



ecta RESPONSE

**TO THE PUBLIC CONSULTATION BY THE
EUROPEAN COMMISSION
ON THE**

**PROPOSAL COMMUNICATION FROM THE COMMISSION
“GUIDELINES ON STATE AID FOR BROADBAND NETWORKS”**

11 FEBRUARY 2022

1. Introductory remarks

1. **ecta**, the **European competitive telecommunications association**,¹ welcomes the opportunity to provide feedback on the European Commission's public consultation launched on 19 November 2021 on the revision of the *Guidelines on State aid for broadband networks* (hereinafter "The Proposed Guidelines").
2. **ecta** represents those alternative operators who, relying on the pro-competitive EU legal framework that has created a free market for electronic communications, have helped overcome national monopolies to give EU citizens, businesses and public administrations quality and choice at affordable prices. **ecta** represents at large those operators who are driving the development of an accessible Gigabit society, who represent significant investments in fixed, mobile and fixed wireless access networks that qualify as Very High Capacity Networks (hereinafter "VHCN") and who demonstrate unique innovation capabilities.
3. **ecta** welcomes the Commission's initiative to review the current Guidelines and appreciates it because the time is ripe to provide an update on several relevant key points such as intervention thresholds for public funding to gigabit fixed networks and wholesale access obligations on such state funded networks. It is also relevant for the Commission to offer guidance on the support for the deployment of mobile networks and on demand-side measures to support the take-up of fixed and mobile services (vouchers) and to clarify relevant concepts such as mapping, public consultation, selection procedure and claw-back mechanisms.
4. **ecta** considers this review timely, necessary and appropriate for the reasons exposed in the following paragraphs.
5. There are no doubts: the ambitious connectivity objectives expressed by European Union through the Digital Compass 2030² and the lessons learned during the Covid -19 pandemic on the crucial role of reliable, performing and ubiquitous VHCNs for European citizens, businesses and economy, compel the telecoms sector to further increase the pace of VHCN deployment that in many EU Member States (hereinafter "MS")³ already reached an important level of VHCN coverage.
6. Studies performed by public institutions such as European Investment Bank and private research institutes such as WIK, indicate that the European connectivity targets cannot be reached through private funding alone, and public funding from EU and MSs' national funds will be needed to support Gigabit-capable connectivity, especially in rural areas.

¹ <https://www.ectaportal.com/about-ecta>

² All European households covered by a Gigabit network, with all populated areas covered by 5G.

³ According to DESI 2021, several MSs such as Malta, Luxembourg, Denmark, Spain, the Netherlands, Latvia, Portugal, Ireland, Sweden have a total VHCN coverage above 80%.

7. In this context, the European Recovery and Resilience Programme (ERRP), worth 672.5 billion Euros, foresees that each MS dedicates a minimum level of 20% of expenditure to digital area.
8. [ecta](#) therefore expects the state aid grants to become increasingly important and disseminated across European MSs in time, as a result of the combination of VHCN connectivity needs and the availability of significant ERRP funds.
9. For these reasons, [ecta](#) recognizes the utmost relevance of this consultation, and, underlines how the rules introduced by the final text of the Guidelines, depending on their content, will substantially impact, negatively or positively, not only the spread of the ultrafast connectivity⁴ but also the competition dynamics.
10. In the following parts of this response, from paragraph 11 to 22, [ecta](#) puts forward its key considerations on the most critical points of the Proposed Guidelines, and, from paragraph 23 to 38, discusses further those points and the other relevant ones and respectfully suggests amendments directly to the text of the Proposed Guidelines.

2. Key [ecta](#) considerations

11. The current state of market evolution towards VHCN is characterized by a situation in which there are already a great number of: i) areas with VHCN in place or areas in which VHCN will be deployed through private investments using different technologies (FTTH, FTTB, FWA and cable upgrades), and, ii) areas without VHCN, but with retail competition dynamics in place on the basis of local loop unbundling (LLU) and sub-loop unbundling (SLU) wholesale access offered on significant market power operators' (hereinafter "SMPOs") copper or hybrid copper/fibre networks (FTTN).
12. In order to ensure on one hand the minimum market distortion by state aid measures, and, to guarantee on the other hand, maximum wholesale and retail take-up of the connectivity services on the state funded networks, [ecta](#) considers of utmost importance that the proposed guidelines, make sure that:
 - the private investments in areas referred to in the previous paragraph, are not undermined by state funded networks;
 - in the selection processes for granting state aid, all market players have a fair chance to bid and win, and;
 - the current competition dynamics in the areas subject to state aid are preserved, improved and not undermined by excluding passive unbundled access to state funded networks;
 - state aids are granted only for the deployment of networks that are future proof and that are upgradable to the connectivity objectives foreseen by the European Union's Digital Compass 2030.

⁴ The Proposed Guidelines define the fixed ultrafast access networks as networks which provide at least 100 Mbps download speed at a fixed location (Section 2.3.1, para 21)

13. **ecta** agrees with the Commission that the 2013 Broadband Guidelines still constitute an appropriate framework, and some improvements are appropriate and sufficient to update them and adapt them to the new policy objectives (i.e. digital transition, contribution to the achievement of the European Gigabit Society objectives, implementation of the Digital Compass and sustainability goals).
14. **ecta** also supports the objectives put forward in the Proposed Guidelines and appreciates clarifications on certain concepts, such as mapping, public consultation and selection procedure, and claw-back mechanism that will provide all private and public stakeholders involved more clarity, transparency and certainty.
15. However, with respect to several important proposed changes, related mainly to:
 - the **classification, competitive assessment of the target areas and step change conditions in those areas** for public support to Gigabit fixed networks;
 - adjustment of the **wholesale access conditions** in relation to services offered, pricing conditions and the duration of wholesale access obligations;
 - the possibility of engaging in **private extensions** by the state aid beneficiary;
 - definition of conditions associated to feasibility of **demand-side measures**.

ecta notes with concern that **if those changes would be confirmed** in the final text of the Proposed Guidelines, they will lead to **a significant alteration of the competition dynamics in the European telecoms market and will harm the existing private investments, access seekers to the state funded networks, and ultimately cause detriment to European end-users.**

White Areas

16. Regarding the definition of **white areas** and the conditions of step change that would be associated to those areas for assessing the appropriateness of the aid measure as a policy instrument, **ecta** agrees with the white area definition. However, **ecta** is concerned with respect to the step change rule suggested by the Proposed Guidelines for the white areas.

The Commission proposes that *“Where the existing networks are not able to provide ultrafast download speed, public support must:*

a) Below 30 Mbps download speed: at least double the download speed and at least reach 30 Mbps download speed

b) 30 Mbps and above download speed: at least triple the download speed and at least reach ultrafast download speed”

This proposal implies that in white areas (irrespective of the network performance being below 30 Mbps or above 30 Mbps download speed) that state funded networks could continue to be based on copper networks, by upgrading them partially to fiber.

ecta disagrees with this proposal because it believes that, regardless of the type of areas at stake, the state funded networks should aspire to reach to the greatest extent possible the connectivity objectives established by the Commission's Gigabit Communication and more recently by the European Digital Compass and to guarantee, even in the white areas, achievement of at least the performance of an ultrafast broadband access network as defined by the Proposed Guidelines (100 Mbps download speed).

