



## **ecta RESPONSE**

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

**ON THE**

**TARGETED REVIEW OF THE GENERAL BLOCK EXEMPTION  
REGULATION: EXTENSION TO NATIONAL FUNDS COMBINED  
WITH CERTAIN UNION PROGRAMMES**

**27 SEPTEMBER 2019**

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## Introduction

1. **ecta**, the **European competitive telecommunications association**,<sup>1</sup> welcomes the opportunity to comment on the European Commission (hereinafter: 'Commission') proposal for a targeted review of the General Block Exemption Regulation<sup>2</sup> (hereinafter: 'GBER').
2. Representing over 100 challenger telecoms operators and digital solutions providers, **ecta** stands for the interests of the access seeker community as well as for those undertakings whose primary business interest is the provision of network infrastructure, and those combining activities as access seekers with gradual deployment. This makes **ecta** positions uniquely balanced and the strongest voice in support of maintaining the ladder of investment as a pathway open to all electronic communications providers.
3. With its members having historically been among the pioneers of broadband deployment in Europe and concurrently leading the development of network infrastructure in the EU to realise the vision of a Gigabit society for Europe, **ecta** is acutely aware of the need for State aid control to strike a sound and sustainable balance between legitimate deployment support where market incentives are lacking and preserving a maximum of room and priority for private initiative in creating the networks of the future.
4. **ecta** thus supports the idea underpinning the draft amending regulation (hereinafter: 'Amending Regulation') insofar it seeks to ensure that Member State broadband financing which contributes to projects under the InvestEU Fund and qualifies as State aid can be implemented swiftly and effectively.
5. Allowing these state resources to benefit from an exemption from the otherwise mandatory requirement of notification under Article 108(3) TFEU constitutes, in **ecta**'s view, a probate means to that end, for as long as it is guaranteed that their implementation neither distorts private investment incentives, nor creates inconsistencies relative to already existing rules applicable to State aid for broadband infrastructure deployment.
6. In both of these regards, **ecta** sees the draft as taking steps in the right direction, yet at the same time giving rise to a number of issues that risk undermining legal certainty for market participants and thus their acceptance of contributions from the InvestEU Fund to network infrastructure buildout.
7. Below, **ecta** details these concerns and proposes means of addressing them, either through concrete redrafting suggestions or by outlining the principles and mechanisms that should guide redrafting. Wherever possible, **ecta** has privileged the former of these approaches.
8. In addition to the specific remarks attaching to individual elements of the draft implementing measure, **ecta** considers that State aid policy in the field of broadband infrastructure deployment needs to incorporate a set of considerations that apply across

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

<sup>2</sup> Commission Regulation (EU) No 651/2014, (2014) OJ L187/1, as amended.

those elements and ensure their cohesiveness. These foundational cornerstones for successful policy design and market impact can be summarised as follows:

- Ensuring focus on future-proof network deployments;
  - Excluding aid being awarded in areas where such deployments have already or are imminently likely to take place;
  - Avoiding overbuild of recently deployed networks with state resources, especially where these deployments themselves have been funded with state resources;
  - Contributing to a procedural framework for the granting of aid that is predictable, efficient and open to participation by all operators, including small and medium-sized enterprises;
  - Enabling private initiative, including in cases where despite aid being available, deployment is not taking place;
  - Achieving the maximum degree of coherence between sectoral regulation and State aid law and practice.
9. [ecta](#) wishes to especially underline the importance of the last of these cross-cutting dimensions. To remain relevant to a changing regulatory landscape, State aid rules must take appropriate account of sectoral legislative and regulatory developments.
  10. In the field of electronic communications, the enactment of the European Electronic Communications Code<sup>3</sup> (hereinafter: 'EECC') marks such a development that should trigger a rethinking of whether the underlying distinction between basic broadband and next generation access networks still provides an appropriate basis on which to base State aid scrutiny. For [ecta](#) and its members, this is critical to realising all of the objectives of the Code and especially the promotion of competition as well as of connectivity, and access, to, and take-up of, very high capacity networks.
  11. The Amending Regulation contains some elements of an attempted adaptation, but does not yet provide a comprehensive recast of the State aid logic applicable to broadband in view of these legislative developments that are already beginning to shape regulatory practice. The proposed exclusion of aid in black NGA/NGN areas or areas with at least one very high capacity network from this vantage point is but a first, if necessary step.
  12. Moreover, the creation of a gap between aid for broadband infrastructure under InvestEU and other aid for broadband deployment would mark an undesirable development that [ecta](#) believes should be avoided in the interest of legal certainty, consistency of financing practices involving state resources and durable promotion of market-led investment.
  13. Building on these underlying considerations, the following sections address a number of definitional matters in identifying white, grey and black areas (chapter 1), the threshold financing values for broadband projects drawing on InvestEU financial products according to intermediary type (chapter 2), project eligibility criteria (chapter 3) and procedural considerations (chapter 4).

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<sup>3</sup> Directive 2018/1972/EU, (2018) OJ L321/36.

