



ComReg's response to Interested Parties Questions - relating to the NBP Process.

Information Notice

Reference: ComReg 16/105

Version: Final

Date: 25/11/2016

An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

Abbey Court Irish Life Centre Lower Abbey Street Dublin 1 Ireland
Telephone +353 1 804 9600 *Fax* +353 1 804 9680 *Email* info@comreg.ie *Web* www.comreg.ie

Additional Information

Document No:	16/105
Date:	25/11/2016

Content

Section	Page
1 Introduction.....	4
2 ComReg's Response to questions received regarding the NBP Process.....	5

1 Introduction

1. The National Broadband Plan (“NBP”) is the Irish Government’s plan to provide for high speed broadband in areas not served by commercial operators. It is the responsibility of the Department of Communications, Climate Action and Environment (“the Department”). The Department published the NBP Intervention Strategy in December 2015. It is now engaged in a process of competitive dialogue with prospective bidders.
2. ComReg published an Information Notice (reference 16/80¹) on 16 September 2016. In the Information Notice ComReg acknowledges “*that interested parties may wish to gain insight into the possible interaction between the NBP and regulation and may wish to discuss these matters with us*”. It sets a process whereby Interested Parties can submit questions in writing to ComReg. It states that responses to such questions would be published, in an anonymised format, on the ComReg website.
3. This document sets out the questions ComReg has received to date under this process and our response.

¹ <http://www.comreg.ie/publication/nbp-bidders-queries-clarifications-process/>

2 ComReg's Response to questions received regarding the NBP Process.

Question 1.

Can ComReg confirm that it will respond to questions from bidders within two weeks of submission, and - at the latest – by the end of November, before the scheduled Invitation to Submit Detailed Solution (ISDS)?

ComReg's Response to Question 1.

ComReg can confirm that it will respond to questions from bidders as expeditiously as possible in every instance.

Question 2.

Can ComReg provide clarification as to its role during the competitive dialogue process? Which specific areas of advice is ComReg providing to the Department, and what is the timing of that advice? Which issues, if any, are specifically out of scope?

ComReg's Response to Question 2.

In relation to ComReg's role during the competitive dialogue process and in relation to the NBP in general, on 26 January 2013, the European Commission published Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (the "EU State Aid Guidelines").

Under the EU State Aid Guidelines, Member States are encouraged to seek the involvement and support of national regulatory authorities ("NRAs") in State aid broadband projects. In particular, paragraph 42 of the EU State Aid Guidelines highlights the importance of the role of NRAs in designing pro-competitive State aid measures to support broadband.

ComReg is the NRA for the electronic communications sector in Ireland and is therefore the NRA for Ireland for the purposes of the EU State Aid Guidelines.

ComReg provides ongoing advice and assistance to the Department for Communications, Climate Action and Environment ("the Department") in relation to the NBP Project. Such advice and assistance concerns those aspects of the NBP Project (i) in respect of which ComReg has expertise or knowledge, and (ii) which are related to ComReg's statutory functions and objectives.

This may include, but is not limited to, providing advice and assistance on issues relating to product specification, data gathering, mapping of existing and planned infrastructure rollout, wholesale access arrangements and issues relating to the promotion of the interests of end users.

ComReg (along with the Competition and Consumer Protection Commission) also has statutory competition law functions insofar as the provision of electronic communications networks, electronic communications services and associated facilities are concerned.

ComReg also has observer status on the NBP Steering Group established by the Department to oversee the execution of the NBP Project, but does not participate in decision making by the Steering Group.

ComReg and the Department have jointly established an Expert Group, made up of representatives of both parties, tasked with providing expert advice and assistance to the Working Group established within the Department, which is responsible for the day-to-day operational implementation of the key phases of the NBP project (ComReg is not a participant in the Working Group).

Beyond these ComReg has no role during the competitive dialogue.

Question 3.

Under the Department's proposed pricing rules NBPco's wholesale prices in the intervention area will be tied to those of a regulated entity in the Excluded Area. How will ComReg take account of the impact on NBPco of its decisions when regulating any regulated entities in the Excluded Area?

ComReg's Response to Question 3.

It is likely that the regulatory framework for electronic communications networks and services will change over the lifetime of the NBP. This is a matter for the EU institutions and ComReg cannot forecast how its functions and duties might evolve. Your question can therefore only be addressed in the context of the legal framework as it currently exists.

