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FITNESS CHECK

**of the 2012 State aid modernisation package, railways guidelines and short-term export
credit insurance**

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GLOSSARY

<i>Term or acronym</i>	<i>Meaning or definition</i>
COVID-19	Coronavirus disease 2019
DG	Directorate-General
EBITDA	Earnings before interest, taxes, depreciation, and amortization
EEAG	Energy and Environmental Aid Guidelines
EIUs	Energy intensive users
EU	European Union
FAQ	Frequently asked questions
FID	First Industrial Deployment
GBER	General Block Exemption Regulation
GDP	Gross domestic product
GHG	Greenhouse Gas
IPCEI	Important Projects of Common European Interest
JRC	Joint Research Centre
OECD	Organisation for Economic Co-operation and Development
RAF	Regional Aid Framework
RAG	Regional Aid Guidelines
RDI	Research, Development and Innovation
RSB	Regulatory Scrutiny Board
SAM	State Aid Modernisation
SGEI	Services of general economic interest
SME	Small and medium-sized enterprises
STEC	Short-term export-credit insurance Communication
SWD	Staff Working Document
TAM	Transparency Award Module
TFEU	Treaty on the Functioning of the European Union
UID	Undertaking in difficulty
WTO	World Trade Organisation

1. INTRODUCTION

1.1. PURPOSE OF THE FITNESS CHECK

Fitness checks are comprehensive policy evaluations assessing whether the regulatory framework for a policy sector is “fit for purpose”.¹ The current Fitness Check provides a comprehensive policy evaluation of the **State aid modernisation** (“SAM”). SAM was an ambitious reform of EU State aid policy, see in detail in Section 2.2.

With the SAM reform launched in 2012 the Commission considered that a more focused framework for the assessment of State aid measures would allow Member States to better contribute both to the implementation of the Europe 2020 strategy for sustainable growth as well as to budgetary consolidation. The objectives of the modernisation of State aid control were threefold: (1) to foster sustainable, smart and inclusive growth in a competitive internal market; (2) to focus Commission's ex-ante scrutiny on cases with the biggest impact on the internal market; and (3) to streamline the rules and provide for faster decisions. In view of these objectives, the Commission revised several State aid rules in 2013 and 2014 (see in detail in Section 2.2).

The current Fitness Check is conducted with a view to the approaching expiry² of some of the rules revised within the framework of SAM and/or the relevant review clauses (see Annex 3), and the fact that some of the rules were already in place before SAM. In doing so, the Fitness Check will assess if those State aid rules are still “fit for purpose” taking into account the current and (already known) future challenges, the general SAM objectives and the specific objectives of the legal frameworks relevant for the rules under examination (including the developments in legislation since the adoption of SAM). Regarding current and future challenges, the current Fitness Check will in particular try to assess the extent to which State aid rules are still fit for purpose in order to support the new political objectives of the Commission, including a European Green Deal, as well as the new Digital and Industrial Strategies³, while acknowledging that the information available and part of the analysis predates the more recent policy initiatives and priorities. On the other hand, the impact of the COVID-19 outbreak is not dealt with in detail in this Staff Working Document (“SWD”).

The purpose of the current Fitness Check is to examine the SAM performance against five criteria: effectiveness, efficiency, relevance, coherence and EU added value. This is a retrospective exercise with the aim of establishing what has worked well or poorly, and it compares actual performance to earlier expectations. The

¹ https://ec.europa.eu/info/sites/info/files/better-regulation-toolbox_2.pdf.

² On 2 July 2020, the Commission has adopted a new Regulation amending the General Block Exemption Regulation (GBER) and the de minimis Regulation, and a Communication amending seven sets of State aid guidelines and prolonging those which would otherwise expire on 31 December 2020. In those Regulation and Communication, the Commission has also made certain targeted adjustments to the existing rules with a view to mitigate the economic and financial impact of the coronavirus outbreak on companies. For a full overview, please refer to Annex 3.

³ See Section 3.3.

findings will serve as a basis for drawing policy conclusions on how well SAM and the rules at stake have been performing, whether SAM is on the right track (i.e. “fit for purpose” in view of the current situation) and if not, why. The Fitness Check will feed into the revision and update process of the relevant State aid regulatory framework and also determine whether non-regulatory actions (such as advocacy, training, etc.) are needed.

This SWD reflects the findings and views of the Commission’s staff and does not reproduce the formal position of the Commission itself. It does not prejudice the final nature of any act or the content of any delegated or implementing acts that may be prepared by the Commission.

1.2. SCOPE OF THE FITNESS CHECK

The current Fitness Check is an “umbrella exercise”, its scope comprises a group of interventions and is not a mere sum of individual evaluations of the individual rules. The Fitness Check aims at assessing SAM as a whole as well as cross cutting, common features of the individual rules, while also focusing on selected issues which are deemed of importance based on the Commission’s case practice.

As also explained in Section 4.1, one of the main tasks of the Commission’s services in State aid is handling notifications. Every notified case is assessed in detail involving close contacts between the Commission’s services and their counterparts, the Member States pre- and post-notification and sometimes during the implementation of the decision (in 2019 alone, DG Competition received over 180 State aid notifications.) That process is one of the most valuable sources for DG Competition to understand what works well and what might need adjustment. In addition, the so-called interpretation (or “eWiki”) questions, as described in footnote 70, also give an insight on what might be problematic for the Member States. Member States also express their views during the State aid Working Groups (see Section 3.1). Further hints to what works well and what not can be obtained from complaints and the monitoring exercise (see Section 3.2.3). The selected areas were thus based on DG Competition’s experience with certain issues.

The current Fitness Check is also to be seen as a “mid-term review” or an “implementing evaluation” that examines whether everything is on track or if there is a case for making any changes.

The key elements of the scope of the current Fitness Check

The current Fitness Check, as set out in the Roadmap⁴ **covers the following substantive State aid rules**⁵ (i.e. rules on compatibility) under SAM: General Block Exemption Regulation No. 651/2014 (“GBER”)⁶, *de minimis* Regulation No.1407/2013 (“*de minimis* Regulation”)⁷, Regional Aid Guidelines (2013/C

⁴ https://ec.europa.eu/info/law/better-regulation/initiative/2044/publication/510476/attachment/090166e5c159a460_en.

⁵ For the sake of simplification, the SWD will use the term “rule” as a general reference to the individual legal texts (regulations, communications, guidelines etc.) under examination.

⁶ OJ L 187 26.6.2014, p. 1, as amended by Commission Regulation 2017/1084, OJ L 156, 20.6.2017, p. 1.

⁷ OJ L 352, 24.12.2013, p. 1.

209/01) (“RAG”)⁸, Research, Development and Innovation Framework (2014/C 198/01) (“RDI Framework”)⁹, Important Projects of Common European Interest Communication (2014/C 19/04) (“IPCEI Communication”)¹⁰, Risk Finance Guidelines (2014/C 19/04)¹¹, Aviation Guidelines (2014/C 99/03)¹², Energy and Environmental Aid Guidelines (2014/C 200/01) (“EEAG”)¹³, Rescue and Restructuring Guidelines (2014/C 249/01)¹⁴.

In addition, the Short-term export-credit insurance Communication (2012/C 392/01) (“STEC”)¹⁵ and the Railway Guidelines (2008/C 184/07)¹⁶ also form part of the current evaluation exercise. Those two rules pre-date SAM (the Railway Guidelines were introduced in 2008 and the latest STEC entered into force in 2013) and were not part of the State aid reform. Nevertheless, they are also important building blocks and complement the State aid legislation reviewed under SAM (State aid aimed at developing certain economic activities or certain economic areas within the meaning of Article 107(3)(c) TFEU). Both rules reflect well the main objectives of SAM, while at the same time they take into account the specificities of the area they cover. They contain some explicit references to the common principles under SAM, such as transparency, avoidance of undue negative effects, need for State intervention and proportionality of the aid amount. As regards STEC, although it was largely inspired by the experience in the financial crisis, it was also inspired by the SAM Communication of 2012 – which set out the initial ideas for SAM.¹⁷ With regard to the Railway Guidelines, since 2012 when SAM was adopted, the Commission has systematically applied the SAM principles in its case practice when assessing cases falling under the scope of the Railway Guidelines, notably for State aid schemes (e.g. transparency or evaluation requirements). The current Fitness Check examines to which extent they are fit for purpose in view of their objectives and of developments on the market and developments in the legislation since their adoption and to which extent those rules are aligned to the SAM objectives.

When the Fitness Check was launched, those rules were ready to be evaluated. As the SAM principles represent now the mainstream of State aid control, and those two rules have to be aligned, it is logical (and efficient) to evaluate them within the Fitness Check exercise. This also allows to ensure to the maximum extent that they would be better aligned to the standard State aid rules as defined by the SAM in the future. In addition, some recent cases in the railway sector have shown that the existing provisions on debt cancellation and restructuring in the Railway Guidelines merit revisiting. Given similarities, that is best done together with the (general) Rescue and Restructuring Guidelines.

⁸ OJ C 198 of 27.06.2014, p. 1.

⁹ OJ C 198 of 27.06.2014, p. 1.

¹⁰ OJ C 188, 20.06.2014, p. 4.

¹¹ OJ C 19, 22.01.2014, p. 4.

¹² OJ C 99, 4.4.2014, p. 3.

¹³ OJ C 200, 28.6.2014, p. 1.

¹⁴ OJ C 249, 31.07.2014, p. 1.

¹⁵ OJ C 392, 19.12.2012, p. 1.

¹⁶ OJ C 184, 22.7.2008, p. 13.

¹⁷ STEC was adopted in 2012 after the SAM Communication and entered into force in 2013.

Based on Article 109 TFEU, Council Regulation No. 1588/2015 (“Enabling Regulation”)¹⁸ allows the Commission to declare, by means of regulations, that certain categories of State aid are compatible with the internal market and are exempted from the notification requirement provided for in Article 108(3) TFEU. It thereby forms the legal basis of the GBER, limiting the scope to block-exempt. The GBER was revised under SAM in order to allow the Commission to include further categories of aid based on the Enabling Regulation. Therefore, the Enabling Regulation will implicitly be considered through the evaluation of GBER. A separate, targeted review of the GBER extending State aid rules to national funds combined with certain EU programmes is also taking place at the moment.¹⁹

A full overview (reference, entry into force, etc.) of the rules covered by the Fitness Check can be found in Annex 3. The State aid universe and the scope of the Fitness Check is illustrated in Figure 1 in Section 2.1, which presents the legal and policy background.

Explanation of the limitations to the scope of the Fitness Check

The **procedural rules** which were revised under SAM (the Procedural Regulation²⁰ and the accompanying Implementing Regulation²¹) are *not* object of the current evaluation exercise, because the present Fitness Check focuses on substantive and not on procedural rules. Likewise, the Commission Notice on the Notion of Aid²² is out of scope of this evaluation exercise, since it provides only a comprehensive summary of the interpretation of the objective notion of State aid by the European Courts.

