



William Fry

Our Ref 019794.0001.CWA



By Post & Fax: 678 2449

Ms Mary Rabbitte
Freedom of Information Officer
Freedom of Information Unit
Department of Communications, Energy & Natural Resources
Elm House, Earlsvale Road
Cavan

Request for Access to Records under the Freedom of Information Acts 1997 and 2003

Dear Ms. Rabbitte

In accordance with Section 7 of the Freedom of Information Acts 1997 and 2003, I wish to request access to the following records which I believe to be held by the Department of Communications, Energy and Natural Resources (the "Department"):

All documents, including and not limited to, notes of meetings, telephone calls, internal memoranda and correspondence between the Department, the Department of Foreign Affairs and the European Commission relating to the notification under State aid rules of a scheme related to the provision of broadband services in unserved target areas in Ireland (the National Broadband Scheme) and the implementation of that scheme, leading up to the European Commission's decision dated 25 September 2007, in particular a letter from the Irish authorities to the European Commission registered by the European Commission on 13 August 2007.

I attach for your reference a copy of the European Commission's final decision in the above matter (Decision N 475/2007).

My preferred form of access to these records is to have copies sent by fax to (01) 639 5333 marked for my attention. In the alternative please provide copies by post to the below address.

Please find enclosed a cheque in the amount of €15 in respect of the fee for a request under Section 7. I look forward to hearing from you within the time period prescribed under the Acts.

Yours sincerely

Claire Waterson

Claire Waterson

Direct Dial: +353 -1- 639 5177

E-Mail: claire.waterson@williamfry.ie



EUROPEAN COMMISSION

Brussels, 25.IX.2007
C(2007) 4320 final

Subject: State aid n° N 475/2007– Ireland
National Broadband Scheme ("NBS")

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the "National Broadband Scheme" (hereafter "NBS" or "the measure") and decided not to raise objections as the State aid contained therein is compatible with Article 87(3) (c) of the EC Treaty.

II. PROCEDURE

- (2) Following informal pre-notification contacts between the Commission and the Irish authorities (March-July 2007), the authorities notified the NBS to the Commission by letter registered on 13 August 2007.

III. CONTEXT

- (3) Broadband¹ connectivity is a key component for the development of knowledge-based economies and the development, adoption and usage of information and communication technologies. Broadband is of strategic importance because of its

¹ Broadband services can be delivered using various combinations of communications network technologies ("platforms"). Technologies can feature either fixed or radio based transmission infrastructure, and they can substitute or complement each other according to the individual situation. Current mass-market broadband services have generally download speeds starting from 512Kbit/s/ - 1Mbit/s. For business users, much higher speeds are needed.

Mr Dermot AHERN
Ministry of Foreign Affairs
St. Stephen's Green 80
Dublin 2
Ireland

Communications, Energy and Geological Survey of Ireland (transfer of Departmental Administration and Ministerial Functions) Order 2002), the National Development Plan (2007-2013) and the National Strategic Reference Framework for Ireland - EU Regional Policy 2007-2013.

- (9) *Target areas:* In order to establish the availability of broadband services and to analyse the rollout plans of network operators, the Irish authorities have carried out an extensive market research and mapping exercise. In order to assess the extent of broadband coverage, the DCENR contacted known service providers and sought details as to their current and future purported broadband coverage. Based on information provided by these providers, an indicative broadband coverage map³, which has been regularly updated, was published on the DCENR's website in May 2007. Following this publication, further operators informed the DCENR about their coverage details.
- (10) The map distinguishes three coverage areas: "Red areas" are currently served by broadband service providers, "blue areas" are currently without broadband coverage but service providers have indicated that they plan to provide broadband services in these regions in the future. Finally, "green areas" identify remaining areas where no service is currently provided and is unlikely to be provided in the future.
- (11) According to the Irish authorities, in ensuring the provision of broadband services for consumers and businesses through the NBS, the DCENR aims at minimising potential distortions of competition. The focus of the NBS is, therefore, on areas that are unlikely to have broadband services available within a reasonable timeframe. The DCENR intends that "green areas" will fall directly within the scope of the NBS whereas for "blue areas" the position is less certain given that service providers have indicated that they intend to provide broadband services in the future.
- (12) According to the Irish authorities, consumers and businesses in the "green" and "blue areas" are still lacking access to broadband services since they first became generally available in Ireland approximately 5 years ago. In order to remedy this situation the DCENR has informed operators of its approach for dealing with "blue" areas: services providers will be given a reasonable timeframe to roll out broadband services to these areas, after which any unserved areas at that time will be supported by the NBS. The DCENR considers this approach to be reasonable and proportionate and one that balances the needs of consumers against those of service providers.
- (13) The "blue" areas will, therefore, be included in the scope of the NBS from the outset and the NBS procurement process will seek to keep an option to address these areas. However, the provision of broadband to the "blue" areas via the NBS contract will not take place until the beginning of Q3 2008. Up to the end of Q2 2008, where the DCENR is presented with clear evidence that a 'live broadband service' is being provided to users in blue areas, the service provider's particular service footprint will be removed from the NBS coverage requirements. The Irish authorities have put in

