Memorandum of Understanding

BETWEEN

The Minister for Environment, Climate and Communications

AND

The Commission for Communications Regulation

In relation to the National Broadband Intervention Project

This Memorandum of Understanding is made between:

1) The Minister for the Environment, Climate and Communications ('the Minister'), and

2) The Commission for Communications Regulation ('ComReg')

(individually called 'a Party' and collectively called 'the Parties')

Any reference to the Minister in this Memorandum of Understanding is deemed to include a reference to the Minister's Representative, the Minister's advisers, consultants, servants, contractors and agents and any reference to the Minister's Representative is deemed to include a reference to the Minister. For the avoidance of doubt, any decision, determination, direction or power, right or entitlement or similar of the Minister under this Memorandum of Understanding (including to approve or make a decision on a matter) may be exercised by the Minister's Representative.

Whereas:

A. ComReg is an independent body established by statute, and the National Regulatory Authority ('NRA') for the electronic communications sector in Ireland; ComReg is the NRA in Ireland within the meaning of section 42 of the EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (2013/C 25/01).

B. The National Broadband Plan ('NBP') is a policy initiative of the Irish government, being implemented through the Minister, which aims to deliver high speed broadband to every citizen and business in Ireland.

C. The Minister and ComReg entered a Memorandum of Understanding dated 20 September 2013 to describe the role of ComReg in the design of a State subsidised scheme for the roll out of the NBP.

D. Following a tender process, the Minister appointed NBI Infrastructure Designated Activity Company ('NBP Co') to provide certain services required to achieve implementation of the NBP.

E. Pursuant to contract dated November 2019 between the Minister and NBP Co ('the Contract'), the Minister and NBP Co agreed the terms that would apply to the provision of the services by NBP Co. ComReg and ComReg's role in the NBP are referenced in the Contract but ComReg is not a party to the Contract.

F. The purpose of this Memorandum of Understanding is to:

   (a) set out a framework of engagement between ComReg and the Minister to enable ComReg to support the Minister in the implementation of the NBP; and

   (b) set out the Parties' mutual understanding of ComReg's role in relation to the Contract in order to facilitate the co-operation envisaged in the Contract, and to provide a framework for that co-operation.

G. The Parties confirm that neither Party will be required to share third party confidential information pursuant to this Memorandum.

H. The Parties enter this Memorandum of Understanding having regard to the EU State Aid Guidelines and to the functions and objectives of ComReg as set out in *inter alia* sections 10 and 12 of the Communications Regulation Act 2002 (as amended), Regulation 16 of the Framework Regulations (SI No. 333/2011), Regulation 6 of the

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Access Regulations (SI No. 334/2011), and section 47A of the Competition Act 2002 (as amended).

I. The Parties acknowledge that the provisions of this Memorandum of Understanding are subordinate to the principles, responsibilities and functions of the Parties as enshrined in Statute.

PART A – DEFINITIONS

1. Definitions

1.1 Capitalised terms in this Memorandum shall have the meaning assigned to them in the Contract, save where otherwise stated.

PART B – COLLABERATION BETWEEN THE MINISTER AND COMREG

2. ComReg's Role in the NBP

2.1 The Parties acknowledge that the Minister may require assistance from ComReg in relation to the NBP, for example but not limited to, in relation 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, as follows ('Requests for Assistance'):

2.1.1 The Minister may require advice from ComReg on technical matters within ComReg's expertise relating to the NBP, (as set out in Part D below), and

2.1.2 The Contract envisages that the Minister may request ComReg to provide advice, and to undertake various roles, relating to the NBP (as set out in Part E below).

2.2 The Minister shall endeavour to communicate all Requests for Assistance to the Expert Group established under Part C in a timely manner having regard to the timeframes identified in Part D and Part E.

2.3 The Parties acknowledge that ComReg will only perform such functions contained in this Memorandum of Understanding that are within ComReg's Statutory powers.

2.4 The Minister acknowledges that ComReg may, at its full discretion, carry out a public consultation process in relation to matters connected with a Request for Assistance.

PART C – EXPERT GROUP

3. Establishment of Expert Group

3.1 In order to support the objectives of this Memorandum, the Parties hereby establish a group to receive and consider any Requests for Assistance as set out in clause 2 above relating to the NBP ('the Expert Group').

4. Membership

4.1 The membership of the Expert Group shall total six (6) and shall be comprised of three (3) nominated representatives of each of:
(a) The Minister, and

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(b) ComReg.