In this context, ComReg will follow its standard practice in relation to any entity which falls to be regulated, pursuant to the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) ("the Framework Regulations") and the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011) ("the Access Regulations") and taking utmost account of any relevant European Commission Recommendations including any Recommendation on relevant markets susceptible to ex ante regulation in force at the relevant time.

In relation to price regulation in particular, Regulation 13 of the Access Regulations is relevant.

Generally, where an operator is designated by ComReg as having significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 27 of the Framework Regulations, ComReg is required by Regulation 8 of the Access Regulations to impose on that operator such of the obligations set out in Regulations 9 to 13 of the Access Regulations as it considers appropriate to address the competition problems identified in that market and in any relevant downstream markets.

Any potential indirect impact on NBPco, would be relevant to ComReg's consideration of these matters only to the extent that the impact was germane to the competition problems identified in the market analysis.

ComReg cannot comment in any greater detail at this time as it would be inappropriate to prejudge the outcome of any market analysis, consultation or regulation which may be undertaken in due course.

Question 4.

In the event that ComReg determines that there is a single national retail market for high speed broadband services, can ComReg confirm whether it would be required to take into account the impact on NBPco (and the consequent impact on the retail market) when considering the remedies imposed on any regulated entity in the Excluded Area?

ComReg's Response to Question 4.

Under the current legal framework, ComReg gathers information about retail markets to provide context for its analysis of upstream wholesale markets but it is not required to formally determine the scope of retail markets. Currently it does not regulate any retail broadband markets.

In imposing obligations on operators found to have significant market power in a relevant market, ComReg must impose such obligations as it considers appropriate to address the competition problems identified in that market and in any relevant downstream markets.

Any potential impact on NBPco and on retail markets that were served by retail service providers using wholesale inputs provided by NBPco, would be relevant to ComReg's consideration of these matters only to the extent that the impact was germane to the competition problems identified in the market analysis.

Beyond that, it would be inappropriate for ComReg to say anything more than that in considering any regulation to be imposed in any market, it carries out a thorough market analysis, taking into account all the circumstances of the relevant market, and consults on any proposed remedies.

Question 5.

Can ComReg confirm that it recognises the need to avoid “double regulation” (i.e. regulation by the NBP contract with the Department and regulation by ComReg through the SMP framework)?

ComReg’s Response Question 5.

Under the State Aid Guidelines, the Department is encouraged to include terms in the NBP contract which are aimed at preventing or mitigating competition problems that might arise in the markets in which NBPco operates and in markets served by retail service providers using wholesale inputs provided by NBPco.

The existence and efficacy of any such terms in the NBP contract are potentially relevant market circumstances for the purpose of any market analysis ComReg would carry out prior to the imposition of any regulation. Such analysis could include consideration of whether there were potential competition problems in relevant markets and downstream markets even in the presence of the relevant terms in the NBP contract.

Any obligations imposed by ComReg would need to be proportionate and appropriate in the light of the potential competition problems identified. If regulation were to be imposed, then operators would be obliged to comply with the regulation irrespective of whether there were similar provisions in the NBP contract.

This is expressly recognised in the “Governance Report”² prepared by KPMG for the Department, where it is stated clearly at Section 6.7: *“The NBI contract will not replace regulation. The regulatory regime managed by ComReg will remain and will apply to the intervention area wherever it is relevant to that market – the NBI contract simply places additional obligations and controls on the wholesale operator(s) appointed to deliver the NBI consistent with the purpose of the Government intervention and the provision of State Aid.”*

The terms of the contract are matter for the contractors and the Department and not for ComReg.

² KPMG, “Governance Report – National Broadband Implementation Strategy”, dated 21 December 2015.

Question 6.

How would ComReg take account of the price and non-price controls imposed on NBPco by the NBP contract with the Department, when undertaking its market reviews? Specifically, can ComReg confirm that it would need to identify a competition problem that the NBP contract did not address before it would consider imposing further SMP remedies?

ComReg's Response to Question 6.

Where relevant, ComReg will take account of any price and non-price controls imposed on NBPco by the NBP contract as some of many relevant factors to be taken into account in any market analysis.

Where such contractual terms are sufficiently robust to alleviate or remedy any potential competition concerns, this would of course be taken into consideration by ComReg in considering whether regulatory intervention is necessary or appropriate.

Beyond this assurance, it would be inappropriate for ComReg to prejudge any such question in the abstract.

Question 7.