The 2015 **Procedural Regulation** is a Council Regulation codifying existing case law and as such dictated largely by the Union Courts. It has to be noted that the Procedural Regulation on State aid dates back to 1999. Prior to that, State aid procedures were based directly on the Treaty, as interpreted by the Union Courts. The 2015 Procedural Regulation introduced only relatively minor changes: some fine-tuning on complaint handling and the introduction of some more information gathering tools in rather specific circumstances.²³ The first one does not affect notified aid and with the latter tools, the Commission has not gained sufficient experience yet (only one sector inquiry and a few tax cases where market information tools were used). Those changes do not change the core concepts of the procedure on notified aid and the assessment of *compatibility*, which remain based on the principles established by the Union Courts. Moreover, the Procedural Regulation is applicable not only to the SAM rules, but to all State aid procedures.

¹⁸ OJ L 248, 24.9.2015, p.1.

¹⁹ Please see details here: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/2086-Targeted-modification-of-the-General-Block-Exemption-Regulation-in-relation-to-the-EU-funding-programmes>.

²⁰ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union; OJ L 248, 24.9.2015, p. 5.

²¹ Commission Regulation (EU) 2015/2282 of 27 November 2015 amending Regulation (EC) No 794/2004 OJ L 325, 10.12.2015, p.1.

²² Commission Notice on the notion of State aid, OJ C 262, 19.7.2016, p. 1.

²³ For market information tools, only after an opening of the formal investigation procedure and on the condition that the standard investigation procedure has been declared ineffective; for sector inquiries, only when the information available substantiates a reasonable suspicion that State aid measures in a particular sector could materially restrict or distort competition within the internal market in several Member States, or that existing aid measures in a particular sector in several Member States are not, or are no longer, compatible with the internal market.

Therefore, it would not make sense to include that Regulation in the Fitness check, but that Regulation would need to be evaluated on its own.

The Services of General and Economic Interest (“SGEI”) rules,²⁴ insofar applicable to health and social services, the rules for agriculture, rural areas, forestry²⁵ and fisheries²⁶ as well as the broadband rules²⁷, are also not covered as they are subject to separate evaluations²⁸ taking into account their specificities.²⁹

As regards the exclusion of the **SGEI** from the scope, those rules are based on a different legal basis and were not part of the SAM initiative. The SGEI rules are based on Article 106 TFEU, which is not a State aid provision in the Treaty. It relates to Member States granting special or exclusive rights to undertakings and limitations to the application of the competition rules, where those rules would obstruct the performance of the specific tasks with which those undertakings are entrusted. In addition, SGEI measures also differ substantially from the State aid assessment in other areas, as the Commission does not have the same powers as under the compatibility assessment under Article 107(3)(c) TFEU. The Member States enjoy a wide margin of discretion in defining what services qualify as SGEI and the scrutiny of the Commission is limited to verifying whether the Member States committed a manifest error in the definition of SGEIs and whether the SGEI service providers have not been overcompensated. In addition, compensation of costs related to SGEIs involves State aid only in cases not compliant with the conditions defined by the judgment in the *Altmark* case³⁰. The assessment of aid related to SGEIs is thus rather specific and distinct from the common assessment principles under the SAM, and thus merits a separate evaluation outside the scope of the current Fitness Check. They were also not part of SAM, precisely because of their particularity and different legal grounding.

The rules for agriculture, rural areas, forestry and fisheries are closely linked to the Common Agricultural and Common Fisheries Policy respectively. Both sectors

²⁴ SGEI Decision (OJ L 7, 11.1.2012, p. 3), SGEI Communication (OJ C 8, 11.1.2012, p. 4), SGEI *de minimis* Regulation (OJ L 114 26.4.2012, p. 8) and SGEI Framework (OJ C 8, 11.1.2012, p. 15).

²⁵ Regulation No 1306/2013, OJ L 347, 20.12.2013, p. 549; Regulation No 1307/2013, OJ L 347, 20.12.2013, p. 608; Regulation No 1308/2013, OJ L 347, 20.12.2013, p. 671; Regulation No 1305/2013, OJ L 347, 20.12.2013, p.487; Agricultural *de minimis* Regulation No 1408/2013, OJ L 352, 24.12.2013, p. 9; Regulation No 733/2013, OJ L 204, 31.07.2013, p.11; Regulation No 651/2014, OJ L 187, 26.06.2014, p. 1, Block exemption Regulation No 702/2014 in the agricultural sector and forestry, OJ L 193, 01.07.2014, p. 1.

²⁶ Regulation No 1380/2013, OJ L 354, 28.12.2013, p. 22; Regulation No 1379/2013 on the common organisation of the markets in fishery and aquaculture products, OJ L 354, 28.12.2013, p. 1; Fishery and aquaculture *de minimis* Regulation No 717/ 2014, OJ L 190, 28.06.2014, p. 45; the fishery Block exemption Regulation No 1388/2014, OJ L 369, 24.12.2014, p. 37.

²⁷ That is to say the Broadband Guidelines (OJ C25, 26.01.2013, p.1.) and related GBER articles.

²⁸ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11835-Evaluation-of-State-aid-rules-for-health-and-social-services-f-general-economic-interest-and-SGEI-De-Minimis>; <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/2089-Review-of-Agricultural-State-aid-Guidelines>; <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/?text=state%20aid&topic=MARE> ; <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12398-Evaluation-of-State-Aid-rules-for-broadband-infrastructure-deployment>

²⁹ Sectoral rules which form an integrative part of other rules (such as broadband in the RAG) have also not been evaluated separately.

³⁰ Judgment of the Court of Justice in Case C-280/00 – *Altmark* of 24 July 2003, EU:C:2003:415.

are very small-structured and stakeholders usually differ from those concerned by horizontal instruments.³¹

As to the **Broadband rules**, the application of the common assessment principles is to a large extent driven by the technological requirements and developments in the sector.

At the time, the Fitness Check started, the rules were considered sufficiently open-ended to cater for developments expected in the near future and flexible enough to assess diverse State interventions, including those addressing the new policy targets of the Gigabit Communication³².

At the same time, technological developments have continued to accelerate, including the commercial roll out of the new generation of mobile (5G), accompanied by a growing need of Gigabit connectivity reinforced by the current pandemic. After the launch of the Fitness Check, the need to take into account these developments became increasingly clear.

In the meantime, the application of State aid rules on a case-by-case has continued and contributed to develop some case practice to address this evolving situation and the 2025 Gigabit objectives. Within this context, a study was launched to examine the Commission's practice under the broadband guidelines and the experience gained in the application of State aid rules in the broadband sector (data gathering exercise, identifying challenges in the application of the Broadband Guidelines, best practices, improvements to address identified difficulties; also aiming at verifying elements required under the Better Regulation rules). Thus, a separate evaluation of the Broadband Guidelines is now better justified.

Timeframe covered and geographical scope of the Fitness Check

The **timeframe covered** by the Fitness Check relates to the period since the entry into force of the relevant rules up until the present, to the extent that the relevant information and data are available (for example, due to the time lag of the reporting obligations by Member States, the State aid Scoreboard³³ data available for this Staff Working Document are only for aid granted until 31 December 2018). While the effect of recent Commission policy initiatives on the State aid rules is assessed (see Section 3.3), the consequences of the COVID-19 outbreak on SAM rules are not analysed in this SWD but its effects will certainly have an impact on future policy-making (see also Section 3.4).

The Fitness Check **covers all Member States** (including the UK which was a Member State during the time covered by the evaluation).

³¹ For the Review of Agricultural and Fishery State aid rules, Roadmaps and public consultations have been published. See e.g. the Better Regulation Portal: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/2089-Review-of-Agricultural-State-aid-Guidelines> and <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/?text=state%20aid&topic=MARE>.

³² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society (COM/2016/0587 final). See for instance decision in case SA.54668 Bavarian gigabit scheme, adopted on 29/11/2019.

³³ See Section 4.1 for more information on the State aid Scoreboard.

2. BACKGROUND TO THE INTERVENTION

2.1. LEGAL AND POLICY BACKGROUND

2.1.1. NOTION OF STATE AID

Competition is a major driver of growth. It incentivises enterprises, including new ones, to enter markets and innovate, improving productivity and competitiveness in a global context.

State aid control is part of competition policy enshrined in the Treaty (please refer to the relevant Treaty provisions in Annex 4) and its basic rationale is to avoid undue market distortions and subsidy races, as well as to safeguard the internal market and create a competitive landscape with a level playing field.

Box 1: Article 107 TFEU: Definition of State aid

“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, insofar as it affects trade between Member States, be incompatible within the internal market”.

*Consequently, the **cumulative** requirements that have to be met in order for a measure to be considered as State aid and to fall under the State aid **general prohibition** are the following:*

- a. the aid must be granted by a Member State or through State resources;*
- b. there must be a selective advantage to an undertaking;*
- c. there must be a - threat of - distortion of competition; and*
- d. there must be affectation of trade between Member States.*

State aid is a form of support given by a Member State that provides an undertaking or specific undertakings with an advantage over its/their competitors. The support given by a Member State financed from the Union budget is also considered State aid if national authorities have discretion about the use of these resources. Aid can be granted in a variety of ways, such as through the allocation of subsidies, the provision of interest and tax relief, state guarantees or the purchasing of goods and services on preferential terms.

2.1.2. NOTION OF COMPATIBILITY

The Treaty contains a negative presumption against all forms of State aid. While Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) lays down a **general prohibition of State aid** granted by Member States to undertakings, Article 107(3) TFEU also allows for a number of policy objectives for which State aid may be granted, they are the so-called objectives of common interest.³⁴ Those objectives of common interest derive from the policy priorities of

³⁴ Article 107(2) TFEU also lists a number of “allowed” State aid which is automatically compatible, without discretion of the Commission. The notification obligation however also applies to that provision. See also Annex 4.

the relevant Member State while taking into account the general priorities of the EU.

State aid control thus does not prevent Member State governments from supporting businesses. State aid control ensures that any detriment arising from distortions of competition is outweighed by the public purpose pursued by the aid.

The exemptions laid down in Article 107(3) TFEU are discretionary in nature and **the Commission has exclusive competence to decide on these exceptions**, i.e. on the so-called “compatibility” of State aid with the internal market. In exercising these wide discretionary powers, when issuing decisions on compatibility under Article 107(3)(c), the Commission balances the negative effects of the aid measure on trade and competition in the internal market with its positive effects in terms of a contribution to the achievement of well-defined objectives of common interest.³⁵ “Distortion of competition” may arise in different dimensions and may have different angles.

Member States wishing to grant State aid should define the objective they pursue, and in particular explain which market failures they intend to address (market efficiency issues or equity problems). Certain objectives may cover both equity and efficiency problems. When assessing an aid measure under Article 107(3)(c), the role of the Commission is to verify whether the objective chosen by the Member State is a genuine one and then weigh the positive effects of the measure to reach this common objective against the negative impact on trade and competition. When exercising the control on State aid, the Commission does not prescribe the Member State which common objectives it has to pursue. The State aid rules only indicate in general terms, which objectives of common interest are normally considered as acceptable in view of the EU priorities.

The Commission also does not oblige the Member States to grant aid – Member States are free to choose other policy instruments to reach a certain goal. The Member States, on the basis of their policy considerations, are (to a certain extent) free to decide which undertakings or sectors they choose to support with State aid, the Commission simply cannot interfere in such a decision.

