

Submission by IrelandOffline

NOT CONFIDENTIAL.

Subject: State aid application - National Broadband Plan, Ireland
The Eircom commitment agreement.

Body: DG Competition,
DG Connect (Directorate B Electronic Communications)

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Introduction

IrelandOffline is a voluntary lobby group seeking high quality, high speed, affordable broadband for all. We are making a submission in relation to the State Aid approval process for Ireland's National Broadband Plan and in particular the commitment agreement¹ (the Agreement) entered into between Eircom Ltd and the Minister for Communications announced on 4th April 2017.

<http://www.dccae.gov.ie/documents/Commitment%20Agreement.pdf>

Background

Due to low population density combined with high dispersion, 96% of the national territory of Ireland has experienced market failure in relation to communications infrastructure investment. In 2011 the government formed the Next Generation Broadband Taskforce to suggest ways to remedy the deficit and later published the National Broadband Plan (NBP) in August 2012. It was to be a State Aided intervention.

In compliance with State Aid Guidelines a mapping process started in July 2013 resulting in a map published in November 2014, showing existing and planned investments (blue areas)² and remaining amber areas³. In June 2015, shortly before the publication of seven government reports detailing how the intervention was to proceed, Eircom, the incumbent provider, announced a further planned investment consisting of 300,000 extra premises. (the Eircom plan)

The following submission addresses,

1. The rationale for a conclusive long-term solution to digital divide.
2. Whether the Eircom plan and the Agreement meet specific State Aid Guidelines.
3. Whether specific aspects of the Eircom plan and the Agreement with the Department of Communications militate against the success of the NBP as a whole.
4. Other considerations that might also be relevant to the assessment of the Eircom plan.

The rationale for a conclusive long-term solution to digital divide.

Since the sale of the State-owned network, Telecom Eireann, in 1999, the Government of Ireland has attempted four schemes to remedy increasing digital divide; the MANS, the GBS, the NBS and the RBS. Only the MANS (urban based) survives in any recognisable form. These schemes could take up to 4 years to plan, and, if gap-funded, included a forbearance clause to protect the contractor from State-Aided overbuild for some years after deployment. The result was that catch-up schemes were already out of date by the time they were deployed and lost further ground against urban areas due to the forbearance condition and inadequate engineering.

After 15 years of demonstrable failure of market⁴, regulation, and public policy, it was clear that digital divide could not be addressed in Ireland by catch-up schemes. Meanwhile, all new investment by fixed line operators such as Virgin Media (formerly UPC), SIRO⁵ and enet was confined to urban areas. With the exception of small FWA operators there was, and still is, no competitor to Eircom in rural areas. With no pro-active investment forthcoming from Eircom other than exchange based DSL deployments, and no likelihood of competition driven investment, there was no prospect of NGA or ultra-fast networks ever being deployed in rural Ireland. The areas identified were therefore

¹ <http://www.dccae.gov.ie/documents/Commitment%20Agreement.pdf>

² Equivalent to black and grey areas under the SAG categorisation

³ Equivalent to white areas under the SAG categorisation

⁴ For the sake of argument 'market failure' is assumed to mean lack of market provision.

⁵ A joint venture between ESB (Ireland's electricity supply network) and Vodafone.

unambiguously 'white' under the SAG criteria and were likely to remain so. The best answer lay in a once-off conclusive intervention using future-proof technology.

Eircom's announcement

on June 4th 2015 Eircom announced⁶ the new planned investment to 300,000 premises⁷. The announcement made clear mention of Fibre-to-the-Home (FTTH) and speeds of "up to 1Gb/s" and was largely targeted on the 96% of the territory where they already have an effective monopoly.

The Agreement and the State Aid Application

Minimising State Aid

We would ask the Commission to satisfy itself that the the adoption of the Eircom commitment agreement (the Agreement) actually reduces the overall amount of State Aid required to achieve the objective of 100% NGA coverage under the NBP. This would hopefully be established by quantitative means using conservative assumptions.

Design

We question whether the remaining areas, now atomised by the Agreement between the Irish Government and Eircom, and subject to greater uncertainty, can actually amount to a 'well-designed' intervention in relation to the SAG compatibility test.

eVDSL and 'step change'

We question whether the proposed use of an unspecified proportion of eVDSL in the Eircom plan, having no new passive elements, could be considered a 'step-change' technology. We note that 'exchange launched' VDSL (eVDSL) is frequency constrained in the Irish context. We therefore question what actual uplift could be achieved from this technology. (See 'Choice of Aid type' below)

Reliance on unregulated market.

In relation to the absence of a developed regulatory regime in Ireland for FTTH, currently in design stage for intervention areas, whether consumers can be protected in the Eircom deployments.

Points not Areas

In relation to the Eircom plan addressing only selected points rather than 'areas' as required by the SAG mapping criteria, we query whether this is a qualifying 'planned investment' as understood by the SAG mapping criteria. No small NUTS unit at LAU1 or LAU2 level is to be provisioned in its entirety. Even more granular "Townlands" (of which there are 50,534) will only partially be served as a consequence of the agreement between Eircom and the Irish Government.

