

**7 OCTOBER 2020**



**DATED**

**20**

**NBI INFRASTRUCTURE DAC**

**AND**

**[COMPANY NAME]**

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**MUTUAL NON-DISCLOSURE CONFIDENTIALITY AGREEMENT**

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**THIS AGREEMENT** is dated (the “**Agreement**”)

**BETWEEN**

- (1) **NBI INFRASTRUCTURE DAC**, a company incorporated in Ireland, with company number 631656 having its registered office at 3009 Lake Drive, Citywest, Dublin 24, D24 H6RR (“**NBI**” (which as described in Clauses 2.3(b) and 2.3(c) shall include its Affiliates));

(as a “**Disclosing Party**” and a “**Receiving Party**”)

and

- (2) [ ], a company incorporated in Ireland, with company number [ ] having its registered office at [ ] (the “**Contractor**”, as a “**Disclosing Party**” and a “**Receiving Party**”)

(together the “**Parties**” and each a “**Party**”)

**WHEREAS:**

- A. NBI has been awarded the contract (the “**Agreement**”) by the Department for Communications, Climate Action & the Environment (the “**Department**”) to provide the National Broadband Plan: State Led Intervention project (the “**Project**”) and deliver a broadband network (the “**Network**”) to certain defined locations within Ireland.
- B. As part of the delivery of the Project, NBI will engage with Retail Service Providers (the “**RSPs**” which shall include the Contractor) who will procure Network services from NBI and in turn sell the associated Network services to end users (the “**Customer**”).
- C. The Contractor and NBI have agreed that they shall each disclose certain information relating to their business operations, processes and products to the other in the context of evaluating potential business opportunities in connection with the Project (the “**Transaction**”).
- D. Now this Agreement sets out the terms and conditions upon which the respective Information shall be kept confidential by each of the Parties.

**IT IS AGREED** as follows:

1. **Interpretation**

1.1 **Definitions**

For the purpose of this Agreement,

“**Affiliate**” means,

- (a) in respect of NBI, a company which is a Subsidiary, a Holding Company or a company which is a Subsidiary of a Holding Company of NBI but which shall not include a Competitor;
- (b) in respect of the Contractor, its ultimate Holding Company and the direct and indirect wholly owned Subsidiaries (other than such Party) of Holding Company.

“**Agreement**” means this mutual non-disclosure confidentiality agreement;

**“Competitor”** means any company or business which competes with or proposes to compete with any business carried on by the Contractor in retail and/or wholesale markets for broadband and mobile services in Ireland;

**“Holding Company”** has the meaning given to “holding company” in section 8 of the Companies Act 2014 (and, notwithstanding any to the contrary stated in this Agreement, this definition does not change in the event of a change to the definition of “holding company” in the Companies Act 2014);

**“Information”** means information provided by the Disclosing Party to the Receiving Party pursuant to this Agreement and may include:

- (a) information used in or otherwise relating to the business and affairs of the Disclosing Party or the Department;
- (b) information relating to any assets, products or services of the Disclosing Party or the Department (including for the avoidance of doubt all information obtained via any communication or during visits to the Data Room or Inspection Locations);
- (c) information relating to intellectual property rights (whether or not registered or otherwise protected and whether or not capable of being so registered or protected) of the Disclosing Party or the Department;
- (d) information relating to the suppliers, service providers, agents, professional advisors, officers, directors or employees of the Disclosing Party or the Department;

in each case relating to the Transaction or the Project and which is either non-public, confidential or proprietary in nature, together with any other information which may from time to time be identified by the Disclosing Party as being of a confidential nature and as being subject to the terms of this Agreement;

**“National Regulator”** means the Commission for Communications Regulation (ComReg) or any person or body designated as the National Regulatory Authority pursuant to Council Directive 90/388/EEC;

**“Permitted Purpose”** shall have the meaning ascribed to it in Clause 2.1 (a) (iii); and

**“Subsidiary”** has the meaning given to “subsidiary” in section 7 of the Companies Act 2014 (and, notwithstanding any to the contrary stated in this Agreement, this definition does not change in the event of a change to the definition of “subsidiary” in the Companies Act 2014).

