



European  
Commission

## **BCOs TRAINING**

Report

For Commission use

### **State Aid**

28 June, 2017

Business Europe premises, Avenue  
de Cortenbergh 168, Brussels



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## Disclaimer

*The opinions expressed by the speakers during the training day are those of the respective speakers and may not be regarded as stating an official position of the European Commission. The Commission does not guarantee the accuracy of the information included in the present paper, or in the discussions among participants, nor does it accept responsibility for any use made thereof.*

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## I. Introduction

As foreseen in the BCO-SF Annual Work Plan, a training day was organised in Brussels on June 28 2017. The training day's objectives were to inform and equip the BCO network members on the topic of State aid, and create dialogue and exchange between them, and with the Commission. The focus points approved by the European Commission for this training day were:

1. State aid procedure
2. Categories of 'no aid' measures
3. GBER
4. State aid planning
5. Price framework for wholesale markets
6. Claw-back

### Participation

In total, there were **65** participants, of which **39** BCO representatives (**24** national and **10** regional).

The **15 national BCOs** represented were:

Austria, Croatia, Greece, Cyprus, Estonia, France, Finland, Denmark, Germany, Italy, Poland, Portugal, Slovakia, Spain, UK

The **10 regional BCOs** represented were:

Auvergne-Rhône-Alpes (France), Région Centre-Val de Loire (France), Normandy (France), Lower Saxony (Germany), Emilia-Romagna (Italy), Lombardia (Italy), Andalucía (Spain), Navarra (Spain), Illes Balears (Spain), València (Spain)

Participants included **5** BCO-SF staff, **18** European Commission staff (from DG AGRI, CNECT, REGIO and COMP) and **3** experts.

## **II. Session summaries and feedback**

### Opening

- Welcome
- Survey summary
- Agenda

### **Welcome and survey summary**

Jan Dröge, Director of the BCO Network Support Facility, welcomed participants and presented the agenda. He ran through the key findings from the pre-training day survey used to shape the agenda to the needs of the day's participants.

Fifteen of the twenty-five participating organisations (excluding BCO-SF and European Commission staff, and the three experts) took part in the survey. The principal finding was that GBER and other support schemes that do not require notification were of great interest to participants. The next two foremost areas of interest were mapping and step change in grey areas, followed by wholesale access and claw-back clauses.

Respondents also showed interest in the use of wireless technology and the State aid implications, and although this was touched on during the training day, participants were invited to attend the BCO-SF's net neutrality-dedicated training day, planned for the week of October 16 in Madrid.

As directed by the survey, the training day did not directly address evaluation and monitoring. Instead, participants were made aware of the related training sessions offered regularly by DG COMP and the JRC.

## Agenda

Time	Session
<b>8.30-9.00</b>	<b>Registration</b>
<b>9.00-9.15</b>	<b>Welcome, agenda and objectives of the day</b> Jan Dröge and DG COMP Ewoud Sakkers (HoU COMP C4)
<b>9.15-9.30</b>	<b>Overview of State aid survey results</b> Adina Claiçi, Director at Copenhagen Economics
	<b>Part I. General introduction</b>
<b>9.30-10.00</b>	<b>The approval process: dialogue between Member State and Commission</b> Prof. Phedon Nicolaides, College of Europe in Bruges & Maastricht University
<b>10.00-10.15</b>	<b>Highlights of State aid procedure and substance in the Broadband Sector</b> DG COMP Ewoud Sakkers (HoU COMP C4)
<b>10.15-10.45</b>	<b>Open discussion</b>
<b>10.45-11.00</b>	<b>COFFEE BREAK</b>
<b>11.00-11.15</b>	<b>Categories of “no aid” measures, including SGEI/Altmark</b> DG COMP - Virginie Roussel
<b>11.15-11.45</b>	<b>Open discussion</b>
<b>11.45-12.00</b>	<b>The General Block Exemption Regulation (GBER)</b> DG COMP – Joseph Smallwood
<b>12.00-12.30</b>	<b>Open discussion</b>
<b>12.30-13.30</b>	<b>LUNCH BREAK</b>
	<b>Part II. Broadband-specific requirements</b>