³ The map and the approach concerning the mapping of broadband coverage are available on:
<http://www.dcmnr.gov.ie/Communications/Communications+Development/National+Broadband+Scheme.htm>

- (18) *Aid intensity:* The aid intensity will depend on the outcome of the bidding procedure but the Irish authorities have informed the Commission that the intensity should not exceed [...] of the overall costs of the measure. [...].
- (19) *Funding instrument:* Public funds will be paid to the Preferred Bidder in the form of a direct service grant. DCENR, which is the granting authority, will insert a claw back mechanism in the service contract to ensure that the Preferred Bidder will not be over-compensated if the demand for the broadband services grows beyond the anticipated level.
- (20) *Duration of the measure:* The DCENR anticipates that the NBS contract will be awarded in 2008 and will run until 2013. The actual length of the contract will be determined as part of the competitive dialogue process once the implementation timescales are agreed between DCENR and the Preferred Bidder.
- (21) *Product or service markets affected:* Several markets, as defined in the Commission Recommendation on relevant markets⁸ for electronic communications services are affected by the measure, directly or indirectly. The most directly concerned markets will be wholesale broadband access as well as the (non-regulated) retail broadband market.
- (22) *Monitoring:* The DCENR, in cooperation with Irish regulator ComReg, will monitor the implementation of the NBS to ensure that retail subscribers and wholesale operators are receiving the required service availability, performance and other specifications as agreed in the Service Level Agreement.

V. STATE AID ASSESSMENT OF THE MEASURE

Presence of aid

- (23) According to the EC Treaty and consolidated case-law there is State aid within the meaning of Article 87(1) when:
- there is an intervention by the State or through State resources;
 - it confers an economic advantage on the recipient undertaking;
 - it distorts or threatens to distort competition;
 - the intervention is likely to affect trade between Member States.

State resources

- (24) The measure is financed by resources of the Irish government. Hence, state resources are involved.

⁸ Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC.

● Effect on trade

- (31) Insofar as the intervention is liable to affect service providers from other Member States, the measure has an effect on trade. The markets for electronic communications services (including the wholesale markets and the retail broadband markets) are open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States.

Conclusion on the presence of aid

- (32) In view of the above, the Commission considers that the notified measure will grant an economic advantage to the Preferred Bidder and to third party operators. The measure is publicly funded, has a potential of distorting competition and has an effect on trade between Member States. Therefore the Commission regards the notified measure as constituting State aid within the meaning of Article 87 (1) of the EC Treaty.
- (33) Having established that the project involves aid within the meaning of Article 87(1) of the EC Treaty, it is necessary to consider whether the measure can be found to be compatible with the common market.

Compatibility Assessment

- (34) The Commission notes that the project aims at facilitating the provision of affordable broadband services in well-identified target areas in Ireland in which no such services are currently available and as such does not fall under one of the existing frameworks and guidelines.
- (35) The Commission therefore considers that the assessment of the compatibility of the measure with the common market needs to be based directly on Article 87(3)(c) of the EC Treaty⁹ which states that:

"aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest"

may be considered to be compatible with the common market.

- (36) In order to be compatible under article 87 (3) (c) EC Treaty, an aid must pursue an objective of common interest in a necessary and proportionate way. In particular, the measure shall be assessed with respect to the following questions:
- (a) Is the aid measure aimed at a well-defined objective of common interest (i.e. does the proposed aid address a market failure or other objective)?

