

**AIDE-MEMOIRE FOR DCCAE RE EXAMPLES OF PROVISIONS IN DRAFT NBP AGREEMENT**

**3 JULY 2019**

## **AIDE-MEMOIRE RE EXAMPLES OF PROVISIONS IN DRAFT NBP AGREEMENT**

This is a very high level and broad based aide-memoire giving examples of the types of provisions contained in the clauses and Schedules of the Agreement.

The clauses and Schedules are lengthy, very detailed and address a variety of different matters. As a result, due its high level nature, this aide-memoire is not exhaustive and the examples of what a clause or Schedule addresses may only highlight certain elements of the clause or Schedule so should not be taken as necessarily being fully representative or reflective of the nuances of certain provisions.

### **1 Clause 1 (Definitions and Interpretation)**

This clause sets out certain boiler plate clauses related to the interpretation of the Agreement. These are fairly standard but important legal provisions.

### **2 Clause 2 (Conditions Precedent)**

This clause provides that the Agreement will not come into effect until the conditions precedent set out in Schedule 8 (Conditions Precedent) are satisfied. This includes, for instance, provision of the executed suite of Project documents and legal opinions where required.

### **3 Clause 3 (Order of Precedence)**

This clause addresses how conflicts, inconsistencies or ambiguities between the provisions of the Agreement, Schedules or NBPco's Solution are resolved.

### **4 Clause 4 (Due Diligence)**

This clause makes clear that NBPco is responsible for having done its own due diligence in relation to the Project and that the Minister is not responsible for the information provided to NBPco to the maximum extent permitted by law.

### **5 Clause 5 (Disclaimer)**

This clause provides that the Minister has no liability to NBPco in connection with the Project, except to the extent expressly provided otherwise in, or arising from the express provisions of, the Agreement.

### **6 Clause 6 (Acknowledgements and Warranties)**

This clause contains an acknowledgement that the Minister is entering the Agreement in reliance upon NBPco's Solution and Tender. It also contains a number of warranties from NBPco which are designed to ensure that it is a suitable contractual counter-party such as with respect to its legal capacity and authority to enter into the Agreement. The Minister similarly gives a warranty as to its power and authority to execute and deliver the Agreement.

In addition, NBPco makes certain undertakings such as to finance and carry out its obligation at its own exclusive cost and risk and without recourse to the Minister or State (other than the Subsidy Payments) and to maintain its incorporation and tax residency in Ireland.

**7 Clause 7 (Appointment)**

This clause contains the overriding appointment of NBPco to deliver the Project. It also contains a number of related provisions such as NBPco's commitment to prioritise the Project, to act reasonably and in good faith and to not disregard its contractual commitments despite the existence of disputes (including as to the withholding of Subsidy Payments). It also addresses what happens if the Minister or a State Body intends to provide Subsidised State Aid over a particular level to a Similar Project.

**8 Clause 8 (Policy Objectives)**

This clause requires NBPco to support the policy objectives set out in it, such as ensuring the NBPco Solution is consistent with the provision of value for money in line with Best Industry Practice. It also contains additional policy related provisions with respect to matters including the use of long term unemployed and individuals on training schemes in the Project.

**9 Clause 9 (Provision of the Services, Wholesale Products and Network)**

This clause sets out general obligations such as with respect to compliance with law and repair and replacement as well as a Best Industry Practice standard of care in the provision of the Services, Wholesale Products and Network.

It also confirms that NBPco is required to provide everything necessary to comply with its obligations and that the provisions of the Agreement apply in full and without qualification even where parts of the Services, Network or Wholesale Products are provided, managed, owned or operated by a third party.

**10 Clause 10 (Service Requirements and NBPco Solution)**

This clause requires NBPco to ensure that the Services, Network and Wholesale Products comply with the Service Requirements set out in the Schedules, as well as the NBPco Solution, the Wholesale Products & Coverage Template, the Wholesale Product Roadmap and the Performance Levels.

It confirms that compliance with the NBPco Solution is not a defence to failure to comply with the Service Requirements and vice versa and addresses how conflicts in these documents are addressed. In addition, it confirms that the inclusion of the NBPco Solution in the Agreement does not impose any obligations on the Minister.

**11 Clause 11 (General Performance Standards)**

This clause requires NBPco to adhere to various important documents such as the Implementation Programme, Project Plan, Detailed Design, Future Proofing Plan and Reference Offer, in addition to Binding Guidance, Consents and Codes and Standards in force from time to time. It confirms that compliance with one of the foregoing is not a defence to failure to comply with another and addresses how conflicts in this regard are addressed. It also requires NBPco to act in the best interests of the full and proper performance of the Agreement and to devote sufficient time, attention and resources.

**12 Clause 12 (Implementation Programme, Project Plan, Wholesale Product and Roadmap and Technology Roadmap)**

This clause requires NBPco to comply with the Implementation Programme, Project Plan, Wholesale Product and Roadmap and Technology Roadmap and to maintain them in accordance with the applicable requirements set out Schedule 2.1 (Technical Solution Specification) and Schedule 2.3 (Deployment Requirements).

**13 Clause 13 (Milestones and Network Deployment Complete)**

This clause requires NBPco to do all that is necessary to ensure that each Milestone is Achieved by its Milestone Date.