## 1. Definitional matters in identifying white, grey and black areas

14. With points 174 to 176, the proposal introduces, for the first time, the notions of white, grey and black areas into statute.
15. **ecta** welcomes this development as a source of enhanced legal certainty for providers and other market participants whose strategic decisions, including investment as well as procurement, are shaped by the classification of intervention areas according to these definitions.
16. To ensure the maximum usefulness, intelligibility and consistency in application of the new provisions suggested for adoption, **ecta** here highlights some definitional matters that, if left unaddressed, may compromise the reform objective.
17. The following sections examine therefore the relation between NGA, NGN and very high capacity networks in respect of area definitions (section 1.1.) and the approach to establishing their current or future existence therein (section 1.2.).

### 1.1. The relation between NGA, NGN and very high capacity networks

18. In this respect, **ecta** observes that the definitions of all area types at points 174 to 176 include a distinction between ‘basic broadband or NGA/NGN’ networks, which suggests the terms ‘NGA’ and ‘NGN’ to be synonymous. This is repeated in Article 56e(3)(e) of the operative part. However, the notion ‘NGN’ is neither defined in the Amending Regulation, nor in the GBER itself.
19. **ecta** further observes that the definition of ‘appropriate mapping’ as suggested as new point 178 in Article 1(1)(f) of the Amending Regulation uses a widened version of this distinction, which, insofar as relevant here, reads ‘basic broadband, or NGA/NGN including very high capacity networks’.
20. **ecta** is concerned that, as currently drafted, the Amending Regulation is liable to create legal uncertainty and possible confusion among addressees, does not fully explore alignment with the State aid acquis and EU electronic communications law, and risks leading to an undifferentiated application of State aid rules in respect of financial products supported by the InvestEU Fund that will also impact upon the review of State aid for broadband outside of section 16.
21. In the comments that follow, **ecta** assumes that the abbreviation ‘NGN’ corresponds to the one used in the context of the Broadband Guidelines<sup>4</sup> at paragraph 60, where this serves as a shorthand for ‘next generation networks ...’, i.e. backhaul networks which do not reach the end-user.’
22. As the Broadband Guidelines clearly state at that point, and as is further confirmed by the definition of next generation access (NGA) networks in Article 2(138) GBER, NGN and NGA networks are technically mutually exclusive as they designate different parts of the

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<sup>4</sup> EU Guidelines for the application of state aid rules in relation to the rapid deployment of broadband networks, (2013) OJ C25/1.

overall network infrastructure. Indeed, NGN networks can serve both basic broadband and next generation access networks.

23. As also recognised by the Guidelines, the deployment of either access network type is at the discretion of the operator financing the investment. For State aid rules to play a meaningful role in facilitating the move towards a Gigabit society in the EU,<sup>5</sup> however, it should be clear that the emphasis for the use of state resources, by default, must be on the access network reaching the end-user. This requirement is consistent with the Guidelines expecting Member State support of backhaul networks to occur at most '[i]n some cases'<sup>6</sup>.
24. Neither law, nor policy can thus provide a basis for suggesting, as the Amending Regulation does, that NGA and NGN could be treated synonymously at the level of definitions or in terms of setting deployment priorities. Importantly, an area could qualify as grey, or possibly even black, in the sense of being served by next generation backhaul network(s), without therefore achieving the same qualification at access network level. Indeed, ecta would emphasize that as part of the copper decommissioning plans of incumbent electronic communications providers, certain areas might actually become white in the future in access terms. This distinction in importance between NGA and NGN is also reflected in sectoral ex ante regulation, whose emphasis is clearly and overwhelmingly on the access network.
25. ecta is therefore not favourable to introducing an equivocation between NGA and NGN in the Amending Regulation and urges the Commission to replace the expression 'NGA/NGN' throughout with sole reference to 'NGA', subject to the below remarks regarding 'very high capacity networks'. The necessity of doing so is further illustrated by the fact that maintaining the suggested wording in the Amending Regulation would create an irresolvable contradiction between the rules governing notification exemptions for traditional broadband aid under Article 52, which appropriately remain focussed on NGA networks, and aid under the InvestEU Fund according to Article 56e(3), as proposed.
26. As for the abbreviation 'NGN', use of the term 'very high capacity networks' at point (178) cannot be understood without making assumptions about its meaning. While State aid law itself provides no basis for elucidation of the concept, it appears that the drafting here implicitly refers to the definition of 'very high capacity network' set out in Article 2(2) of the European Electronic Communications Code as 'either an electronic communications network which consists wholly of optical fibre elements at least up to the distribution point at the serving location, or an electronic communications network which is capable of delivering, under usual peak-time conditions, similar network performance in terms of available downlink and uplink bandwidth, resilience, error-related parameters, and latency and its variation'.

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<sup>5</sup> COM(2016) 587, 14.9.2016.

<sup>6</sup> Paragraph 60 of the Broadband Guidelines.