However, it will take many years, even for State aided operators, to build out to all premises in white areas. Specific isolated premises within white areas (e.g. rural SMEs, farmhouses, residential homes located away from public roads, etc.) are likely to remain underserved by ultrafast access networks for a long time to come. Therefore, the Commission could usefully include provisions in the Guidelines to allow for specific connectivity vouchers for such 'long lines' cases, enabling recipients to obtain the best realistically available fixed or wireless broadband connection for the time being, even if it has to be by means of a custom project for their premises. In order to keep expenses manageable, such connections could potentially be of lower speed than the State aided network being built out in the white area, but should contribute to improving the socio-economic conditions of these specific users considerably, compared to a situation in which they would have no broadband, or only the most basic broadband which is insufficient to participate effectively in European society.

Black Areas

17. ecta underlines that, in black areas, which are by definition the most competitive and characterized by a fully fledged infrastructure competition, market failure is not and should not be expected. However, if a clear market failure is assessed along the lines set out in the Proposed Guidelines, ecta would like to highlight the following points.
18. In relation to the **classification, competitive assessment** and step change conditions set for the target areas defined as black, ecta agrees with the definition and market failure threshold suggested by the Proposed Guidelines.

However, ecta considers that **the only step change that could be admitted is to a minimum of symmetric 1 Gbps download and upload speed**. This is because by their own definition, those areas are the ones in which at least two independent ultrafast networks are present or credibly planned. Consequently, they are areas in which more than one undertaking deemed or deems the investment in ultrafast broadband networks profitable.

Moreover, in those areas, also as a consequence of infrastructure-based competition, the private investment is able to smoothly react to any eventual demand driven by the end-user needs by investing in more and innovative connectivity technologies.

Those areas, are the most likely ones to reach the 2030 European Digital Compass Objectives because of the favourable demand conditions as it emerges from the existence of fully-fledged infrastructure competition.

So, the step change condition proposed for those areas should be higher, and, be aimed at: obtaining maximum speed performance from the state funded network and to preserve and improve the strong competition dynamics in place through an obligation of physical unbundled access on the state funded network.

Wholesale Access Conditions

19. With respect to the **wholesale access conditions** that will be required to be offered by state funded networks, ecta appreciates that the Broadband State Aid Guidelines currently in force require (among others) full physical unbundling and ‘virtual’ unbundling, in order to strengthen competition and to avoid the creation of regional monopolies in all target areas.

The Proposed Guidelines, by contrast, propose to differentiate the types of wholesale access products that will be required to be offered by subsidized fixed access networks depending on the competitive situation in a given intervention area. This is understood to be motivated by a desire to reduce the amount of aid granted.

The Proposed Guidelines state that in areas with limited competition, defined by the Commission as the white areas and grey areas, less-stringent access obligations would apply. In such areas, the physical unbundling obligation to the stated funded networks would be lifted and a Virtual Unbundled Local Access (VULA) solution would have be offered.

The Proposed Guidelines distinguish between grey and black areas and clearly indicate, based on previous Commission cases⁵, that if only one ultrafast network is present, even if this network is used through physical unbundling of the network by several alternative operators, the area shall be considered as a grey area and be treated as a white area where no competition is assessed.

First of all, ecta respectfully invites the Commission to clarify in the final text of the Guidelines with respect to the distinction between the grey and black areas whether the investments of the alternative operators in newer technologies that ensure 100 Mbps (i.e.VDSL investments through FTTCAB) and rely in part on physical unbundling of the network of the SMPO are considered or not as the alternative operators’ own network investment.

ecta notes in this context that many alternative operators have invested very substantially in their networks, on an end-to-end basis and also where they integrate unbundled local loops and subloops rented from the SMPO as a portion of their own network, and equip those local loops and subloops with their own

⁵ Commission Decision C(2011) 7285 final of 19 October 2011, case N 330/2010 — France – Programme national «Très Haut Débit» - Volet B (OJ C 364, 14.12.2011, p. 2).

transmission equipment. ecta firmly believes that such alternative operator investments should be considered as the alternative operators' own network infrastructures and the areas concerned should be considered as black areas. In those areas, a higher market failure threshold should apply, and physical unbundled access to the state funded network should be mandatory (see paragraph 16).

Secondly, even after such clarification of the issue by the Commission, ecta underlines that **the grey areas where there is only retail service competition reliant on physical unbundled access to the SMPO's network by the access seekers, cannot be considered in any case as areas of limited competition.**

The current Broadband State Aid Guidelines **call for more detailed assessment in evaluating the compatibility of the measure with respect to art. 107(3) on the basis of the existence of a network because** *"in areas where there is already one broadband network operator, subsidies for the construction of an alternative network could distort market dynamics"*.

The Proposed Guidelines, with respect to the current Guidelines, (correctly) pursue a wider policy objective related to the promotion of the connectivity targets in line with the Commission's Gigabit Communication⁶ and propose that even if there is one ultrafast access network or such network is credibly being planned, the state aid can be granted if the existing or credibly planned ultrafast network cannot provide at least 1 Gbps download and 200 Mbps upload speeds.

ecta agrees with the Proposed Guidelines and with the objectives pursued. However, when it comes to the proposal of limiting the wholesale access solutions offered on the stated funded network by **excluding physical unbundled access** from the available solutions, ecta underlines that **in no circumstances such proposal can be acceptable, because if confirmed, it would harm competition and end-users' welfare.** Access takers to the state funded network must be able to invest in their own transmission equipment, to be able to compete on the basis of differentiated quality and speed to price ratios, develop innovative service propositions (e.g. going beyond internet access and traditional bundles), meet business customers, public tender' and socio-economic drivers' needs for tailored services and quality requirements, including by relying in part on physical access to the state funded network.

Finally, ecta respectfully requests that **also in white areas, if there are reasonable requests from access seekers, physical unbundled access should continue to be offered by the state funded network.** This is necessary to ensure that alternative operators, if they so request, can deploy their own equipment and offer differentiated and innovative service propositions similar to those in grey and black areas. This is important to ensure that consumers, businesses and public

⁶ The Commission, in this Communication, set the following connectivity objectives for 2025: (i) all Union Households, rural or urban, should have an internet connectivity of at least 100 Mbps download speed, upgradable to 1 Gbps; (ii) socio-economic drivers, such as digitally intensive enterprises, schools, hospitals and public administrations should benefit from Gigabit connectivity (1 Gbps upload and download); and (iii) all urban areas and major transport paths should have an uninterrupted 5G coverage.

sector entities in white areas are not left behind and would only be able to receive inferior services, which would exacerbate the digital divide.

Such reasonable requests should be assessed, through a consultation with the market, before the publication of the tender, ideally emanating from the NRAs who have the technical competences and needed know-how deriving from their ex-ante regulatory responsibilities for telecoms markets.

