

6.12 BENCHMARKING AND MARKET TESTING

1 INTERPRETATION

1.1 The definitions and rules of interpretation in this Paragraph 1 (Interpretation) apply in this Schedule.

Average Price means in relation to the Equivalent Services provided by a Comparison Sample, the mean price of the relevant services over the previous 12-month period.

Benchmark Party means the Minister, NBPco and/or Buildco as appropriate having regard to the context in each case and Benchmark Parties shall be construed accordingly.

Benchmark Review means any Key Subcontract Service Review or any Service Continuity Review.

Benchmarker means the independent third party appointed by the Employer following the directions of the Minister under Paragraph 4 (Appointment of Benchmarker).

Benchmarking Report means the report produced by the Benchmarker following a Benchmark Review.

Comparison Sample means a sample of organisations providing Equivalent Services identified in accordance with Paragraph 5.10.1 (Benchmarking Process).

Equivalent Services means services that are identical, or similar or comparable in nature, to some or all of:

- (A) the services provided under the Key Subcontracts; or
- (B) the services that will be provided under the Industry Standard Service Level Agreement(s)

being benchmarked (including in terms of scope, specification, volume and quality of performance), as applicable and that are available within Ireland including services purchased by the Employer from any other service provider that are identical or similar or comparable in nature to (A) or (B) of this definition (including in terms of scope, specification, volume and quality of performance) as applicable.

Key Subcontract Service Review means any benchmarking of a service or services provided by a Key Subcontractor under a Key Subcontract during the Operational Period.

Market Testing Procedure has the meaning given to it in Paragraph 7.1.1(E) (Market Testing) in relation to a Key Subcontract.

Market Testing Review Dates means the date of the fifth anniversary of the Effective Date, the date that is the tenth anniversary of the Effective Date, the date that is the fifteenth anniversary of the Effective Date, the date that is the twentieth anniversary of the Effective Date and the date that is the twenty-fifth anniversary of the Effective Date and **Marketing Testing Review Date** will be construed accordingly.

Service Continuity Review means any benchmarking of the Industry Standard Benchmark Service Levels and/or the Industry Standard Service Level Agreements.

1.2 A service or services provided by a Key Subcontractor under a Key Subcontract shall be “**Good Value**” if:

1.2.1 [REDACTED]

1.2.2 **[REDACTED]**

- 1.3 The scope of the services (as noted in the definition of Key Subcontract Service Review) being provided under a Key Subcontract which may be subject to a Key Subcontract Service Review shall be no broader than the scope of the Services.

2 NOTICE AND FREQUENCY OF BENCHMARK REVIEW

- 2.1 The Minister may, by written notice to:

2.1.1 the Employer, require a Key Subcontract Service Review for the purposes of determining if a service or the services provided under that Key Subcontract are Good Value; or

2.1.2 NBPco, require a Service Continuity Review in accordance with the provisions of Clause 74.5.4 (Term of This Agreement and Service Continuity) and this Schedule 6.12 (Benchmarking and Market Testing).

- 2.2 The Minister shall:

2.2.1 not be entitled to carry out a Key Subcontract Service Review during the twenty four (24) month period beginning on the commencement date of the relevant Key Subcontract or at intervals of less than twenty four (24) months after any previous Key Subcontract Service Review;

2.2.2 only carry out a Service Continuity Review from time to time in accordance with the provisions of Clause 74.5.4 (Term of This Agreement and Service Continuity).

3 PURPOSE AND SCOPE OF BENCHMARK REVIEW

- 3.1 The purpose of a:

3.1.1 Key Subcontract Service Review shall be to establish whether benchmarked Key Subcontract services are Good Value;

3.1.2 Service Continuity Review shall be to establish the Industry Standard Benchmark Service Levels and/or the terms of an Industry Standard Service Level Agreement.

- 3.2 The scope of any Benchmark Review shall be identified by the Minister in the written request it gives under Paragraph 2.1 (Notice and Frequency of Benchmark Review).

- 3.3 The provisions of this Schedule 6.12 (Benchmarking and Market Testing) are without prejudice to the provisions of Schedule 6.13 (Ministerial Oversight of Deployment Subcontract Procurement Process).

4 APPOINTMENT OF BENCHMARKER

- 4.1 Each Benchmark Review shall be performed by an independent third party appointed by the Employer on providing ten (10) Working Days prior written notice to the Minister. In the event of any disagreement regarding the identity or appointment of the Benchmarker prior to the expiry of that ten (10) Working Day period the Minister shall have the right to appoint the Benchmarker on notice to NBPco. If there is no objection by the expiration of that ten (10) Working Day period the Employer may appoint the Benchmarker. When considered

appropriate by the Minister it may require that the Benchmarker for the Service Continuity Review will be the Regulator.