27. While [ecta](#) generally would welcome better alignment between State aid and EU electronic communications law, it is concerned that such an implied link is neither legally clear, nor sufficiently practical to improve State aid practice.
28. First, the reference in point 178, as proposed, is isolated and does not adequately reveal its basis. Use of the term ‘appropriate mapping’ in the definitions of the different areas at points 174 to 176 does not address this issue.
29. Secondly, without such clarification of its basis and without systematic use throughout the Amending Regulation, the term is likely to be interpreted in a manner specific to its context in the GBER, thus risking to create divergence from, rather than convergence with, EU electronic communications law.
30. Such disparity would be particularly worrying at a time when the concept of ‘very high capacity network’ has not yet established a shared, firm understanding in EU electronic communications law itself. Indeed, guidance on the concept and notably on the criteria that a network must meet to be considered a very high capacity network is yet to be issued in accordance with Article 82 ECCC.
31. Moreover, introduction of this concept should occur in an adequately streamlined manner so as to ensure its applicability to all uses of aid for the promotion of broadband, instead of creating internal disparity between the rules on standalone aid in Article 52 GBER and the new regime for the InvestEU Fund in section 16.
32. To this end and to address the above concerns, [ecta](#) suggests adding a new point to Article 2 of the GBER that defines ‘very high capacity network’ by reference to Article 2(2) ECCC. This point should be added as point (139a) under the ‘Definitions for aid for broadband infrastructures’ to indicate its relevance and applicability also to aid measures outside the context of InvestEU.
33. Upon integrating the notion of very high capacity networks into the GBER, [ecta](#) would further suggest complementing the definition by a clarifying phrase that explicitly marks the added value of this novel definition relative to the well-established notion of NGA networks as defined in point 138. This will also be material for ensuring fully appropriate and up-to-date application of the rules in grey areas.
34. Without prejudice to a more comprehensive adaptation of State aid rules for broadband deployments in light of broader policy and legislative developments (see paragraph 9f above), [ecta](#) would on that basis suggest integrating this definition into the area definitions and into the definition of appropriate mapping by using the following phrase from the latter, with the indicated amendment as follows:

‘broadband infrastructure[s]<sup>7</sup> of the same (in other words, basic broadband or ~~NGA/NGN~~, including very high capacity, networks)’

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<sup>7</sup> Plural phrasing to be determined according to context.

## 1.2. The qualification of network existence

35. To determine whether an area qualifies as white, grey or black, the proposed definitions at points 174 to 176 refer to whether no, one or at least two broadband infrastructures are 'present or planned on commercial terms within three years'.
36. [ecta](#) notes that this phrasing replaces the more nuanced language used in the Broadband Guidelines when differentiating between basic broadband and NGA networks.
37. The Guidelines apply the maximum degree of such differentiation in defining a grey NGA area as an area 'where only one NGA network is in place or is being deployed in the coming 3 years and there are no plans by any operator to deploy a NGA network in the coming 3 years.'<sup>8</sup>
38. This definition interestingly and pertinently suggests that a difference exists not only between existing and planned deployments, but also between ongoing and planned deployments.
39. [ecta](#) would have welcomed this distinction also being included in the Amending Regulation. In [ecta](#)'s and its members' experience, the existence of an ongoing build-out project provides an unequivocally more reliable indication of an area already gaining access to an NGA infrastructure and therefore not meriting allocation of state resources than plans announced in the context of a public consultation, which may not see any follow-up.
40. More generally, this draws attention to the standard of proof in determining when networks can be considered as being effectively 'planned' for purposes of State aid review.
41. The existence of planned networks has profound implications for the role that state resources are allowed to play in a given area. [ecta](#) would here only highlight that the forward projection of only two networks based on 'planning' is sufficient to exclude aid, whilst a single one triggers application of the step change test as part of project selection.
42. [ecta](#) considers that 'planning' must include a certain amount of project specification and an outline for its realisation. The latter should be linked to a clear schedule for achieving the project within an overall timeline of no more than three years.
43. Specifically in the context of a mapping process (see section 4 below), adequate specificity of project planning should, in [ecta](#)'s view, always be assessed in relation to the specific target area under consideration. There, generic planning statements relating to an area in its entirety should be found inadequate to fulfil the test of a network being effectively planned.
44. [ecta](#) does not believe any of the following to satisfy the criterion of planning:
  - Statements of intent;
  - Ad hoc surveys of user demand;
  - Project ideas without corresponding business plan with a clearly specified timetable.

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<sup>8</sup> Paragraph 76 of the Broadband Guidelines..



45. Due to the significant effect that it is liable to have on the classification of areas and thus on the operation of aid in financial products for broadband infrastructure that are supported by the InvestEU Fund, [ecta](#) invites the Commission to introduce additional, clarifying language on how the aspect of planning is to be assessed when classifying areas. [ecta](#) would also appreciate such language reflecting the principled difference, for assessment purposes, between ongoing deployments and merely planned deployment projects.