Wholesale Access Prices

20. With regard to wholesale access prices, the Proposed Guidelines indicate a hierarchy among the different principles to be used. It is stated that: *"In setting the prices for the wholesale access products, Member States must ensure that the wholesale access price for each access product is based on one of the following benchmarks and pricing principles:*

- a) the average published wholesale prices that prevail in other comparable, more competitive areas of the Member State or the Union; or*
- b) in the absence of such published prices, the regulated prices already set or approved by the NRA for the markets and services concerned; or*
- c) in the absence of such published or regulated prices, cost orientation or the methodology mandated in accordance with the sectorial regulatory framework".*

ecta does not agree with this proposal because it does not enable flexibility with respect to the benchmarks and pricing principles and it obliges MSs to comply with the hierarchy without accounting of the specific country conditions (regulatory or market driven) in setting such wholesale pricing conditions.

ecta would like to draw the attention of the Commission to the fact that **in order to guarantee an effective retail take-up rate on the state funded network, as a general condition, the wholesale access prices defined for accessing the state funded network by the access seekers in no way should be superior – during the entire lifespan of the state funded infrastructure - to the average wholesale prices that prevail in other comparable and more competitive parts of the Member State not subject to market failure.**

ecta underlines that in such comparison, the average published wholesale prices that prevail in **other comparable and more competitive parts of the Union should not be included**. As the experience shows, when it comes to the network deployment and operational and service costs incurred on networks, Member States display different patterns, which can vary considerably, for different reasons, which can be endemic or not to the telecom sector. Therefore, it appears very difficult to perform a comparability assessment between different Member States even though the areas compared would be the competitive ones.

In terms of ensuring such general condition regarding the wholesale access prices to state funded networks, ecta believes that **a distinction should be made between the Member States in which the regulated wholesale prices to the**

SMPO's broadband network are cost-oriented, and the rest (e.g. regulated prices based on methods other than cost-orientation, cases where an Economic Replicability Test is applied instead of cost-orientation, or wholesale access prices based on commercial negotiation).

In the Member States where the regulated prices are cost-oriented, the benchmark for state aid should be based on these regulated wholesale prices.

Where this is not the case, [ecta](#) underlines that the **Member States should be given adequate flexibility in deciding either: (i) to take as a reference the average published wholesale prices that prevail in other comparable areas of the Member State not subject to market failure (if available), or (ii) to calculate the cost oriented wholesale prices to the state funded network, net of amount of the state aid received by the beneficiary.** The consideration of the amount of the state aid received by the beneficiary would aim at avoiding excessive prices, neutralising the extra costs to deploy the network and to compensate the minor revenues that will be incurred in those low populated areas with respect to competitive areas.

With respect to the wholesale access prices definition, [ecta](#) would like to draw the Commission's attention to the fact that **it is important that wholesale access prices on state funded networks are subject to a regular adjustment mechanism in order to take into adequate account efficiency progress and amortization of the investments over the years.** Furthermore, they should also reflect the presence of state subsidies by securing that, during the entire lifespan of the state funded infrastructure, they shall never be superior to the reference price set according to the principle/benchmark set out in the specific Member State. All telecoms networks have by their nature efficiency gains in time and all cost models built by the operators or by NRAs take this, and the lifetime of assets, into due account.

Therefore, the wholesale access prices to the state funded networks should factor-in these elements, and ensure that all parties (the state aid beneficiary -including all its divisions- and all other access takers) equally benefit from them.

[Duration of wholesale access obligations](#)

21. In relation to the the duration of the wholesale access obligation for the state aid beneficiary, the Proposed Guidelines put forward a period of 10 years instead of 7 years foreseen in the current Guidelines, except for the passive access elements to the stated funded network and the VULA (VULA being incorrectly considered as the substitute of physical unbundled access). Access to passive access elements would be granted for a period of time equal to the lifespan of the passive infrastructure, access to VULA for a period of time equal to the lifespan of the passive infrastructure for which VULA is a substitute. On this last proposal by the Commission please see the [ecta](#) considerations at paragraph 17 and 31.

[ecta](#) appreciates that the Proposed Guidelines suggest to extend the access duration from 7 years to 10 years for the rest of the access services.

However, **ecta** would like to underline its position that **all access services, regardless of their active or passive nature, should always be offered for a period equal to the lifespan of the state aided network infrastructure.**

ecta notes that such networks (except for the Direct Investment Model and SGEI model), are the property of the state aid beneficiary and therefore give the beneficiary a significant economic and competitive advantage, which does not end after 7 or 10 years.

ecta is concerned that if the Proposed Guidelines are confirmed, paradoxical situations could arise in which, after 10 years, with the expiry of some wholesale obligations, the state aid beneficiary could deny access to the state funded network, ask to renegotiate such access by attempting to define excessive wholesale prices, and consequently distort competition significantly.

It should also be underlined that in near future there will be a much greater distribution of state aid for telecoms than ever before, meaning that the overall impact on the market (hopefully for the common good) will be greater. The Commission should take precautions to avoid negative effects.

Therefore, **ecta** respectfully invites the Commission to take appropriate preventive measures and set the wholesale access duration equal to the lifespan of the state funded network.

Private Extensions by State Aid Beneficiaries Into Adjacent Areas

22. With respect to the issue of private extensions by a state aid beneficiary, the Proposed Guidelines foresee that: *“When carrying out a public consultation inquiring about existing or planned network in the target area (see Section 5.2.2.3), the Member State must indicate that private extensions are permitted at a later stage unless interested parties in an adjacent area oppose such extensions during public consultation process.*

If, in the mapping exercise and public consultation, interested parties demonstrate that the planned extension enters an adjacent area which is already served by at least two independent networks providing speed comparable to those of the State funded network or that there is at least one comparable network in the adjacent area which entered into operation less than five years before the State funded network, private extension into such adjacent area may only be carried out two years after the publicly funded network enters into operation”

ecta would like to express its concerns on this proposal. **ecta**’s first order request is that, to avoid competition distortions, such extensions by the state aid beneficiary to areas characterized by the presence of other comparable infrastructures, should be prohibited *sine die* without foreseeing any permissibility exceptions.

ecta is aware that the policy objectives underlying the proposal aim at ensuring maximum extension of the best connectivity solutions and their effective take-up.

ecta highlights that in case such extensions are allowed with conditions, in addition to the competitive advantage provided by the State aid to new deployment in the reference areas, the beneficiary would be given an additional competitive advantage also in the adjacent private extension areas, enabling it to damage the business case of existing and comparable infrastructure built exclusively with private funds. Worse, allowing such extensions could negatively affect private investments which are not yet amortized, which were committed without prior knowledge of potential state aided competition.

Therefore, should the Commission opt for allowing such extension with conditions, ecta's second order request is to invite the Commission to **amend the criteria in a way** to protect other operators' existing private investments and to make sure **that those investments are adequately amortized** before allowing these to be challenged by state aid beneficiaries' extended networks.

To such aim, ecta respectfully invites the Commission to review the definition of severe competition distortion, in order to make sure that **no extension into an adjacent area is permissible when there is at least one comparable infrastructure in the adjacent area which has entered into operation less than 10 years before the state funded network enters into operation**. The prohibition of extension in case there exist two networks providing speed comparable to the state funded network in the adjacent area would remain unaffected by the addition of the above additional criterion.

In addition, ecta's second order request includes **the extension of the period of standstill during which the state aid beneficiary could not make private extensions from the currently proposed two years to five years after the publicly funded network enters into operation**.

Only by introducing the proposed amendments could the negative impact of private extensions by state aid beneficiaries on the private operators' investment be limited to an acceptable extent.

Demand-Side Measures

23. ecta appreciates the inclusion by the Commission of specific and detailed guidance on demand-side measures, with the indication of set of conditions associated to the acceptability of such measures, in particular in the form of vouchers.

However, ecta would like to highlight some discrepancies between the conditions associated to the social vouchers and to the connectivity vouchers, which cannot be justified on the basis of the different scope of two types of voucher.