**14 Clause 14 (Network Deployment, Operation and Maintenance)**

This clause addresses Network deployment, operation and maintenance. For instance, it requires NBPco to minimise interference with the reasonable convenience of the public and access to public/private roads or footpaths in undertaking Network Deployment, operation and maintenance. It also, for instance, addresses the discovery of Monuments, Antiquities and Archaeological Objects.

**15 Clause 15 (Defects)**

This clause requires NBPco to repair or otherwise remedy any Default as soon as reasonably practicable after discovery or notification. It confirms that the Minister can instigate the Remedial Plan Process if NBPco fails to do so.

**16 Clause 16 (Testing and Milestones)**

This clause requires the Minister and NBPco to adhere to the Milestone testing procedures set out in Schedule 2.3 (Deployment Requirements). It also confirms that NBPco remains solely responsible for ensuring the Services, Wholesale Products and Network are suitable and comply with the Agreement, despite the issue of a Milestone Achievement Certificate. It contains related provisions to deal with where a Milestone Achievement Certificate was issued based upon materially misleading or materially incorrect information provided to the Independent Certifier.

**17 Clause 17 (Delay)**

This clause addresses what occurs in the event that there is a Delay in the Achievement of a Milestone, including prioritisation requirements and the application of the Remedial Plan Process.

**18 Clause 18 (Relief Events)**

This clause provides NBPco with relief from its obligations to the extent it is prevented from carrying out its obligations as a result of a Relief Event such as earthquakes, hurricanes, flood and strikes generally affecting the entire telecommunications industry. It sets out a detailed process that must be followed in order for NBPco to get relief.

**19 Clause 19 (Wholesale Products)**

This clause sets out requirement in relation to the provision of Wholesale Products. It also includes an obligation for NBPco to act as the retailer of last resort where no other retailer will do so.

It requires NBPco to ensure that the contracts it enters into with Service Providers comply with the requirements set out in the Agreement.

This clause contains a restriction on sales to or by Associated Wholesale Service Providers (i.e. wholesalers which form part of NBPco's Economic Group) in the Intervention Area. This is so that NBPco does not circumvent the requirements set out in the Agreement by selling to another group company at the wholesale level which is not bound by the Agreement. It is also clarified that this provision does not limit or affect certain activities such as:

- the provision of products or services outside the Intervention Area;
- any member of NBPco Economic Group providing Wholesale Products in the Intervention Area by means other than NBPco's Network and NBPco Assets; or
- the joint sale by NBPco of Wholesale Products with the wholesale products of any other company in the NBPco Economic Group.

The clause requires that changes to Wholesale Products and that the removal or the introduction of New Wholesale Products go through the Wholesale Product Control Procedure.

## **20 Clause 20 (Performance Levels)**

This clause requires NBPco to adhere to the Performance Levels and addresses the consequence of NBPco's failure to do so, including the application of Performance Credits and the Remedial Plan Process.

## **21 Clause 21 (Consents)**

This clause requires NBPco to obtain and comply with all Consents required by law. It also confirms that NBPco is not entitled to an extension of time or relief as a result of a failure or delay in securing any Consent, except in the specific circumstances set out in Clause 18 (Relief Events) and Schedule 4 (Relief Events).

## **22 Clause 22 (Compliance)**

This clause requires NBPco to comply with all Laws and maintain and, on request, provide any records it is required to keep by Law.

## **23 Clause 23 (Health, Safety, Security and the Environment)**

This clause makes clear that NBPco is responsible for the health, safety, stability and security of the Network, Wholesale Products, Equipment and Project and any impact or resulting change in the environment. It requires NBPco to take all reasonable steps to protect the environment and the health, safety and security of relevant persons. It also requires NBPco to comply with more detailed requirements related to environmental matters which are set out in Schedule 2.5 (Environmental).

## **24 Clause 24 (Network and Service Security)**

This clause contains specific requirements in respect of Network and Services security.

## **25 Clause 25 (Changes in Law)**

This clause addresses the impact of a Change in Law. It confirms, in particular, that NBPco is not entitled to any relief from a Change in Law (other than a Qualifying Change in Law) or a Regulatory Decision, but that it is entitled to relief (including potentially Subsidy Payments) in the event of a Qualifying Change in Law. It requires NBPco to adhere to the process set out in Annex 4 (Qualifying Change in Law) of Schedule 6.2 (Change Control Procedure) in order to obtain relief as a result of a Qualifying Change in Law.

## **26 Clause 26 (Service and Network Future Proofing and Continues Improvement)**

This clause requires NBPco to comply with Schedule 6.4 (Service, Network and Wholesale Product Compliance and Future Proofing).

**27 Clause 27 (Subsidy Payments)**

This clause imposes an obligation on the Minister to make the Subsidy Payments subject to, and in accordance with, the provisions of Schedule 5.1 (Subsidy Payments). It also addresses related matters like interest for late payment and the requirement to maintain NBPco's bank account in Ireland. It also contains an indemnity so that NBPco must pass on any savings or additional revenue it makes as a result of a deliberate abandonment of obligations under the Agreement.