## 2. Nominal maximum financing thresholds

46. This chapter considers the maximum financing thresholds applicable to aid involved in financial products in the domain of broadband infrastructure and other domains under Article 56e in section 2.1., and to aid involved in commercially-driven financial products under Article 56f in section 2.2.
47. As a general introductory remark across these categories, [ecta](#) is concerned that the specification of the nominal amount of total financing per beneficiary may not be unequivocally clear, neither to parties administering aid, nor to potential beneficiaries partaking to selection procedures.
48. While the headings of both provisions clearly refer to ‘aid’ and thus to the state resources involved in the financial products, the formulation ‘the nominal amount of *total* financing provided to any final beneficiary under the support of the InvestEU Fund’<sup>9</sup> could be read as comprising both the aid component and the EU budgetary resources involved in project financing.
49. Doubts in this regard are also not removed by the wording of Article 56d, as proposed, which in points b and c of the first paragraph refers to financial products supported by the InvestEU Fund and to aid passed on to intermediaries and final beneficiaries as being within scope of the rules of section 16. While this wording makes clear that aid may be comprised in the financial products supported by the InvestEU Fund, including such as used for financing the deployment of broadband infrastructure, it remains unclear whether and to what extent this will always be the case.
50. Moreover, and critical to [ecta](#) members, it appears likewise uncertain how large the share of aid in the nominal amount of total financing is going to be, if that amount were to extend beyond aid in a technical sense. Were that indeed to be the case, the implications in terms of market impact would be very difficult to discern. While a total maximum amount of EUR 70 million for Member State support per beneficiary on a project basis, as proposed for broadband infrastructure (as discussed in section 2.1.), is a relatively clear figure (but see paragraph 50 immediately below for some interpretive queries in this respect), if the total amount comprises elements other than aid, the impact on resource availability for individual projects and the overall distributional consequences become increasingly hard to assess. In consequence, the nominal maximum amount of total financing would either

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<sup>9</sup> Art. 56e(3)(a), and *passim*; emphasis added.



appear not to provide clarity to the maximum amount of state aid involved in a given financial product or to the maximum financing volume that any given project can benefit from under InvestEU.

51. **ecta** therefore calls on the Commission to create adequate certainty about the precise scope of the the nominal amount of total financing and its implications. While the amount of EUR 70 million for broadband infrastructure does not facially appear unreasonable, the assessment will vary according to whether it refers to total project size or to the State aid component thereof. In this context, **ecta** would also appreciate clarification of whether provision ‘to *any* final beneficiary per project’<sup>10</sup> is to be understood as linearly additive so that, for example, five final beneficiaries involved in a given project could benefit from total financing of EUR 350 million.

## 2.1. The maximum nominal amount in financial products supported by the InvestEU Fund

### 2.1.1. *The maximum nominal amount of aid for broadband infrastructure*

52. Article 56e(3)(a), as proposed, would set the upper limit for total financing for any final beneficiary to a nominal amount of maximum EUR 70 million per project.
53. **ecta** and its members can confirm that deployment projects of this size recurrently exist in their daily work. At face value, the amount therefore does not appear unreasonable.
54. However, it would have been useful if the Commission had provided further background as to how this proposed value was arrived at. In particular, it would have helped had the Commission clearly specified to what extent the amount
  - i. Has been derived from existing case practice;
  - ii. Reflects increased investment volumes in the transition to very high capacity networks and the rollout of 5G wireless networks;
  - iii. Is intended to be applied without differentiation to any type of deployment, irrespective of whether it concerns basic or NGA/NGN broadband.
55. As set out in the introductory comments (see paragraph 8), **ecta** considers that aid at this point in market development should focus on creating future-proof infrastructure. Other than in highly exceptional circumstances, which would require thorough justification, the deployment of basic broadband should no longer be eligible for support through state resources.
56. For this reason, **ecta** also believes it appropriate for the proposed amendment to be accompanied by consideration of stipulating alternative financing caps according to what type of broadband infrastructure is to benefit from such resources. Such differentiation appears also possible and appropriate in view of the differentiation of financing thresholds in other domains.<sup>11</sup>

<sup>10</sup> Emphasis added.

<sup>11</sup> E.g., with regard to investments in infrastructure used for the provision of social services, for education or for cultural purposes and activities set out in Article 53(2).

57. At the same time, doubts as to the cumulativeness of funding on a per project basis across beneficiaries should be addressed, and an increase in the threshold for broadband infrastructure financing commensurate with its role as an essential enabling infrastructure be contemplated.
58. [ecta](#) invites the Commission to consider introducing differentiated maximum project financing thresholds according to whether the deployed infrastructure constitutes basic or NGA, including VHC, broadband networks. In any case, [ecta](#) suggests that, for reasons of consistency and in order to reflect the crucial importance to the functioning of society at large and other infrastructures in particular (see subsection 2.1.2. below), a EUR 100 million maximum be applied for the financing of broadband infrastructure through financial products supported by the InvestEU Fund. These steps should be undertaken jointly with clarification of the precise coverage of the total maximum amount (see paragraph 50).