⁹ See also, similar decisions for other cases of broadband support: N 199/2004 - Broadband Business Fund - United Kingdom; http://ec.europa.eu/community_law/state_aids/comp-2004/n199-04.pdf, N 264/2006 - Broadband for rural Tuscany - Italy, http://ec.europa.eu/community_law/state_aids/comp-2006/n264-06.pdf, N 263/2005 - Broadband for Kärnten - Austria, http://ec.europa.eu/community_law/state_aids/comp-2005/n263-05.pdf

- (39) Despite the good broadband coverage in most areas of Ireland and strong growth in the uptake of broadband services,¹³ a number of households and businesses will still be outside the reach of broadband services. As outlined above, the Irish authorities have identified a number of barriers to universal broadband provision. Moreover, cable broadband services in Ireland are limited to large urban areas and it is unlikely that cable operators will extend their infrastructure or services to sparsely populated rural areas as there is no commercial case for development in areas with low population density. Furthermore, wireless service providers will not address certain rural, sparsely populated areas, as there is no commercial case for broadband services in such areas.
- (40) Hence, by providing financial support for the provision of retail and wholesale broadband services in areas of Ireland where broadband is currently not available, the Irish authorities pursue genuine cohesion and economic development objectives.

b. Well-designed aid

Aid is the appropriate instrument

- (41) The NBS is part of the integrated approach pursued by the Irish authorities to deal with the problems encountered in the delivery of broadband in Ireland. The authorities consider that there is no alternative to granting public funding to overcome the lack of service provision. Demand-side measures in favour of broadband (such as vouchers or tax advantages) could be another instrument. However, this measure alone would be unable to solve the identified problems on the supply side (absence of broadband enabled networks). Whereas regulation has facilitated broadband deployment in urban and more densely populated areas, it is unlikely to lead to sufficient investments for the provision of broadband services to unserved areas, and it is unlikely that regulatory activity alone will be adequate to address the ongoing digital divide.¹⁴
- (42) Eircom, the incumbent fixed-line telecom operator, has been designated by ComReg as having significant market power (SMP) in the market for wholesale unbundled access and is obliged, among other things, to provide access to its local loop to enable local loop unbundling ("LLU"). Nevertheless, it is clear that the economics of providing broadband services via LLU in the remote rural areas are not viable and it is therefore unlikely that other service providers will use LLU to provide services in these areas. Moreover, Eircom has indicated that it does not intend to enable at least [...] of its exchanges in the remote areas on the basis that it would not be commercially viable. As a consequence, no wholesale (or retail) broadband service is available from Eircom in these areas.

¹³ Cf. report by ComReg, the Irish communications regulator: *Irish Communications Market – Quarterly Key Data Report*, June 2007.

¹⁴ The Commission recognised in a previous decision concerning Ireland that "market evidence shows that regulation has so far neither ensured effective competition in various Irish markets for electronic communications nor led to sufficient investments to bridge the "broadband gap", State aid case N 284/2005 – Ireland, Regional Broadband Programme: Metropolitan Area Networks, phases II and III, para. 68.

for the service providers to choose the most efficient way of procuring the necessary infrastructure, either by building, buying or leasing it from third parties minimises duplication and enhances economic efficiency. Existing infrastructure owners have the possibility to contribute their infrastructure to the project, which limits the economic impact of the project for operators that may already have basic electronic communications infrastructure in place.

e) Wholesale access: The wholesale access provision will enable third party operators to compete with the Preferred Bidder, thereby strengthening choice and competition in the areas concerned by the measure.

f) Claw-back mechanism to avoid over-compensation: To ensure the Preferred Bidder service provider is not over-compensated if demand for broadband in defined target areas grows beyond anticipated levels, the DCENR will be inserting a reverse payment mechanism into the contract.

g) Limited duration: The DCENR anticipates awarding a contract for a limited duration of five years. A five-year contract is considered necessary to enable the Preferred Bidder to establish a solid business case for its investment that will also allow it to continue delivering services beyond the contract duration.

h) Benchmarking consumer product with similar services in urban areas: The Irish authorities undertake that the broadband product to be provided by the NBS will be benchmarked with tariffs and products typically available on the Irish market.

c. The distortions of competition and the effect on trade are limited and the overall impact of the measure is positive

- (46) On balance, the Commission concludes that the overall effect of the measure is deemed to be positive. The measure is clearly in line with the objectives of Article 87 (3) (c) EC Treaty as it facilitates the development of certain economic activities (retail and wholesale broadband services) in remote and rural areas of Ireland.
- (47) The Commission concludes that the notified measure will offset a geographical and commercial handicap and is objectively justified to address the lack of availability of broadband services due to the insufficient density of potential and actual subscribers to make delivering broadband services economically viable on a purely market-driven basis. The Irish authorities have designed the measure in a way which minimises the State aid involved and potential distortions of competition. Concerning the effect on trade, the Commission does not identify negative spill-over effects for other Member States.
- (48) In the light of the above, the Commission has come to the conclusion that the aid involved in the notified measure is compatible with Article 87(3) (c) of the EC Treaty.