**28 Clause 28 (Product Prices)**

This clause requires NBPco to comply with the Wholesale Pricing Rules and Retail Pricing Rules set out in Schedule 5.2 (Wholesale Prices, Price Benchmarking Rules and Wholesale Product Benchmarking Rules).

**29 Clause 29 (Project Financial Model)**

This clause requires NBPco to comply with specific requirements in relation to the development of, and changes to, the Product Financial Model which are set out in Schedule 5.3 (Project Financial Model).

**30 Clause 30 (State aid)**

This clause requires NBPco to comply with State aid law. It requires NBPco to provide the Minister with such assistance, support and information he may reasonable require in connection with European Commission investigations, Court cases and claims arising from State aid law.

The clause also puts in place a mechanism to seek to resolve any breach of State aid law, with different principles applying depending on whether or not the breach arose from NBPco's Implementation Discretion. NBPco is also required to put money into a blocked bank account if there is a recovery order made in respect of NBPco.

**31 Clause 31 (Compensation Events)**

This clause sets out a mechanism for NBPco to obtain compensation from the Minister if a Compensation Event (essentially a breach of the Agreement or delay by the Minister with an impact above a specific financial threshold) occurs.

**32 Clause 32 (Tax)**

This clause requires NBPco to comply with tax law. It also addresses various tax related matters.

**33 Clause (Set-off and Withholding)**

This clause confirms that the Minister can set-off any amount owed by NBPco to the Minister against any amount due to NBPco. It confirms that NBPco does not have any right of set-off or withholding.

**34 Clause 34**

This is deliberately blank.

**35 Clause 35 (Financial Distress)**

This clause requires NBPco to comply with the requirements of Schedule 5.7 (Financial Distress) which relate to monitoring the financial standing of certain specific Monitored Entities.

**36 Clause 36 (Non-Discrimination and Transparency)**

This clause requires NBPco to comply with, and procure that certain Key Subcontractors comply with, non-discrimination and transparency related obligations. For instance, NBPco is required to treat all Service Providers on a non-discriminatory basis and apply equivalent conditions to all Service Providers in equivalent circumstances.

**37 Clause 37 (NBPco Requirements and Business Restrictions)**

This clause requires NBPco to comply with the requirements of Schedule 2.7 (NBPco Requirements). In addition, it imposes specific restrictions on NBPco:

- using the Subsidy Payments other than for the intended purpose;
- operating at the retail level in the Intervention Area (except where it does so as the retailer of last resort) or outside the Intervention Area; or
- circumventing the provisions of the Agreement by providing Wholesale Products to Service Providers in accordance with an unapproved Reference Offer or services agreement.

**38 Clause 38 (Guarantee)**

This clause requires NBPco to confirm that any Guarantors, such as with respect to certain Key Subcontractors that relied upon the financial standing of another entity, meet specified financial metrics. It also addresses what occurs if a Guarantor ceases to be meet the relevant financial metrics during the Contract Period.

**39 Clause 39 (Performance Bond)**

This clause requires NBPco to provide a Deployment Bond and Expiration Bond. It sets out specific financial metrics which the Surety must meet and addresses what happens if the Surety no longer meets the relevant financial metrics.

**40 Clause 40 (Financial Standing of NBPco)**

This clause requires NBPco to ensure that it is capitalised in accordance with the NBPco Funding Plan and that it maintains the necessary financial standing, funding and working capital. It also requires NBPco to comply, and procure compliance by Claw-backable Subcontractors, with financial transparency and reporting obligations set out in Schedule 5.1 (Subsidy Payments), Schedule 5.4 (Eligibility Requirements for ERDF Funding) and Schedule 5.5 (Accounting Separation).

**41 Clause 41 (Eligibility Requirements for ERDF Funding)**

This clause requires the Minister and NBPco to comply with Schedule 5.4 (Eligibility Requirements for ERDF Funding). It confirms that if the Minister wishes to rely on alternative sources of funding that place obligations on NBPco, this will be dealt with through the Change Control Procedure.

**42 Clause 42 (Subcontractors)**

This clause requires NBPco to use the Key Subcontractors approved by the Minister and not to replace them without the Minister's consent. It sets out when the Minister is entitled to refuse his consent. It also contains additional requirements to ensure that the Key Subcontracts are consistent with the provisions of the Agreement, address the specific flow down requirements set out in Schedule 2.8 (Key Subcontractor Provisions) and that Key Subcontractors enter into Key Subcontractor Direct Agreements with the Minister. It also permits the Minister to require NBPco to cease using Key Subcontractors in certain circumstances such as where they give rise to national security concerns or are giving rise to a breach of material provisions of the Agreement.

**43 Clause 43 (Small and Medium Sized Enterprises)**

This clause requires NBPco to provide processes and measures so that SMEs are given fair access to subcontracting opportunities with NBPco.

**44 Clause 44 (Project Documents and Funding Documents)**

This clause requires NBPco to use all reasonable endeavours to procure that Contracting Associates perform their obligations under the terms of the Project Documents (e.g. for the capitalisation of NBPco) to which it is a Party. It contains additional provisions so that the Project Documents cannot be amended except in certain circumstances. This is because the Project Documents form a key part of the contractual nexus underpinning NBPco and the Project. In addition, this clause restricts NBPco from raising additional or substitute finance or rescheduling its debt or entering a Refinancing without the Minister's prior written approval.