Member States can make different choices with regard to policy instruments and State aid control does not impose a single way of intervening in the economy. The Commission, when carrying out a compatibility assessment, has to verify whether the intended goal could not be reached by less distortive means (this is done under one of the common assessment principles of SAM – appropriateness of the aid). It also has to be mentioned that also non-aid measures are capable of distorting competition. If a public measure is distortive, does however not fulfil the other

³⁵ An aid measure, which cannot be approved, is “incompatible”.

cumulative criteria of Article 107(1)³⁶, it will not be caught by State aid control. A State aid measure and a non-aid measure can be equally distortive.³⁷

For public policy purposes, some Member States grant more aid than others³⁸, which is allowed under EU State aid rules. The purpose of State aid is not to ensure that Member States grant proportionally equal amounts of aid, but rather to ensure that the level playing field is maintained when aid is granted. Some might prefer other policy instruments (regulatory measures for instance which can also be distortive, but are not captured by State aid rules as not all the cumulative conditions for the existence of State aid are fulfilled).³⁹ The role of State aid control is to define what State aid can be accepted/approved under Article 107(3) TFEU since it is considered as compatible under the common assessment principles, but it is up to the Member States and their budget priorities whether and to what extent they use those possibilities for granting State aid. The Treaty rules on State aid do not set any limits to how much compatible aid a Member State can spend. It is not their role. They only define which aid can be considered compatible with the internal market.

Furthermore, Article 107 TFEU confers power on the Commission to control State aid *measures*. **It is outside the remit of State aid control to compare / assess the overall spending levels of individual Member States.** There are other tools of economic governance looking into possible investment or reform needs and the broad developments of public finances, for example the European Semester and the Stability and Growth Pact.⁴⁰ The compatibility assessment under Article 107 TFEU does not allow to carry out such a high-level, or “macro” analysis. **To ensure predictability and legal certainty for Member States and stakeholders on how the Commission applies its margin of discretion in interpreting the compatibility provisions in Article 107(3) TFEU**, the Commission has adopted a series of rules (in the form of “soft law” such as guidelines and frameworks). The adopted rules aim at laying down the compatibility conditions of aid measures. They can be either “horizontal” or “sectoral”. Horizontal rules, which apply across all industries, are aimed at solving problems that may arise in any industry and country. Sectoral rules apply to specific industries.

As State aid is not *ex lege* compatible with the internal market, but rather may be considered by the Commission to be compatible, that assessment falls, in principle, within the **exclusive competence of the Commission**, subject to review by the

³⁶ Selectivity, state resources/ imputability, conferring an advantage to an undertaking and affectation of trade

³⁷ A typical example would be the huge variation in taxation rules between different Member States (which however are considered non-selective, general measures) or discriminatory regulatory measures (which fall outside State aid control because they do not entail State resources).

³⁸ According to the 2019 State aid Scoreboard, State aid expenditure in the EU is 0.76% of total GDP. However, there is a strong variation of spending among Member States. While for some Member States State aid expenditure exceeds 1.5% of their GDP (the largest share for 2019 concerned Hungary and Czechia, followed by Denmark with close to 1.5%), for others this represents less than 0.3% (Ireland, The Netherlands, Greece). For more information on the State aid Scoreboard, please refer to Section 4.1.

³⁹ As already mentioned above, also non-aid measures are capable of distorting competition.

⁴⁰ As to a possible macro effect, there is an ongoing debate on the size of the multiplier effect of State aid. For example, in 2016, a multiplier of 0.5 was assumed (see Jan in 't Veld (2016), “Public Investment Stimulus in Surplus Countries and their Euro Area Spillovers”, Economic Brief 16, European Economy Series, August 2016).

Union Courts. The guidelines and frameworks adopted to that end being “soft law”, are merely binding on the Commission.⁴¹

There is also no legal obligation to adopt guidelines and frameworks. The adoption of such guidelines by the Commission is an instance of the exercise of its discretion. They are not and must not necessarily be exhaustive – the Commission cannot be regarded as having deprived itself of the power to recognise State aid as compatible with the internal market directly on the basis of Article 107(3) TFEU if it has not explicitly adopted a position on the question at issue in the relevant communication, guidelines or framework. Where the relevant rules do not expressly prohibit, or it is not intended to prohibit a certain type of State aid to be granted, the Commission can assess the measure directly on the basis of Article 107(3) TFEU. However, the Commission will make sure that the common compatibility principles are applied to the extent possible when aid is directly assessed under the Treaty.

2.1.3. PROCEDURAL ASPECTS

Member States can grant State aid either in the form of a “scheme” or as “individual aid”. An aid scheme is a measure which defines beneficiaries in a general and abstract manner and the authorities in charge of applying that scheme do not have any margin of discretion in its application.⁴² On the contrary, individual aid means (i) aid that is either not awarded on the basis of an aid scheme or (ii) notifiable individual awards on the basis of an aid scheme.⁴³

As described above, **the Commission has exclusive *ex-ante* control power**: under Article 108 TFEU, Member States are obliged to notify their intentions to grant State aid and cannot implement the measure before the Commission's approval. “Unlawful aid” means aid put into effect in contravention of Article 108(3) TFEU.⁴⁴ The Commission’s approval takes the form of a Commission decision. Such decisions can be challenged and are subject to scrutiny before the Union Courts.

In a State aid procedure, the counterpart of the Commission is the Member State. Once a measure is approved (or block-exempted, see below), the Member State is authorised, on the basis of the Commission decision (or the GBER, see below), to disburse the aid to the beneficiary or beneficiaries. It may do so according to its national administrative set-up (at national or regional level for instance, or through specific aid granting bodies) and depending on the type of the aid measure. Only the Member State is a party to a State aid procedure, the beneficiary is merely a third party.

For small amounts of aid and/or less distortive aid measures however, the Commission can issue block exemption regulations, pursuant to Article 109 TFEU, laying down the conditions⁴⁵ that have to be fulfilled in order to deem the State aid measure compatible with the internal market without the necessity of an

⁴¹ Case C-310/99 Italy v Commission [2002] ECR I-2289, [52].

⁴² See Article 1(d) of the Procedural Regulation.

⁴³ See Article 1(e) of the Procedural Regulation.

⁴⁴ See Article 1(f) of the Procedural Regulation. Lawfulness (or “legality”) of an aid measure is thus a different concept than “compatibility”.

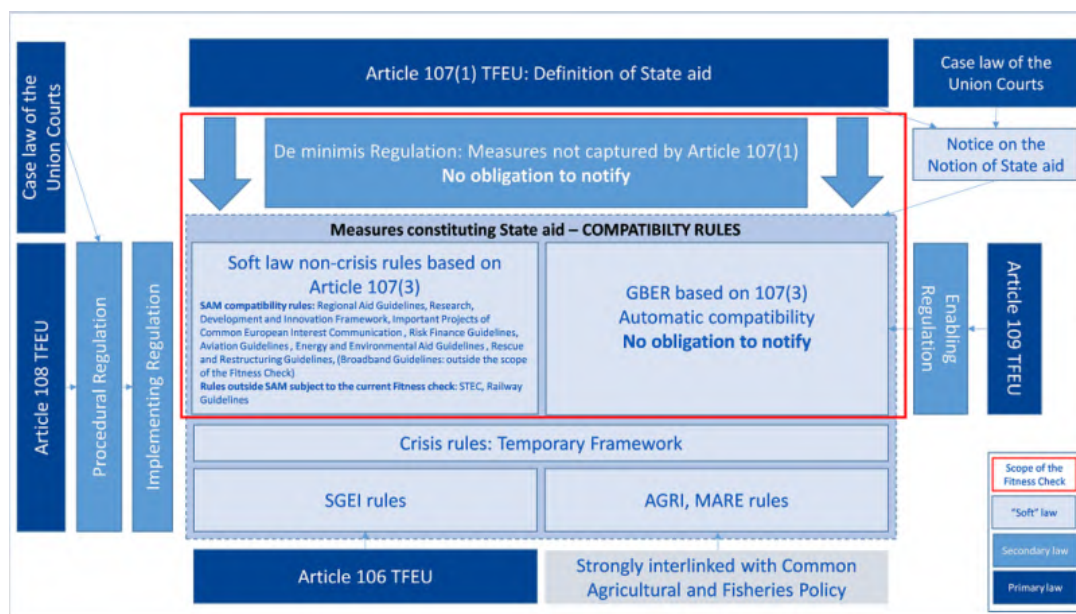
⁴⁵ The criteria of the GBER determine, in particular, eligible beneficiaries, maximum aid intensities (i.e. the maximum proportion of the eligible costs of a project that can benefit from State aid) and eligible expenses.

ex-ante notification and approval. Since 2008, the previous block exemption regulations (so-called “BERs”) have been “merged” into a single document, the GBER. The GBER is directly applicable and thus its conditions binding for the numerous national administrations in the Member States if they wish to grant aid under it. The aid measures fulfilling the conditions of GBER are presumed to be compatible with the internal market and thus exempted from the requirement of prior notification to the Commission, Member States may implement those measures without prior Commission scrutiny. On the other hand, the fact that a State aid measure is not covered by the GBER does not imply that it is incompatible; it merely means that the measure needs to be notified to the Commission, who will then assess it under the relevant compatibility rules (i.e. guidelines or frameworks or even directly under one of the Treaty provisions).

In addition, the Commission in the so-called *de minimis* Regulation, provides a ceiling below which measures are deemed not to constitute State aid within the meaning of Article 107 TFEU, and are exempted from the notification procedure, because they are considered not to have any effect on trade between Member States and not to distort or threaten to distort competition.⁴⁶ As such, there is no monitoring obligation and compatibility assessment by the Commission.

For a graphic representation of the State aid “universe”, please refer to Figure 1.

Figure 1: Schematic representation of the State aid “universe”



⁴⁶ See Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (OJ L 352, 24.12.2013, p. 1), Commission Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the agriculture sector (OJ L 352, 24.12.2013 p. 9), Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the fishery and aquaculture sector (OJ L 190, 28.6.2014, p. 45).

2.2. THE STATE AID MODERNISATION REFORM AND ITS LOGIC

In May 2012, the Commission adopted the SAM Communication⁴⁷ setting out the principles of a major reform of the State aid rules.

There were several reasons which lead to the adoption of the SAM Communication. The State aid rules prior to SAM were about to expire. In addition, the modernisation of State aid control was needed to strengthen the quality of the Commission's scrutiny and to shape that instrument into a tool promoting a sound use of public resources for achieving objectives of common interest and supporting growth-oriented policies while at the same time limiting competition distortions that would undermine a level playing field in the internal market. Over time, State aid rules have developed into a complex legal framework. There was scope to clarify and simplify the rules, enhance consistency and streamline the assessment process.

Based on the SAM Communication, a series of reformed rules entered into force between 2012 and 2014.⁴⁸ Throughout the SAM process, the Commission followed a common approach in establishing new guidelines/frameworks containing the criteria for assessing State aid compatibility. In particular, SAM clarified the criteria for finding that an aid measure is compatible with the TFEU and hence can be approved. More precisely, as part of the SAM package, the Commission adopted new streamlined and aligned guidelines/frameworks based on the so-called "SAM common principles"⁴⁹ applicable to the assessment of compatibility of the aid measures in line with the SAM objective to foster "good aid".