Department of Communications, Energy and Natural Resources
Roinn Cumarsáide, Fuinnimh agus Acmhainní Nádurtha

09 April 2008

Ms. Claire Waterson

William Fry,
Fitzwilton House,
Wilton Place,
Dublin 2.

FOI Request Reference: FOI/2008/26

Dear Ms. Waterson,

I refer to your FOI request under Section 7 of the Freedom of Information Acts, 1997 and 2003, received in this office on 04 April, 2008 in relation to notification under State aid rules of a scheme related to the provision of broadband services in unserved target areas in Ireland. The application was received along with the associated fee.

The officer handling your request will be Mr. Garry Purcell, Communications (Development) & Electronic Commerce Division, Department of Communications, Energy and Natural Resources, 29 – 31 Adelaide Rd., Dublin 2. He can be contacted at: 01 678 2553.

You can expect to receive your decision by the 02 May, 2008.

If you have not received a decision by that time, you are automatically entitled to appeal to the Department for a review of the matter. This review proceeds on the legal basis that the initial request is considered to be refused once the specified time for responding to it has expired. A request for a review should be addressed to the undersigned at the address shown.

Yours sincerely,

Seána McGearty

FOI Unit
Department of Communications, Energy and Natural Resources
Elm House,
Earlsvale Rd,
Cavan

Phone: 01 6782902

Garry Purcell

From: Garry Purcell
Sent: 02 May 2008 17:17
To: 'claire.watson@williamfry.ie'
Subject: FOI 26/2008

2 May 2008

Ms. Claire Waterson
William Fry,
Fitzwilton House,
Wilton Place,
Dublin 2

FOI 26/2008

Dear Ms. Waterson,

I refer to the request which you made under the Freedom of Information Acts 1997 and 2003 for records held by this Department:

All documents, including and not limited to, notes of meetings, telephone calls, internal memoranda and correspondence between the Department, the Department of Foreign Affairs and the European Commission relating to the notification under State aid rules of a scheme related to the provision of broadband services in unserved target areas in Ireland (the National Broadband Scheme) and the implementation of that scheme, leading up to the European Commission's decision dated 25 September 2007, in particular a letter from the Irish authorities to the European Commission registered by the European Commission on 13 August 2007.

I have made a final decision on your request on 2 May 2008. If you have any queries regarding this correspondence you can contact me by telephone at 01 6782553.

Findings, particulars and reasons for decisions to deny access.

I am withholding all the documents requested under two exemptions. The first exemption is Section 20, which states:

[SU20] 20_(1) A head may refuse to grant a request under *section 7*

(a) if the record concerned contains matter relating to the deliberative processes of the public body concerned (including opinions, advice, recommendations, and the results of consultations, considered by the body, the head of the body, or a member of the body or of the staff of the body for the purpose of those processes), and

(b) the granting of the request would, in the opinion of the head, be contrary to the public interest,

The National Broadband Scheme (NBS) tendering process is currently ongoing, and at an advanced stage, so releasing the requested documents before a decision is made would not be in the public interest.

The second exemption I am relying on is Section 22 (1) (b) , which states:

[SU22] 22. (1) A head shall refuse to grant a request under *section 7* if the record concerned _

(a) would be exempt from production in proceedings in a court on the ground of legal professional privilege,

(b) is such that the head knows or ought reasonably to have known that its disclosure would constitute contempt of court, or is such that its disclosure would constitute contempt of court,

Judicial Review proceedings relating to certain parts of the NBS process are currently before the courts. Releasing the requested documents could possibly interfere with these proceedings, and could lead to contempt of court.

Rights of appeal

You may appeal this decision. In the event that you need to make such an appeal, you can do so by writing to the Freedom of Information Unit, FOI Unit,
Dept. Communications, Energy & Natural Resources, Elm House, Earlsvale Road, Co. Cavan.

Your correspondence should include a fee of €75 for processing the appeal. Payment should be made by way of bank draft, money order, postal order or personal cheque made payable to Dept. Communications, Energy & Natural Resources.

You should make your appeal within 4 weeks from the date of this notification. However, the making of a late appeal may be permitted in appropriate circumstances. *A week is defined in the Act to mean 5 consecutive weekdays, excluding Saturdays and public holidays (Sundays are also excluded, as they are not weekdays).* The appeal will involve a complete reconsideration of the matter by a more senior member of the staff of this Department.

