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From: Yvonne McCarthy [mailto:Yvonne.McCarthy@dcmnr.gov.ie]
Sent: Thursday, July 05, 2007 10:48 AM
To: RIEDL Alexander (COMP)
Subject: RE: Draft PN 47/2007 - NBS Ireland
Sensitivity: Confidential

Dear Alexander,

Just to give you an update on the National Broadband Scheme (NBS). Today is the deadline for receipt of Pre-Qualification Questionnaire (PQQ) responses from prospective candidates. The next phase of the process is to evaluate the PQQ responses and, depending on number of responses received, we would hope to be in a position to conclude this phase by end of July. This will be followed by the issue of the more detailed Invitation to Participate in Competitive Dialogue (ITPCD) documentation to pre-qualified candidates which will set out our requirements and provide candidates (and the market more generally) with details of (amongst other things) the NBS product, pricing and coverage requirements.

In order to do this we need to finalise our position in relation to the approach for dealing with the provision of service in white and grey areas and you may already have had the opportunity to examine our suggested approaches for doing this as set out in our Draft Pre-Notification. Due to the fact that we are such a critical stage of the NBS procurement process we would very much appreciate your early feedback in relation to our proposed approach and, if at all possible, a conference call may be useful. We are, as ever, disposed to meeting with you directly should this be more beneficial.

Regards,

Yvonne

Yvonne Mc Carthy
Communications Development
29-31 Adelaide Road
Dublin 2

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From: Alexander.RIEDL@ec.europa.eu [mailto:Alexander.RIEDL@ec.europa.eu]
Sent: 27 June 2007 17:49
To: Yvonne McCarthy
Cc: Kenneth Spratt; eric.tomkins@comreg.ie; Majella O'Dea;
Lambros.Papadias@ec.europa.eu
Subject: RE: Draft PN 47/2007 - NBS Ireland
Sensitivity: Confidential

Dear Yvonne,

Thanks for your message.

We will look at the documents and will get back to you asap, in particular as regards the "grey areas".

We will either call you or send you an e-mail. Should there be further questions, we can have a conference call next week.

Best regards,
Alexander and Lambros

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-----Original Message-----

From: Yvonne McCarthy
Sent: 26 September 2007 18:41
To: Kenneth Spratt
Cc: Eric Tomkins; Joanne.Finn@mccannfitzgerald.ie; Patrick Kidney
Subject: FW: Commission decision re National Broadband Scheme (State Aid N475/2007)
Sensitivity: Confidential

Formal notification from the Commission.
Regards,
Yvonne

-----Original Message-----

From: Eoin.ODomhnaill@dfa.ie [mailto:Eoin.ODomhnaill@dfa.ie]
Sent: 26 September 2007 17:46
To: Des Hackett (DFA); Yvonne McCarthy
Subject: Commission decision re National Broadband Scheme (State Aid N475/2007)

Des, Yvonne,

Please see attached Commission's decision C(2007) 4320, dated 25 September 2007 - good news, you'll see. You'll probably receive separately from D/FA in due course. Please note the 15 day period within which you can object to any information in the decision being disclosed to third parties - even if you've no objection, you might please let me know, and I can inform Commission accordingly.

Des - in case Yvonne isn't available or isn't in the office, can you please email this decision to one of her colleagues for attention as appropriate?

Thanks,

Eoin

Eoin Ó DOMHNAILL
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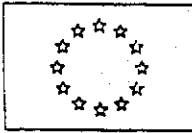
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This is also to certify that this mail has been scanned for viruses.

Tá eolas sa teachtaireacht leictreonach seo (agus b'fhéidir sa chomhaid ceangailte leis) a d'fhéadfadh bheith príobháideach nó faoi rún. Is le h-aghaidh an duine/na ndaoine nó le h-aghaidh an aonáin atá ainmnithe thuas agus le haghaidh an duine/na ndaoine sin amháin atá an t-eolas. Murab ionann tusa agus an té a bhfuil an teachtaireacht ceaptha dó bíodh a fhios agat nach gceadaítear nochtadh, cóipeáil, scaipeadh nó úsáid an eolais agus/nó an chomhaid seo. Más trí earráid a fuair tú an teachtaireacht leictreonach seo cuir, más é do thoil é, an té ar sheol an teachtaireacht ar an eolas láithreach.

Deimhnítear leis seo freisin nár aimsíodh víreas sa phost seo tar éis a scanadh.



EUROPEAN COMMISSION

SECRETARIAT-GENERAL

26 IX 2007

Brussels,
SG-Greffe (2007) D/ 205695

ORIGINAL TO: € OIS...
DATE: 26-9-07
CC: ...

PERMANENT REPRESENTATION OF
IRELAND TO THE EUROPEAN UNION
Rue Froissart, 89-93

1040 BRUXELLES

Subject: State Aid n° N 475/2007 - Ireland

The Secretariat-General would be obliged if you would forward to the Minister for Foreign Affairs, the enclosed decision from the Commission on the subject specified above.

For the Secretary-General,


Karl VON KEMPIS

Encl. : C(2007)4320 final



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
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St. Stephen's Green 80
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ability to accelerate the contribution of these technologies to economic growth, to facilitate innovation and in order to enhance social inclusion.