In relation to social vouchers, ecta notes that the Proposed Guidelines state: *"Vouchers must not be used to upgrade existing fixed or mobile subscriptions unless it can be clearly demonstrated that the performances of the current subscriptions are unable to fulfil end-users' minimum reasonable needs"*

ecta is concerned that such a provision is not foreseen for the connectivity vouchers, quite the contrary in fact. The Proposed Guidelines indicate that

“connectivity vouchers may be used to upgrade the existing fixed or mobile subscription only to the extent it does not unduly distort competition at retail and wholesale level” without providing any further detail.

ecta would like to highlight that if the current proposal would be confirmed in the final text of the Guidelines, SMPOs who have a large (typically by far the largest) customer base and substantial advantages in upgrading their existing network (they can swiftly rely on their precious network elements such as ducts, manholes, dark fiber), will have a strong advantage *vis-à-vis* alternative operators.

Should such provision be confirmed, the SMPOs would be able to lock in their existing customers on the legacy copper networks also with a marginal network upgrade (for instance upgrading the customers from a basic broadband access offer to a VDSL based access offer) by using the leverage of the connectivity vouchers to maintain/further increase their dominance.

On the basis of the above, ecta respectfully invites the Commission to take appropriate preventive measures to avoid such risk and ecta would respectfully ask the Commission to foresee in the final text of the Guidelines that the **vouchers in general must not be used to marginally upgrade existing fixed or mobile subscriptions, but they should be made available only for those services that ensure a step change for the end-users' connectivity**⁷

In particular, ecta calls on the Commission to provide in the final text of the Guidelines a baseline that would make a certain offer eligible for customers in the framework of the connectivity vouchers. This baseline should be **aligned to the 100 Mbps download speed**, the minimum speed guaranteed by a fixed ultrafast access network suggested in the Proposed Guidelines.

ecta recognizes that there can be relevant areas of territory where the connectivity performance could be, in short term, for all existing networks, below the proposed threshold of 100 Mbps.

The Member States, before releasing any voucher scheme, could therefore identify those areas in which no network with 100 Mbps download speed exists.

Once such identification is performed, **only in cases where no infrastructure ensuring 100 Mbps is available**, it could be foreseen that **only the best performing technology available at the end-user premises, vis-à-vis the current connectivity of the end-user is eligible for the voucher**. However, **in all areas where there are already networks that ensure 100 Mbps**, the step

⁷ In this sense, the step change examples provided in the Current Guidelines still constitute an important reference to identify the step change cases with respect to the marginal upgrade cases: *Footnote (65) For instance, an upgrade from a basic to an NGA broadband network. Also certain upgrades of an NGA network (such as extension of fibre connectivity nearer to the end-user) could constitute a step change. In areas where broadband networks are already present, the application of the step change should ensure that the use of State aid does not lead to a duplication of existing infrastructure. Similarly, a small, gradual upgrade of existing infrastructures, for instance from 12 Mbps to 24 Mbps is unlikely to bring additional service capabilities (and would likely disproportionately favour the existing operator)*.

change condition should apply and **operators only performing simple upgrades below 100 Mbps, should not be eligible for the vouchers.**

3. Comments on Section 2 of the Proposed Guidelines: Scope, Type of Broadband Network, Definitions

24. In relation to the definition provided in section 2.2 point a), ecta notes that the Proposed Guidelines state *“broadband electronic communications network’ means a network able to provide high-speed internet access via various technologies and includes active and passive components”*

ecta believes that such definition, if confirmed in its current version, could create uncertainty for the market for the purpose of state aid eligibility.

The definition, as is formulated, seems to require that the state funded network is necessarily able to provide broadband internet access. In such case, a fully passive infrastructure including ducts, dark fibre, towers and not active components, could paradoxically not be eligible for state aid.

In order to lift such uncertainty, ecta respectfully invites the Commission to amend the final version of the Proposed Guidelines as follows:

2.2 Definitions

(19) For the purposes of these guidelines, the following definitions apply:

a) “broadband electronic communications network’ means a network able to provide high-speed internet access via various technologies and ~~can include~~, consist of, for the purpose of the state aid grants, either active and passive components or passive only components”

4. Comments on Section 3 of the Proposed Guidelines: The Compatibility Assessment under Article 106(2) of the Treaty

25. In relation to the characteristics attached to the SGEI mission, the current Broadband State Aid Guidelines, state *“Where the provider of the SGEI mission is also a vertically integrated broadband operator, adequate safeguards should be put in place to avoid any conflict of interest, undue discrimination and any other hidden indirect advantages”*

They further explain (in footnote 38) that *“Such safeguards should include, in particular, an obligation of accounting separation, and **may** also include the setting up of a structurally and legally separate entity from the vertically integrated operator. Such entity should have sole responsibility for complying with and delivering the SGEI mission assigned to it”* (emphasis added)

The Proposed Guidelines re-state such provision without any changes. Thus, the imposition of a structurally and legally separate entity from the vertically

integrated operator for the SGEI mission remains a mere option and not an obligation of the MS.

Considering that:

- the state aid grants will become increasingly important and disseminated across European MSs in time, and,
- the state aid will be granted either through the assessment under article 106 (2) of the Treaty or through the assessment under article 107 (3) of the Treaty

ecta underlines that it is of utmost importance, in order to avoid any undue advantage for the undertakings carrying out an SGEI Mission, when those are also active on retail markets by **foreseeing an obligation to structurally and legally separate their SGEI mission from the rest of the undertaking**.

In order to prevent any undue discrimination, ecta respectfully invites the Commission to amend the final version of the Proposed Guidelines as follows:

(footnote 36) "Such safeguards should include, in particular, an obligation of accounting separation, and ~~may also include an obligation to the setting up of a structurally and legally separate entity from the vertically integrated operator~~. Such entity should have sole responsibility for complying with and delivering the SGEI mission assigned to it"

5. Comments on Section 5 of the Proposed Guidelines: Aid for the deployment of Broadband electronic communications networks

a. Comments on existence of market failure as regards fixed access networks (Section 5.2.2.1)

26. In relation to existence of market failure in case of fixed access networks, ecta agrees in general with the Proposed Guidelines.

However, ecta underlines that **several clarifications in the final text of the Guidelines should be provided** to avoid uncertainties and harm to the existing private investments in the target areas.

27. Firstly, in relation to the definition of grey areas (section 5.2.2.1.2), ecta notes that Proposed Guidelines state *"Grey areas are those in which one ultrafast network is present or credibly planned in the relevant time horizon. The mere existence of one ultrafast network does not necessarily imply that no market failure exist"*.

With respect to the mere existence of one ultrafast network, it is also explained that the competitive situation is assessed according to the number of existing network operators and that the existence of several retail providers on one network (including by means of Local Loop Unbundling (LLU)) does not turn the area into a black area, but that the territory remains a grey area as only one network is present.

ecta invites the Commission to clarify in the final text of the Guidelines, with respect to the distinction between the grey and black areas, whether the investments of the alternative operators in newer technologies that ensure 100 Mbps (e.g.VDSL investments through FTTCAB) through the physical unbundling of the network (the use of sub loop unbundling from the SMPO by the access taker) are considered or not as their own network investment.

ecta notes in this context that many alternative operators have invested very substantially in their networks, on an end-to-end basis and also where they integrate unbundled local loops and subloops rented from the SMPO as a portion of their own network, and equip those local loops and subloops with their own transmission equipment. ecta firmly believes that such alternative operator investments should be considered as the alternative operators' own network infrastructures and the areas concerned should be considered as black areas. In those areas, a higher market failure threshold should apply, and physical unbundled access to the state funded network should be mandatory (see also paragraph 16).