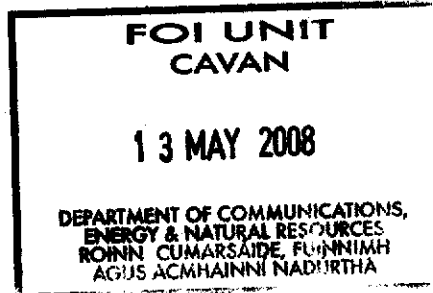
Yours sincerely,

Garry Purcell
Communications Development Division
Adelaide Road
Dublin 2



William Fry

Our Ref 019794.0001.JH



9 May 2008

By Post

FOI Unit
Department of Communications, Energy & National Resources
Elm House
Earlsvale Road
Co. Cavan

FOI 26/2008 *FOC/2008/27*

Dear Sirs

We refer to an e-mail dated 2 May 2008 from Mr. G. Purcell in which he states that he is withholding all documents requested by Claire Waterson of this office.

Mr. Purcell has relied on two exemptions under the 1997 and 2003 Acts.

We fail to understand how any or all documents relating to a State aid notification can properly be regarded as relating to the deliberative processes of the Department and how it would be contrary to the public interest to grant the request. Likewise, we cannot see how granting the request "could possibly" interfere with current court proceedings or could lead to contempt of court.

We hereby appeal Mr. Purcell's decision and enclose a cheque for €75 for processing the appeal.

Yours sincerely

pp Carmel Little
John Handoll

Direct Dial: +353 -1- 639 5111
E-Mail: john.handoll@williamfry.ie

WF-925144-v1



Department of Communications, Energy and Natural Resources
Roinn Cumarsáide, Fuinnimh agus Acmhainní Nádúrtha

20th May, 2008

Ms Claire Waterson
William Fry Solicitors
Fitzwilton House,
Wilton Place,
Dublin 2.

FOI Request Reference: FOI/2008/27

Dear Ms. Waterson,

I refer to the appeal you have made under the Freedom of Information Acts, 1997 and 2003 on the decision taken regarding your recent FOI request concerning correspondence between this Department, the Department of Foreign Affairs and the European Commission relating to the National Broadband Scheme.

Your appeal was received in the FOI Unit on the 13th May, 2008 along with the associated fee. You can expect a decision on your appeal by the 4th June, 2008.

A full and new examination of the matter will be carried out by Mr Brendan Buckley, Communications (Development) & Electronic Commerce Division, Department of Communications, Energy and Natural Resources, 29 – 31 Adelaide Rd., Dublin 2. The Internal Reviewer can be contacted at 01 6782955.

If you are not satisfied with the outcome or if you have not received a reply within the designated timeframe, you are entitled to apply for a further review by the Information Commissioner.

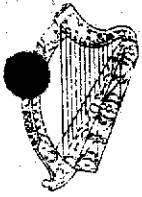
Please note that due to the introduction of a new FOI tracking system within this Department the reference number of your request has changed from FOI/0026/2008 to FOI/2008/27, this new number should be quoted in all future correspondence relating to this request.

Any further queries please contact the FOI Unit.

Yours sincerely,

Mary Rabbitte
FOI Unit
Elm House,
Earlsvale Rd
Cavan

Phone: 01 6782903



An Roinn Cumarsáide,
Fuinnimh agus Acmhainní Nádurtha
Baile Átha Cliath 2.

Department of Communications,
Energy and Natural Resources,
Dublin 2.

Your Ref: 019794.0001.JH

Our Ref: FOI/23/2008

4 June 2008

Ms Claire Waterson
William Fry Solicitors
Fitzwilton House
Wilton Place
Dublin 2

Dear Ms Waterson

I refer to the appeal made on your behalf by John Handoll under the Freedom of Information Acts 1997 and 2003 on 9 May 2008 for review of the earlier decision of this Department dated 6 May 2008.

I am a more senior member of the staff of this Department than the person who made the decision of 6 May 2008. I have decided to uphold the original decision not to release certain of the information sought. This review decision is an entirely new and separate decision on your request, and is explained below.

Section 10

I have reviewed your information request. I am of the opinion that the extent of the information being sought by you is extremely voluminous to the point that it would be a major administrative job to list all of the documentation sought by you with a decision made on the release or non-release of each individual document, and that such an exercise would be an inappropriate use of State resources. I have attached summary lists of the relevant files/folders held by the Department in relation to the National Broadband Scheme (NBS), Appendix I lists the physical files held by the Department, Appendix II lists the computer folders (within which there are hundreds of documents) held by the Department. As you are aware I wrote to you to explore the possibility of narrowing the request in order to assist the process, and we subsequently discussed the matter, but could not agree to a narrowing of the information being sought. My review decision is that the information request is too voluminous and is refused under Section 10 (c) of the FOI Acts.