<b>13.30-13.45</b>	<b>Planning aspects: mapping and public consultation, procurement, step change</b> DG COMP Alexandra Manaila
<b>13.45-14.15</b>	<b>Open discussion</b>
<b>14.15-14.30</b>	<b>Wholesale access and pricing</b> DG COMP Oliver Stehmann (DHoU COMP C4)
<b>14.30-15.00</b>	<b>Open discussion</b>
<b>15.00-15.15</b>	<b>COFFEE BREAK</b>
<b>15.15-15.30</b>	<b>Claw-back, monitoring and reporting</b> Adina Claiçi, Director at Copenhagen Economics
<b>15.30-16.00</b>	<b>Open discussion</b>
<b>16.00-16.30</b>	<b>CONCLUSIONS:</b> <b>Summary of discussions</b> <b>Final questions</b> <b>Next steps</b> Jan Dröge and Adina Claiçi

**Moderator:** Jan Dröge – Director of the BCOs Support Facility

**Rapporteur:** Adina Claiçi – Director of Copenhagen Economics in Brussels

*The following offers an overview of the sessions' discussions. For a comprehensive review, please consult the speakers' presentations in the FUTURIUM Library: <https://ec.europa.eu/futurium/en/content/training-session-state-aid-broadband-brussels-28-june-2017>*

## **Session 1: Introduction to State aid**

Adina Claiici, Director at Copenhagen Economics

Professor Phedon Nicolaides, College of Europe in Bruges and Maastricht University

Adina Claiici defined State aid, highlighting that it is qualified by four cumulative conditions (see below), as outlined in Article 107 (1) of the Treaty on the Functioning of the European Union (TFEU):

“[...] any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”.

Aid granted by a public authority will therefore be considered State aid if it fulfils the following conditions simultaneously:

1. The resources are granted by a public authority
2. It implies a selective economic advantage to the beneficiary, increasing its profitability above the level that a private investor would seek (Market Economy Investor Test)
3. It introduces a distortion of competition
4. It introduces a distortion of trade between Member States

State aid may be compatible with the TFEU when the positive effects of the aid, stemming from its objectives (of efficiency or equity considerations), are higher than the negative effects that may result in potential distortions of competition and trade. These objectives may have a social character, or may refer to the execution of a strategic project for European policy, or the development of economic activities in certain territories.

Ms. Claiici introduced the Services of General Economic Interest (SGEI) provided by Member States in certain areas, wherein, if the four Altmark conditions are met, aid to deliver universal services is not considered to provide a selective economic

advantage to the beneficiary and hence does not constitute State aid, as defined by Article 107 (1) TFEU:

- 1.** The beneficiary must have clearly defined public service obligations
- 2.** The parameters for compensation are established in advance, objective and transparent
- 3.** There is no overcompensation (costs incurred + reasonable profit)
- 4.** Tender or comparison with costs of a typical well-run undertaking (Altmark Judgment, C-280/00)

Professor Phedon Nicolaidis, College of Europe in Bruges and Maastricht University, presented the general context of State aid in the broadband sector, including objectives and instruments of the State aid framework.