Choice of Aid type

We ask whether the choice of aid type (NGA) is appropriate given the established and forecast continuance of digital divide⁸ and the length of the NBP Contract (25 years), and therefore whether the aid application (including planned investments) is more appropriately assessed under aid to ultra-fast networks.

Not in line with Common Community goals (compatibility test)

We query whether the Eircom plan, including the deployment of an unspecified percentage of eVDSL in a non-competitive area, with no prospect of further upgrade, can meet Community goals which

⁶ See Annex 1 - The announcement

⁷ Repeated requests for a detailed map of the premises were declined by Eircom.

⁸ See Background above

are expected to rise to 100Mb/s for all citizens by 2025, and therefore whether it meets common community goals under the compatibility test. eVDSL is unvectorised VDSL and is also frequency constrained.⁹

Specific aspects of Eircom's commitment contract

The Recitals

In relation to **Recital 3** we note that virtually all respondents to the cited consultation¹⁰ objected to the Eircom plan and requested that the map be finalised either 'as was' in November 2015 or before the Pre-Qualification Questionnaire (January 2016) so that potential bidders could start working on bids.

Also in relation to **Recital 3** we note that the period of overbuild forbearance has not been specified and query whether it is to be assumed to be the "the Term" (as defined in the Agreement) or alternatively the length of the main NBP contract - 25 years.

In relation to **Recital 4** the Eircom plan does not deploy to any "area" as required by the SAG but selects specific premises on a lowest cost of deployment basis. (see also Definitions)

In relation to **Recital 5** of the Eircom plan, we question why the Minister believes his objectives cannot be met in the absence of the Eircom plan.

In relation to **Recital 6** of the Eircom plan, we query the "exceptional circumstances" referred to, and what circumstances have changed since the publication of the original map in November 2014.

The Definitions

"eir Deployment Area"

We question whether the selection of specific premises, while omitting adjacent ones¹¹, can legitimately have the meaning of an "area" as understood by the State Aid Guidelines.

"Non-Standard Connection"

We note that a connection greater than 50M from the Network Touch Point (usually a telephone pole) is considered 'non-standard'. We are unclear if, or how, the 50M criteria is subject to the limitation to 5% of the total premises cited in Section 4.1.3 of the agreement.

Premises subject to change.

We note from Section 6.3 of the Agreement that,

"Without derogating from its obligations under clause 4.1, eir may during the Term, acting in good faith, propose reasonable changes to the eir Project Plan. eir must promptly submit the proposed change, along with all supporting information, for the Minister's consideration. However, collectively all changes proposed by eir during the Term must not, in aggregate, impact more than 10% of the total Premises within the eir Deployment Area as at the Effective Date."

We have not been able to ascertain what type of changes qualify as "reasonable changes".

We believe the possibility of changes to as many as 30,000 premises (10%) while the remainder of the NBP procurement is proceeding is an unacceptable disadvantage to other bidders. The wording

⁹ As with BDUK decision it is prudent that the compatibility test on such a long term project should look forward to likely future targets rather than sticking strictly to current ones.

¹⁰

<http://www.dccae.gov.ie/en-ie/communications/consultations/Pages/Consultation-on-the-process-for-updating-the-High-Speed-Broadband-Map-preduring-and-post-procurement.aspx>

¹¹

<http://www.dccae.gov.ie/en-ie/communications/topics/Broadband/national-broadband-plan/high-speed-broadband-map/Pages/Interactive-Map.aspx>

implies that up to 10% of premises could revert to the state-aided area, and possibly as late as mid 2018.

eVDSL percentage not specified

We note that the proportion of eVDSL is not specified in the Agreement. (see also ‘Eircom’s announcement’)

Premises subject to a non-standard connection charge

We note at Section 4.1.3 that a ‘non-standard’ connection charge may apply to 5% of premises. The amount of the non-standard connection charge is unspecified. We note that arbitration is not contemplated and we are unaware of any current regulations that would offer consumer protection in the event of a dispute.¹²

Fragmentation of the Intervention Area

We note that the deployment plan effectively atomises the intervention area where the rules relating to mutual access to infrastructure are undeveloped. It is likely to lead to loss of economies of scale and contiguity in the remaining area.

Other considerations

Advantageous position

We note that Eircom Limited has had, since at least June 2015, extra time to develop its roll-out in the event of acceptance of its plan and is therefore at a considerable advantage over its competitors.

We note also that Eircom has been able to choose the premises so as to suit its own existing backhaul network.

Failure to complete previously mapped blue areas¹³.

We note that 84,500 premises have not qualified as NGA within previously notified urban areas (dark blue on map). We understand that Eircom has no immediate plans to remedy those premises first.

Aarhus, EIA & SEA assessments and mandatory consultation.

We note that the Eircom plan makes up over 35% of the overall planned intervention for which 2 other operators entered into detailed tendering work a year ago and that the Eircom plan and the NBP remain technologically neutral and that the environmental process (EIA and SEA reports) relating to the NBP has not been completed or published by consultants RBS and furthermore there has been no public consultation on the findings and recommendations of those 2 reports.