#### *2.1.2. The maximum nominal amount of aid for other activities*

59. A horizontal review of the financing thresholds for projects other than broadband infrastructure laid down in paragraphs 4 to 10 of Article 56e shows that the latter range from EUR 2 to 100 million.
60. This variety in financing thresholds raises questions about the appropriateness of the EUR 70 million threshold for broadband infrastructure as well as about the possibility for broadband infrastructure to be considered as eligible to qualify for financing under different project types, and the delimitation between them. [ecta](#) addresses each of these points in turn.
61. As regards consistency of the broadband maximum financing threshold with those for other infrastructure types,<sup>12</sup> [ecta](#) observes that a uniform threshold of EUR 100 million appears to have been consistently applied to the latter, making broadband infrastructure the only infrastructure subject to stricter scrutiny requirements.
62. [ecta](#) has pointed out above that the specific financing threshold for broadband infrastructure projects unfortunately has been derived without any statement of accompanying reasons for choosing this value (see paragraph 53).
63. Considering the pivotal importance that the deployment of such infrastructure has for advancing the digitisation of EU industry, the persistence of coverage gaps in underserved locations where markets fail and the continuously growing demand for denser, higher capacity infrastructure, [ecta](#) believes it to be appropriate to align the financing threshold for broadband infrastructure with that of other infrastructure types.

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<sup>12</sup> Namely, port access infrastructure and port infrastructure proper, energy infrastructure in gas and electricity, infrastructure used for the provision of social services, for education or for cultural purposes, transport infrastructures and other infrastructures (water, waste management, research).

64. Such alignment has two important knock-on effects, both of which also bear on the second consideration raised above, i.e. the eligibility for broadband projects to seek financing under other infrastructure classifications.
65. One of the major pillars of sectoral legislative enactment seeking to facilitate the deployment of broadband networks<sup>13</sup> has been to enable cooperation and joint deployment across network industries.
66. By aligning the maximum financing thresholds applicable to financial products for broadband and other infrastructure deployments, the proposed amendment to the GBER would further facilitate such joint deployments by reducing complexity, excluding perceptions of unjustified discrimination and preventing asymmetries from hindering joined-up project planning. Practically, this means that where infrastructures are planned wholly or partially in parallel so as to realise cost efficiencies, a lower exemption threshold for broadband infrastructure will no longer constitute an obstacle to projects getting under way due to one of them being subject to individual scrutiny.
67. Secondly, this will also reduce incentives for parties seeking to deploy broadband infrastructure, especially where this infrastructure is closely linked to that of other networks, to attempt qualifying these projects as pertaining to other infrastructure classes in order to be eligible for bigger opportunities of support. Such attempts could be readily conceivable in domains such as research infrastructure (where also the Commission is currently examining the scope for financing strategic Terabit connectivity infrastructure for research purposes under CEF2), transport infrastructure and infrastructure used for the provision of social services, for education or for cultural purposes.
68. Even if such an incentive effect can be obtained, and joint network deployment promoted in this manner, [ecta](#) considers that some additional effort should go into more precise specification of the boundaries between different infrastructure types so as to clarify how these will be assessed. This appears important notably in view of increasingly convergent approaches to infrastructure planning, notably at the intersection between electronic communications and transport networks. It is also important in view of the need to promote and preserve coherence between section 16 and other sections dedicated to individual infrastructures.

## 2.2. The maximum nominal amount where financing is managed by commercial financial intermediaries

69. Article 56f(3), as proposed, would set the upper limit for total financing awarded to each final beneficiary to a nominal amount of EUR 6 million, respectively EUR 10 million if market funds account for at least 50% of each tranche of the financing portfolio.
70. At this stage, [ecta](#) has no specific remarks on the proposed threshold values.

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<sup>13</sup> Directive 2014/61/EU, (2014) OJ L155/1.

### 3. Project eligibility criteria

71. In Article 56e(3), points b and c specify the criteria that projects in white and grey areas need to comply with in order to be eligible to receive aid in the context of the InvestEU Fund.
72. The wording of criteria (b)(i) and (b)(ii) is materially identical to that of criteria (c)(ii) and (c)(iii) and thus sets a common standard for broadband infrastructure aid in both white and grey areas, while criterion (c)(i), the step change test, is exclusive to grey areas. The following sections commence with the horizontal criteria (section 3.1.) before addressing the step change test (section 3.2.).

#### 3.1. Criteria applicable to both white and grey areas

73. This section first discusses points relating to the presentation and structure of the criteria (subsection 3.1.1.), before discussing various substantive aspects thereof (subsection 3.1.2.).

##### 3.1.1. Remarks on the presentation and structure of the criteria

74. Given their materially identical content, **ecta** would find it useful if slight drafting changes were implemented to fully align the wording and order of the criteria, so that process, project and investment need requirements would immediately appear as common bases for project eligibility in both white and grey areas.

75. Structurally, **ecta** also suggests splitting criteria (b)(i) and (c)(ii) as follows:<sup>14</sup>

(i) selected on the basis of a transparent and non-discriminatory selection process respecting technology neutrality; **and**

**(ia)** open to all users at fair, reasonable and appropriate conditions, including full and effective unbundling in line with Article 52(5) and (6);

76. **ecta** believes such restructuring to be necessary to remove the lack of readability and ambiguity from the insertion of the word ‘open’ immediately after what is effectively a self-standing criterion. As currently drafted, ‘open’ could be interpreted as relating to the selection process described before, when presumably it is a characteristic of the project to qualify for the award of aid and thus marks an eligibility criterion of its own. The possible substantive incongruence that this drafting implies relative to existing rules concerning aid for broadband infrastructures is discussed in the following subsection at paragraphs 79 to 82.