- (4) Based on market assessments conducted by the Irish government, Department of Communications, Energy and Natural Resources ("DCENR"), today approximately 10 - 15% of the geographical area of Ireland and 10% of the population cannot have access to broadband services. Typically, the unserved areas of Ireland are rural and have low population density so that commercial providers have no economic incentive to invest in electronic communications networks to provide broadband². Although this figure indicates that a large part of the population are already benefiting from a competitive broadband market, the unserved parts of Ireland illustrate the ongoing presence of a "digital divide", where a number of communities in isolated areas are disadvantaged because they lack access to affordable broadband services.
- (5) In order to address this broadband deficit, the Irish authorities designed the National Broadband Scheme. The DCENR has initiated an open tender process following EU procurement rules. Interested service providers will submit bids and the DCENR will select a successful service provider who will provide broadband services to consumers, businesses and other operators (on a wholesale level) in the unserved target areas in Ireland. The level of funding necessary to ensure the delivery of affordable broadband services will be determined during the procurement procedure.
- (6) The DCENR considers that in the absence of intervention by the State under the NBS, service providers are unlikely to invest in these areas within a reasonable timeframe, with the consequence that consumers and businesses in primarily rural and isolated areas will continue to lack access to broadband services with the consequence of being excluded from the social and economic benefits of such access.

IV. DESCRIPTION OF THE MEASURE

- (7) *Objectives:* The objective of the NBS is to encourage and secure the provision of affordable broadband services in well-identified target areas in Ireland in which no such services are currently available. The Irish authorities will grant financial support for building the necessary infrastructure and the provision of broadband service at a retail level to costumers and at the wholesale level to third operators. The NBS objectives are integral to the economic and social infrastructure priorities set out in Ireland's National Development Plan 2007-2013, namely "*to promote the availability of competitive broadband services and to achieve nationwide broadband coverage by the end of the Plan period*".
- (8) *Legal basis:* The legal basis of the notified measure is to be found in the Ministers and Secretaries (Amendment) Acts, 1924 - 2007 (as amended by S.I. 300/2002 Communications, Energy and Geological Survey of Ireland (transfer of Departmental

² According to the Irish authorities, for instance, Eircom, the incumbent provider, has 1149 local telephone exchanges of which a minimum of 254 exchanges will not be enabled with broadband.

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 place a notification mechanism for operators to inform them about updated service

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>

footprints, i.e. the geographic areas where they roll out broadband. A mechanism to give effect to this approach will also be built into the NBS procurement process and service contract.

- (14) *Service definition:* A service provider⁴ will be selected by means of an open tender and will be responsible for rolling out and operating electronic communications networks capable of providing broadband services. The service provider will be required to offer subscribers in specified areas a retail connection with specific service requirements⁵. Moreover, there will be a requirement for the successful service provider to offer a wholesale product at an appropriate tariff, which will be available to other operators on the market on a non-discriminatory basis. The Irish authorities have informed the Commission that the wholesale pricing will be set at a reasonable margin compared to the retail price to allow competition.
- (15) *Procurement:* The DCENR has commenced an open tender process following the Competitive Dialogue in compliance with Directive 2004/18/EC. The tender notice has been published in the Official Journal of the European Union.⁶ The short-listed candidates will take part in the tender proceeding and will receive the invitation to tender documentation. The bidder with the most economical offer will be awarded a Preferred Bidder status. Following completion of permissible post-tender clarifications and confirmation of commitments, the NBS Contract will be signed (subject to observation of the required 14 day standstill period) and the implementation stage of the NBS project will commence.
- (16) *Beneficiaries:* The direct recipient of the funding will be the Preferred Bidder. Indirect beneficiaries will be third party operators using the wholesale provision, and finally, end users, i.e. businesses (in particular SMEs) and households using the retail services.
- (17) *Budget:* The overall aid amount will be determined during negotiations as part of the competitive dialogue process to select the Preferred Bidder. The remaining costs have to be funded in their entirety by the Preferred Bidder. While the amount will not be known until the conclusion of the competitive dialogue process, it is anticipated that the subsidy required will be in the range of [...] ⁷.
- (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

⁴ Single undertakings or consortia may submit bids. For reasons of simplicity, the term "preferred bidder" and "service provider" will be used in this decision letter, which includes a possible consortium of several undertakings.

⁵ The service requirements are: always-on service (no charge by connection time); downstream (i.e. Internet to subscriber) speed of 1024kbit/s (1Mbit/s) whereby the service must allow minimum peak speeds up to 1024kbit/s; upstream (i.e. subscriber to Internet) speed of 128kbit/s whereby the service must allow minimum peak speeds up to 128kbit/s; a maximum contention ratio equivalent to 48:1 (by reference to the technology employed by the Service Provider); minimum monthly limit on download capacity (uncharged) per retail subscriber connection of 10GB; latency requirements such that common Internet Protocol (IP), applications such as Virtual Private Network (VPN), Voice over IP (VoIP) and gaming may be supported by the broadband service.