We note that the Aarhus convention requires that the information commissioned or acquired by a public body (such as environmental assessments) within the framework of an intervention that is likely to affect the environment - the NBP - must be available to the public and subject to consultation while it is still possible to change course. The Agreement acknowledges that it is subject to “Law” and “Binding Guidance” as defined in the agreement. Binding guidance includes regulatory guidance to which the Minister is subject.

Failure to properly transpose the Infrastructure sharing Directive gives Eircom an advantage.

We note that mutual access to infrastructure information has been hampered by a minimal and incomplete transposition of Directive 2014/61/EU on cost minimisation of communications networks, thereby favouring operators who own their own pole and duct network. Under the Irish regulation (S.I. No. 391 of 2016)¹⁴ Eircom’s competitors must notify Eircom of areas of interest in order to

¹² Our understanding is that current USO-AFL regulations would not cover a non-standard broadband installation.

¹³ Equivalent to black or grey areas under the SAG categorisation.

¹⁴ <http://www.irishstatutebook.ie/eli/2016/si/391/made/en/print>

acquire infrastructure information. Eircom is thereby alerted to the likelihood of competition in those areas of interest and can prioritise them in its own deployment to the disadvantage of competitors.

We note also the heavily bureaucratic dispute resolution process in the Irish regulation which is subject to multiple time-outs for assessment and information gathering.

Phasing and the BDUK experience.

We note the detrimental effect to the overall plan in the case of BDUK¹⁵ caused by ‘phasing’. The selection of the higher density areas under Phases 1 and 2 of that plan has made Phase 3 of that plan unattainable. In our view the adoption of the Eircom plan which selects the lower cost and relatively higher density clusters in the intervention area repeats the BDUK mistake.

Strategic announcements

We note the commentary on State Aid concerning “strategic announcements”. We believe that the Eircom plan in all its disruptive and anti-competitive features can be categorised as such.

“There are indications that operators in the market may provide information about their planned activities in a strategic way. They announce deployment within the near future and do not meet their commitments and thereby block potential State aid measures in favour of other operators”.- Wik Consult¹⁶

Discrimination

We note that there is an ongoing assessment¹⁷ of Eircom’s record of discrimination vis-a-vis its wholesale customers. We note that the assessment is proceeding slowly¹⁸ and we have concerns about the dual role of consultants KPMG within the NBP procurement process and also as advisors to ComReg in the review of Eircom’s governance.

Purpose is to protect Investments already made.

We note that the overall objective in mapping is primarily to minimise distortion and protect pre-existing private investments. In that regard Eircom has made little investment in these premises previously other than selective POTS to DSL upgrades dating back to 2007-2009.

USO implications

We note that the Regulator ComReg has elected to defer consideration of a broadband USO to 2020. Premises not covered by the Agreement, but along the routes identified, will be especially vulnerable to surcharges and low QoS if not included specifically in the Eircom plan, or covered by USO, or covered by SMP regulations.

Transparency

We query the date on which the Agreement with Eircom was actually made and why the announcement of the agreement was made at such a later date (04/04/2017).

We note that penalty clauses have been excluded from publication.

Solvency and History

We note that Eircom’s corporate history has been of multiple changes of ownership between private equity entities with little communications experience. The levels of debt accumulated through successive and excessive securitisation of cash flow meant that network investment outside competitive areas was minimal.

¹⁵ State aid SA.33671 (2012/N) – United Kingdom

¹⁶ http://ec.europa.eu/competition/consultations/2011_broadband_guidelines/final_report_summary_en.pdf (para 10)

¹⁷ <https://www.comreg.ie/csv/downloads/ComReg15128.pdf>

¹⁸ <https://www.comreg.ie/review-eirs-regulatory-governance-model/>

We note that Eircom Limited ultimately experienced a debt default event in 2012 and went through a court examinership process. Nonetheless the Company remains heavily indebted.

The Company will be for sale in the near future with senior executives heavily incentivised¹⁹ to deliver a successful floatation.

We note Eircom Limited's extensive record of litigation.

We note that Eircom has made commitments in the past. We note the failure of LLU in Ireland, that the rural DSL exchange upgrade programme of 2007 remains incomplete, and that the announcement of June 4th 2015 (the subject of the Agreement) was barely started before Q3 2016.

Access to officials

We note that because of the Eircom plan, Eircom will be afforded considerably increased access to the procurement team while the remainder of the intervention proceeds to completion. We doubt whether the Department is sufficiently resourced to separate its Agreement monitoring team from the procurement team; inevitably Eircom will gain an advantage in the ultimate tender.

Summary

We believe for the reasons stated above that the Eircom plan and Agreement undermines the integrity and design of the National Broadband Plan, is contrary to State Aid Guidelines, is unlawful in relation to environmental obligations, is contrary to Community goals for connectivity in 2025, is unfair to competitors in the procurement process, and ultimately puts rural consumers whom it addresses and opportunistically omits at a disadvantage and at an ongoing risk of digital divide. We believe it will also make the NBP more expensive.

¹⁹ <http://www.independent.ie/business/media/executives-at-eir-set-for-181m-windfall-after-ipo-35341851.html>