure that wholesale access prices replicate market conditions like those prevailing in other competitive broadband markets (see recital (64)). Furthermore, the beneficiary has been selected through an open selection procedure, as described in recitals (20) to (23) above. These conditions also ensure that the public intervention does not crowd out comparable private investments.
- (122) Therefore the Commission concludes that the conditions for a step change are fulfilled and that negative effects of the measure, if any, are expected to be limited.

Transparency

- (123) As explained in recitals (73) to (75), the scheme ensures that stakeholders should have easy access to all relevant acts and pertinent information about the aid awarded thereunder. The Irish authorities have committed to comply with the transparency requirements laid down in paragraph 78(j) of the Broadband Guidelines (as amended by Communication C(2014) 3349/2).
- (124) The Irish authorities ensure that all stakeholders and interested parties are fully informed and kept up to date about all aspects of the NBP through its dedicated

⁶⁵ I.e. maximum latency: 100 ms; maximum jitter: 50 ms; maximum packet loss: 0.1%; minimum end-to-end service availability 99.95%.

central website.⁶⁶ In particular, the Irish authorities shall ensure the publication of the following information on the dedicated website:

- i. the objectives of the measure, the full text of the approved aid scheme and its implementing provisions, or a link to it,
- ii. the identity of the granting authority/(ies), the identity of the individual beneficiaries, the form and amount of aid granted to each beneficiary, the date of granting, the type of undertaking (SME / large company), the region in which the beneficiary is located (at NUTS level II) and the principal economic sector in which the beneficiary has its activities (at NACE group level).

(125) The information will be published within 6 months from the granting act and the information will be kept for at least 10 years and will be available to the general public without restrictions. As a result, the Commission is satisfied that the aid will be awarded in a transparent manner.

(126) Furthermore, under the NBP contract, NBI is required to provide wholesale and retail access seekers with updated, comprehensive and non-discriminatory access to information on its infrastructure deployed under the NBP contract. NBI is also required to publish on the NBI website⁶⁷ a reference wholesale offer describing all supported wholesale products, conditions and prices.

Compatibility assessment of the evaluation plan

(127) As explained in recital (78), the Commission can require that aid schemes with large budgets be subject to an evaluation. As this is the case for the present State aid scheme, the Irish authorities notified an Evaluation Plan.

(128) The Commission considers that, as described in paragraph 2.3 of this decision, the notified Evaluation Plan contains the minimum elements necessary: the objectives of the aid scheme to be evaluated, the evaluation questions, the result indicators, the envisaged methodology to conduct the evaluation, the data collection requirements, the proposed timing of the evaluation including the date of submission of the final evaluation report, the description of the independent body conducting the evaluation or the criteria that will be used for its selection and the modalities for ensuring the publicity of the evaluation.

(129) The Commission notes that the scope of the evaluation is defined in an appropriate way. It comprises a list of evaluation questions with matched indicators for each and methodologies to address the questions. Data sources are individually defined for each question.

(130) The Commission also acknowledges the commitments made by the Irish authorities to conduct the evaluation according to the Evaluation Plan described in the present decision by an independent evaluation body. The procedures envisaged for selecting such evaluation body are appropriate in terms of independence and skills. Moreover, the proposed modalities for the publication of the evaluation results are adequate to ensure transparency.

⁶⁶ <http://www.dccae.gov.ie/en-ie/communications/topics/Broadband/national-broadband-plan/Pages/National-Broadband-Plan.aspx>

⁶⁷ www.nbi.ie

- (131) The Commission notes the commitment made by the Irish authorities to submit yearly short updates on the data collection, 2 interim reports (year 3.5 and year 8) and the final evaluation report at the latest in December 2030 but at least 6 months before the notification of the potential follow up scheme, which shall take into account the results of that evaluation.
- (132) The Commission notes that Ireland must suspend the scheme and any payments under it if the final evaluation report were not submitted in good time and sufficient quality.

Overall balancing: the positive effects of the aid measure are expected to outweigh its potential negative effects

- (133) The Commission concludes that the notified scheme will offset a geographical social, economic and commercial handicap and is objectively justified to address the lack of availability of high-speed broadband services in the intervention areas.
- (134) As mentioned above, the objective of the measure is to bridge the ‘digital divide’ and provide access to NGA services where they are currently unavailable by making possible a significant new investment in areas where private operators are not planning any investments within the time horizon for the deployment of the new subsidized infrastructure. The measure addresses the market failure in the targeted areas and constitutes a significant step towards the achievement of the EU's goals as expressed in the EU 2020, DAE and the Gigabit Society Communication. Consequently, the measure is objectively justified and is in line with the common interest.
- (135) The Commission notes that the Irish authorities have paid particular attention to ensure the presence of an adequate step change by including among the award criteria of the selection process provisions concerning ‘future-proof’ offers. In response, bidders have indicated predominantly FTTH solutions to satisfy the long-term nature of the NBP Contract. The network will offer speeds of at least 150 Mbps download and at least 30 Mbps upload, while fulfilling other technical criteria such as latency, jitter, packet loss and service availability.⁶⁸ The new subsidised network will be designed and built to support the growing Internet connectivity needs of the Digital Single Market and will be able to support also the objectives of the European Gigabit society, in addition to those of the DAE (see recital (4)).
- (136) The Irish authorities have designed the measure in such a way as to minimise the risk of crowding out private investments and the potential distortion of competition arising from the public intervention. Indeed, the measure supports only areas where NGA infrastructure is not provided by the market and where without the public intervention the investment would not take place, which was verified by the mapping and the public consultation.
- (137) The scheme will ensure full open wholesale access to the subsidised infrastructure, with various safeguards in place to ensure the non-discriminatory treatment of all access seekers, favouring competition at retail level. The provision of NGA services by creating a high quality and capacity infrastructure

⁶⁸ I.e. maximum latency: 100 ms; maximum jitter: 50 ms; maximum packet loss: 0.1%; minimum end-to-end service availability 99.95%.

has a pro-competitive impact, as it allows several network operators to use the subsidised infrastructure and compete on services to the end users. The measure is thus expected to create a level playing field for competition benefitting end-users. The increase in network capacity is expected to stimulate market entry by service providers and the provision of a larger variety of services.

- (138) In view of the characteristics of the project and of the safeguards applied, the Commission considers, based on the information available, that the overall impact on competition is expected to be positive. The risk of crowding out private investments and the negative effects of the measure are expected to be limited and there does not appear to be any significant negative spill-over for other Member States. Accordingly, the measure is designed in a way that does not distort competition or adversely affect trading conditions to an extent contrary to the common interest and is in line with Article 107(3)(c) TFEU.

4. CONCLUSION

The Commission has accordingly decided:

- not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union

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 electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully,
For the Commission

Margrethe VESTAGER
Member of the Commission

