

ANNEX 1: M1’S COMMENTS ON IDA’S CONSULTATION ON THE PROPOSED MODEL CONFIDENTIALITY AGREEMENT FOR THE PROVISION OF SERVICES ON THE NEXT GENERATION NATIONAL BROADBAND NETWORK

Reference	Description	Comments
Clause 1	“The Parties agree to execute this Agreement as a precondition to the negotiation and execution of a Customised Agreement between the Parties.”	Assuming Confidential Information is also to be disclosed in the negotiation of an ICO Agreement, we note that the restriction of the MCA to the context of negotiation and execution of a Customised Agreement, rather than also that of an ICO Agreement, may be inconsistent with the intent for the MCA to also govern the preservation of confidential information disclosed in negotiation of ICO Agreement.
Clause 3	“Each Party hereby irrevocably covenants to keep the other Party fully and effectively indemnified against all actions, claims, costs, damages, deficiencies, demands, expenses, liabilities and losses (including all legal costs incurred on a full indemnity basis) that may be suffered, incurred or sustained by the other Party in consequence of or in connection with any breach of this Agreement by the first-mentioned Party.”	<p>We note that, absent qualification, the indemnity proposed under Clause 3 may be excessive and over-broad, and may be broader than necessary to protect the legitimate commercial interests of each party.</p> <p>Specifically, we propose that the indemnity in Clause 3 be subject and limited to:</p> <ul style="list-style-type: none"> (a) an appropriate exclusion and limitation of liability; (b) mitigation and proper defence of third party claims by the indemnified Party; (c) the extent of the indemnifying Party’s acts or omissions in causing the harm; (d) material breach of the MCA by the indemnifying Party; and (e) culpable acts by the indemnifying Party.
Clause 9	“ The Receiving Party may disclose some or all of the Confidential Information to the Authorised Person(s) provided that prior to a disclosure under clauses 7(b) and 7(c), the Receiving Party shall obtain to provide to the Disclosing Party a written undertaking in favour of the Disclosing Party from the relevant Authorised Person(s) to comply with the terms of this Agreement as if the relevant Authorised Person(s) is a party hereto. . . .”	<p>The reference to “clauses 7(b) and 7(c)” should be replaced by a reference to “<u>clauses 8(b) and 8(c)</u>”.</p> <p>We further note that requirement that the Receiving Party must submit written undertaking by the Authorised Persons to the Disclosing Party may be impractical and unduly burdensome, and may be in any event unnecessary in light of the fact that the Receiving Party is to remain liable for any unauthorised disclosure of the Confidential Information by the Authorised Persons.</p>
Clauses 13 (b) and (f)	“ . . . is made pursuant to a directive”	We propose revising the phrase to state “ . . . is made pursuant to, <u>and to the extent required by,</u> a directive” so as to make clear that the disclosure is not to be more extensive than required.

Reference	Description	Comments
Clause 14	“The receiving Party shall inform the Disclosing Party of any disclosures to third parties under clause 13 by the Disclosing Party prior to any such disclosure.”	We propose the addition of the words “, so as to provide, where circumstances reasonably permit, <u>the Disclosing Party with the opportunity to take appropriate, legal actions to mitigate or prevent the disclosure</u> ” at the end of Clause 14.
Clause 22	“ . . . losses arising out of the efforts <u>or</u> either or both parties”	Please replace the first “or” (underlined) with “ <u>of</u> ”.