⁶ A copy of the OJEU Notice can be found at the following link http://ted.europa.eu/Execjsessionid=DFD6B37C685C6761CD8E69DB625C5394.instance_1?DataFlow=ShowPage.dfl&Template=TED/N_one_result_detail_curr.htm&docnumber=105759-2007&docId=105759-2007&StatLang=EN

⁷ In view of the ongoing tender procedure, this information is confidential.

[REDACTED] of the overall costs of the measure. [REDACTED]

- (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.

Economic advantage

- (25) Preferred Bidder: Through the tender process, the Preferred Bidder will receive financial support which will enable it to enter the market and provide broadband services on conditions not otherwise available on the market. Although an open tender

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.

procedure tends to reduce the potential advantage in terms of excessive profits, the aid will allow the service provider to offer end-to-end services prima facie at lower prices than if it had had to bear all costs itself and thus attract more customers than under normal market conditions. The Preferred Bidder will also be in ownership of the networks as well as other tangible and intangible assets acquired with State funds (e.g. equipment, customer relations) even after the lifetime of the project and hence enjoy continuing benefits partly funded with State resources after the end of the project. In view of the above, it is clear that an economic advantage will be granted to the Preferred Bidder.

- (26) *Third party operators:* In the areas covered by the measure, there is no broadband infrastructure and therefore no broadband wholesale offer at all. Therefore, third party providers of broadband services using wholesale access to the networks built under the measure will also benefit from the economic advantage through State resources as (wholesale) customers of the Preferred Bidder.
- (27) *End users:* The measure aims at facilitating the provision of broadband services to residential and business users not currently available in the target areas. Whereas residential users are not subject to State aid rules, it is not excluded that businesses in the targeted geography might indirectly benefit from service coverage. However, it is not evident at this stage that the measure confers a sufficiently identifiable advantage on such future business users.

Distortion of competition

- (28) The intervention of the State alters the existing market conditions by allowing the provision of broadband services by the Preferred Bidder and, potentially, third party providers. A number of firms are likely to subscribe to the services provided by the selected suppliers instead of more expensive market-based solutions (for instance expensive satellite or leased line services). Therefore, the fact that a broadband service becomes available at a lower price than existing although expensive market offers has the effect of distorting competition.
- (29) In addition, while the Irish authorities decided to intervene precisely in view of the lack of private initiatives in at least some of the concerned areas, it cannot be excluded that market initiatives could become viable in some areas in the longer term. By securing this project, the Preferred Bidder will be capable of establishing its business and developing a customer base, thus enjoy a first mover advantage over prospective competitors.
- (30) The measure is also selective in that it is addressed to undertakings active only in certain regions or in electronic communications services. These selectivity elements also induce a potential distortion of competition.

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)?
 - (b) Is the aid well designed to deliver the objective of common interest? In particular:
 - Is the aid measure an appropriate instrument, i.e. are there other, better-placed instruments?

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

- Is there an incentive effect, i.e. does the aid change the behaviour of undertakings?
 - Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
- (c) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

a. The support of broadband rollout is in line with the common interest

Community policy

- (37) As outlined in its Communication "i2010 – A European Information Society for growth and employment"¹⁰, the Commission actively supports the widespread availability of broadband services. There is clear evidence of regional economic development benefits resulting from greater broadband deployment, including job creation and retention as well as improved health and education services¹¹. In order to achieve better broadband coverage, the Commission encourages Member States to put comprehensive national broadband strategies in place.¹² The NBS, which forms an important part of the Irish broadband strategy, is fully in line with the community policies in this area. It will deliver broadband access to citizens and businesses in disadvantaged areas of Ireland which would otherwise miss out. Hence, the NBS is in line with the common interest.

Cohesion objective and market failure considerations

- (38) Lack of broadband coverage is due, among others, to some of the typical economic problems of network industries. In particular, due to economics of density, broadband networks (e.g. using DSL technology) are generally more profitable to roll out where potential demand is higher and more concentrated. On the supply side, due to high fixed costs, unit costs escalate dramatically as population densities drop. Remoteness also plays a role, requiring bridging longer distances in the backhaul and in the last mile. In the rural areas targeted by the measure, where demand is not very developed and coverage of cost is uncertain, operators have so far decided not to roll-out broadband.
- (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

¹⁰ COM(2005)229 final, 1 June 2005.

¹¹ For an overview, see: Lehr, Osorio, Gillet and Sirbu (2005): "Measuring Broadband's Economic Impact", and Orazem, Peter, University of Kansas Business School (2005), "The Impact of High-Speed Internet Access on Local Economic Growth".

¹² Commission Communication COM(2004) 369 of 12.05.2004, "Connecting Europe at High Speed – National Broadband Strategies".

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

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 [REDACTED] 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.
- (43) In view of these considerations, the Commission concludes that public support for the provision of broadband services is an appropriate instrument to achieve the set objectives.

The aid provides the right incentives to operators

- (44) The NBS will ensure that bidders tendering for the NBS will indicate the amount of public funding they consider necessary to carry out the required investment on the basis of the anticipated total investment, operating costs and revenues. Ireland's

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.