##### 3.1.2. On the substance of the criteria

77. As the analysis in the preceding subsection has shown, the criteria that broadband infrastructure projects in both white and grey areas must fulfil to be eligible for being awarded aid comprise three dimensions (see paragraph 73 above).
78. Building on the restructuring proposed in paragraph 74, these can be restated as follows:

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<sup>14</sup> The below wording assumes that the verb ‘are’ is integrated into the chapeau.

(i) selected on the basis of a transparent and non-discriminatory selection process respecting technology neutrality; **and**

**(ia)** open to all users at fair, reasonable and appropriate conditions, including full and effective unbundling in line with Article 52(5) and (6); and

(ii) based on an identified need of investment, based on the consultation of available appropriate mapping or, when such mapping is not available, on a public consultation, to avoid a crowding out of private initiatives;

79. Examining these eligibility criteria, [ecta](#) remarks that the proposed drafting involves several important, yet unexplained departures from the existing standards applied when reviewing aid for broadband infrastructures under Article 52 GBER.

80. First, the criteria that a selection process for the award of broadband infrastructure aid has to meet beyond the respect for technology neutrality have been reduced to transparency and non-discrimination, to the exclusion of openness, thus departing from the requirements of Article 52(4) GBER.

81. [ecta](#) is particularly concerned about this change, as more even than transparency and non-discrimination, it is openness in the sense of accessibility that marks the constitutive hallmark of a selection process allowing for the best projects to be freely identified among competing bidders.

82. Considering recent examples of public authorities opting to conclude agreements on infrastructure deployment with incumbent operators despite having received invitations by competitive operators to collaborate on deployment in the very areas concerned by these agreements, [ecta](#) is convinced that wherever such deployments involve state resources open, competitive selection must be guaranteed. This criterion has to apply, a fortiori, where such aid is dispensed in the context of the InvestEU Fund as the EU's new flagship strategic financing programme.

83. Accordingly, and in the interest of preserving internal consistency in how the GBER treats investment selection for broadband-related aid, [ecta](#) urges to reword the criteria for the selection process as follows:

(i) selected on the basis of an **open**, transparent and non-discriminatory **competitive** selection process respecting technology neutrality;

84. Secondly, the Amending Regulation proposes that the broadband infrastructure deployments taking place in the context of the InvestEU Fund shall be universally open at fair, reasonable and appropriate conditions, including full and effective unbundling in line with Article 52(5) and (6).

85. [ecta](#) appreciates the Commission's clear and unequivocal commitment to extend to the InvestEU context a requirement for any broadband infrastructure having benefitted from state resources to subsequently be accessible to third parties.

86. However, also here [ecta](#) notes significant, unexplained discrepancies in the suggested standards of review relative even to the very wording of the provisions to which the draft refers.
87. Article 52(5) GBER requires network operators to guarantee the widest possible access, whether access or passive, on fair and non-discriminatory conditions.
88. The alternative standard of fair, reasonable and appropriate conditions set forth by the Amending Regulation has no discernible grounding in the EU law of State aid, whether in legislation or jurisprudence.
89. Although [ecta](#) is not per se opposed to extending the existing standard to also include a criterion of 'reasonableness', such extension should be appropriately explained and situated with regard to its overall implications for the coherence of the rules relating to aid for broadband and to the State aid acquis more generally. Such explanation would be particularly necessary where reasonableness were to have implications for access pricing practices, thus interfering with Article 52(6) GBER, which the provision explicitly refers to.
90. Irrespective of the outcome regarding the criterion of reasonableness, [ecta](#) cannot endorse replacing the requirement for conditions to be non-discriminatory with a requirement for them to be simply appropriate. [ecta](#) would also maintain this objection if it were to be argued that the criteria of reasonable and appropriate conditions were to jointly replace the non-discrimination requirement.
91. In [ecta's](#) and its members' experience, non-discrimination is the sine qua non of competitively functional and effective access regulation. Only when it is ensured that wholesale inputs are available to any access seeker without discrimination on the same conditions can such regulation hope to promote competitive market functioning. Maintenance of this standard is all the more essential where state resources are used to create infrastructures that are inherently non-replicable as they respond to an investment need that the market fails to address (on which see paragraphs 92 to 98 below).
92. Therefore, [ecta](#) calls on the Commission to reinstate the requirement for access conditions to be non-discriminatory, consistent with Article 52(5) GBER, and invites it to provide further justification for adding a requirement for those conditions to be reasonable in terms of its purpose, scope, envisaged effects and compatibility with the existing State aid acquis and rules for broadband financing in particular.
93. Thirdly, the Amending Regulation introduces the existence of an investment need as a third criterion for a project to become eligible for the award of aid.
94. While again not unfavourable to the idea, [ecta](#) is concerned about the lack of specificity as to its substantive content and implementation.
95. In [ecta's](#) understanding, the implied test is wholly procedural in nature. Thus, the need of investment has to be identified, and this identification has to occur either by consulting already available appropriate mapping or, where this does not exist, by public consultation.