4.2 It is agreed that the Benchmarker for any Key Subcontract Service Review may be different to the Benchmarker for any Service Continuity Review.

4.2.1 The Parties, for the purposes of Clause 4.2 (Appointment of Benchmarker), shall meet, no later than twelve (12) months following the Effective Date, and use all reasonable endeavours, acting reasonably and in good faith, to promptly agree in writing the proposed scope, terms and basis for the role of the Benchmarker for any Key Subcontract Service Review.

4.3 The Minister and/or the Employer has the right at any time to require the Benchmarker to enter into an appropriate confidentiality undertaking directly with it, provided that:

4.3.1 such undertaking shall not restrict disclosure by the Benchmarker to the Minister for the purposes of or in connection with the Benchmark Review; and

4.3.2 the exercise of such right shall not unreasonably delay the conduct of the Benchmark Review.

4.4 Each Benchmark Party shall bear its own costs (other than the costs of the Benchmarker) relating to a Benchmark Review. The reasonable vouched costs of the Benchmarker shall be borne equally by the Minister and NBPco except for where there is a finding that the Key Subcontract Service Review is not Good Value in which case NBPco shall bear all of the Benchmarker's reasonable vouched costs.

4.5 The Benchmarker shall conduct each and every Benchmark Review by applying the following general principles and criteria:

4.5.1 benchmarking shall be carried out in an independent and objective manner;

4.5.2 the Benchmarker shall be jointly instructed by the Minister and the Employer;

4.5.3 benchmarking shall be truly comparative in respect of the technology, services, service levels and service credits;

4.5.4 benchmarking shall be structured and undertaken in a way that causes the minimum disruption possible; and

4.5.5 immediately following appointment of the Benchmarker in accordance with the terms of this Schedule 6.12 (Benchmarking and Market Testing), the Minister, the Employer and the Benchmarker shall agree the general principles and method of benchmarking including the following benchmarking criteria:

(A) [REDACTED]

(B) [REDACTED]

(C) [REDACTED]

(D) [REDACTED]

(1) [REDACTED]

(2) [REDACTED]

- (E) whether there is any other reason or factor that would make benchmarking unrealistic or impracticable;
- 4.5.6 in the event of any disagreement regarding the general principles and method of benchmarking including the above benchmarking criteria the Minister's view shall be final; and
- 4.5.7 to the extent that the Benchmarker notifies the Parties that a service being benchmarked has no Equivalent Service, and this is confirmed by the Minister, the Benchmarker shall be allowed a degree of latitude to interpret and extrapolate existing services for the purposes of creating an Equivalent Service for that service.

5 BENCHMARKING PROCESS

- 5.1 The instructions to the Benchmarker by or on behalf of the Minister (via the Employer) shall require the Benchmarker to produce, and to send to each Benchmark Party for approval, a draft plan for the Benchmark Review within ten (10) Working Days after the date of appointment of the Benchmarker. The plan shall include:
 - 5.1.1 a proposed timetable for the Benchmark Review (including for delivery of the Benchmarking Report);
 - 5.1.2 a description of the information that the Benchmarker requires each Benchmark Party to provide;
 - 5.1.3 a description of the benchmarking methodology to be used; and
 - 5.1.4 details of any organisations providing Equivalent Services which the Minister proposes, having consulted with the Employer (and including any organisations providing Equivalent Services reasonably proposed by the Employer), are included within the Comparison Sample.
- 5.2 Each Benchmark Party shall give notice in writing to the Benchmarker and to the other Benchmark Parties (as applicable) within ten (10) Working Days after receiving the draft plan, advising whether it approves the draft plan or, if it does not approve the draft plan, suggesting amendments to that plan. No Benchmark Party may unreasonably withhold its approval of the draft plan and any suggested amendments shall be reasonable.
- 5.3 Where a Benchmark Party suggests amendments to the draft plan under Paragraph 5.2 (Benchmarking Process), the Benchmarker shall, if it believes the amendments are reasonable, produce an amended draft plan. Paragraph 5.1 (Benchmarking Process) shall apply to any amended draft plan. If the Benchmarker believes that the suggested amendments are not reasonable then the Benchmarker shall discuss the amendments with the Benchmark Parties to reach a resolution. If the Benchmark Parties are unable to agree a resolution within ten (10) Working Days of the matter first being referred to the first of them by the Benchmarker for discussion, then such matter shall be resolved in accordance with the Dispute Resolution Procedure.
- 5.4 Failure by a Benchmark Party to give notice in accordance with Paragraph 5.2 (Benchmarking Process) shall be treated as approval of the draft plan by that Benchmark Party.
- 5.5 Once the plan is approved by the relevant Benchmark Parties, the Benchmarker shall carry out the Benchmark Review in accordance with the plan. Each Benchmark Party shall, to

the extent it is not precluded from doing so by confidentiality obligations owed to third parties, provide the information described in the plan, together with any additional information reasonably required by the Benchmarker. The appropriate Benchmark Party shall use its best endeavours to obtain authority from such third parties to disclose such information to the Benchmarker solely for the purposes of enabling him to carry out the Benchmark Review.