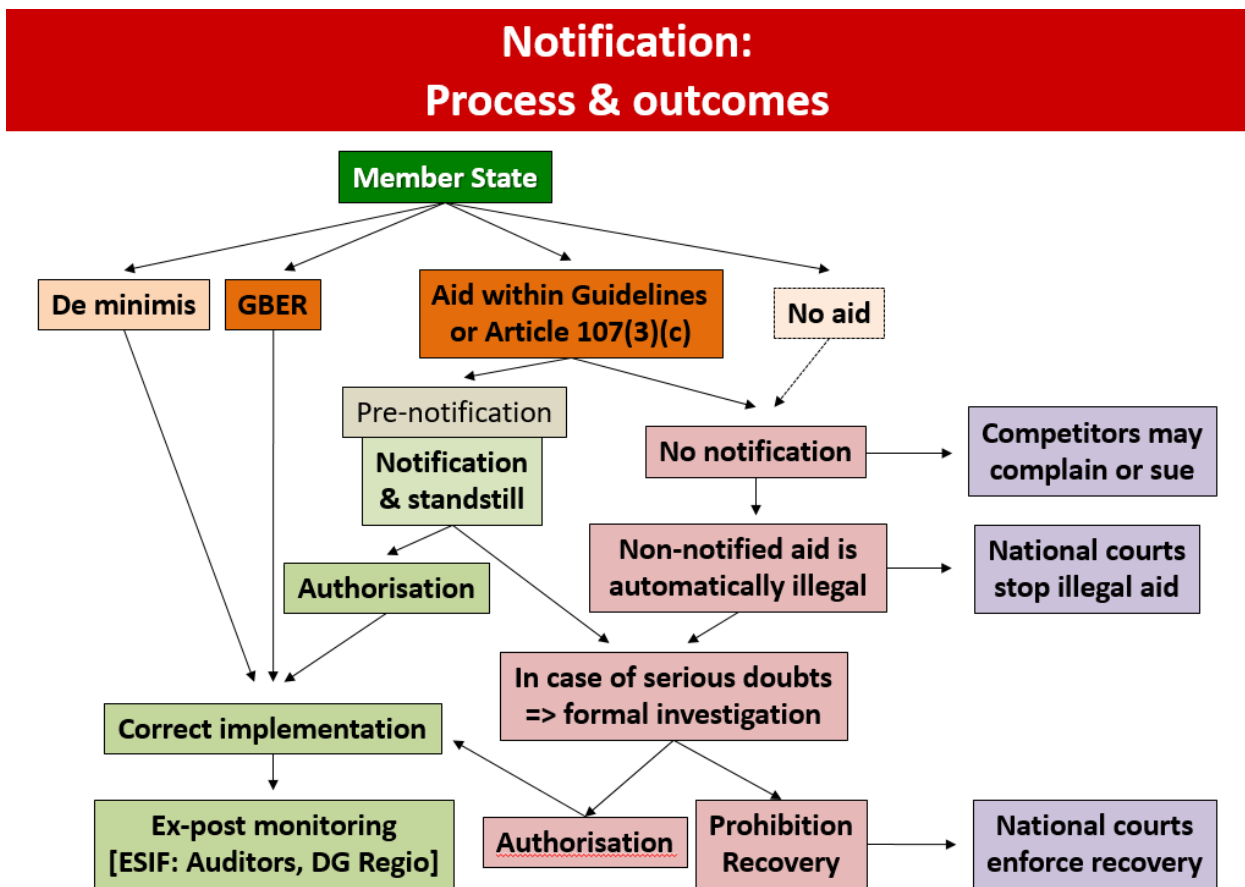
Professor Nicolaidis stated that, while financial instruments are attractive for commercially viable projects, grants are generally considered for projects entailing a high risk with no prospect for commercial return.

Professor Nicolaidis underlined the importance of pre-notification of State aid projects to the European Commission in order to allow the granting authority to fine-tune the aid measure to comply with EU State aid requirements. Once a general understanding has been achieved, the aid measure can be formally notified, and the European Commission has two months to adopt a position on the notified measure, as long as the file is complete. If not, the European Commission will request further information.

The average time for approval of aid schemes is nine months due not only to incomplete files but also to the obligation of the European Commission to listen to all parties with a legitimate concern in the case, such as market operators who may raise objections.



A summary of the process for notification of State aid:



Speaking of General Block Exemption Regulation (GBER), Professor Nicolaides underlined that it requires an *ex-post* impact evaluation of certain aid measures categories; that GBER measures may be checked by DG COMP after implementation; and that, if a project is co-funded by EDRF, DG REGIO and/or the Court of Auditors may audit the use of the money.

The *de minimis* rule exempts aid of less than €200 000 from the requirement of notifying the European Commission in advance.