96. Considering that the definition of areas as white, grey or black relies on the same procedural tools (on which, see the remarks below in chapter 4), [ecta](#) would have appreciated further elucidation of the relation between that process and the identification of an investment need.
97. Arguably, at least the identification of an area as white could be considered as tantamount to identifying an investment need, since no broadband infrastructure of a given category is available within the area. If, however, it were additionally necessary to specifically identify a particular need of investment within that area, this would appear to imply a requirement to prioritise among different needs, without it being clear according to which criteria such prioritisation would have to occur.
98. In the alternative that identification is to constitute a procedural requirement of making a determination confirming an investment need identified on the basis of appropriate mapping or public consultation, [ecta](#) would appreciate that point being reinforced through accompanying text in the recitals or other forms of guidance.
99. Whether either, both or none of the interpretations set out above capture the intended substance and functioning of the requirement to identify a need of investment, [ecta](#) is convinced that the above considerations clearly illustrate the significant uncertainty that this novelty will likely introduce, if adopted, and therefore asks the Commission to provide appropriate clarification thereof prior to adoption. Given its unique position, [ecta](#) is ready to engage with the Commission and relay such clarification as appropriate among its membership and industry contacts.

### 3.2. The step change test

100. In addition to what has been discussed in section 3.1, the first point of Article 56e(3)(c) also requires projects in grey areas to ‘represent a step change’ in order to be eligible for aid granted under the InvestEU Fund.
101. [ecta](#) welcomes that by focussing the step change test specifically on grey areas, the Amending Regulation excludes its application to black areas, as suggested by paragraph 83 of the Broadband Guidelines.
102. The definition of what constitutes a step change in point 177, as proposed, reflects in its first sentence the definition given thereof in paragraph 51 of the Broadband Guidelines.
103. The following comments therefore focus on the novel elements laid down in the second sentence, which holds a step change to be demonstrable where, cumulatively, the following conditions are fulfilled:<sup>15</sup>
  - the subsidised project ensures a doubling [sic!] download and upload speeds compared to existing and/or planned infrastructure and at least symmetrical speeds above 300 Mbps, whichever is higher, and

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<sup>15</sup> The below text is a quote from the second sentence of point 177, as proposed, reformatted for readability and clearly separating the different criteria.



- ensures significantly more pro-competitive outcomes compared to the current and/or planned infrastructure such as full open access conditions and more adequate and affordable services for end-consumers.

104. Prior to commenting on the substantive aspects, [ecta](#) notes that the overall drafting of the definition does not make sufficiently clear whether the first and the second sentence of point 177 are intended to function as alternatives; whether the second sentence is supposed to exemplify the first; or whether they are otherwise related to each other, e.g., by partial overlap.
105. By way of example, [ecta](#) would point out that a project qualifying according to the criteria quoted above at paragraph 102 would not be subject to the criterion of triggering significant network investments. At the same time, those criteria do not provide for any direct illustration of changes in service availability and capacity, and thus only partially serve as illustration of the established step change test in the first sentence. As a result, while the relationship between the two test specifications remains unclear, it appears that the newly added specification may permit a project to more easily qualify as representing a step change and thus open the door to potentially discriminatory treatment, as long as that relationship is not clarified.
106. This uncertainty about the precise meaning and purpose of the newly added second sentence to define a step change is liable to create confusion among both applicants to and administrators of aid schemes and thus to slow down effective financing, in addition to providing grounds on which to contest award decisions. [ecta](#) therefore urges the Commission to clarify the relation between the range of options for demonstrating a step change set out in the two sentences of point 177, as proposed.
107. Substantively, [ecta](#) is concerned that the step change test specification given in the second sentence of point 177 and reproduced at paragraph 102 above does not in all circumstances uphold the same standards as under the Broadband Guidelines.
108. In particular, the upgrade of a cable network from DOCSIS 3.0 to DOCSIS 3.1 would allow for exceeding the required minimum threshold of 300 Mbps symmetrical, yet not represent a significant network investment. Incidentally, such an upgrade would also not seem likely to yield any major improvement in broadband infrastructure availability to the extent that the upgrade would simply be performed on the same equipment on the same network.
109. Similarly, the requirement for ‘full open access conditions’, while to some extent conceivable as mirroring the requirement for projects to demonstrate significant new capabilities in terms of competition, is an entirely new concept whose precise meaning and implications for award decision-making are insufficiently clear and should be further developed in relation to the notion of widest possible access in point 139 of Article 2 GBER.

110. Overall, [ecta](#) therefore invites the Commission to address the systematic and substantive concerns identified above with a view to ensuring that possibilities of discrimination between broadband infrastructure aid applicants in the context of InvestEU Fund are removed, and inconsistencies relative to other types of broadband infrastructure aid avoided. [ecta](#) would welcome if the necessary clarifications were elaborated in dialogue with electronic communications providers and their associations, and stands ready to participate to such exchanges.