⁴⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU State Aid Modernisation (SAM) COM/2012/0209 final, 08.05.2012.

⁴⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012DC0209:EN:NOT> .
https://ec.europa.eu/competition/state_aid/modernisation/index_en.html.

⁴⁹ Identification and definition of these common principles was one of the main requirements of the SAM Communication and each SAM rules then included a section setting out both these general principles common to all rules and their application in their specific context.

Box 2: SAM Common principles

1. Contribution to a well-defined objective of common interest: aid must aim at an **objective of common interest*** in accordance with Article 107(3) Treaty;
2. **Need for State intervention:** aid must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing an equity or cohesion concern;
3. **Appropriateness of State aid as policy instrument:** selection of least distortive tool (potential alternatives: other policy instruments or other forms of aid);
4. **Existence of an incentive effect:** the aid must change the behaviour of the undertaking(s) concerned in such a way that it engages in additional activity that it would not carry out without the aid, or it would carry it out in a restricted or different manner or location;
5. **Proportionality of the aid amount** (aid limited to minimum necessary): the aid amount must be limited to the minimum needed to achieve the objective of common interest;
6. **Avoidance of undue negative effects** on competition and trade: negative effects on competition and trade between Member States must remain sufficiently limited; positive effects must outweigh negative effects;
7. **Transparency:** the relevant acts and pertinent information about aid awards must be transparent (public).

** A full overview of the rules subject to the Fitness Check by common objective is in Annex 5.*

The Commission also adopted several reformed regulations in terms of *substantive* rules, these included the GBER⁵⁰ and the *de minimis* Regulation.⁵¹

Besides the streamlined and aligned guidelines and frameworks, the much widened GBER was the cornerstone of the SAM reform, as it simplified aid granting

⁵⁰ Preceded by an amendment of the Enabling Regulation, Council Regulation No 733/2013, OJ L 204, 31.7.2013, p. 11. See also Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 193, 1.7.2014, p. 1, and Commission Regulation (EU) No 1388/2014 of 16 December 2014 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 369, 24.12.2014, p. 37.

⁵¹ On procedure, the Commission adopted a reformed Procedural Regulation and the accompanying Implementing Regulation. As a last piece of SAM, in 2016 the Commission adopted a guidance to clarify what falls within the scope of EU State aid rules, the Notice on the Notion of Aid. See also Commission Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the agriculture sector (OJ L 352, 24.12.2013 p. 9), Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the fishery and aquaculture sector (OJ L 190, 28.6.2014, p. 45).

procedures for Member States by authorising without prior notification a wide range of measures fulfilling horizontal common interest objectives.⁵²

Under the modernised State aid rules, granting national authorities got more possibilities to grant aid measures while at the same time, as a result of the extended GBER, those measures could also be implemented faster. This was tied to newly introduced transparency and *ex-post* evaluation⁵³ requirements and a strengthened *ex-post* monitoring of measures (the SAM evaluation requirements will be hereinafter referred to as “ex-post evaluation of the implemented national measures” or “ex-post evaluation”). Therefore, **SAM aimed at striking a balance between more possibilities for the Member States to grant aid on the one hand, and proper compliance with the rules and limiting distortions of competition on the other.** In essence, SAM aimed at achieving the “best value for money”, promoting a sound use of public resources for growth-oriented policies while tackling significant distortions of competition.

All the SAM initiatives (including the GBER and other SAM instruments) are complementary tools for achieving all the three SAM objectives and both have their role to play for each of the objectives.

Box 3: SAM objectives

The **objectives of SAM were threefold**. Those objectives are strongly interlinked and have to be seen in the context of the overall objective of State aid control which aims at minimising distortions of competition in the internal market.

1. To foster sustainable, smart and inclusive growth in a competitive internal market (**fostering “good aid”**);
2. To focus the Commission’s ex-ante scrutiny on cases with the biggest impact on internal market whilst strengthening the Member States’ cooperation in State aid enforcement (**“big on big, small on small”**);
3. To streamline the rules and provide for faster decisions (**“faster access to aid”**).

2.2.1. FOSTERING “GOOD AID”

With SAM, the Commission increased the emphasis on the quality and efficiency of public support. One of the key ideas was that State aid control should facilitate aid which is well-designed, targeted at identified market failures and objectives of common interest, and the least distortive. For that to happen, it was essential that

⁵² Areas covered: regional aid; SME investment aid; SME access to finance; RDI; training aid; aid to disadvantaged workers and workers with disabilities; environmental protection; transport for residents in remote areas; cultural and heritage conservation; sport and multifunctional recreational infrastructure; local infrastructure; natural disasters. The Commission extended the scope of GBER to ports and airports in 2017 (Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014, OJ L 156, 20.6.2017, p. 1.). This slightly amended GBER also includes a number of new simplifications in other areas (culture projects, multi-purpose sports arenas and outermost regions).

⁵³ Evaluation requirements under SAM imposed an obligation on Member States to carry out an ex-post evaluation of their State aid measures above certain expenditure. Evaluation under SAM does not equal to “evaluation” under Better Regulation.

State aid was: (i) effective in achieving the desired public policy objective and has an incentive effect; (ii) designed in a way that limits distortions of competition; and (iii) addressing situation where the market cannot deliver itself.

The “common principles” identified above and the revision and streamlining of the State aid guidelines to bring consistency with such principles were designed to foster “good aid” and thus contribute to the growth objective.

The overall SAM objective of fostering “good aid” was, via the implementation of those common objectives, translated into more concrete objectives of common interest pursued by the individual rules in the specific areas of application of the State aid rules reviewed under SAM (for more details see Annex 5 and Section 5.1.1).

According to the SAM Communication, modernised State aid control should facilitate the treatment of aid, which is well-designed, targeted at identified market failures and objectives of common interest, and least distortive (“good aid”). SAM does not entail a prescriptive list which objectives are “good” - “good aid” mirrors aid which is intended to reach an objective of common interest, which (in view of the above) derives from EU priorities.

2.2.2. BIG ON BIG, SMALL ON SMALL

SAM meant a significant move towards the prioritisation and stronger scrutiny of the aid with a significant impact on the internal market. In parallel, SAM’s objective was to simplify the analysis of cases of a more local nature, with little effect on trade and competition. The review of the *de minimis* Regulation and the GBER were meant to achieve those objectives. The review of GBER was the backbone of SAM and it meant to better target aid towards well-established objectives while simplifying the administrative treatment of well-designed measures with low amounts of aid.

While block exemptions existed also prior to SAM and the 2008 GBER was already used (albeit to a varying extent) by aid granting authorities in Member States, SAM aimed to increase the categories of aid exempted from the notification obligation by introducing: (i) new categories of aid⁵⁴; (ii) broader application for existing categories⁵⁵; and (iii) higher notification thresholds and aid intensities.

In the SAM design, the lower administrative burden resulting from such an increase of non-notifiable aid should have been accompanied by a commitment of the national authorities in terms of compliance. The Commission foresaw several safeguards, such as: (i) enhanced monitoring (*ex-post* control of legality carried out

⁵⁴ Aid to innovation clusters and aid to process and organisational innovation; aid schemes to make good the damage caused by natural disasters; social aid for transport residents of remote regions; aid for broadband infrastructure; aid for culture and heritage conservation, including aid schemes for audio-visual works; aid for sport and multifunctional recreational infrastructures; investment aid for local infrastructure.

⁵⁵ Wider scope for risk finance aid; investment aid for research infrastructure; a new simplified provision on start-up aid; environmental aid categories: aid for the remediation of contaminated sites, district heating and cooling, waste management, operating aid for electricity from renewable sources, energy infrastructures; a wider definition of the notion of disadvantaged workers for employment aid to the youngest; aid for compensating the costs of assistance provided to disadvantaged workers; and regional operating aid for outermost regions and sparsely populated areas and for urban development schemes.

on a number of random schemes and individual aid awards inside schemes); (ii) *ex-post* evaluation of large schemes (meant to determine if the scheme delivered the intended positive results), and (iii) transparency of aid (Member States required to publish the basic elements of the aid award, i.e., aid amount, beneficiary etc.).

That objective was supposed to result in more measures and a higher proportion of the spending under the GBER and in turn in a reduction of number of notifications to the Commission. The expected effects and benefits are explained in more detail in Section 2.3.

2.2.3. FASTER ACCESS TO AID

The third of SAM's key objectives was to streamline procedures in order for the Commission to deliver decisions within business-relevant timelines, in close cooperation with the Member States. Ultimately, SAM was meant to result in:

- a clearer and more coherent architecture of State aid control;
- the prioritisation of those cases with a significant impact on competition and trade;
- the simplification of the rules for smaller amounts of aid;
- improved compliance for Member States and lower administrative burden; more effectiveness in public spending.

Under SAM, there was a need to streamline and reform procedures in order to deliver decisions within business-relevant timelines, in close cooperation with Member States. Given that important elements of the package contributing to this objective were the Procedural Regulation and the Notice on the Notion of State aid which are not covered by the current Fitness Check, this objective will be only partially assessed.

2.3. POINTS OF COMPARISON FOR THE ANALYSIS

2.3.1. BASELINE SCENARIO

An evaluation needs an appropriate point of comparison to be able to assess the change that the EU action has brought over time. In general, the main baseline (or counterfactual) is a situation in the absence of EU intervention.⁵⁶

In the current case, under the baseline scenario, the pre-SAM rules (i.e. the 2008 GBER, the 2006 *de minimis* Regulation and the preceding guidelines and frameworks) would have continued to apply. The pre-SAM State aid rules were already found to underpin the Europe 2020 flagships, as also acknowledged by the SAM Communication.⁵⁷

⁵⁶ It has to be noted that the construction of a baseline scenario for State aid is very complex and may be specific to the facts of the case. See also Section 4.2.

⁵⁷ The SAM Communication states: "*For example, the framework for State aid to research, development and innovation facilitates the achievement of "Innovation Union" as well as "An industrial policy for the globalisation era" objectives. The enforcement of "polluter pays" principle as well as a possibility to provide aid in order to encourage companies to go beyond mandatory EU environmental standards or to promote energy efficiency provided for in the Environmental aid guidelines are one of the tools to implement "Resource efficient Europe" flagship. [...] Rescue and restructuring aid guidelines allow State aid to ailing companies only under strict conditions and if it results in their return to long-term*

Box 4: Baseline scenario

This Fitness Check assesses the reform of the State aid rules under SAM and its baseline is the State aid rules in place without SAM, i.e. the counterfactual where the rules in place at the time would have been prolonged as they were.

The current Fitness Check does not assess the unlikely scenario that the rules in force prior to SAM would have simply expired. **The consequence of the absence of substantive rules would be the direct application of the Treaty**, i.e. the notification of each and every measure constituting State aid in the meaning of 107(1) TFEU and their compatibility assessment by the Commission directly under the Treaty without any substantive guidance provided to Member States by the relevant soft law.

The current Fitness Check also does not evaluate the existence/absence of State aid control as such, as the general prohibition of State aid is enshrined in the Treaty since 1957 (see Section 2.1).