Professor Nicolaides noted that national courts may be appealed to by competitors in order to check whether a measure involves State aid which should be notified to the Commission and in order to obtain a recovery of unlawful non-notified aid. In case of appeal, a national judge may halt the project immediately.

Appeals may also be addressed to the European Commission. If an investigation is justified, the European Commission may ask for the scheme to be halted and, in

some cases, the granting authority may be requested to reclaim aid that was disbursed illegally.

- BCO Greece highlighted the fact that broadband-related projects require a long time to recover the investments, representing a high risk.

Professor Nicolaides suggested two solutions:

1. To have a bank loan backed by State guarantee
2. To link repayable advantages to the project, where pay-back will only take place if the project is successful, and if the success is greater than expected, the profits could be shared.

The following sessions built on Ms. Claiçi and Professor Nicolaidēs' introduction, clarifying further key aspects on State aid procedure; 'no aid' measures, including SGEI / Altmark; General Block Exemption Regulation (GBER); planning aspects: mapping and public consultation, commitments of operators, qualitative leap of new networks; price framework for wholesale markets and a final session on claw-back.

#### Session 2: State aid procedure

Ewoud Sakkers, Head of C4 Unit in DG COMP

#### Session 3: Categories of 'no aid' measures

Virginie Roussel, Case Handler at DG COMP

#### Session 4: GBER

Joseph Smallwood, case handler at DG COMP

#### Session 5: State aid planning

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#### Session 7: Claw-back

Adina Claiçi, Director at Copenhagen Economics

## **Session 2: State aid procedure**

Ewoud Sakkers, Head of C4 Unit in DG COMP

Ewoud Sakkers highlighted that the cases to come will be more complex than those encountered so far, particularly due to the scarcity of white NGA areas. He remarked that the new goals for high capacity networks under the EU Gigabit Society go beyond ultrafast speeds of 100 Mbps and target speeds of 1 Gbps.

Mr. Sakkers reminded participants that when EU funding is used, State aid comes into place if the Member States enjoy discretion over the allocation of such funds and the designation of beneficiaries.

He noted that the European Commission's procedure for validating a State aid measure brings together DG COMP and the different Directorates concerned (REGIO, CNECT, AGRI), as well as other services in the Commission, in particular the Legal Service.

Mr. Sakkers explained that the European Commission encourages Member States to use GBER measures, and is open to working with public authorities in order for them to make the best choices in preparing their measures for approval, should notification be necessary.

Mr. Sakkers noted that complainants can appeal directly to the European Commission, which must then respond. It is preferable to avoid litigation, which creates uncertainty and delays the schemes' implementation.

Most of the funds committed to broadband development have not been used, partly due to the crisis of post-2008, but also to the technological changes and the complexity of the administrative framework. Aid measures approvals are not always followed by immediate investments. In the past, only approximately 30% of approved aid was actually disbursed for broadband, though figures are improving.

The State aid modernisation plan is under way, and in particular the GBER has rendered Member States more responsible for the correct implementation of State aid measures in the broadband sector, by authorising them not to notify under a threshold of €70m per project and under certain conditions.

State aid approval is part of the overall broadband infrastructure planning in Europe. The earlier administrations engage with the European Commission, the better, but this should be done with a clear and structured plan. When a request comes too late, after implementation has taken place, the risks are greater. Mr. Sakkers reminded

participants that the European Commission can give advice on how to proceed and can also share good practices. He invited the BCOs to reach out to the European Commission, the BCO-SF, and their network of peers when seeking guidance.

The session was followed by discussions with the participants:

- BCO Spain requested a review of the definition of white areas in relation to the speed of services provided.

The European Commission responded that, for the time being, there are no plans to revisit the existing thresholds. Participants were reminded that the GBER applies only for interventions in white areas; if grey, the measure should be notified.

- A representative from DG REGIO asked whether the provision of high-speed broadband on a train or bus could be considered a service for a white area.

DG COMP recognised the difficulty in addressing the mapping issues in this example, and noted that it will depend on the existence of service providers and on the exact design of the measure.