4.2 Each of the Minister and ComReg will nominate one of its representatives to act as a co-chairperson of the Expert Group.

4.3 The Expert Group may consult with other subject matter experts and invite such experts to attend meetings of the Expert Group as required from time to time.

5. Meetings

5.1 Meetings of the Expert Group shall be convened from time to time as agreed by the chairpersons.

5.2 Minutes of each meeting will be kept and circulated to all members of the Expert Group for approval prior to the subsequent meeting.

5.3 A quorum will require at least the chairpersons.

5.4 The Expert Group shall reach decisions by consensus of those present at a meeting and if consensus cannot be reached, the matter under consideration by the Expert Group will be adjourned to a subsequent meeting or referred to the Minister for further consideration.

6. Functions of the Expert Group

6.1 The Expert Group shall adopt an annual work plan by 31 December each year ('Annual Work Plan') on the basis of a proposal prepared by the Minister's Department, subject to agreed amendments, setting out the projected Requests for Assistance in the 12 month period ahead. The Annual Work Plan shall be updated, amended and recirculated to the Parties by the Expert Group on a quarterly basis, unless otherwise agreed between the Parties.

6.2 The Expert Group shall consider all Requests for Assistance from the Minister.

6.3 The Expert Group shall determine whether the Request for Assistance is one properly dealt with by ComReg pursuant to the processes set out in either Part D or Part E of this Memorandum.

6.4 If the Expert Group determines that the Request for Assistance is a matter properly dealt with pursuant to the processes set out in Part E of this Memorandum, the Expert Group will identify to ComReg and to the Minister the clause of the Contract to which the Request relates.

6.5 If the Expert Group determines that the matter cannot be properly dealt with pursuant to either Part D or E, the matter will be referred to the Minister for further consideration.

6.6 Having referred a Request for Assistance to ComReg, if the Expert Group receives a communication from ComReg pursuant to clause 9 or 10 of this Memorandum, the matter will be referred to the Minister for further consideration.

PART D – REQUESTS FOR TECHNICAL ADVICE

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7. Requests for Technical Advice

7.1 The Parties acknowledge that ComReg has considerable technical knowledge and expertise in relation to all aspects of electronic communications networks and electronic communications services.

7.2 The Parties acknowledge that the Minister may require advice from ComReg in relation to these matters and ComReg will endeavour to assist in so far as possible or permissible.

7.3 Where the Expert Group refers a matter to ComReg as a 'Part D' matter (being a request for technical advice), the following process will apply:

(a) ComReg will indicate to the Expert Group within 10 working days of receipt of the query the expected timeframe for the provision by ComReg of the advice.

(b) If any additional information is required by ComReg, ComReg will endeavour to communicate this to the Expert Group within 10 working days of receipt of the query.

(c) ComReg will endeavour to respond to the query as soon as possible having regard to the particular importance of the NBP.

PART E – REQUESTS RELATING TO THE CONTRACT

8. Requests relating to the Contract

8.1 If the Expert Group refers a Request for Assistance to ComReg as a 'Part E' matter (being a request for ComReg to provide advice or to perform a role identified in the Contract), the processes set out below shall apply, depending on the clause of the Contract to which the Request for Assistance relates.

8.2 The Parties acknowledge that there are various forms of engagement between the Minister and ComReg envisaged in the Contract, which can be categorised as follows:

8.2.1 Compulsory consultation with ComReg by the Minister ("Compulsory Consultation") in clause 80.11, clause 5.3 (Schedule 5.2, part 1), clause 7.4 (Schedule 5.2, part 2), clause 3.2 (Schedule 5.2, part 4), clause 4.1 (Schedule 5.2, part 4), clause 2.6 (Schedule 6.2, Annex 4);

8.2.2 Discretionary consultation with ComReg by the Minster ("Discretionary Consultation") in clause 2.1.1 (Schedule 5.2), clause 3.9 (Schedule 6.2, part 2), clause 4.3 (Schedule 6.2, part 2).

8.2.3 Discretionary delegation of a role under the Contract by the Minister to ComReg ("Discretionary Delegation") in clause 2.1.2 (Schedule 5.2), clause 1.4 (Schedule 5.2, part 4), clause 1.1.5 (Schedule 6.4, Appendix 1); and

8.2.4 Discretionary engagement by the Minister of ComReg in relation to the Contract Liaison Board ("CLB Engagement") in clause 5.1 (Schedule 6.1).