However, while there were provisions with regard to the substantive assessment available, not all guidelines were streamlined with regards to the compatibility assessment criteria, thereby potentially hindering coherence in all set of the rules. Transparency and monitoring of State aid schemes, the ex-post evaluation requirement and other accompanying actions as described in detail in Section 3.1 were missing. Most importantly however, the “old” State aid regime was characterised by more notifications to the Commission and less measures under the direct control of the Member States.

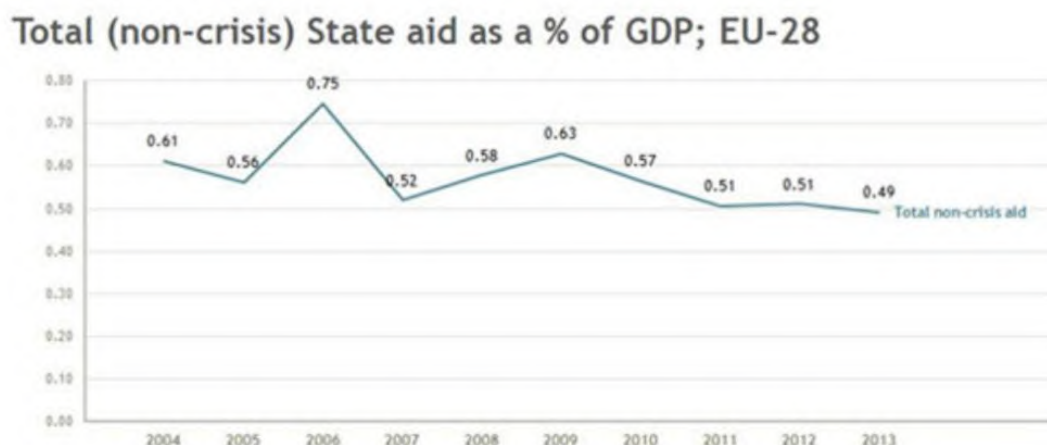
It can be reasonable assumed, that in the absence of SAM, all things equal, the relatively stable trends in the period following the “crisis” years, as from 2011, and preceding the SAM cut-off year, 2014, would have continued, including the trends of State aid expenditure and the trends with regard to GBER measures, as shown in the graphs below. However, it cannot entirely be excluded that the priorities of the Commission 2015-2019⁵⁸ would have had an impact of those trends.

In particular, as shown by Figure 2, the trend in total State aid expenditure was at around 0.5% in 2013 and the two preceding years. In the absence of SAM, all things equal, this could have been reasonably assumed in the following years as well.

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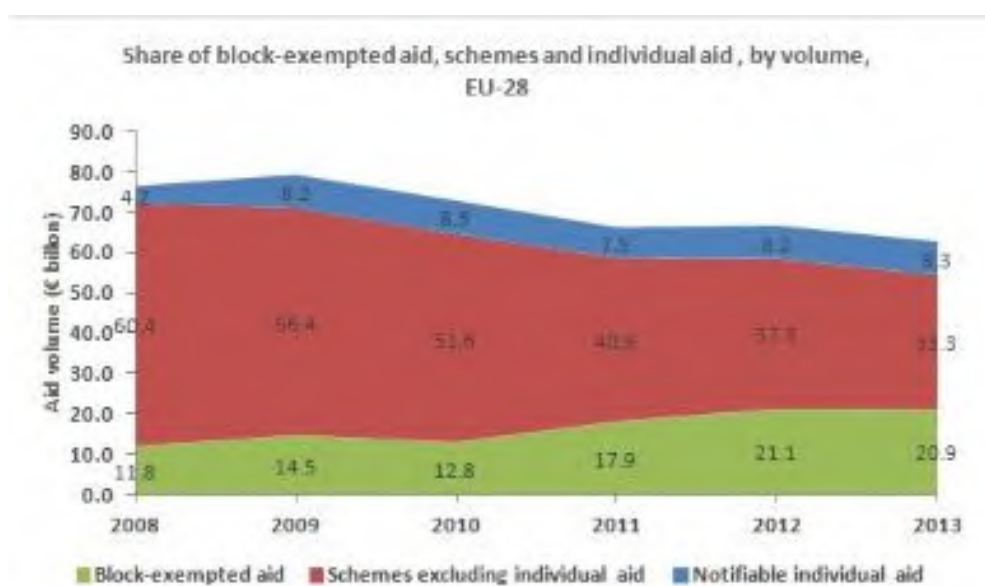
viability, encouraging thereby exit of inefficient firms and bracing the companies for global competition, contributing to "An industrial policy for a globalised era".
https://ec.europa.eu/commission/publications/president-junckers-political-guidelines_en.

Figure 2: Total pre-SAM State aid expenditure as % of EU 28 GDP⁵⁹



Moreover, as shown by Figure 3, the volume of block-exempted aid was at around EUR 21 billion in the EU. In the absence of SAM, all things equal, this volume could have been reasonably assumed in the following years as well.

Figure 3: Share of block-exempted aid, schemes and individual aid, by volume, EU 28⁶⁰

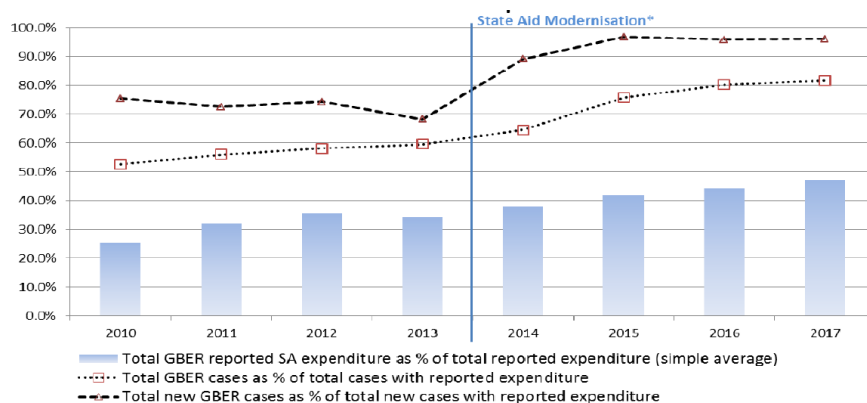


In addition, as shown by Figure 4, the total block-exempted cases as percentage of total cases with reported expenditure was at around 60%, while the total new block-exempted cases as % of total new cases with reported expenditure was at around 70%. In the absence of SAM, all things equal, it could have been reasonably assumed that these trends would have continued in the following years as well.

⁵⁹ 2015 State aid Scoreboard. Excluding “crisis” aid.

⁶⁰ 2015 State aid Scoreboard. Excluding aid to agriculture and fisheries (see also footnote 77).

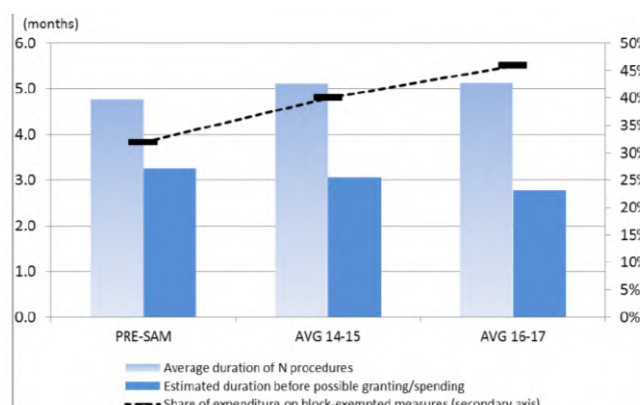
Figure 4: Use of GBER pre- and post-SAM, EU 28⁶¹



Finally, as shown by Figure 2, the average duration of notified procedures was close to five months, while the estimated duration before possible granting/spending just above 3 months. In the absence of SAM, all things equal, these durations could have been reasonably assumed in the following years as well.

Figure 5: Estimated average duration before granting/implementing State aid⁶²

Pre- and post-SAM, in months



Baseline scenario for the individual rules

As regards the individual rules, as mentioned above, the baseline implies that the rules in place at the time would have been prolonged as they were (with the exception of IPCEI and Railway Guidelines where no dedicated rules existed before). In the absence of SAM (or new rules in the case of STEC and the Railway Guidelines), all things equal, it could have been reasonably assumed that the situation, as described in the baseline, would have continued in the following years as well.

A detailed assessment of the baseline scenario for each rules can be found in Annex 5.

⁶¹ 2018 State aid Scoreboard.

⁶² 2018 State aid Scoreboard.

2.3.2. INTENDED RESULTS AND INTERVENTION LOGIC

As explained above, SAM was needed because the State aid rules were about to expire and there was a need to strengthen the quality of the Commission's scrutiny and promote objectives of common interest while at the same time limiting competition distortions.

There was also scope to clarify and simplify the rules, enhance consistency and streamline the assessment process. Prior to SAM, the complexity of the substantive rules that applied equally to smaller and bigger cases were challenges to State aid control and could cast doubt on its legitimacy. A more focused State aid was also meant for Member States to better contribute both to the implementation of the Europe 2020 strategy for sustainable growth as well as to budgetary consolidation in the aftermath of the financial and economic crisis. Those factors, together with the strengthening of the economic and budgetary surveillance, the expiry of a number of key State aid rules before the end of 2013, the preparation of the EU Multiannual Financial Framework and of the EU Structural Funds rules for 2014-2020⁶³ were important drivers that required the launch of a modernisation package of State aid control.

As regards transparency, before SAM, there was no requirement for public information on beneficiaries of aid awarded under notified schemes or schemes covered by the GBER.⁶⁴ Although Member States already collected aggregate information on all of their national State aid expenditures in the context of a so-called "annual reporting exercise" before SAM, which was then transmitted to the Commission for publication through the annual State aid Scoreboard and on the Eurostat website, more detailed information was not available.

Box 5: Anticipated effects of SAM in terms of GBER measures

With the introduction of SAM, **it was expected that 3/4 of aid measures existing at that time and about 2/3 of total aid amounts granted by Member States could be covered by the newly reformed GBER⁶⁵**, which could even extend to **up to 90% of all aid measures**, if Member States used the GBER to the full extent by designing their measures in order to fit its requirements.⁶⁶

It was anticipated that this increased use of the GBER would have **a strong impact on aid beneficiaries and on granting authorities**, as it would allow for **immediate access to aid** (no notification, no prior compatibility assessment by the Commission if compliance with the GBER) and, consequently, a **lower administrative burden**. This would also **free up resources for the Commission** to deal with cases which are deemed to be **most distortive**.

⁶³ As explained in Section 2.1, support granted by Member States coming from the Union budget under the EU Multiannual Financial Framework including the Structural Funds rules is also considered as State aid if national authorities have discretion about the use of these resources.

⁶⁴ The Commission only publishes the names of beneficiaries of notified individual aid and the amount of aid in its decisions.