**45 Clause 45 (Representatives)**

This clause provides for NBPco and the Minister to each appoint a representative which has authority to represent and act on its behalf in relation to the Agreement.

**46 Clause 46 (Governance)**

NBPco and the Minister agree under this clause to manage their relationship in accordance with Schedule 6.1 (Contract Liaison Board) to Schedule 6.12 (Benchmarking and Market Testing).

**47 Clause 47 (Audit)**

This clause provides the Minister with Audit Rights and NBPco agrees to comply with Schedule 6.11 (Audits) in this regard. This is important given the level of Subsidy Payments being made to NBPco. It also confirms that ComReg's and other regulatory bodies' audit rights are not fettered by the Agreement. NBPco also agrees under this clause to comply with Schedule 6.10 (Independent Assurance).

**48 Clause 48 (Records and Reports)**

This clause requires NBPco to comply with Schedule 6.5 (Reports) which sets out specific reporting requirements. NBPco also accepts under this clause that the Minister can share the Reports, Open Book Data and other records with Regulatory Bodies and other Public Service Bodies.



**49 Clause 49 (Change Control Procedure)**

NBPco and the Minister agree under this clause to comply with the Change Control Procedure set out in Schedule 6.2 (Change Control Procedure).

**50 Clause 50 (Disputes)**

This clause requires NBPco and the Minister to adhere to the Dispute Resolution Procedure set out in Schedule 6.3 (Dispute Resolution Procedure). It also requires NBPco to continue to perform the Agreement during a Dispute.

**51 Clause 51 (NBPco Personnel)**

This clause sets out specific requirements with respect to NBPco Personnel such as with respect to:

- employment, discrimination and equality laws;
- the use of appropriately qualified, skilled, trained and experienced NBPco Personnel;
- work visas; and
- use of personnel with Relevant Convictions.

**52 Clause 52 (Assets)**

This clause requires NBPco to maintain ownership of NBPco Assets and to not grant any Encumbrances over them. NBPco is also required to ensure that it does not exercise its Implementation Discretion in such a way that its use or exploitation of the Assets gives rise to a breach of the State Aid Decision and/or State Aid Law.

**53 Clause 53 (Asset Register)**

This requires NBPco to maintain an Asset Register and to give the Minister real time access to the Asset Register, Network Infrastructure Map and Inventory Management System. This is for transparency purposes and also to facilitate handover in the event that the Minister takes ownership of NBPco or its Assets on an early termination of the Agreement.

**54 Clause 54 (Intellectual Property Rights)**

This confirms that each of NBPco and the Minister retain ownership of their own Intellectual Property Rights and requires NBPco to perform the Agreement without infringing any Intellectual Property Rights of a third party. It also confirms that NBPco cannot use the Minister's name or logos without his consent. The Minister is entitled to use NBPco's name and logos in connection with the Project.

**55 Clause 55 (Licence Granted by NBPco)**

Under this clause, NBPco grant a licence to the Minister in respect of NBPco's Intellectual Property Rights to the extent necessary to enable the Minister manage, oversee and administrate the Project and for other related purposes.

**56 Clause 56 (Licence Granted by the Minister)**

Under this clause, the Minister grants a licence to NBPco in respect of the Minister's Intellectual Property Rights to the extent necessary for the performance of NBPco's obligations under the Agreement.

**57 Clause 57 (Minister Data)**

This clause contains a number of protections with respect to the Minister Data with which NBPco is required to comply.

**58 Clause 58 (Data Protection)**

This clause confirms that NBPco and the Minister do not jointly control personal data processed by NBPco and that NBPco is required to comply with data protection law. The Minister separately confirms that he will comply with data protection law in respect of personal data provided to it by NBPco.

**59 Clause 59 (Requests for Information)**

This clause requires NBPco to assist and co-operate with the Minister in relation to Freedom of Information and Environmental Information requests, as well as requests in relation to its statements to or responses to questions raised by or on behalf of Oireachtas Committees, the Comptroller and Auditor General and other bodies.

**60 Clause 60 (Confidentiality)**

This clause addresses confidentiality. It confirms that the confidentiality obligations in the clause do not apply in respect of certain disclosures by the Minister such as as necessary to fulfil the Minister's obligations to supply information for parliamentary, ministerial, judicial or administrative purposes.

**61 Clause 61 (Prohibited Acts and Prevention of Bribery)**

This clause entitles the Minister to terminate the Agreement in the event of bribery or corruption by NBPco. It also address what happens in the event of bribery or corruption by NBPco's Subcontractors.

**62 Clause 62 (Conflicts of Interest)**

This clause requires NBPco to disclose to the Minister any actual or potential conflict of interest between its or a Critical Key Subcontractor's interests and the duties and obligations owed under the Agreement.

**63 Clause 63 (Change in Ownership and of Control)**

This clause imposes restrictions on Change in Ownership in NBPco, its Shareholders and certain other entities.

**64 Clause 64 (Undertakings)**

NBPco, under this clause, undertakes to do certain things such as to locate the Network and Equipment in Ireland, to secure all necessary Intellectual Property Rights and to not use materials etc which are deleterious with the passage of time or a potential hazard to health, safety or the environment.