## 2. Agreement as to Confidentiality

### 2.1 Treatment and use of Information

- (a) In consideration of the Disclosing Party agreeing to supply (either orally or in writing) and so supplying the Receiving Party with the Information, the Receiving Party, on their own behalf and on behalf of their associated companies and associates and their respective officers, employees, servants, agents and professional advisers, unconditionally and irrevocably undertakes to the Disclosing Party that they will:
  - (i) treat the Information as private and confidential;

- (ii) ensure that all Information is adequately and sufficiently protected with appropriate security measures and a degree of care i) that would apply to the Receiving Party's own confidential information; and ii) as would be reasonably expected to apply by any disclosing party, having regard to the nature and type of Information being disclosed;
- (iii) utilise the Information exclusively for the purpose of evaluating: i) the Transaction, and ii) with providing certain services to NBI in connection with the Project (the "**Permitted Purpose**");
- (iv) not use or disclose or permit the disclosure by any person of any Information for the benefit of any third party; and
- (v) not copy, reduce to writing or otherwise record the Confidential Information except as strictly necessary for the Permitted Purpose. Any such copies, reductions to writing and records shall be deemed to be Information and shall be the property of the Disclosing Party.

## 2.2 **Non-Disclosure**

- (a) The Receiving Party undertakes that it will only disclose Information in accordance with this Clause 2.2 where it is considered strictly necessary in accordance with the Permitted Purpose.
- (b) The Receiving Party further undertakes to take all necessary steps to prevent the disclosure of Information shared under this Agreement, to any person other than:
  - (i) the Receiving Party's (and its Affiliates (strictly on a need to know basis) directors or employees whose knowledge of such Information is essential for the Permitted Purpose; or
  - (ii) any professional advisers acting on the Receiving Party's behalf in connection with the Transaction and or the Permitted Purpose; or
  - (iii) in the case where NBI is the Receiving Party, any member of the Department or any professional advisers acting on the Department's behalf in connection with the Project and who are bound to a Project specific non-disclosure agreement in respect of the Transaction and the Permitted Purpose; and
  - (iv) any other person approved in advance by the Disclosing Party in writing,

and the Receiving Party shall procure that any of the persons referred to in this sub-Clause 2.2 (b) (Non-Disclosure) (other than those individuals referred to in Clause 2.2 (b) (iii)) to whom all or any of the Information is disclosed shall agree to be bound by confidentiality provisions no less stringent than those in this Agreement.
- (c) Nothing in this Clause 2 shall operate to prevent or preclude engagement by the Parties with the National Regulator, other regulatory authorities or any court in the Irish court system (the "**Courts**"), in the exercise of a Party's rights

and entitlements otherwise to engage in good faith with the National Regulator, other regulatory authorities or Courts.

### **2.3 Disclosure of Minimum Amount Necessary**

- (a) In the case of having to disclose all or any part of the Information in accordance with Clause 2.2 (Non-Disclosure), the Receiving Party undertakes only to disclose the minimum amount of such Information as is strictly necessary.
- (b) NBI and the Contractor are each entering into this Agreement on its own behalf and on behalf of their respective Affiliates. Any reference to NBI or the Contractor should read as a reference to their respective Affiliates such that any Affiliate of either NBI or the Contractor respectively may be a “Disclosing Party” or a “Receiving Party” hereunder PROVIDED THAT, for the avoidance of doubt, NBI undertakes that it shall not disclose Information to a Competitor.
- (c) For the purpose of this Agreement each of NBI and the Contractor shall be entitled to receive and disclose Information on its own behalf and on behalf of their respective Affiliates and may share Information received with their respective Affiliates.

All acts or omissions of either Party’s Affiliates in relation to the Information shall be treated as if they were the acts or the omissions of that Party itself.

## **3. Return and Recording of Information**

### **3.1 Undertaking**

- (a) Whenever requested by the Disclosing Party, the Receiving Party undertakes to:
  - (i) return, and procure that there is returned to the Disclosing Party, promptly all matter in tangible form which constitutes the Information, or any part of it, together with all copies (whether supplied to or made by the Receiving Party);
  - (ii) destroy and procure the destruction of any notes, analyses, compilations, studies, reports, memoranda and other documents or materials prepared by the Receiving Party or on their behalf which reflect or are prepared from or contain any of the Information;
  - (iii) to the extent possible, expunge and procure that there is expunged all Information from any computer, word processor or other similar device into which all or any part of it was entered or programmed;
  - (iv) furnish and procure that any person referred to in Clause 2.2 (Non-Disclosure) to whom or to which Information has been imparted furnishes the Disclosing Party with written confirmation confirming compliance with this Clause 3 (Return and Recording of Information); and
  - (v) maintain a list of individuals or entities to whom any Information is disclosed (to include details of the Information disclosed) and make such list available to the Disclosing Party upon request.