- BCO France shared the French case for mobile markets where obligations have been established for the operators to cover the whole territory; in this instance, the entire train system.

In the case of Wi-Fi spots offered by municipalities as public services, it must be ensured that there is no other commercial service, and this service should be clearly framed as a public service, ensuring no distortion of competition.

- BCO Denmark expressed a concern regarding the pressure from the new Gigabyte Society's communication and Broadband Guidelines. Denmark has decided to focus on national goals, but they are concerned about the implications of the new connectivity goals and how these will fit with the Guidelines.

The European Commission responded that the closer you come to the Gigabyte Society goals, the closer you come to the step change. The European Commission is currently treating various cases which deal with this aspect and expects that case-practice should clarify this point in the future.

- Another question referred to when a State aid scheme has been approved by the European Commission, but later, a market player complains and wins: what happens to the investments already made? What are the possible outcomes?

The European Commission stated that it would investigate the case and if indeed it would find that State aid was misused, the disbursement of further aid may be blocked and the aid already granted may have to be recovered by the Member State from the beneficiaries.

- BCO Denmark shared an example where an awarded tender had to be withdrawn. The winner had begun roll-out.
- The European Commission mentioned another example, in Birmingham, where a State aid intervention in white areas was approved by the European Commission. Following two complaints claiming the area was in fact grey, the case went to court. It was finally decided not to implement the project.

### **Session 3: Categories of 'no aid' measures**

Virginie Roussel, Case Handler at DG COMP

Virginie Roussel offered insights on the different categories of 'no aid' measures, including SGEI / Altmark.

The absence of State aid is recognised when:

1. there is no commercial purpose;
2. the network cannot be used for services or by third parties (Closed User Group);
3. and beneficiaries do not engage in economic activity.

This last criterion may be delicate, since benchmarks proving that this principle is respected need to be provided.

- BCO Denmark asked whether it would be considered State aid if a public administration is rolling out passive infrastructure and private operators do not want to use it, but they do want to co-dig.

The European Commission directed them to paragraph 29 of the EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks.

- Another example presented was a case where a single project has two targets: one does not imply State aid as it falls under the category of public service (setting a closed network for public use), but the other target involves a measure judged as aid (opening the network).

Even if an action is a follow-up measure on a non-State aid measure, if this second measure fulfils the State aid criteria, it is considered State aid and is evaluated to limit risks of undue competition distortion.

In general:

1. If the measure had been benefiting the public sector alone, but then was opened commercially, then it needs to be assessed if compatible with the State aid requirements. If the MEOP is respected, then it can be considered non-State aid.
2. Where the network is closed, it may be considered as non-economic, but two criteria need to be assessed: remuneration and use.

#### **Session 4: GBER**

Joseph Smallwood, case handler at DG COMP

Joseph Smallwood developed in further detail the General Block Exemption Regulation (GBER).

The GBER 2014-2020 is a set of 43 exemptions that can be used to provide effective and compliant State aid. To use the GBER, the granting body must publish aid details online and complete an online form, submitted to the European Commission.

As of 2014, the new General Block Exemption Regulation includes aid for broadband infrastructures. Article 52 of the GBER regulation (aid for broadband infrastructures) lists the conditions for a project to be submitted under GBER.

For further questions relating to implementation, please consult: <https://webgate.ec.europa.eu/fpfis/wikis/display/StateAid/12.+Aid+for+broadband+infrastructure+--+Art.+52>

Points raised during the discussion included:

- For large mixed areas, it may be interesting to divide the project, submitting white areas under GBER and notifying State aid measures for the grey ones.

- A competitive selection procedure should be guaranteed, as under the GBER the selection cannot be restricted to a limited number of operators.

Addressing some of the questions raised during the preliminary survey:

- Is it possible to provide aid for the implementation of projects involving the upgrade of the NGA network to the standard of high-speed networks with parameters of at least 100 Mbps to the end user?

For the GBER to apply, the intervention area must be white – in this case NGA white. Interventions in grey areas will not be possible under the GBER and should be notified.