#### 4. Procedural aspects

111. As both the circumscription of intervention areas and, by implication, the identification of investment needs meriting the attribution of InvestEU aid rely critically on two procedural tools that the Amending Regulation proposes to introduce for the first time in the GBER, [ecta](#) concludes its submission with a number of remarks on these tools.

112. The tools of appropriate mapping and public consultation are proposed to be inserted as novel points 178 and 179 in Article 2 GBER.

113. While the tool of public consultation is already recognised, albeit in undefined form, by Article 52(3) GBER, the tool of appropriate mapping is entirely new to the GBER.

114. The following sections first discuss public consultation (section 4.1.), before turning to the introduction of appropriate mapping (section 4.2.).

##### 4.1. Public consultation

115. According to point 179, a public consultation is to be

‘... carried out by the competent national authorities through publication on an appropriate website available to any interested stakeholders for 1 month with the objective of gathering substantiated information from stakeholders regarding infrastructure investments of the same category existing or planned in the next three years in an area, including the relevant target area.’

116. [ecta](#) considers that, although generally sound, the suggested definition includes a number of issues that should be addressed in order to ensure the smooth functioning of public consultations in the context of broadband infrastructure aid under the InvestEU Fund.

117. Most important among these is the limitation of the consultation period to solely one month.

118. In [ecta](#)’s view, the consultation period should be extended to ideally three, but at least two months, so that providers whose strategic decision-making may be affected by the subject matter of consultation have adequate time to engage.

119. Such extension is also required in view of the practice of competent authorities, confirmed by [ecta](#) members in several Member States, of launching a significant number of consultations in parallel, thereby limiting operators’ ability to engage meaningfully. This impact is

comparatively more heavily felt by challenger operators due to resource imbalances relative to incumbent operators.

120. The cumulative impact of public consultations is also felt with particular gravity where authorities concurrently launch parallel consultations on matters whose interrelation requires them to be treated sequentially or recursively, thus further limiting the time ultimately available to providers for responding to each individual consultation.
121. Secondly, as regards the making available of consultation materials, [ecta](#) would welcome greater specificity and clearer requirements regarding the website hosting them.
122. Building on elements already present in paragraph 78(b) of the Broadband Guidelines, [ecta](#) supports the mandating of one central national website through which all relevant consultations should be accessible. Additionally, that site should also allow for submissions to be made electronically.
123. Thirdly, [ecta](#) understands the reference to competent national authorities as conducting public consultations to not prejudice who the relevant authority in any given setting might be, or indeed to require a centralisation, but would ask the Commission to provide reassurance on this point.

#### 4.2. Appropriate mapping

124. Under point 178, appropriate mapping constitutes

‘mapping of an area, including the relevant target area, not older than [X] year, carried out by the competent national authorities, which includes all infrastructure of the same category (in other words, basic broadband, or NGA/NGN including very high capacity networks) existing or planned in the next three years, and is performed at premises level on the basis of premises passed (not premises connected).’

125. For definitional aspects relating to the relation between NGA, NGN and very high capacity networks, [ecta](#) refers to its remarks in section 1.1. above.
126. As regards the proposed level of mapping, [ecta](#) considers the drafting here to reflect the guidance set out in conjunction with paragraph 78(a) of the Broadband Guidelines.
127. Still, [ecta](#) would encourage further reflection on how to ensure that the results gathered and the conclusions drawn from such mapping do not exaggerate effective broadband availability in the area being mapped, since homes passed guarantee neither access, nor competition at retail or wholesale level.
128. As regards the maximum permissible age for a mapping to qualify as appropriate, [ecta](#) notes that the Amending Regulation does not suggest any concrete figure.
129. [ecta](#) also observes that the principal difference in the uses made of mappings and public consultations appears to be with regard to the identification of investment needs for eligibility purposes, for which the Amending Regulation only foresees to rely on public consultation when no appropriate mapping is available.

130. The perception of such mapping exercises as potentially burdensome will significantly depend on the associated information requirements. Without clarity as to the nature of these requirements, [ecta](#) and its members have therefore found it difficult to agree a time span in abstracto, were it to subsequently become evident that the data gathering requirements would prove disproportionate.

131. However, [ecta](#) members do agree that mapping exercises should generally be reactive to private initiative in the sense that where an operator changes its deployment plans relative to a previously occurred mapping, it should be possible for that operator to prompt a revision of the mapping and, where no deployment using aid has yet commenced, that update should imply discontinuation of state resources targeting the provider's area of choice.

#### 4.3. Complementary use of public consultations in relation to mapping

132. Finally, [ecta](#) wishes to emphasize its support for the complementary use of public consultation as a means of verifying mapping results and thereby minimising distortions of competition. This possibility also being recognised in paragraph 78(b) of the Broadband Guidelines., [ecta](#) suggests clarifying that the Amending Regulation does not preclude such sequential use of the two different tools.

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In case of questions or requests for clarification regarding this contribution, the services of the European Commission are welcome to contact Mr Oliver Füg, Director of Competition & Regulation at [ecta](#), at [ofueg@ectaportal.com](mailto:ofueg@ectaportal.com).