### 3.2 **Notification of Proceedings or Actions**

- (a) The Receiving Party may make and retain copies of Information as required by law and/or regulatory requirement, or that are automatically generated or stored by backup systems **and** which are not accessible in the normal course of business.
- (b) This Agreement does not prevent the disclosure of Information that a Party is required to disclose by law or to a regulatory authority provided that the Receiving Party undertakes to immediately notify the Disclosing Party in writing as soon as reasonably practicable if any proceedings are commenced or action taken which could result in the Receiving Party or any person referred to in Clause 2.2 (Non-Disclosure) becoming compelled to disclose all or any of the Information, and to take all available steps at the Receiving Party's expense to resist or avoid such proceedings or action, including all steps that the Disclosing Party may reasonably request and to keep the Disclosing Party fully and promptly informed of all matters and developments relating to such proceedings.

### 3.3 **Announcement of Interest**

Except as contemplated by this Clause 3.3 (Announcement of Interest), NBI and the Contractor undertake not to make any announcement whatsoever or disclosure (other than as permitted by Clause 2.2 (Non-Disclosure) relating to the Transaction or the Project or the Permitted Purpose (including its existence and the terms of same or the proposed transactions between the Parties hereto (if any)). Where it is reasonably determined that any such disclosure or announcement is required by law or by any regulation, rule or any governmental or quasi-governmental authority or its equivalent or any supervisor or regulatory body to which NBI and/or the Contractor or any of the persons in Clause 2.2 (Non-Disclosure) are subject and with whose rules it is necessary to comply, to the maximum extent permissible at law such disclosure shall be made by the Parties hereto, only after consultation with each other after taking into account the Parties reasonable requirements as to its timing, contents and manner of making or despatch.

### 3.4 **Information in Public Domain**

It is accepted by the Disclosing Party that nothing contained in this Agreement shall in any way restrict the Receiving Party's right to use, disclose or otherwise deal with any of the Information if and to the extent that it is, or becomes generally available in the public domain, including Information obtained pursuant to the Freedom of Information Act 2014, other than as a result of a breach (whether directly or indirectly) of this Agreement, by the Receiving Party or by any person referred to in Clause 2.2 (Non-Disclosure).

### 3.5 **Basis of Arrangements**

- (a) The Parties further agree that:
  - (i) All Information and the intellectual property rights therein shall remain the property of the Disclosing Party and no right or licence, including any right or licence to any intellectual property rights in the

Information, is granted to the Receiving Party or its advisers in relation to the Information;

- (ii) documents, whether containing Information or otherwise, made available to the Receiving Party or their advisers prior to, or in the course of, or for the purposes of the Transaction, the Project or the Permitted Purpose, will not constitute an offer by the Disclosing Party, nor will such documents or the information contained in them form the basis of any contract (save as expressly provided for in them) nor a representation which may be relied upon by the Disclosing Party;
- (iii) neither Party nor any of their advisers, associates, agents, directors, employees or officers accepts responsibility for or makes (nor has accepted responsibility for or made) any representation or warranty, express or implied, with respect to the accuracy, completeness or otherwise of the Information or the contents of any other document or data supplied by the Disclosing Party or its agents in relation to the Transaction, and or the Project;
- (iv) the Disclosing Party will be solely responsible for making its own decisions on the Information and any other documentation or data supplied to it or its agents in relation to its evaluation of the Transaction and the Project during the course of the Permitted Purpose and preparing and proposing and / or providing services to the Receiving Party in respect of the Transaction and the Permitted Purpose;
- (v) NBI may exclude from participating further in negotiations any person referred to in Clause 2.2 (Non-Disclosure) who NBI believe has breached the terms of this Agreement in any respect and the Contractor hereby undertakes to comply forthwith with any such reasonable direction from NBI (subject always to the terms and conditions of this Agreement);
- (vi) no single or partial exercise of, or failure or delay by a Party in exercising any right, power or privilege to which the relevant Party is entitled shall operate as a waiver of, or impair or preclude any other or further exercise; and
- (vii) any right or remedy conferred upon a Party hereunder for breach of any of the provisions of this Agreement shall be in addition and without prejudice to all other rights and remedies available to the relevant Party whether pursuant to this Agreement or provided for by law.

### 3.6 **Terms of Agreement**

The terms of this Agreement and each Party's obligations and acknowledgements under it may only be:

- (a) Waived by either Party in writing only by prior agreement between both parties; and
- (b) Varied in writing signed by both of the Parties.