What is ComReg's initial response to the European Commission's draft 'Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications code' published on 14th September, particularly with respect to NBPco?

ComReg's Response to Question 7.

ComReg notes that the Directive is, as stated in question 8, in draft form only at this stage and it is therefore too soon for ComReg to comment on this question.

Question 8.

Does ComReg consider that the draft Directive will affect its market review process? In particular, how does ComReg interpret the suggestion that wholesale-only network operators should be subject to a “clearer and simpler” regulatory regime?

ComReg’s response to Question 8.

ComReg repeats its answer to Question 7.

Question 9.

Please confirm that ComReg will issue a statement of principles relating to its potential regulation of NBPco, in particular setting out its commitment to undertaking extensive consultation, research and detailed market analysis before imposing any remedies on NBPco? As set out in Question 1, bidders need sight of these principles before the scheduled ISDS, therefore please confirm that these principles will be available by latest end November 2016.

ComReg’s response to Question 9.

As indicated in the response to your question 4 above, ComReg can confirm that it will follow its normal consultation practices in relation to the regulation of any market as required by the Framework Regulations, the Access Regulations and taking utmost account of any relevant European Commission Recommendations in force at the relevant time.

ComReg does not propose at this time to issue any further or alternative statement of principles.

Question 10.

In circumstances where ComReg decides to impose price regulation on NBPco, please can ComReg provide guidance on how this would be determined? In particular:

a. How would ComReg take into account early year losses by NBPco (i.e. where actual revenues in the initial years before ComReg imposed price regulation are lower than allowed revenues)? Could these be capitalised into the Regulatory Asset Base (RAB), as occurs in other regulated sectors?

Similarly, if accounting losses are forecast to continue after the date that ComReg imposes price regulation, then presumably these losses would also be capitalised into the RAB?

b. Would ComReg recognise all costs incurred to date in calculating the RAB applicable at the date from which price regulation is imposed for the first time – i.e. development costs, capital expenditure (net of capital subsidies received and depreciation to date), WACC and accounting losses incurred)?

c. Shareholders should be permitted to earn a return on the actual equity invested, which is consistent with the risk profile of the project at the outset. Although the risk profile of the project will improve as the network is deployed, operations commence and revenues build up and become more predictable, the cost of equity component of the WACC should not be reset at levels which reflect this reduced risk profile until the shareholders have earned a return on the equity invested commensurate with the risks faced at the outset. Please confirm that when determining the cost of equity component of the WACC, ComReg will recognise the greenfield nature of NBP, which is a relatively high risk investment with significant construction risks, demand risk and operational risks?

ComReg's response to question 10.

Under the current legal regime, a price control would be imposed on NBPco only if NBPco were found to have significant market power in a relevant market and ComReg deemed it appropriate to impose a price control to address a competition problem it had identified in the market in question or in relevant downstream markets.³

The existence and efficacy of any pricing provisions in the NBP contract would potentially be a relevant consideration in determining whether it was appropriate to impose a price control under regulation.

If it were deemed appropriate to impose a price control, then the matters raised in this question would need to be analysed in detail and there would be a full consultation process in which NBPco and others would have an opportunity to put forward their views. It is not possible for ComReg to comment on the issues raised in your question 10 in the abstract.

It might nevertheless be helpful to refer to Regulation 13 (price control and cost accounting obligations) of the Access Regulations, which state (inter alia) that pricing obligations must take account of relevant investment and allow a reasonable rate of return on adequate capital employed, taking into account any risks involved specific to a particular new investment network project.

Also potentially of interest are ComReg Document No. 14/136 (ComReg Decision D15/14) on the Weighted Average Cost of Capital and also the European Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (OJ L 251/13 of 21.9.2013).

³ Note, in appropriate circumstances, ComReg also has powers to impose price controls pursuant to the European Union (Reduction of Cost of Deploying High-Speed Public Communications Networks) Regulations 2016 (S.I. No. 391 of 2016), the dispute resolution process provided for in Regulation 31 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) (as amended) and pursuant to Regulation 6 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 333 of 2011) (as amended).

Question 11.

Could ComReg set out how it considers Eir's Regulatory Governance Model (RGM) should address the issues raised by the existence of an NBPco? How would this vary according in circumstances where Eir is successful in winning at least one of the NBP lots?

ComReg's response to Question 11.

ComReg's review of Eir's Regulatory Governance Model is an ongoing project and as such it would be inappropriate for ComReg to comment at this time.