In order to prevent any undue discrimination, ecta respectfully invites the Commission to amend the final text of the Proposed Guidelines as follows:

(Footnote 48) "The competitive situation is assessed according to the number of existing network operators. In Commission Decision C(2011) 7285 final of 19 October 2011, case N 330/2010 — France – Programme national «Très Haut Débit» - Volet B (OJ C 364, 14.12.2011, p.2), it was clarified that the existence of several retail providers on one network (including Local Loop Unbundling (LLU)) does not turn the area into a black area, but that the territory remains a grey area as only one network is present". For the sake of clarity, all existing investments of the alternative operators in newer technologies, such as FWA and also the VDSL investments through FTTCAB that use physical unbundling of the network (i.e. wholesale access to the sub loop of the SMPO legacy network), to the extent that they ensure a download speed of 100 Mbps and therefore being defined as a ultrafast broadband access network, will be considered as independent ultrafast broadband networks, and thus those areas are classified as black areas.

28.Secondly, with respect to the definition of Mixed areas (section 5.2.2.1.3) and in particular to the possibility foreseen by the Proposed Guidelines for the MSs to select *target areas which are partly white and partly grey and to allow a certain percentage of overbuilding quantified as 10% of the target areas*, ecta would like to express its significant concerns.

The areas in which there is already an ultrafast broadband access network deployed exclusively with private funds should not be subject to any overbuild with state funds, **irrespective of the percentage of the overbuild planned.**

Should they allowed also with conditions to limit the overbuild, in addition to the competitive advantage provided by the State aid to new deployments in the reference areas, the beneficiary would damage investments made in existing and comparable infrastructure built exclusively with private funds in an unacceptable manner.

ecta, therefore, respectfully invites the Commission to amend the final text of the Proposed Guidelines as follows:

5.2.2.1.3 Mixed areas (white and grey)

In principle, the proposed intervention should be designed such that the entire target area is either white or grey.

~~However, for reasons of efficiency, Member States may select target areas which are partly white and partly grey. Where some citizens and business users are already adequately served in the target area (or will be in the relevant time horizon), it has to be ensured that the public intervention does not lead to an undue overbuilding of the existing network. This can be prevented if the public intervention is limited to 'gapfilling' measures only. Where Member States can demonstrate that a limited overbuilding of the existing network is proportionate and does not create undue distortions of competition, the public intervention may take place. Overbuilding must be limited to maximum 10% of all premises in the target area. In such situations, the entire target area will be treated as 'white' for the purposes of assessing the public intervention (meaning that the conditions that apply to white areas also apply here)~~

b. Comments on instruments to determine the existence of market failure (Section 5.2.2.4)

29. ecta fully agrees with the indications and conditions put forward in the Proposed Guidelines in paragraphs (77) to (83) and particularly appreciates the provisions to ensure the maximum transparency of the measure and of the target areas in a way to allow interested parties express adequately their opinion.

However, ecta notes that the Proposed Guidelines do not include in the scope of the questions asked in the public consultation the terms and conditions of the wholesale access that will be offered on the state funded network.

Such elements appear equally crucial for the success of the measure, insofar as they are key for the effective retail take-up of the services that will be offered on the state funded network. Without adequate wholesale conditions, such take-up would be difficult or impossible.

ecta, therefore, respectfully invites the Commission to amend the final text of the Proposed Guidelines as follows:

5.2.2.4.2 Public consultation

(77) Member States must publish, including on an appropriate publicly available webpage at national level, the main characteristics of the measure and the list of target areas identified in the mapping exercise.

(78) The public consultation must invite interested parties to comment on the measure and to submit substantiated information regarding their networks present or credibly planned to be deployed in the target area within the relevant time horizon as well as

their comments on the wholesale access requirements and pricing or pricing methodology as indicated in footnote (64)

c. Comments on appropriateness of the aid measure as a policy instrument
(Section 5.2.3)

30. **ecta** fully agrees with the definition of white areas suggested in the Proposed Guidelines. However, in relation to the definition of the conditions of step change that would be associated to those areas for assessing the appropriateness of the aid measure as a policy instrument, **ecta** would like to express its concerns.

The Proposed Guidelines suggest in those areas, to make a distinction between the networks below 30 Mbps download speed and the networks with a 30 Mbps and above download speed. In the former, it is proposed that where the existing networks are not able to provide ultrafast download speed, public support must at least double the download speed and at least reach 30 Mbps download speed while in the latter the public support must at least triple the download speed and at least reach ultrafast download speed.

Such proposal allows therefore state aid also to be granted for networks that would ensure a performance below 100 Mbps download speed (thus, for networks that cannot be defined as ultrafast broadband access networks).

Moreover, this also implies that in white areas, regardless of the network performance being below 30 Mbps or above 30 Mbps download speed, the state funded networks could continue to use the copper networks by simply upgrading them partially to fiber.

ecta believes that, irrespective from the type of target areas, the state funded networks should aim at reaching to the greatest extent possible the European connectivity objectives, and ensure, even in the white areas, at least the performance of a ultrafast broadband access network as defined by the Proposed Guidelines (100 Mbps download speed).

ecta therefore respectfully proposes to amend the final text of the Proposed Guidelines as follows:

5.2.3.1.1

White areas

(99) Where the existing networks are not able to provide ultrafast download speed, public support, regardless of the current download speed, must

a) ~~Below 30-Mbps download speed: at least double the download speed and at least reach 30-Mbps download speed.~~

b) ~~30-Mbps and above download speed: at least triple the download speed and at least reach ultrafast broadband access network download speed of 100 Mbps. The~~

Union has set a strategic objective that, by 2025, 'all European households, rural or urban, will have access to Internet connectivity offering a downlink of at least 100 Mbps, upgradable to Gigabit'

31. ecta agrees with the definition of black areas and the market failure threshold (section 5.2.2.1.4) suggested in the Proposed Guidelines.

However, in such areas, in ecta's opinion, the only step change that could be admitted, is to a minimum of symmetric 1 Gbps download and upload speed.

The black areas by definition represent the areas in which more than one undertaking deemed or deems the investment in ultrafast broadband networks profitable and where the private investment thanks to the competition between different infrastructures can smoothly respond to any eventual demand driven by the end-user needs by investing in more performing connectivity solutions.

Therefore, in black areas, the step change ensured by the state funded network should be higher, and, be aimed at:

- obtaining maximum speed performances from the state funded network; and
- keeping/fostering the strong competition dynamics in place by requiring physical unbundled access on the state funded network.

Those areas, in fact, are the most likely ones to reach the 2030 European Digital Compass Objectives because of the favourable demand conditions as it emerges from the existence of fully-fledged infrastructure competition.

In those areas the demand is more likely to drive the investment choices towards the most performing technologies. Therefore, a step change that allows for lower performance networks with respect to the best available performance, would lead to state aid grants for networks that should be re-upgraded subsequently due to the further demand evolution. This would entail serious risk of wasting public funds.

ecta therefore respectfully proposes to amend the final version of the Proposed Guidelines as follows:

5.2.3.1.3 Black areas

(103) Where there exist already at least two ultrafast networks, public support for a more performing network may be granted if, ~~in addition to the requirement of at least tripling the download speed and sufficiently increase the upload speed as compared to the existing network,~~ the new network provides at least 1 Gbps symmetric download and upload speeds.