8.3 The Parties acknowledge that ComReg is not and will not be responsible for the following roles in the Contract:

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8.3.1 The Agency

8.3.2 The Independent Certifier

8.3.3 The "industry expert" as referred to in clause 6.1.10 of Schedule 2.4

8.3.4 The Independent Assurance Reviewer

8.3.5 The Audit Agent.

8.4 The Parties acknowledge that ComReg is not and will not be assigned any role pursuant to clause 73.1 or clause 81.7 of the Contract.

8.5 The Parties acknowledge that the references to a "determination, finding or opinion" of ComReg in clauses 9.4 and 9.5 (schedule 5.2)(part 1), clause 6.4 (schedule 5.2)(part 2), clauses 6.4 and 6.5 (schedule 5.2)(part 3), do not anticipate the creation of, or reference, any obligation on ComReg outside its existing statutory functions.

8.6 Having regard to clause 9.6 (schedule 5.2)(part 1), clause 7.6 (schedule 5.2)(part 2) and clause 6.6 (schedule 5.2)(part 3) of the Contract, the Parties acknowledge that there is no obligation on ComReg to monitor NBP co or Associated RSPs by virtue of the Contract.

8.7 In relation to a Request for Assistance in respect of Compulsory Consultation (as defined in clause 8.2.1 above):

8.7.1 The Minister will advise the Expert Group in writing of the issue the Minister requires ComReg to consider and will furnish the Expert Group with all material relevant to the issue; and

8.7.2 ComReg will indicate to the Expert Group within 20 working days of receipt of the Request for Assistance from the Expert Group, when it is likely to be in a position to respond to the Expert Group.

8.8 In relation to a Request for Assistance in respect of Discretionary Consultation (as defined in clause 8.2.2 above):

8.8.1 The Minister will advise the Expert Group in writing of the issue the Minister requires ComReg to consider and will furnish the Expert Group with all material relevant to the issue;

8.8.2 ComReg will indicate to the Expert Group within 20 working days of receipt of the Request for Assistance from the Expert Group, when it is likely to be in a position to respond to the Expert Group.

8.9 In relation to a Request for Assistance in respect of Discretionary Delegation (as defined in clause 8.2.3 above):

8.9.1 The Minister shall endeavour to provide 60 Working Days' notice of an intention to delegate.

8.10 In relation to a Request for Assistance in respect of CLB Engagement (as defined in clause 8.2.4 above):

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8.10.1 The Minister shall endeavour to provide the Expert Group and ComReg with at least 5 Working Days' notice of any CLB meeting that the Minister requires ComReg to attend.

8.10.2 The Minister shall endeavour to furnish an agenda to the Expert Group and ComReg prior to the scheduled CLB Meeting and identify to the Expert Group and ComReg the aspect of the CLB meeting that is relevant to ComReg.

PART F – GENERAL

9. Conflict

9.1 Having regard to section 11 of the Communications Regulation Act 2002, as amended, in the event that the performance of any Request for Assistance by ComReg could, in the reasonable opinion of ComReg, give rise to a conflict with ComReg's statutory role as NRA, ComReg will notify the Expert Group as soon as possible of its inability to exercise the particular role or act or advise in respect of the particular matter.

10. Resources

10.1 In the event that ComReg, in its reasonable opinion, is unable to adequately act or advise the Minister, in respect of any matter the subject of this Memorandum, due to a lack of resources, ComReg shall notify the Expert Group as soon as possible of its inability to so act or advise.

11. Information Sharing and Confidentiality

11.1 The Minister and ComReg will share third party confidential information only to the extent permitted by law and in accordance with each Party's internal processes. ComReg's process for sharing information obtained by it in the exercise of its functions is described in ComReg Document No. 05/24 dated 22 March 2005 entitled Guidelines on the Treatment of Confidential Information.

12. Review and Amendments

12.1 The Parties shall review this Memorandum regularly and will agree any amendments as may be necessary from time to time to reflect any changes in circumstances. Any such amendments must be recorded in writing and signed by both Parties.

13. Termination

13.1 For the avoidance of doubt, this Memorandum will cease to apply upon the agreement of the Parties.

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Signed:

On behalf of the Minister for Environment, Climate, Communications and Transport

On behalf of the Commission for Communications Regulation

Date: 6 October 2021

20 September 2021