- Should Article 52 (4) be read as imposing an obligation to tender a development even if no such obligation exists on the basis of public procurement law, or would an open public consultation suffice when, as a result of this consultation, only one operator has shown interest in providing the service?

According to the fourth criteria of Article 52 (“The aid shall be allocated on the basis of an open, transparent and non-discriminatory competitive selection process respecting the principle of technology neutrality.”), this would not be a valid exception. If a competitive selective process is organised but only one operator participates, this can be considered in line with the GBER.

## **Session 5: State aid planning**

Alexandra Manaila, case handler at DG COMP

Alexandra Manaila offered insights on mapping and public consultation, commitments of operators, procurement and the step change requirements applicable to the subsidised networks.


Ms. Manaila outlined the 2020 European Commission technologies and objectives (30 Mbps downloads for all; 50% of the population connected to 100 Mbps) and the Gigabit Society 2025 objectives (e.g. 1 Gbps symmetrical for public services and innovative companies; 100 Mbps for all households and small businesses).

She presented different investment model categories: direct investment, concession, wholesale-only interventions, and gap-funding.



Ms. Manaila underlined the importance of using existing infrastructure, which public authorities should encourage.

The following figures can be used as an indication to justify step change in the Gigabit Society 2025 objectives:



## 10. Future Demand Estimation

Future demand estimation by 2025:  
(Staff Working Document, p. 18, 24):

*Table 1: Application categories with their capacity and quality requirements 2025*

Application category	Downstream (Mbit/s)	Upstream (Mbit/s)	Packet loss	Latency
Basic Internet	≈20	≈16	0	0
Homeoffice/VPN	≈250	≈250	+	+
Cloud Computing	≈250	≈250	+	++
Media and Entertainment HD/3D	≈150	≈30	++	+
Media and Entertainment Ultra-HD, 4k-TV, 3D, ...	≈300	≈60	++	+
Communication	≈8	≈8	++	+
Videocommunication (HD)	≈25	≈25	++	++
Gaming	≈300	≈150	++	++
E-Health	≈50	≈50	++	+
E-Home/E-Facility	≈50	≈50	0	0
Mobile Services / Wifi-Offloading	≈15	≈12	0	0

0 = No specific importance  
 + = High importance  
 ++ = Very high importance

*Source: WIK-IDATE-Deloitte; Regulatory, in particular access, regimes for network investment models in Europe, SMART 2015/0002*

Points raised during the session included:

- When proceeding with mapping, what should the target area be? Only inhabited households or all?

State aid is not prescriptive on the details of mapping exercises, where Member States enjoy a wide margin of discretion. It is important to map infrastructure (the number of providers over the same infrastructure may not change the colour of the area, but would impact step change requirements). Premise-level mapping is more precise than postcode-level mapping and can better limit risks of crowding out private investment. It is helpful to engage in early talks with operators as they may be able to provide detailed information.

- In the case of opportunistic behaviour by an operator that may be in a privileged position: can their behaviour be stopped temporarily in order to protect citizens?

State aid is not prescriptive in this regard either. This will depend on national law, such as commercial, civil or criminal law (reliance on false declarations...). The approved aid measure can go ahead as originally planned. Only if further aid is needed will it be necessary to launch a new public consultation and mapping exercise and check compliance with public procurement rules where relevant. It is important to take into account two relevant deadlines:

1. Deadline of the public consultation: if an operator brings to the attention of the public authorities plans to invest past the deadline of the public consultation, the Member State has a margin of discretion to decide on this new information. State aid rules do not require that State aid plans have to be changed if the publication consultation was correctly performed.
2. When the aid has already been granted. The aid is generally considered granted when the contract is signed with the operator. Further new aid may require a new public consultation and mapping, and a new procurement exercise, depending on circumstances.

- Can the mapping rely on existing databases and therefore avoid the public consultation?

No. Public consultations complement the mapping exercise, in particular as concerns planned investments in the target areas. Existing databases show what exists today, but not the three years to come.