**65 Clause 65 (IPR Warranty and Indemnity)**

NBPco, under this clause, provides a warranty and indemnity in favour of the Minister in relation to the infringement of third party Intellectual Property Rights.

**66 Clause 66 (Indemnity)**

NBPco agrees under this clause to indemnify the Minister against damage or loss to property, death or personal injury claims, breach of statutory duty or third party claims suffered or incurred by the Minister. NBPco also agrees to indemnify the Minister in respect of any breach of State Aid Law arising as a result of the exercise by NBPco of its Implementation Discretion or breach of the Agreement.

**67 Clause 67 (Handling of Indemnified Claims)**

This clause sets out a process which applies where the Minister makes a claim under an indemnity. It includes a right for NBPco to take over the defence of the claim, subject to certain conditions.

**68 Clause 68 (Limitation of Liability)**

This clause contains provisions limiting and excluding the liability of the Minister and NBPco in certain cases. It includes related provisions such as principles against double recovery and other matters.

**69 Clause 69 (Required Insurance)**

This clause sets out requirements in relation to insurance.

**70 Clause 70 (Business Continuity and Disaster Recovery)**

This clause requires NBPco to develop and implement a Business Continuity and Disaster Recovery Plan and to test and review its operation periodically.

**71 Clause 71 (Force Majeure)**

This clause provides for NBPco to be granted relief in the event of an occurrence of a Force Majeure Event. It sets out a detailed process which NBPco must follow in order to obtain relief.

**72 Clause 72 (Persistent Default and Remedial Plan Process)**

Under this clause, NBPco and the Minister agree to comply with Schedule 6.8 (Persistent Defaults and Remedial Plan Process).

**73 Clause 73 (Step-In Rights)**

This clause provides the Minister to step in and take over managerial control of NBPco in certain specific circumstances.

**74 Clause 74 (Term of this Agreement and Service Continuity)**

This clause sets out the term of the Agreement, including the right of NBPco and the Minister to extend its term for a period of up to five (5) years.

It also provides for NBPco to perform a more limited set of services during the Service Continuity Period, i.e. years 25 to 35 of the Agreement, to a level of industry benchmarks failing which the Minister is entitled to take ownership of NBPco or its Assets for market value.

**75 Clause 75 (Termination Suspension)**

This clause contains a mechanism for the Minister to suspend the effect of a Termination Notice so that the Minister can, following the Minister (or his nominee) taking ownership of NBPco, continue the Agreement with NBPco (under new ownership) should it wish to do so.

**76 Clause 76 (Termination by Minister for NBPco Termination Event)**

This clause entitles the Minister to terminate the Agreement in the event of an NBPco Termination Event. It provides NBPco with an opportunity to remedy certain NBPco Termination Events in which case the Agreement will continue. The Minister has the right to take ownership of NBPco or its Assets under this clause if the Agreement terminates. Under this clause, the Minister is required to pay compensation to NBPco pursuant to Schedule 6.9 (Consequences of Termination) if the Agreement terminates, whether or not the Minister exercises the Share Option or Asset Option.

**77 Clause 77 (Termination by NBPco for Minister Default)**

This clause entitles NBPco to terminate the Agreement in the event of a Minister Default. The Minister has the right to take ownership of NBPco or its Assets under this clause if the Agreement terminates. Under this clause, the Minister is required to pay compensation to NBPco pursuant to Schedule 6.9 (Consequences of Termination) if the Agreement terminates, whether or not the Minister exercises the Share Option or Asset Option.

**78 Clause 78 (Non-Default Termination)**

This clause includes termination and other rights and requirements based upon a number of different scenarios. These include:

- Minister voluntary termination;
- NBPco being incapable of providing the Services due to a Force Majeure Event;
- a Change in Law rendering illegal or impossible all or substantially all of NBPco's obligations under the Agreement;
- Deployment Contract Viability Check Failure;
- Ten Year Contract Viability Check Failure; and
- where a Risk is Uninsurable and the Minister elects to terminate accordingly.

The Minister has the right to take ownership of NBPco or its Assets under this clause if the Agreement terminates. Under this clause, the Minister is required to pay compensation to NBPco pursuant to Schedule 6.9 (Consequences of Termination) if the Agreement terminates, whether or not the Minister exercises the Share Option or Asset Option.

**79 Clause 79 (Partial Termination)**

This clause addresses what occurs in the event of a Partial Termination.

**80 Clause 80 (Consequences of Termination or Expiry)**

This clause addresses what occurs in the event of a termination or expiry of the Agreement, including what occurs if a Termination Notice is disputed, which provisions survive termination or expiry and the application of the provisions of Schedule 6.9 (Consequences of Termination). It also requires NBPco and the Minister to consult with the European Commission and ComReg in the event of termination prior to the Expiry Date to ensure any public funding paid under the Agreement is not rendered unlawful State aid as a result of the early termination.

**81 Clause 81 (Assignment and Novation)**

This clause addresses assignment and novation of the Agreement and other Project Documents.

**82 Clause 82 (Waiver and Cumulative Remedies)**

This clause addresses waiver of rights and the cumulative nature of the Minister's rights and remedies.