- 5.6 Each Benchmark Party shall co-operate fully with the Benchmarker, including by providing access to the Assets, Wholesale Products, UWG, portals, Operational Environment, records, technical documentation, premises, equipment, systems and personnel at times reasonably requested by the Benchmarker. The Benchmarker shall minimise any disruption to the operation of any Key Subcontract or this Agreement as applicable.
- 5.7 The Minister or the Employer shall instruct the Benchmarker to produce the Benchmarking Report within ten (10) Working Days of the approval of the plan under Paragraph 5.5 (Benchmarking Process). Any correspondence between the relevant Benchmark Parties and the Benchmarker shall be copied to the other Benchmark Parties at the same time. The Benchmarker shall share with the relevant Benchmark Parties, in an even-handed manner, all data relating to the Benchmarking and the Benchmarking Report to the extent that it is lawfully able to do so.
- 5.8 The Benchmark Parties may provide additional material to the Benchmarker to assist the Benchmarker in conducting the Benchmark Review.
- 5.9 The selection of the Comparison Sample (both in terms of number and identity of entities) shall be a matter for the Benchmarker's professional judgement, but it will be requested to consider the following:
- 5.9.1 information from other service providers to the Minister;
 - 5.9.2 regulatory information;
 - 5.9.3 survey information;
 - 5.9.4 market intelligence;
 - 5.9.5 the Benchmarker's own data and experience;
 - 5.9.6 relevant published information including published expert analysis; and
 - 5.9.7 information from consultancies and/or other vendors or purchasers of Equivalent Services.
- 5.10 Once it has received the information it requires, the Benchmarker shall:
- 5.10.1 identify the Comparison Sample in accordance with Paragraph 5.9 (Benchmarking Process) above;
 - 5.10.2 in respect of a Key Subcontract Service Review, calculate the Average Price and/or median service level specifications for the Equivalent Services provided by the Comparison Sample;

- 5.10.3 in relation to a Service Continuity Review:
- (A) identify the industry standard benchmarks applicable or reasonably expected to be applicable to the Industry Standard Benchmark Service Levels during the Service Continuity Period;
 - (B) identify the industry standard benchmarks applicable or reasonably expected to be applicable to the terms of the Industry Standard Service Level Agreements during the Service Continuity Period;

5.10.4 in respect of a Key Subcontract Service Review, **[REDACTED]**; and

5.10.5 in respect of a Key Subcontract Service Review, **[REDACTED]**.

- 5.11 In conducting the Benchmark Review, the Benchmarker shall apply correction factors to the information to take account of reasons for difference in accordance with Best Industry Practice. Such normalisation information shall be available for approval by the Benchmark Parties prior to the production of the Benchmarking Report.
- 5.12 The Benchmarker shall perform the Benchmark Review in a fully transparent and open manner and shall promptly provide the Employer and the Minister with full details of all data and methodologies employed at all stages of the Benchmark Review.

6 BENCHMARKING REPORT

- 6.1 The Benchmarker shall prepare a Benchmarking Report setting out its findings in the timeline specified in the plan approved under Paragraph 5 (Benchmarking Process) (being no later than that specified in Paragraph 5.7 (Benchmarking Process)) and shall provide a copy to all Benchmark Parties. Those findings:
- 6.1.1 in respect of a Key Subcontract Service Review shall include a finding as to whether or not the benchmarked Key Subcontract services are Good Value; and
 - 6.1.2 in respect of a Service Continuity Review, shall specify:
 - (A) the Industry Standard Benchmark Service Levels for the Service Continuity Period; and
 - (B) the terms of the Industry Standard Service Level Agreements for the Service Continuity Period;
 - 6.1.3 may include other findings regarding the quality and competitiveness or otherwise of the benchmarked Key Subcontract services, Services, Industry Standard Benchmark Service Level(s) or Industry Standard Service Level Agreement(s); and
 - 6.1.4 in respect of a Key Subcontract Service Review, if the benchmarked Key Subcontract services:
 - (A) are not Good Value, specify the recommendations that would be required to the terms of the Key Subcontract, **[REDACTED]**; and
 - (B) are Good Value, recommend that the Key Subcontract continues to operate in accordance with its terms.