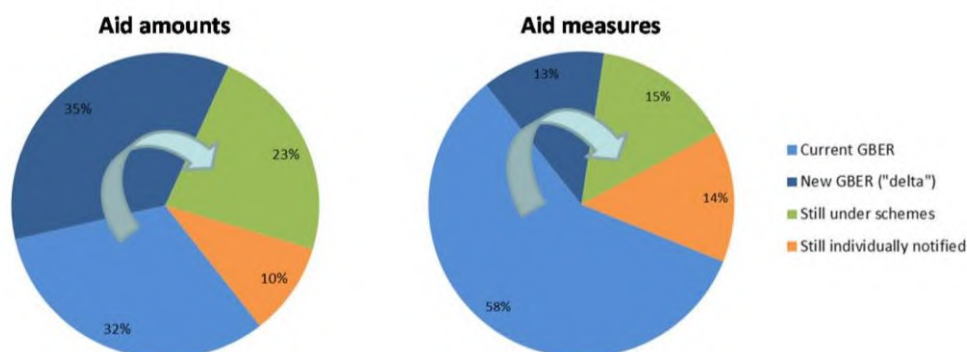
⁶⁵ Implying a doubling of aid amounts and an increase of 13 percentage points of total aid measure.

⁶⁶ MEMO/14/369 https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_369.

Figure 6 summarises the expected outcome of SAM in terms of aid amounts/aid measures.

Figure 6: Anticipated effects of SAM in terms of GBER measures

Analysis based on aid amounts awarded in 2012, aid notified/block exempted in 2012⁶⁷



An overview of the context to each of the individual State aid rules under the Fitness Check and the problems each one of the rules aimed to tackle specifically is to be found in Annex 5.

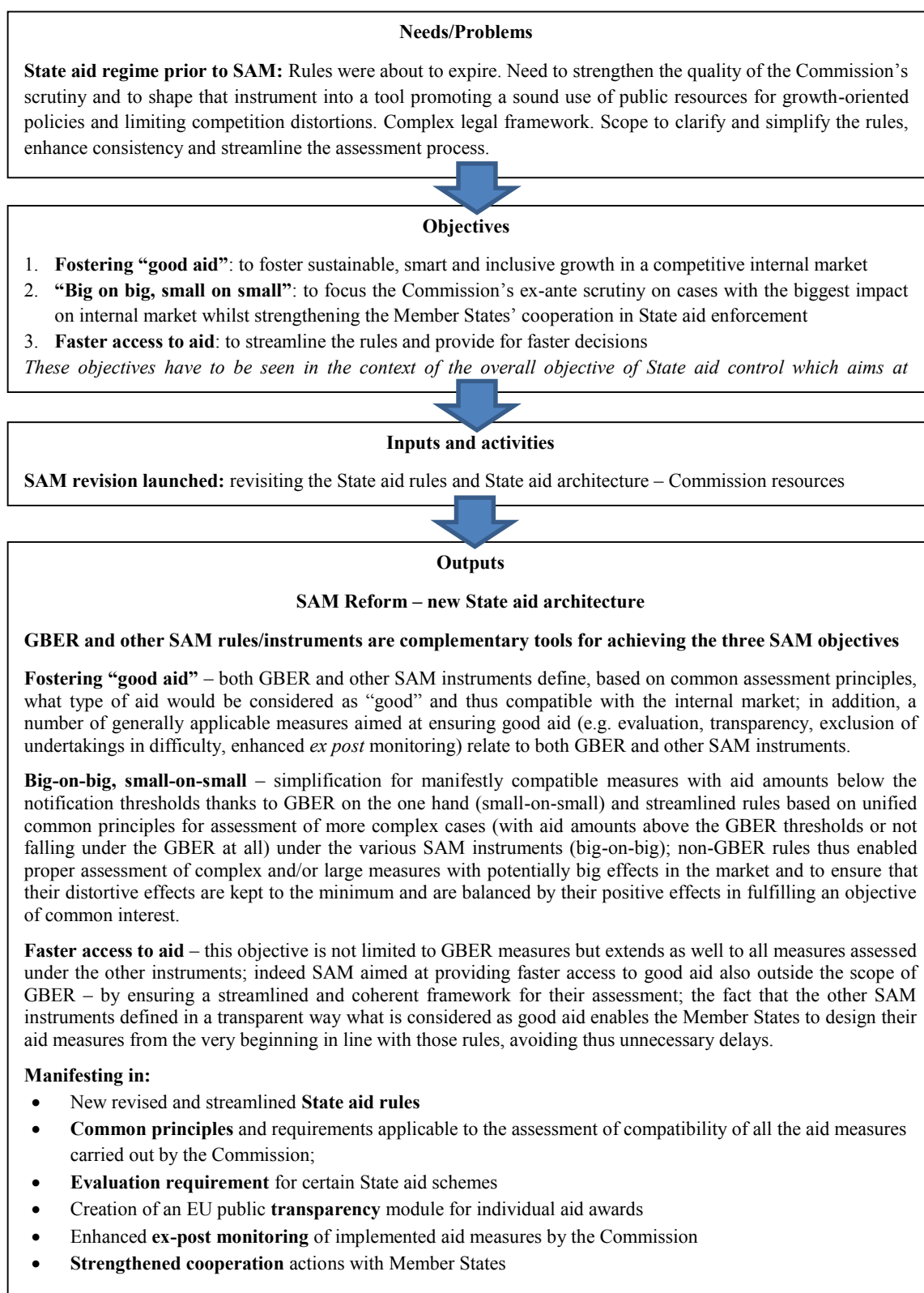
As described in Section 1.2, the present Fitness Check encompasses a series of substantive State aid rules, while others are not covered. The intervention logic as summarised in Figure 2, refers only to the rules covered by the Fitness Check.

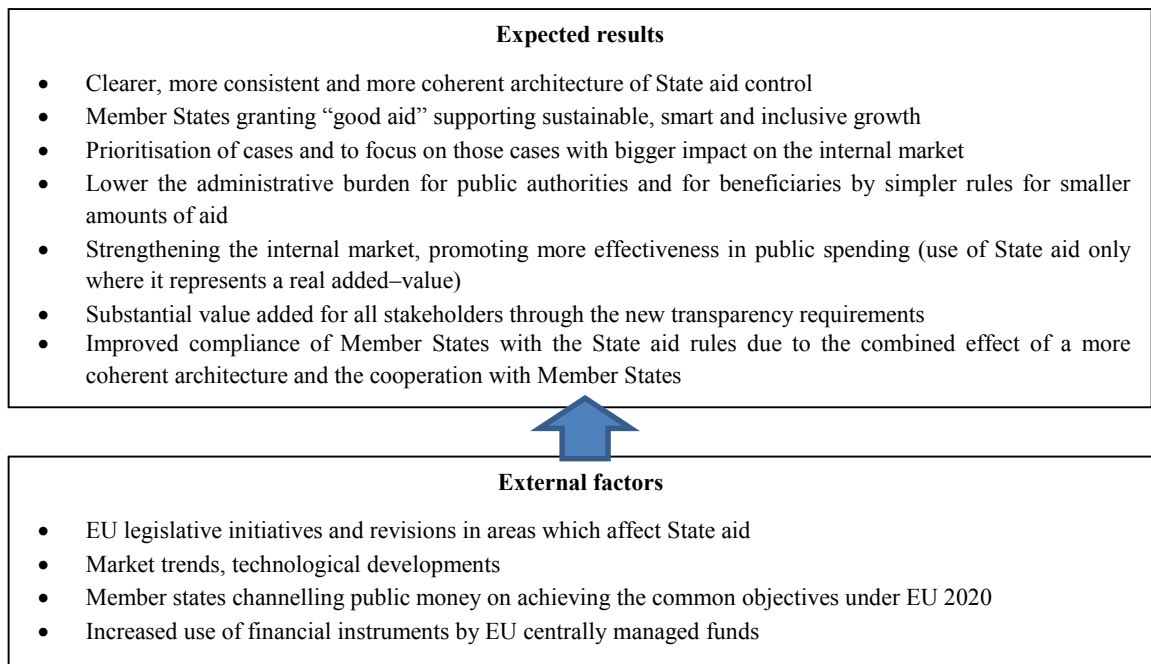
As explained in Section 1.1, the aim of the Fitness Check is to analyse the effectiveness, efficiency, relevance, coherence and EU added value of the rules, and to evaluate and assess, to the extent possible at this stage, their contribution to achieving the EU 2020 policy objectives. In doing so, the Fitness Check will assess if the rules under the Fitness Check are fit for purpose and whether the objectives of SAM have been met. This analysis will consider the relationship between policy objectives, actions, consequences and impacts/expected results.

Finally, it also has to be noted that SAM as a whole did not undergo an impact assessment, but the individual rules under it did.

⁶⁷ Source: https://ec.europa.eu/competition/publications/cpb/2014/011_en.pdf.

Figure 7: SAM intervention logic





3. IMPLEMENTATION AND STATE OF PLAY

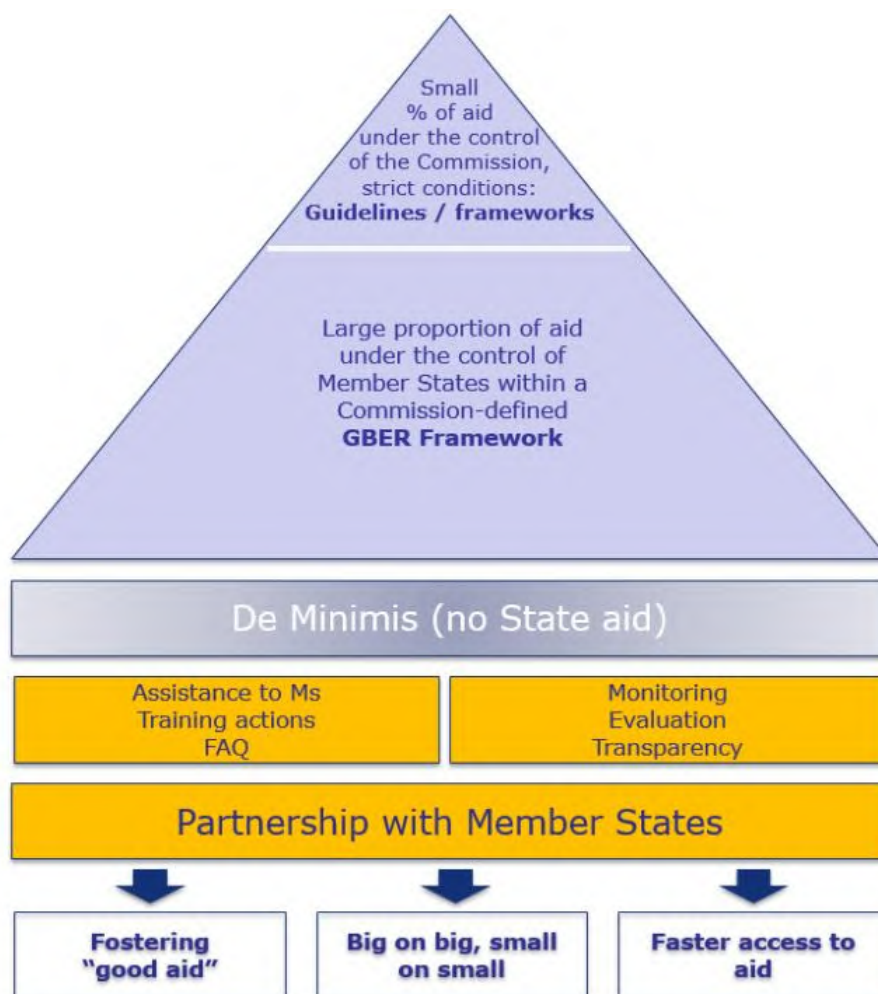
3.1. IMPLEMENTATION OF SAM

3.1.1. THE COMMISSION

As a result of SAM, the Commission adopted a series of soft law in form of guidelines and frameworks, along the common principles, as well as the GBER and the *de minimis* Regulation. However, SAM was not only a bundle of legislation, but also an encompassing approach to enforce State aid policy. Accompanying the adoption of those SAM rules and in line with its principles, the implementation of SAM also included other actions. In particular, under SAM the greater role for Member States came with “greater obligations” and there were a series of measures requiring greater involvement by Member States’ as well as more systematic ex-post assessments and checks, both from the Member States’ and the Commission’s side.