**83 Clause 83 (Relationship of the Parties)**

This clause addresses various matters related to the relationship between NBPco and the Minister such as that the parties are not partners, there is no right of agency granted to NBPco and NBPco does not have any State immunity.

**84 Clause 84 (Publicity and Branding)**

This clause addresses publicity regarding the Agreement and related matters.

**85 Clause 85 (Severance)**

This clause addresses what occurs if one or more of the provisions is or becomes illegal or unenforceable.

**86 Clause 86 (Competition Law)**

This clause addresses how NBPco and the Minister will address a circumstance where the Agreement is deemed unenforceable by operation of Irish or European competition law or any related investigations.

**87 Clause 87 (Further Assurances)**

This clause requires NBPco and the Minister to do all acts and things as may be necessary to give effect to the meaning of the Agreement.

**88 Clause 88 (Counterparts)**

This clause addresses execution and delivery of the Agreement in counterparts.

**89 Clause 89 (Entire Agreement)**

This clause confirms what documents constitute the entire agreement between NBPco and the Minister.

**90 Clause 90 (Amendments)**

This clause addresses when amendments to the Agreement bind NBPco and the Minister.

**91 Clause 91 (Third Party Rights)**

This clause confirms that the Agreement does not confirm any rights or benefits on any person other than NBPco and the Minister.

**92 Clause 92 (Notices)**

This clause addresses how notices must be served under the Agreement.

**93 Clause 93 (Minister Powers)**

This clause confirms that the Agreement does not fetter the discretion of the Minister or ComReg under Law

**94 Schedule 1 (Definitions)**

This Schedule contains definitions of terms used in the Agreement. It runs to close to 200 pages.

**95 Schedule 2.1 (Technical Solution Specification)**

This Schedule 2.1 sets out all of the technical requirements that the solution (the Network) must meet for the duration of the contract. The aim of the schedule is to allow the Minister to achieve the policy objectives and to align the delivered network with the principles set out in the State Aid guideline, including:

- a) technology neutrality;
- b) provision of affordable access to high quality High Speed Broadband services;
- c) use of existing infrastructure;
- d) effective wholesale access;
- e) step change in broadband availability;
- f) step change in broadband End User experience;
- g) future-proofed technology; and
- h) service affordability.

**96 Schedule 2.2 (Reference Offer Requirements)**

This Schedule sets out the requirements to provide high quality, highly available and future proof High Speed Broadband services in the form of a number of different Wholesale Products to be offered by NBPco in the Intervention Area. The products include products aimed at the residential and business markets.

**97 Schedule 2.3 (Deployment Requirements)**

This Schedule sets out the minimum rollout requirements with which NBPco must comply with respect to the deployment of the Network. Among others it describes the coverage area and the various milestones that NBPco must achieve during the rollout phase.

**98 Schedule 2.4 (Operational Performance)**

This Schedule sets out the requirements for the day to day operational performance of NBPco's Network to ensure that the policy objective of delivering High Speed Broadband services to IA End Users is achieved and that those High Speed Broadband services are of comparable performance to, and evolve in line with, equivalent products in the commercial area throughout the Contract Period and that NBPco meets demand from IA End Users and Service Providers for new product and innovations over time.

**99 Schedule 2.5 (Environmental)**

This Schedule sets out specific requirements in relation to the manner in which NBPco will comply with and address Environmental law. It includes provisions regarding relevant guidelines, environmental management systems, environmental consultation and the general approach to environmental obligations.

**100 Schedule 2.6 (Communications, Demand Stimulation and Brand Plan)**

This Schedule sets out specific requirements in relation to communications, demand stimulation and branding. For instance, it requires NBPco to develop a:

- strategic plan for these activities which addresses specific requirements;
- a Demand Stimulation Project Plan;
- an NBPco Brand Development Project Plan; and
- a Communications and Engagement Plan.

It also includes specific reporting requirements.

**101 Schedule 2.7 (NBPco Requirements)**

This sets out certain specific requirements in relation to the corporate governance of NBPco. For instance, it:

- requires NBPco to be established as a special purpose legal entity established for the Project (without prejudice to its right to carry out other activities, subject to compliance with the Agreement);
- requires a Governance Protocol to be developed by NBPco which complies with the requirement set out in the Schedule;
- requires certain specific roles (Top Tier Personnel) to be filled by full time employees of or secondees to NBPco (and not any other member of the NBPco Economic Group) and to be responsible and accountable to the Board of NBPco;
- sets out rules in relation to the composition of the Board (including the appointment of a non-executive director directly by the Minister), rotation of Board members and notification of the Board's terms of reference to the Minister prior to their adoption;

- sets out that the Board of NBPco and NBPco shall have sole decision making power and responsibility (including as between it and other members of the NBPco Economic Group and its Shareholders) in relation to certain specific matters, whilst making clear that certain functions may be provided on a shared services basis within the NBPco Economic Group;
- requires agreements with Shareholders or other members of the NBPco Economic Group to be done in a manner consistent with an Arm's Length Transaction;
- imposes requirements to ensure that NBPco Personnel, directors and other officers of NBPco and NBPco's Subcontractors are not incentivised through their remuneration package to act in a discriminatory manner and disclose information concurrently to all Services Provider;
- requires NBPco to engage independent auditors to audit NBPco's accounts and for the audited accounts to be prepared in manner compliant with the accounting and auditing requirements set out in the Agreement;
- sets out requirements to ensure that the branding of NBPco are not confusingly similar to Service Providers operating at the retail level or that NBPco is not associated with a specific Service Provider operating at the retail level; and
- requires information to be made available by NBPco on its Public Portal in a manner that represents all Service Providers equally and without bias and facilitates IA End Users subscribing to services or products from any Retail Service Provider.