32. The Proposed Guidelines in the best practices section (5.2.3.5) define the role of NRAs, NCAs, national competence centres and BCOs.

They put forward for the NRAs a consultative role for many relevant issues connected to the state aid, such as the identification of target areas (mapping and

public consultation), the assessment of step-change, the wholesale access products, conditions and pricing, the conflict resolution mechanisms, as well as in the event of disputes in relation to any of those aspects.

ecta generally agrees with such role. However, ecta would like to underline that NRAs, with respect to the dispute resolution regarding the state funded networks should not only be called on to support the public authorities. They should instead be the authority in charge of the dispute resolution.

The NRAs are best placed to deal with sectoral disputes due to their technical knowledge and expertise gained in applying sectoral regulation in their MS.

This is also confirmed by the European Electronic Communications Code that entrusts them with such task.

ecta therefore respectfully proposes to amend the final text of the Proposed Guidelines as follows:

5.2.3.5 Best practices: role of NRAs, NCAs, national competence centres and BCOs

(111) The role of NRAs in designing the most appropriate State aid measure in support of broadband is particularly important. The NRAs have gained technical knowledge and expertise due to the crucial role assigned to them by sectoral regulation and are best placed to support public authorities with regard to the design of State aid measures.

(112) Member States are encouraged to systematically consult NRAs on the design of State aid measures, and in particular but not limited to, on: the identification of target areas (mapping and public consultation), the assessment of step-change, the wholesale access products, conditions and pricing, ~~the conflict resolution mechanisms, as well as in the event of disputes in relation to any of those aspects.~~ NRA are entrusted by the European Electronic Communications Code⁸ with the exclusive responsibility to deal with disputes. Member States shall ensure that NRAs have the responsibility to resolve disputes in relation to the state funded electronic communications networks. Member States are encouraged to provide NRAs with the resources and competences they need ~~to give such support in this respect.~~ Where necessary, Member States should provide an appropriate legal basis for such involvement of NRAs in State aid broadband projects.

⁸ See recital (35). “Certain tasks pursuant to the Directive, such as ex ante market regulation, including the imposition of obligations for access and interconnection, and the resolution of disputes between undertakings are tasks which should be undertaken only by national regulatory authorities, namely, bodies which are independent both from the sector and from any external intervention or political pressure. Unless otherwise provided, Member States should be able to assign other regulatory tasks provided for in this Directive either to the national regulatory authorities or to other competent authorities. In the course of transposition, Member States should promote the stability of competences of the national regulatory authorities with regard to the assignment of tasks which resulted from the transposition of the Union electronic communications regulatory framework as amended in 2009, in particular those related to market competition or market entry. Where tasks are assigned to other competent authorities, those other competent authorities should seek to consult the national regulatory authorities before taking a decision. Pursuant to the principle of good cooperation, national regulatory and other competent authorities should exchange information for the exercise of their tasks”.

d. Comments on the proportionality of the aid measure (section 5.2.4)

33. In relation to the competitive selection procedure foreseen by the Proposed Guidelines (section 5.4.1.), **ecta** agrees with the indications and the conditions suggested in paragraphs 118 to 126.

With respect to the qualitative criteria that the Proposed Guidelines suggest to include, **ecta** notes and appreciates, in particular, the impact of the proposed solution on competition including wholesale access terms, conditions and pricing and the future proof qualities of the technological approach.

However, those two criteria are included as possibilities, and not as firm requirements, and therefore their application is left to the MSSs' discretion.

ecta recalls that widespread retail take-up of the ultrafast access services (and services with higher performance, in accordance with the 2030 Digital Compass objectives) offered on state funded networks should be the ultimate aim of the public intervention. The deployment of networks without their effective adoption by the end users would mean a waste of taxpayers' money.

Making sure that the qualitative criteria to be used in the competitive selection foresees more points for the future proof solutions and for the solutions ensuring pro-competitive market outcomes, such as the ones with network topologies allowing full and effective unbundling, should not be an option but *a conditio sine qua non*.

ecta therefore respectfully proposes to amend the final text of the Proposed Guidelines as follows:

(122) Qualitative award criteria may include, among others, the performance of the network (including its security), the geographical coverage and the total cost of ownership⁸⁷. ~~In any case—and it~~ they shall include the future proof qualities of the technological approach, the impact of the proposed solution on competition (including wholesale access terms, conditions and pricing)⁸⁶.

34. With respect to the wholesale access products to be made available by the state funded fixed access network, as specified also in paragraph 18, **ecta** is compelled to express serious concerns.

The Proposed Guidelines, foresee that in the white and grey areas the state funded network must ensure bitstream access, virtual unbundled access (VULA), access to street cabinets, poles/masts/towers, ducts and dark fibre. In such areas, full physical unbundled access is explicitly excluded from the set of wholesale access services that state funded network is obliged to make available.

The Commission's underlying reasoning appears to be that such provision is necessary in order to reduce costs of the final amount of aid granted.

ecta totally disagrees with such arguments and underlines that: (i) civil engineering costs (digging, laying down ducts and handholes, etc.) represent the overwhelming majority of cost, (ii) there is no material additional cost for (especially a new fibre network) enabling full physical unbundled access, and (iii) the cost of installing and running active transmission equipment (for VULA, bitstream) is by contrast substantial (both CAPEX and recurring OPEX).

In addition, after over two decades of experience following market liberalization in Europe, passive unbundling still appears as the only wholesale solution able to provide the access seekers with an effective ability to innovate and differentiate their offers, and with sustainable economic margins for commercializing their offers. Therefore, full and physical unbundling enables differentiated and more attractive retail offers, which is crucial for the retail take-up in those areas.

All active access solutions, including VULA, that is being considered as a substitute to physical unbundled access, foresee that the network equipments, crucial for service differentiation, are offered by the network owner and not independently acquired, deployed and controlled by the access seekers.

Consequently, the access seekers, if left with only active wholesale service solutions, would have suboptimal innovation capabilities in comparison with the state aid beneficiary and would also be condemned to lower economic margins because they would be obliged to pay a higher monthly fee to remunerate also those equipments belonging to the network owner.

The retail take-up of the ultrafast broadband access services is the ultimate aim of the state intervention.

Therefore, the deployment of the ultra fast access networks without their effective adoption by the end users would be useless and would constitute a waste of public resources at odds with the objective of the state intervention and the associated regulation.

The current Broadband Guidelines require effective wholesale access to State funded fixed networks (including full physical unbundling) to strengthen competition and to avoid the creation of regional monopolies. In ecta's opinion, no changes in time have occurred with respect to such correct and legitimate need specified by the current guidelines.

In the specific context of state aid where the aid beneficiary receives taxpayers' money and in most of the cases also keeps the ownership of the state funded network⁹ the benefits of the aid cannot be allowed to accrue principally to the beneficiary, but should also be available to the access takers, in order to ultimately enhance socio-economic welfare for end-users.

⁹ The only exceptions are SGEI model and Direct Investment model.