- 6.2 In respect of a Key Subcontract Service Review, if the Benchmarking Report states that any or all benchmarked Key Subcontract services are not Good Value then the Minister may require the Employer to:
- 6.2.1 undertake market testing in accordance with Paragraph 7 (Market Testing) below; and
 - 6.2.2 where necessary, replace the relevant Key Subcontract services or Key Subcontractor, as applicable, in accordance with Paragraph 7 (Market Testing) below.
- 6.3 When a Key Subcontractor is due to be wholly or partially replaced under Paragraph 6.2.2 (Benchmarking Report) NBPco shall and, where applicable, shall procure that Buildco shall promptly terminate all or part of that Key Subcontractor's Key Subcontract, as appropriate depending on the recommendations in the Benchmarking Report, to facilitate an orderly and appropriate transition to the appointment of the replacement Key Subcontractor for some or all of the services provided by the benchmarked Key Subcontractor under the process set out in Paragraph 7.6 (Market Testing) below. NBPco shall ensure and procure that Buildco procures that the orderly and appropriate transition of services to a different Key Subcontractor shall not adversely impact the delivery of any services.
- 6.4 For the avoidance of doubt, Benchmark Reviews shall not result in any increase to the Subsidy Payments, costs, fees, payments and charges attributable to the benchmarked Key Subcontract services or this Agreement or any decrease in the required performance of any services, service credits or service levels.

7 MARKET TESTING

- 7.1 If the Minister requires market testing of any Key Subcontract services pursuant to Paragraph 6.2 (Benchmarking Report), the following procedure will apply:
- 7.1.1 at least three (3) months before each Market Testing Review Date, the Benchmark Parties will meet together as often as may be necessary to consider to agree:
 - (A) the number and identity of prospective tenderers that will be invited to prepare and submit tenders for the Key Subcontract services in question provided that any prospective tenderer will possess an appropriate degree of skill, resources, reputation and financial standing relative to the terms of the Key Subcontract in question (and any Dispute as to the selection of a prospective tenderer will be determined in accordance with the Dispute Resolution Procedure);
 - (B) the appropriate manner of advertising the Key Subcontract services;
 - (C) the identity of members of the evaluation panel 50% of which may be comprised of the Minister's representatives;
 - (D) any changes to the Key Subcontract in question; and
 - (E) the form and contents of the tender documents (which will include a Key Subcontract service specification) relevant to the Key Subcontract to be delivered to prospective tenderers, which will be incorporated into an agreed document (the "**Market Testing Procedure**").

- 7.2 If the Benchmark Parties are unable to agree any of the matters set out or to be set out in the Market Testing Procedure, they may refer the matter to the Dispute Resolution Procedure.
- 7.3 The Employer will manage the market testing tendering process in accordance with the Market Testing Procedure.
- 7.4 The evaluation panel will select the most economically advantageous tender based on the evaluation criteria agreed in the Market Testing Procedure and will not be obliged to accept the lowest tender.
- 7.5 Where the evaluation panel fails to agree which of the tenders is the most economically advantageous within thirty (30) Working Days following the expiry of the tender period, any Dispute will be determined in accordance with the Dispute Resolution Procedure.
- 7.6 The Employer will appoint any tenderer selected in accordance with the Market Testing Procedure as the applicable Key Subcontractor in respect of the market tested Key Subcontract services as soon as reasonably practicable having regard to:
- 7.6.1 the provisions of Clause 42 (Subcontractors);
 - 7.6.2 the terms of the Key Subcontract with the current Key Subcontractor and the provisions of Schedule 2.8 (Key Subcontractor Provisions); and
 - 7.6.3 any consultation or other timescales which have to be observed under the TUPE Regulations.

8 MINISTER'S RIGHT TO BENCHMARK

- 8.1 Nothing in this Schedule 6.12 (Benchmarking and Market Testing) or otherwise shall prevent the Minister from undertaking or procuring its own:
- 8.1.1 benchmarking exercise the same as or similar to a Key Subcontract Service Review; and/or
 - 8.1.2 market testing exercise the same as or similar to that under Paragraph 7 (Market Testing) above.

9 CO-OPERATION AND COMPLIANCE WITH LAW

- 9.1 In carrying out the Benchmark Review and any Market Testing Procedure or any benchmarking or market testing under Paragraph 8 (Minister's Right to Benchmark), the Parties will:
- 9.1.1 co-operate fully with each other and act in good faith, and (subject to the provisions of this Agreement) will provide each other with all requisite documents and information; and
 - 9.1.2 comply with the Law, in particular Good Procurement Practice.
- 9.2 To give full effect to the provisions of this Schedule 6.12 (Benchmarking and Market Testing) including Paragraph 9.1 (Co-operation and Compliance with Law) above, NBPco shall, as requested by the Minister from time to time, procure the cooperation and compliance of Buildco and any other Key Subcontractor or other relevant service provider with the provisions of Schedule 6.12 (Benchmarking and Market Testing).

10 INDEMNITY

10.1 [REDACTED]