In addition, the Schedule provides for the grant of a Minister Special Share (which does not grant any economic rights and has a limited function) and requires certain provisions to be included in NBPco's Constitution (such as provisions facilitating the Minister's Special Share and exercise of the Share Option or restricting Changes in Ownership in breach of the principles set out in the Agreement) and Shareholders Agreement (such as provisions facilitating the exercise of the Share Option and providing for the Minister to be paid, in certain circumstances, a portion of the proceeds of a Change in Ownership where particular thresholds are exceeded).

## **102 Schedule 2.8 (Key Subcontractor Provisions)**

This Schedule requires certain specific provisions / principles to be addressed in the Key Subcontracts (including Infrastructure Access Agreements) that NBPco or Buildco put in place. These are designed to ensure that there are appropriate flow downs of obligations so that NBPco can comply with its obligations in the Agreement.

## **103 Schedule 3 (NBPco Solution)**

This Schedule will contain NBPco's tender broken down into a number of further Schedules.

## **104 Schedule 4 (Relief Events)**

This Schedule contains the definition of what is a "Relief Event".

## **105 Schedule 5.1 (Subsidy Payments)**

This Schedule sets out the key principles and conditions regarding the payment of Subsidy Payments. It includes a detailed process for making payment claims, including the information required to verify that the Subsidy Payment is properly payable. It also includes a requirement for NBPco to pay claw-back in certain circumstances.



**106 Schedule 5.2 (Wholesale Prices, Price Benchmarking Rules and Wholesale Product Benchmarking Rules)**

This Schedule sets out detailed rules regarding the prices that may be charged by NBPco and other relevant entities. It also sets out detailed rules for benchmarking Wholesale Products against wholesale products outside the Intervention Area. It includes a detailed process for review of NBPco's compliance with these rules and requirements for NBPco to submit Statements of Compliance in this regard.

**107 Schedule 5.3 (The Project Financial Model)**

This Schedule will contain the initial Project Financial Model. It contains specific requirements that must be adhered to in generating the initial version of the Project Financial Model and regulates how changes may be made to it over the Contract Term.

**108 Schedule 5.4 (Eligibility Requirements for ERDF Funding)**

This Schedule addresses requirements that apply in order to be able to secure ERDF Funding for the Project. These include audit requirements, access rights and publicity requirements.

**109 Schedule 5.5 (Accounting Separation)**

This Schedule imposes accounting separation requirements. It is intended to provide a higher level of detail of information than that derived from statutory financial statements of NBPco. This, in turn, is to ensure greater transparency and facilitate review of NBPco's compliance with the Agreement.

**110 Schedule 5.6 (Insurance)**

This Schedule sets out detailed requirements in relation to the insurance to be put in place in relation to the Project.

**111 Schedule 5.7 (Financial Distress)**

This Schedule requires NBPco to monitor and report to the Minister on the financial standing of certain entities, including NBPco, its Shareholders and Critical Key Subcontractors. Under this Schedule, if a Financial Distress Event occurs, NBPco is required to put in Financial Distress Service Continuity Plan to address the relevant circumstance.

**112 Schedule 6.1 (Contract Liaison Board)**

This Schedule provides for the creation and operation of a Contract Liaison Board (made of representatives of the Minister and NBPco) which is to facilitate engagement between the Minister and NBPco and governance.

**113 Schedule 6.2 (Change Control Procedure)**

This Schedule sets out a detailed process for making changes to the Agreement. It includes detailed Annexes to deal with certain specific scenarios such as changes to the Intervention Area, changes resulting from Qualifying Changes in Law and the rules that apply in relation to the application of the Contract Assumptions.

**114 Schedule 6.3 (Dispute Resolution)**

This Schedule sets out a process for resolution of Disputes. It provides for, among other things, internal escalation within NBPco and the Minister, mediation and arbitration. It also contains an Expedited Dispute Resolution Procedure for time sensitive disputes and a mechanism to require Key Subcontractors to participate in the Dispute Resolution Procedure where they are relevant to the Dispute.

**115 Schedule 6.4 (Service, Network and Wholesale Product Compliance and Future Proofing)**

This Schedule sets out specific requirements in relation to the development by NBPco of a Future Proofing Plan and requirements and processes for review of NBPco's compliance with certain aspects of the Agreement including the Technology Roadmap, Wholesale Product Roadmap, Wholesale Product & Coverage Template and Future Proofing Plan.

It also includes a requirement for NBPco to assess, evaluate, identify and implement new or potential improvements to the Wholesale Products, Network, Services, Operational Environment including so as to ensure that the Minimum Requirement Wholesale Products and Additional Required Wholesale Products evolve in line with Equivalent Products in the Excluded Area, subject to certain exceptions.