Joint ventures between a public authority and private investors for long-term investments also need to be notified if not compliant with the Market Economy Operator Principle (MEOP). In that case the private operator should be selected through a tender.

When the implementation of a large project is planned in phases, it is recommended to submit a notification for the project in its entirety to ensure consistency.

Austrian example: where there was only enough money for the centre of the village, but more distant houses were not served, additional later interventions which were to serve these areas became more difficult as the areas had become grey and the risks that the market would be distorted had to be considered.

## **Session 6: Price framework for wholesale markets**

Oliver Stehmann, Deputy Head of C4 Unit in DG COMP

Oliver Stehmann highlighted the obligation of opening access to next-generation networks, stating that competitors must be able to access the offers of ducts, dark fibre, street cabinets and bitstream. Mr. Stehmann noted that the price of wholesale access can be oriented according to the principles implemented by the regulator, through the comparison of existing offers and after taking account of State aid. He reminded participants that, it is highly recommended to always consult the NRA both as regards pricing and as regards the conditions of wholesale access (including litigation on access).

The main points raised during the discussion included:

- Is the NRA always to be consulted or only in cases of litigation?

The Broadband Guidelines recommend that the NRA should be consulted on various aspects, from mapping and definition of intervention areas, to wholesale access conditions and pricing, as well as in cases of litigation. However, Member States have a wide margin of discretion in attributing such competences to the NRAs and the level of involvement of NRAs varies among Member States. The FR NRA is very active on various aspects in the design and implementation of State aid plans. In the UK, the State aid scheme provides a price benchmarking methodology to set the wholesale access prices. Each bidder proposes a pricing of open access products they will offer as part of the procurement process, observing the benchmarking rules set by the UK authorities. The UK authorities seek technical advice from the NRA, who check these proposals, with the objective to keep prices at a reasonable and non-discriminatory level.

- Does the European Commission publish best practices on benchmarking exercises?

Not currently, but the BCO-SF is open to collecting them if the BCOs contribute them.

## Session 7: Claw-back

Adina Claiici, Director at Copenhagen Economics

Adina Claiici concluded the day with recommendations on claw-back.

Ms. Claiici expressed a concern regarding the lack of incentives for the beneficiary to be cost-efficient in case of full *ex-post* compensation. Aid amount established *ex-ante* based on expected profits has the potential to provide good incentive to beneficiaries to be efficient. However, in case of a high degree of uncertainty, *ex-ante* approval of aid may be combined with *ex-post* adjustments in the form of claw-back. With this option, Member States have the possibility to reclaim part of the profits obtained by beneficiaries when these are above a reasonable market level. The reasonable profit is based on benchmarks and prospective studies carried out on the sector. Extra profits may be used for further broadband network expansion. The claw-back clause is triggered only for projects that are relatively large (i.e. above €10m).

An example of claw-back implementation can be found in the National Broadband Scheme for the UK for 2016-2020. The UK mechanism will recover excess profits from two sources (take-up and revenues) and will be limited to projects of relatively high value (above £150,000 of aid).

- BCO France shared the rules they put in place for the implementation of the French broadband plan. The French government has made four important decisions :
  1. The possibility of a public financial support in profitable areas has been excluded to avoid crowding-out effects so that there will be no competition between public authorities and private investors, and as such, no legal procedures.
  2. The public interventions by direct investment in FTTH (fibre to the home) has been dimensioned in order to allow the market to grow.
  3. A geographic broadband observatory has been created so that everyone can know what services are offered and will be offered within a three-year period.
  4. A national commission has been created to enable the stakeholders of the national plan to discuss and negotiate the future of the plan.

The French government therefore does not grant any type of project which could be a threat to private operators and investors. Currently, the private financial operators

have subscribed to financing public projects to a far greater degree than was expected.

### **III. List of participants and link to materials**

Pictures of the sessions, as well as video interviews with the speakers and their presentations, can be found in the BCO-SF forum's Library on Futurium (<https://ec.europa.eu/futurium/en>).

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