The SAM “architecture” (contributing to the SAM objectives) can be illustrated as in Figure 8.

Figure 8: Schematic illustration of SAM architecture



The main elements of the SAM architecture accompanying the SAM rules (regulations, guidelines, frameworks) were as follows.

Better coordination and partnership with Member States: Since SAM, the Member States have had greater responsibility in State aid control and more possibilities to grant aid without notifying it to the Commission under the GBER. Therefore, cooperation between the Commission and the Member States on the application of the new State aid rules became more important.

- **High Level Forum:** The Commission launched a partnership with the Member States on the implementation of the reform. To that effect, a High Level Forum between the Commission and the Member States was set up for regular discussions. The High Level Forum is a platform for Member States and the Commission to review the most prominent State aid issues in a climate of “partnership”, and to agree on priorities and working modalities moving forward. The meeting takes place annually since 2014 and is chaired by the

Commission, usually with the participation of the Commissioner in charge of Competition policy.⁶⁸

- **SAM Working Group:** To foster closer working relationships with the Member States, the Commission has set up several working groups bringing together representatives from both the Member States and the Commission. Those working groups meet on a regular basis⁶⁹ and are meant to allow Member States, among themselves and with the Commission, to exchange information on practical aspects and lessons learned in the application of State aid rules. The SAM Working Group is chaired by a Member State (on a rotating basis) and meets three times a year. The Commission also organises, normally once a year, a Steering Group on Transparency and a workshop on evaluation. The working groups report on an annual basis to the High Level Forum.
- **SAM guidance and country contact points:** In addition, the Commission services also support Member States bilaterally, for example by providing informal guidance on the interpretation of the SAM rules (GBER and guidelines/frameworks alike)⁷⁰ and by providing training sessions on State aid topics when asked for by the Member States. The Commission services have also set up a network of country coordinators to facilitate day-to-day contacts with the Member States.

Transparency of State aid awards: The new transparency provisions under SAM entered into force as from 1 July 2016. As a result, Member States have to, as a condition for granting aid (for both under GBER and guidelines/frameworks), establish comprehensive State aid websites, at regional or national level, for the publication of information on aid measures and their beneficiaries. The transparency requirement applies in general to all State aid, except for smaller aid awards of less than EUR 500,000. The transparency provisions were meant to promote compliance, to reduce uncertainties and enable companies to check whether aid granted to competitors is lawful. By doing so, its aim is to promote a level playing field in the internal market for Member States and companies. For more details, please refer to Section 3.2.4.

Requirement to Member States to evaluate their main aid schemes: To ensure that the positive effects of State aid outweigh its potential negative effects, SAM introduced an ex-post evaluation provision requiring Member States to conduct evaluations for a selection of significant State aid schemes, both under the GBER (when the scheme's annual aid budget exceeds EUR 150 million) and approved schemes under guidelines and frameworks (for schemes with the higher potential of distorting competition). The aim of evaluation is to assess the actual impact of aid, to enable Member States to improve the design of future schemes by making them less distortive and more effective, and the Commission to design better State aid rules for the future. For more details, please refer to Section 3.2.4.

⁶⁸ There have been seven meetings of the High Level Forum held between 2014-2019.

⁶⁹ The SAM Working Group is currently (March 2020) co-Chaired by Denmark and Hungary.

⁷⁰ The Commission set up an online tool ("eWiki") accessible to Member States' authorities to ask questions about the interpretation of the SAM rules, in particular of the GBER where Member States have the responsibility to apply them. The questions and replies to these questions are available to all Member State. Until 31 March 2020, the Commission services received 1,480 questions on the SAM rules, including close to 1180 questions on the GBER alone. The Commission also published a FAQ. That FAQ is based on the questions in eWiki.

Monitoring by the Commission: In parallel to the enhanced role of the GBER, SAM also foresaw a shift from *ex-ante* to *ex-post* assessment, by stepping up monitoring efforts from the side of the Commission both for GBER and approved aid schemes. In particular, since SAM, Member States have had greater possibilities to grant aid without notifying it to the Commission, mainly because GBER now applies to more measures. To ensure that those measures comply with the rules in a consistent way throughout the EU, the Commission monitors how Member States apply existing or exempted aid schemes. The Commission services set up an annual monitoring process during which they select a sample of State aid schemes for further scrutiny already in 2006. Following SAM those monitoring efforts have been scaled up. The Commission services check both the compliance of the selected schemes with their legal basis and their implementation. For more details, please refer to Section 3.2.3.

Exemption for small amounts (*de minimis* Regulation): In line with the principles of SAM, the 2013 *de minimis* Regulation aimed at simplifying and clarifying the rules for small aid amounts that fall outside the scope of EU State aid control because they are deemed to have no impact on competition and trade in the internal market (“*de minimis* measures”). The main criteria of the previous 2006 regulation, which exempted amounts of up to EUR 200,000 per undertaking over a three year period, remained unchanged⁷¹, but the treatment of small aid measures has been further simplified. It is the responsibility of the Member States to ensure the correct application of the *de minimis* Regulation. In order to ensure that the conditions for *de minimis* measures are fulfilled (e.g. that the total amount of *de minimis* measures received over three years by one beneficiary indeed remains under the EUR 200,000 threshold), the Member States have the choice between a declaration by the beneficiary to the Member State on the *de minimis* measures received or a system of central register.⁷² In the current system, the Commission does not monitor *de minimis* measures. In view of the absence of any notification or reporting obligation from the Member States to the Commission⁷³ for *de minimis* measures and of the lack of any central register in a number of Member States, there are no aggregate data on the total amount of *de minimis* measures actually paid⁷⁴.

⁷¹ In fact this is the same ceiling as the one laid down in the 2006 *de minimis* Regulation. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006R1998&from=FR>.

⁷² Currently, 16 Member States have a national *de minimis* register, which is open to the public in 6 Member States (Croatia, Estonia Italy, Poland, Slovenia, Spain) and non-public in 10 (Bulgaria, Cyprus, Czechia, Greece, Hungary, Latvia, Lithuania, Portugal, Romania, Slovakia). These systems, however, vary a lot between Member States. The remaining 12 Member States (Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, Netherlands, Sweden, United Kingdom) do not have a central register and rely on self-declaration by the beneficiaries. Only a limited number of these Member States has introduced further monitoring tools in addition to the self-declaration.

⁷³ The system of self-declaration, if put into place, relies on a declaration made by the beneficiary to the Member State. The Member State has no obligation to report such declarations.

⁷⁴ For illustration, the following figures for *de minimis* measures granted since 2014 were reported by some Member States during the targeted consultation on the *de minimis* Regulation: Portugal - in total EUR 1.3 billion; Spain – in total EUR 2.2 billion paid to around 70,000 beneficiaries; Poland – in total EUR 7.46 billion paid to 874,688 beneficiaries; Czechia – in total EUR 1.3 billion paid to 111,298 beneficiaries; Lithuania – in total EUR 448 million; Croatia – in total EUR 503 million.

3.1.2. MEMBER STATES

As explained in Section 2.1, the SAM rules are legal instruments in the form of directly applicable regulations on the one hand (GBER and *de minimis* Regulation) and soft-law instruments (communications, guidelines, frameworks) on the other hand, assisting in the enforcement of and compliance with Article 107 TFEU. In view of their legal character, the SAM rules do not require adoption of any implementing legislation from the Member States. The Member States are only obliged to bring any existing State aid schemes in line with the new compatibility requirements under SAM, through an “existing aid” procedure whereby the Commission proposes “appropriate measures”.⁷⁵

3.2. DESCRIPTION OF THE CURRENT SITUATION

3.2.1. GENERAL TRENDS OF STATE AID EXPENDITURE

According to the 2019 State aid Scoreboard⁷⁶, the total State aid spending⁷⁷ relative to Gross Domestic Product (“GDP”) has been steadily increasing since SAM in 2014 (with a small exception of the year 2015). A large part of the increase registered since 2014 is due to a sharp increase in spending for environmental protection⁷⁸ and energy savings (see Figure 9). In 2018, Member States spent EUR 120.9 billion in absolute terms, i.e. 0.76% of GDP, on State aid at the European Union level.⁷⁹

In 2018, Member States reported spending for 4,121 active measures, out of which 1,760 were new measures. A large majority of measures were schemes (71%). The State aid schemes currently in force are very heterogeneous in terms of expenditure size.⁸⁰ In total, 20 schemes have reported expenditure above EUR 1 billion in 2018, while 155 are above EUR 100 million.

⁷⁵ The procedure with regard to existing aid is laid down in Articles 21-23 of the Procedural Regulation.

⁷⁶ See https://ec.europa.eu/competition/state_aid/scoreboard/index_en.html. The State aid Scoreboard comprises aid expenditure which falls under the scope of Article 107(1) TFEU. The data is based on annual reporting by Member States pursuant to Article 6(1) of the Implementing Regulation. This Fitness Check will use data from the 2019 State aid Scoreboard, unless otherwise specified.

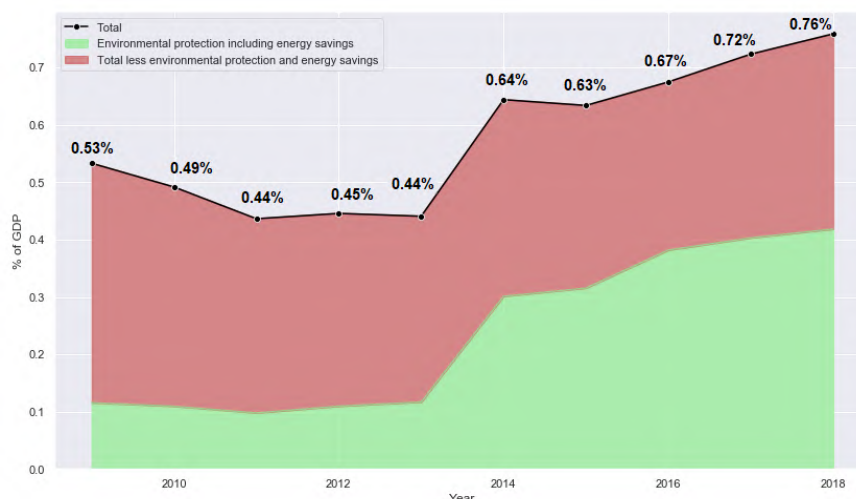
⁷⁷ Excluding aid to agriculture, fisheries and railways. The 2019 State aid Scoreboard includes dedicated sections to agriculture and fisheries expenditure. Aid to railways are excluded from the total State aid amount in the Scoreboard, as they fall under Article 93 TFEU and corresponding regulations. They however appear in a dedicated table in the Scoreboard, together with data falling under Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail (OJ L 354, 23.12.2016), which are reported on a voluntary basis by Member States. Source: State aid Scoreboard.