### **3.7 Entire Agreement**

This Agreement constitutes the entire agreement between the Parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

Each Party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Agreement. Each Party agrees that it shall have no claim for innocent or negligent misrepresentation based on any statement in this Agreement.

### **3.8 Binding Obligation**

The Parties hereby acknowledge and confirm that the provisions of this Agreement are intended to impose an immediately binding legal obligation on them and will continue:

- (i) indefinitely in relation to personal information and any intellectual and industrial property rights or trade secrets; and
- (ii) five years beyond the date on which the last piece of Information was shared in relation to all other Information,

unless the Parties enter into a contract or agreement with one another, in which event the undertakings in this Agreement will lapse.

### **3.9 Breach of Provision**

The Receiving Party further acknowledges that any breach of the provisions of this Agreement (to include but not be limited to any unauthorised disclosure or use of the Information) would result in serious damage and harm being sustained by the Disclosing Party and as a result the Receiving Party hereby unconditionally agrees that damages would not be an adequate remedy for any breach of the provisions of this Agreement and the Receiving Party agrees to waive any rights it may have to oppose the granting of any equitable relief (including injunctive relief) sought by the Disclosing Party in relation to any threatened or actual breach of the provisions of this Agreement. Accordingly, the Disclosing Party shall be entitled, without proof of special damages, to seek an injunction or other interim measures.

### **3.10 Severability of Clauses and Provisions**

The Parties agree that each provision of this Agreement (including each undertaking and each part of it) shall be construed separately and independently from each other and notwithstanding that such provision and / or undertaking (or part of it) may be held by any court or competent authority to be illegal or unenforceable the remaining provisions and undertakings of this Agreement shall continue in full force and effect.

### **3.11 Decline to Supply Information**

For the avoidance of doubt the Parties acknowledge that nothing contained in this Agreement shall compel the Parties respectively to provide all or any information relating to the Transaction, the Project, the Department and the Parties shall be entitled at its absolute and sole discretion to decline to supply a Party hereunder, with any information (including the Information).



### 3.12 Counterparts and Electronic Execution

- (a) The Parties to this Agreement consent to the execution by or on behalf of each other Party of this Agreement by electronic signature provided that such manner of execution is permitted by law.
- (b) The Parties to this Agreement also:
  - (i) agree that an executed copy of this Agreement may be retained in electronic form; and
  - (ii) acknowledge that such electronic form shall constitute an original of this Agreement and may be relied upon as evidence of this Agreement.
- (c) This Agreement may be executed in any number of counterparts, and by the parties on separate counterparts, but will not be effective until each Party has executed at least one counterpart, which will have the same effect as if the signatures on the counterparts were on a single original of this Agreement. Each counterpart will constitute a duplicate original of this Agreement but all the counterparts will together constitute but one and the same instrument.
- (d) Transmission of an executed counterpart of this Agreement (or of the executed signature page of a counterpart of this Agreement) by personal delivery, email (in PDF, JPEG or other readable format) or commercial courier will take effect as delivery of an executed counterpart of this Agreement. If such a method of delivery is adopted by a party, without prejudice to the validity of the agreement thus made, it will provide the other party with the complete executed original of such counterpart as soon as reasonably possible on request in writing.

### 3.13 Governing Law

The Parties agree that the terms of this Agreement (to include but not limited to all obligations and undertakings hereunder) shall be governed by and construed in all respects in accordance with the laws of Ireland and the Parties hereby agree to submit to the exclusive jurisdiction of the Irish courts.

**IN WITNESS WHEREOF** this Agreement has been entered into the day and year first herein written.

Signed for and on behalf of:  
**NBI INFRASTRUCTURE DAC**

\_\_\_\_\_  
SIGNATURE

\_\_\_\_\_  
NAME (BLOCK CAPITALS)

\_\_\_\_\_  
POSITION

\_\_\_\_\_  
DATE

Signed for and on behalf of:  
**NBI INFRASTRUCTURE DAC**

\_\_\_\_\_  
SIGNATURE

\_\_\_\_\_  
NAME (BLOCK CAPITALS)

\_\_\_\_\_  
POSITION

\_\_\_\_\_  
DATE

Signed for and on behalf of:  
[COMPANY NAME]<sup>1</sup>

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SIGNATURE

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NAME (BLOCK CAPITALS)

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POSITION

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DATE

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<sup>1</sup> NBI comment: Correct execution block to be provided by the Contractor.