Under such conditions, the objective of reducing the deployment costs by denying access to the full physical unbundling cannot be considered acceptable and would be in contrast with the objective of inclusiveness by maximizing the retail take up. In any case, ecta considers that there is no additional cost for a State aid beneficiary in providing physical unbundled access to a network. On the contrary, it is the provision of wholesale active services that engenders additional costs for the wholesale provider.

ecta would also like to highlight that, today, physical unbundled access is more than ever feasible on FTTP type networks and does not present prohibitive costs on such networks. Claims by SMPOs that point-to-point fibre networks would not be possible due to lack of space in the feeder segment are readily rebutted, on account of: (i) fibre networks taking up less space in the feeder segment than the legacy copper network, and (ii) the widespread non-problematic deployment in P2P FTTP networks (to millions of homes) in many EU Member States, initiated more than 20 years ago.

For instance, in Italy, for many years the SMPO declared that physical unbundled access to its FTTH GPON¹⁰ network was technically impossible and the FTTH P2P network that would allow a fibre unbundling solution was too costly to deploy. Consequently, the Italian SMPO did not offer a physical unbundled access to its FTTH GPON network. However, it became widely understood that fibre unbundling over a FTTH GPON network is readily technically feasible, and became available in 2016, with the market entry of wholesale only FTTH operator Open Fiber¹¹. Passive access to point-to-multipoint fibre networks has also been the principal wholesale access product in France for a decade, including in the case of rural Réseaux d'Initiative Publique operated on a concession contract basis, by independent wholesale-only operators as well as by a subsidiary of the SMPO.

In light of those considerations, ecta therefore respectfully proposes to amend the final text of the Proposed Guidelines as follows:

5.2.4.4.1 Wholesale access products

5.2.4.4.1.1 Fixed access networks deployed in white ~~and grey~~ areas

(135) The State funded network must ensure bit-stream access, virtual unbundled access ('VULA'⁹⁴), access to street cabinets, poles/masts/towers, ducts and dark fibre⁹⁵. Where there are reasonable requests for effective and full physical unbundling, these must be met by the State funded network.

¹⁰ The Architecture of FTTH GPON (Gigabit Passive Optical Network) Network foresees a tree topology. GPON maximizes the coverage with minimum network splits, thus reducing optical power.

¹¹ The Open Fiber FTTH access network is a multi-operator passive network that supports the use of point-to-multipoint and point-to-point technologies. The Open Fiber “point-multipoint” architecture is based on the implementation of a network in which the optical concentration resources (PON Trees) are shared by the various operators, while the final connection with the user is implemented with a single dedicated fiber.

Such reasonable requests shall be assessed, through a consultation with the market, before the publication of the tender, by the NRAs which have the technical competences and needed know-how deriving from their ex-ante regulatory responsibilities for telecoms markets.

5.2.4.4.1.2 Fixed access networks deployed in black and grey areas and networks providing enhanced upload speed

(136) In black and grey ultrafast areas and for networks providing enhanced upload speed (see section 5.2.3.1.4) the State funded network must provide effective and full physical unbundling⁹⁶ in addition to what is foreseen for white areas.

35. In relation to the wholesale access terms and conditions foreseen by the Proposed Guidelines (section 5.2.4.4.2), ecta appreciates the proposal of extending the duration of the effective wholesale access from the currently applied 7 years to 10 years.

However, as stated in paragraph 20, ecta underlines that any kind of limitation on the effective wholesale access duration would have the adverse effect of hampering competition.

All access services regardless of their active or passive nature should always be offered for a period equal to the lifespan of the state aided network infrastructure.

Should the provision of 10 years duration be confirmed, paradoxical situations could arise in which, after 10 years, with the expiry of some wholesale obligations, the state aid beneficiary could deny access to the state funded network, ask to renegotiate such access by attempting to define excessive wholesale prices, and consequently distort competition significantly.

Therefore, ecta respectfully invites the Commission to take appropriate preventive measures and set the wholesale access duration equal to the lifespan of the state funded network as in the following proposed amendment:

5.2.4.4.2 Wholesale access terms and conditions

(140) Effective wholesale access must be granted for a period of time equal to the lifespan of the state funded network ~~at least ten years~~ for all passive (such as ducts, poles, cabinets, dark fibre, effective and full physical unbundled access) and active access products (VULA, Bitstream, etc.). ~~except VULA.~~

~~*(141) Access based on VULA must be granted for a period of time equal to the lifespan of the passive infrastructure for which VULA is a substitute¹⁰¹.*~~

~~*(142) Access to new passive infrastructure (such as ducts, poles, cabinets, dark fibre, etc.) must be granted for the lifespan of the network element concerned¹⁰². If State aid is granted for new passive infrastructure, the passive infrastructure must be large enough to cater for at least three networks and different network topologies¹⁰³. This is without prejudice to any similar regulatory obligations that may be imposed by the NRA*~~

in the specific market concerned in order to foster effective competition or measures adopted during the same period or after the expiry of the ten years period

36. With respect to the private extension conditions indicated in the same section, paragraphs (146) and (147), for the arguments put forward in paragraph 21, ecta reiterates its argument in first instance that this should not be permitted. If the Commission would not proceed in that manner, as a secondary point, ecta respectfully proposes to amend the final text of the Proposed Guidelines as follows:

(146) When carrying out a public consultation inquiring about existing or planned network in the target area (see Section 5.2.2.3), the Member State must indicate that private extensions are permitted at a later stage unless interested parties in an adjacent area oppose such extensions during public consultation process.

*(147) If, in the mapping exercise and public consultation, interested parties demonstrate that the planned extension enters an adjacent area which is already served by at least two independent networks providing speed comparable to those of the State funded network or that there is at least one comparable network in the adjacent area which entered into operation less than ~~five~~ **ten** years before the State funded network, private extension into such adjacent area may only be carried out ~~two~~ **five** years after the publicly funded network enters into operation¹⁰⁵.*

37. Regarding the wholesale access pricing (section 5.2.4.4.3), as specified in paragraph 19, ecta does not agree with the Proposed Guidelines insofar as they propose a hierarchy among the different principles to be used in the wholesale access prices definition. In presence of such rigidly indicated hierarchy, the MSs would be obliged to comply without being able to account for the specific country conditions (regulatory or market driven) in setting such wholesale pricing conditions.

ecta respectfully calls on the Commission to set a general rule, instead of indicating such a strict hierarchy, to make sure that the wholesale access prices defined for accessing the state funded network by the access seekers in no way could be superior to the average wholesale prices that prevail in other comparable and more competitive parts of the same Member State.

Such rule would guarantee an effective retail take-up rate on the state funded network.

ecta also underlines that in such comparison, the average published wholesale prices that prevail in other comparable and more competitive parts of the Union should not be included. As the experience shows, when it comes to the network deployment and operational and service costs incurred on such network, each Member State has different cost patterns. Therefore, it appears very difficult to perform a comparability assessment between different Member States even though the areas compared would be the competitive ones.

In terms of ensuring such general condition regarding the wholesale access prices to state funded networks, ecta believes that a distinction should be made between

the Member States in which the regulated wholesale prices to the SMPO's broadband network are cost-oriented, and the rest (e.g. regulated prices based on methods other than cost-orientation, cases where an Economic Replicability Test is applied instead of cost-orientation, or wholesale access prices based on commercial negotiation).

In the Member States where the regulated prices are cost-oriented, the benchmark for state aid should be based on these regulated wholesale prices.