**116 Schedule 6.5 (Reports)**

This Schedule sets out the reports which NBPco is required to provide to the Minister. The reports are an important means for the Minister to oversee and monitor compliance by NBPco with the Agreement.

**117 Schedule 6.7 (Performance Levels)**

This Schedule set out the Target Performance Levels which NBPco is required to achieve in its performance of the Agreement. It also contains rules regarding the time periods in which maintenance of the Network can be undertaken.

**118 Schedule 6.8 (Persistent Default and Remedial Plan Process)**

This Schedule contains a mechanism so that the Minister can escalate a persistent failure by NBPco to comply with contractual obligations which fall outside the Performance Level regime. The final layer of escalation is a right to terminate.

This Schedule also contains a Remedial Plan Process. This is a formal process under which NBPco is required to put in place a Remedial Plan to remedy and prevent the reoccurrence of breaches of the Agreement.

**119 Schedule 6.9 (Consequences of Termination)**

This Schedule addresses the consequences of termination of the NBP Agreement. It sets out detailed rules on the amount of compensation payable on termination. It also sets out a detailed mechanism to enable the Minister to take ownership of the share capital in NBPco and Buildco or their Assets on termination of the Agreement, together with detailed rules in relation to due diligence on them and a handover process.

**120 Schedule 6.10 (Independent Assurance)**

This Schedule sets out the circumstances in which the Minister may engage an Independent Assurance Reviewer to review compliance by NBPco with certain important aspects of the Agreement, such as with respect to compliance with the Wholesale Product Benchmarking Rules or the Wholesale Pricing Rules. NBPco is required under this clause to co-operate and provide the Independent Assurance Reviewer with all relevant information and access it requires in this regard.

**121 Schedule 6.11 (Audit)**

This Schedule sets out the Minister's rights of audit in respect of NBPco as well as his rights of audit over NBPco's Key Subcontractors. Audit rights are important to ensure that the Minister can properly review compliance by NBPco with the Agreement, such as the sums claimed by NBPco as Permitted Expenditure eligible for Subsidy Payments.

**122 Schedule 6.12 (Benchmarking)**

This Schedule sets out the process for an independent third party to benchmark certain operational Key Subcontracts to determine whether they are Good Value. This is so that the Minister can satisfy himself that the relevant Key Subcontractor's fees, service levels and service credits represent Good Value. This is important as the Subsidy Payments will include sums payable by NBPco to these Key Subcontractors.

It also sets out a process for an independent third party to determine industry standard service levels and service level agreements for the Service Continuity Period, i.e. years 26 to 35 of the Agreement, if the Minister and NBPco cannot reach agreement on them.

**123 Schedule 6.13 (Minister Oversight of Procurement Process)**

This Schedule sets out the required level of oversight by the Minister of procurement processes being undertaken by NBPco or Buildco in relation to certain subcontracting roles. This is designed to ensure that the procurements are undertaken in accordance with Best Industry Practice so that NBPco and Buildco secure value for money.

**124 Schedule 7.1 (Form of Guarantee)**

This Schedule will contain the approved form of guarantee in respect of Deferred Equity Commitments.

**125 Schedule 7.2 (Performance Bonds)**

This Schedule contains the required form of the Deployment Bond and Expiration Bond which NBPco is required to procure in favour of the Minister. These bonds are a form of additional security to ensure that claw-back sums payable by NBPco to the Minister are ultimately paid.

**126 Schedule 7.3 (Key Subcontractor Direct Agreement)**

This Schedule contains the required form of Key Subcontractor Direct Agreement which Key Subcontractors are required to enter into with the Minister. The Key Subcontractors provide collateral warranties to the Minister under the Key Subcontractor Direct Agreement and also include other protections where the Agreement with NBPco is terminated, such as a right for the Minister to novate the underlying Key Subcontract from NBPco to the Minister or a nominee of the Minister. This is to facilitate the

continuity of the Project in the event that, for whatever reason, the Agreement with NBPco is terminated.

**127 Schedule 7.4 (Form of Key Subcontracts)**

This Schedule will contain the approved form of Key Subcontracts.

**128 Schedule 7.6 (Form of Limited Recourse Guarantee)**

This Schedule will contain the approved form of Limited Recourse Guarantee.

**129 Schedule 7.7 (Minister Share Charge)**

This Schedule will contain the approved form of Minister Share Charge.

**130 Schedule 7.8 (NBPco Constitution)**

This Schedule will contain the approved form of the NBPco Constitution.

**131 Schedule 7.9 (Buildco Constitution)**

This Schedule will contain the approved form of the Buildco Constitution.

**132 Schedule 8 (Conditions Precedent)**

This sets out the conditions precedent that must be satisfied before the Agreement takes legal effect. This includes, for instance, provision of the executed suite of Project documents and legal opinions where required.

**133 Schedule 9 (Required Documents)**

This sets out a list of the agreements that are connected to the Project. It links into the controls in Clause 44 on amendments to Project Documents. The Schedule also sets out the circumstances in which the Minister may object to amendments to Project Documents.

**134 Schedule 10 (NBPco Termination Events)**

This sets out the specific circumstances in which the Minister is entitled to terminate the Agreement as a result of an NBPco default.