Where this is not the case, **ecta** underlines that the Member States should be given adequate flexibility in deciding either: (i) to take as a reference the average published wholesale prices that prevail in other comparable areas of the Member State not subject to market failure (if available), or (ii) to calculate the cost oriented wholesale prices to the state funded network, net of amount of the state aid received by the beneficiary. The consideration of the amount of the state aid received by the beneficiary would aim at avoiding excessive prices and neutralising the extra costs to deploy the network in those low populated areas.

With respect to the wholesale access prices definition, **ecta** would like to draw the attention of the Commission to the importance that wholesale access prices on state funded networks are subject to a regular adjustment mechanism in order to take into adequate account efficiency progress and amortization of the investments over the years. All telecoms networks have by their nature efficiency gains in time and all cost models built by the operators or by NRAs take this, and the lifetime of assets, into due account.

Therefore, also the wholesale access prices to the state funded networks should factor-in these elements, and ensure that all parties (the state aid beneficiary (including all its divisions) and all other access takers) equally benefit from them.

This would be the most optimal way to ensure that end-users in market failure areas ultimately benefit from adequate retail prices,- as foreseen in paragraph 50 of the Proposed Guidelines.

In light of those considerations, **ecta** therefore respectfully proposes to amend the final text of the Proposed Guidelines as follows:

5.2.4.4.3 Wholesale access pricing

(149) "In setting the prices for the wholesale access products, Member States must ensure that, during the entire lifespan of the state funded network, those prices should never be superior to the average wholesale prices that prevail in other comparable and more competitive parts of the same Member State. The wholesale access price for each access product is based on one of the following benchmarks and pricing principles:

- a) wherever the regulated prices already set or approved by the NRA for the markets and services concerned are cost-oriented, the wholesale access products offered on state funded networks should be based on such prices ~~the average published~~*

~~wholesale prices that prevail in other comparable, more competitive areas of the Member State or the Union; or~~

- b) ~~in all other cases, the Member States shall choose on the basis of the country specific conditions the best principles/benchmark between the average published wholesale prices that prevail in other comparable areas of the Member State not subject to market failure (if available), or to calculate the cost oriented wholesale prices to the state funded network, net of the amount of the state aid received by the beneficiary. The consideration of the amount of the state aid received by the beneficiary aims at avoiding excessive prices and neutralising the extra costs to deploy the network in those low populated areas..to absence of such published prices, the regulated prices already set or approved by the NRA for the markets and services concerned; or~~
- c) ~~the wholesale prices to the state funded network shall be subject to a regular adjustment mechanism in order to take into adequate account the efficiency progress and amortization over the years in the absence of such published or regulated prices, cost orientation or the methodology mandated in accordance with the sectorial regulatory framework”.~~

6. Comments on Section 6 of the Proposed Guidelines: Compatibility assessment of take-up measures

38. As already stated in paragraph 21, **ecta** appreciates the inclusion by the Commission of specific and detailed guidance with the indication of a set of conditions associated to take-up stimulation measures (notably vouchers).

However, **ecta** notes differences between the conditions associated to the social vouchers and those associated to the connectivity vouchers, which cannot be justified on the basis of the different scope of two types of voucher.

ecta notes that the Proposed Guidelines state, regarding social vouchers: “*Vouchers must not be used to upgrade existing fixed or mobile subscriptions unless it can be clearly demonstrated that the performances of the current subscriptions are unable to fulfil end-users’ minimum reasonable needs*”. This should be applied also to the connectivity vouchers.

ecta is concerned that the Proposed Guidelines, for connectivity vouchers appear quite blurred when stating that “*connectivity vouchers may be used to upgrade the existing fixed or mobile subscription only to the extent it does not unduly distort competition at retail and wholesale level*” without providing any further detail.

ecta would like to highlight that if the current proposal would be confirmed without the introduction of a step change criterion, it would end up in providing significant and unduly competitive advantages to the SMPOs.

SMPOs have a significant customer base and substantial advantages in upgrading their existing network (they can swiftly rely on their existing network elements such as ducts, manholes, dark fiber). Therefore if any kind of network upgrade will

be eligible for the voucher, the SMPOs will have a strong advantage *vis-à-vis* alternative operators.

Should such provision be confirmed, the SMPOs would be able to lock in their existing customers on the legacy copper networks with a minimum network upgrade (for instance upgrading the customers from a basic broadband access offer to a VDSL based access offer) by using the leverage of the connectivity vouchers. They would also have the possibility to capture new customers, hence further increasing their dominance.

ecta would therefore respectfully request the Commission to foresee in the final text of the Guidelines that the **vouchers in general must not be used to marginally upgrade existing fixed or mobile subscriptions, but they should be made available only for those services that ensure a step change for the end-users' connectivity**¹².

In particular, ecta calls on the Commission to provide in the final text of the Guidelines a baseline speed that would make a certain offer eligible for customers in the framework of the connectivity vouchers. This baseline speed should be **equal to the 100 Mbps download speed** (i.e. the minimum speed guaranteed by a fixed ultrafast access network suggested in the Proposed Guidelines).

ecta recognizes that there can be relevant areas of territory where the connectivity performance could be, in short term, for all existing networks, below the proposed threshold of 100 Mbps.

The Member States, before releasing any voucher scheme, could therefore identify those areas in which no network with 100 Mbps download speed exists.

Once such identification is performed, **only in cases where no infrastructure ensuring 100 Mbps is available**, it can be foreseen that **only the best performing technology available at end-user premises, vis-à-vis the current connectivity of the end-user is eligible for the voucher**

However, **in all areas where there are already networks that ensure 100 Mbps**, the step change condition should apply and **the operators only performing simple upgrades below 100 Mbps should not be eligible for the vouchers**.

In light of those considerations, ecta therefore respectfully proposes to amend the final text of the Proposed Guidelines as follows:

¹² In this sense the Step change examples provided in the Current Guidelines still constitutes an important reference to identify the step change cases with respect to the marginal upgrade cases: *Footnote (65) For instance, an upgrade from a basic to an NGA broadband network. Also certain upgrades of an NGA network (such as extension of fibre connectivity nearer to the end-user) could constitute a step change. In areas where broadband networks are already present, the application of the step change should ensure that the use of State aid does not lead to a duplication of existing infrastructure. Similarly, a small, gradual upgrade of existing infrastructures, for instance from 12 Mbps to 24 Mbps is unlikely to bring additional service capabilities (and would likely disproportionately favour the existing operator)*.

(193) Vouchers may be necessary to support subscription to a new service and they should not be used ~~or~~ to upgrade the current one unless they ensure a step change for end users. ~~Vouchers may be used to upgrade the existing fixed or mobile subscription~~ Vouchers of any type are permissible only to the extent they ~~it~~ does not unduly distort competition at retail and wholesale level.

The Member States shall identify those areas in which no network with 100 Mbps download speed exists.

In order to ensure that a step change is achieved where vouchers are used as a take-up stimulation measure, in such areas where no infrastructure ensuring 100 Mbps download speed is available, only the best performing technology available at end-user premises, vis-à-vis the current connectivity of the end-user shall be eligible for the voucher.

In all the remaining areas, the baseline speed recognized to make the offer eligible for the customer in the framework of the connectivity voucher shall be 100 Mbps download speed which is the minimum speed guaranteed by a fixed ultrafast access network as defined in these Guidelines.

In case of questions or requests for clarification regarding this contribution, The Commission is welcome to contact Mr Luc Hindryckx, [ecta](#) Director General and Ms Pinar Serdengeçti, [ecta](#) Regulation and Competition Affairs Director.