⁷⁸ The increase was mainly driven by the inclusion of one specific renewable energy scheme.

⁷⁹ In addition, the State aid expenditure to the rail sector in 2018 as reported by the Member States based on the sectoral rules amounted to EUR 50 billion.

⁸⁰ In particular, the largest State aid scheme in the EU (SA.45461 - Erneuerbare-Energien-Gesetz 2017 or EEG 2017, prolongation of the original EEG 2014, for further details see https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_45461) accounts for EUR 28.9 billion of State aid expenditure in 2018, i.e. one fifth of the total 2018 State aid expenditure.

Figure 9: Total State aid expenditure as % of EU 28 GDP⁸¹



It has to be also noted that there may be various other reasons for increasing State aid expenditures not necessarily related to the design of the rules:

- As explained above, it is the Member States who decide on allocation of their public funds within the framework of their budgetary procedures (it is not the role of the State aid control to say whether Member States should spend money on any objective of common interest or not).
- Liberalisation of various industries together with developments of case-law on the notion of aid has increased the coverage of the State aid rules (while financing of monopolies not affecting competition is not considered as State aid and thus not included in the State aid expenditures, the introduction of competition into various sectors such as air transport, railways or even some cultural areas has turned many of these measures which were previously not caught under the State aid rules into State aid).
- The public funding of many infrastructure projects originally fell outside the remit of State aid control since their construction and operation were considered to not constitute an economic activity. However, with ongoing liberalisation and other factors, such as increased market integration, commercial exploitation of infrastructures increased. Clarifications were brought about by the Union Courts on the notion of aid in the Leipzig/Halle judgment⁸², which pointed out that not only the operation of an infrastructure, but also its construction can be considered an economic activity, and thus will fall under the remit of State aid rules.

As regards State aid spending per policy objective, more than half (55%) of all spending in the EU in 2018, i.e. EUR 66.5 billion corresponding to 0.42% of EU 28 GDP, was allocated to environmental protection and energy savings. RDI and Regional development represent around 9% of total spending each (EUR 11.3 and 10.6 billion respectively), while sectoral development (a large variety of projects, across different sectors and for various purposes, i.e. investment for port and airport

⁸¹ Excluding aid to agriculture, fisheries and railways (see also footnote 77). Source: State aid Scoreboard.

⁸² Judgment of the Court of Justice of 19 December 2012 in Case C-288/11 P – Flughafen Leipzig-Halle, EU:C:2012:821.

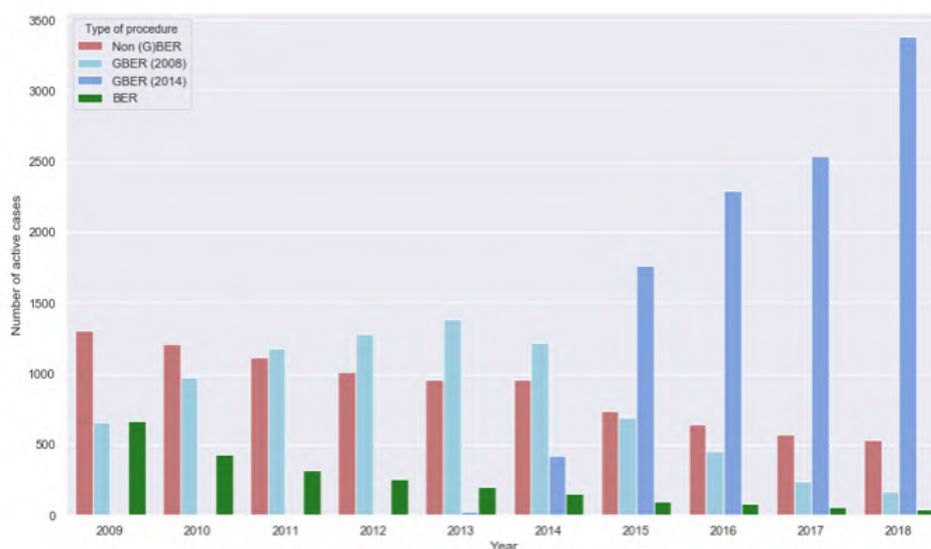
infrastructure, aid for press and television, etc.) represents 7% (EUR 8.4 billion). These four biggest policy objectives make up 80% of total State aid spending in 2018. For further details see also Annex 6.

3.2.2. OVERALL IMPACT OF SAM

Member States are increasingly using GBER measures since the SAM reform.

In particular, Member States implemented 1,666 new⁸³ GBER measures in 2018, **representing 94.7% of new State aid measures**. This upward trend gets more pronounced each year in terms of schemes for which any actual expenditure was reported and which were thus actively used in a given year: among the measures active in 2018, 86% were GBER measures, against 54.8% in 2014.

Figure 10: Number of cases with a reported expenditure by type of procedure⁸⁴



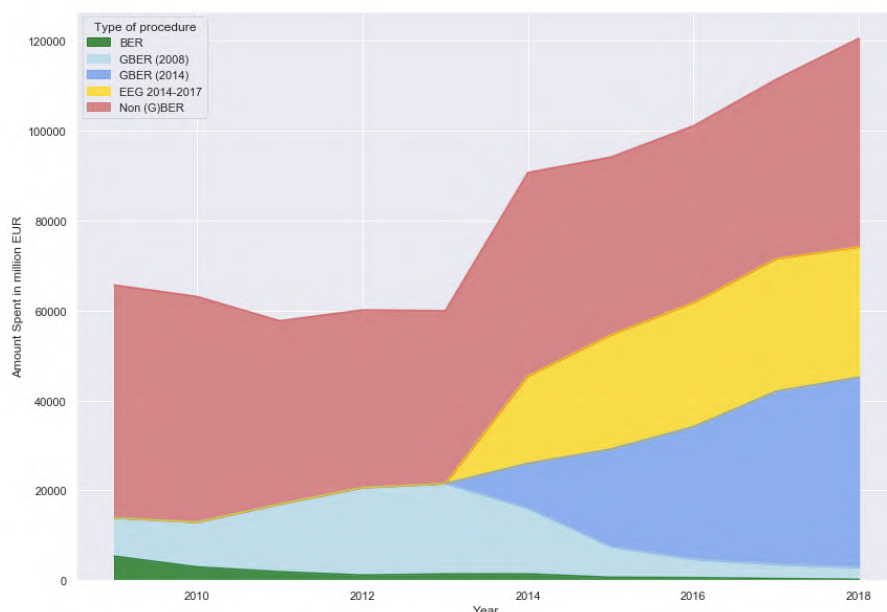
While the share of GBER measures in the aggregated expenditure keeps increasing, this only becomes visible once the single largest (notified) State aid measure is singled out⁸⁵ (see Figure 11). If we exclude that largest State aid scheme, the share of GBER in State aid spending (49.2%, i.e. EUR 45.0 billion) is at a comparable level to spending for notified cases (51%, i.e. EUR 46.8 billion) in 2018. Moreover, the share of notified measures in total expenditure is on a stable downward trend since 2009 at least.

⁸³ “New” measures are measures for which positive expenditure was first reported in 2018.

⁸⁴ As Member States may report expenditures for a given scheme over more than a decade, some measures have been authorised under a now repealed legal basis, such as Council Regulation No 994/98 of 7 May 1998, “BER” (OJ L 142, 14.5.1998, p. 1) or Commission Regulation No 800/2008 of 6 August 2008, “2008 GBER”, (OJ L 214, 9.8.2008, p. 3). Excluding aid to agriculture, fisheries and railways (see footnote 77). Source: State aid Scoreboard.

⁸⁵ The German renewable energy law - Erneuerbare-Energien-Gesetz (EEG) 2014 prolonged by the EEG 2017 (SA.45461).

Figure 11: Breakdown of State aid spending by type of procedure⁸⁶



As regards the size of the budget, the median annual budget for notified measures is higher than for GBER measures. Since 2014, it has increased from around EUR 12 million to more than EUR 17.5 million in 2018. However, median annual budget of GBER measures have increased even more significantly, from around EUR 6 million in 2014 to almost EUR 12 million in 2018 growing by around 100% in 4 years. GBER measures thus seem progressively catching up with notified measures in terms of planned expenditure. The actual spending under GBER measures has remained stable between 2014 and 2018 at a median annual value of around EUR 0.5 million and expenditures have not followed the increase of the mean annual budgets, implying that only limited fraction of the budget allocated under the GBER measures are actually spent, with significant differences between GBER and notified measures and a marked preference of Member States for spending under the latter.

For data on the implementation of the individual rules, please refer to Annex 6.

3.2.3. MONITORING

As explained above, monitoring is a cornerstone of State aid control and its objective is to ensure full legal compliance of block exempted and approved State aid schemes, in order to prevent distortion of the internal market due to unlawful and incompatible aid. Both for block-exempted schemes and for individual aids granted under notified schemes, monitoring is the main tool by which the Commission verifies whether Member States respect State aid rules (i.e. *ex post* compliance assessment). In practice, the goals of monitoring are (i) to identify and correct irregularities, (ii) to expand the awareness of State aid rules among national granting authorities, (iii) to improve State aid rules, (iv) to detect errors in reporting and (v) to act as a deterrence. By carrying out systematic monitoring exercises trying to cover as many Member States as possible and as many sectors and aid

⁸⁶

With identification of the largest State aid measure. Source: State aid Scoreboard.

objectives as possible, Member States are incentivised to ensure State aid discipline throughout their aid measures.

The Commission services started monitoring aid schemes systematically in 2006. Monitoring efforts were scaled up following SAM in order to match the new SAM architecture under which Member States have more responsibility. The years following SAM, the number of monitored cases increased progressively. However, once the schemes with highest budget and individual aid expenditure were captured, the number of selected monitored schemes was extended to cover more beneficiaries/aid awards.

Table 1: Overview of DG Competition's annual monitoring exercise⁸⁷

	Number of total monitored schemes	Number of SAM measures in the monitoring exercise ⁸⁸	Out of which SAM GBER measures
2018	50	34	25
2017	70	54	36
2016	77	59	31
2015	96	64	33
2014	75	50	15
2012-2013	45	NA	NA

In the monitoring exercise, two aspects are looked at. On the one hand it is verified whether the national legal basis is correct. On the other hand, it is checked whether the Member State has correctly implemented the measure (e.g. sufficient control). The Commission's monitoring experience shows that certain irregularities appear in approximately one third of the monitored cases. Even if such irregularities do not in all instances result in granting incompatible aid, they often represent breaches of material compatibility conditions or of procedural obligations that in many cases need to be rectified for the past and in any event be avoided in the future.

The monitoring experience shows that overall, irregularities remained largely at the same level before and after the adoption of the SAM package. However, it can be observed that monitoring has started to show its disciplinary effect on Member States. The number of cases having more severe problematic irregularities has become significantly lower overtime.

As regards irregularities with respect to the legal basis for the pre-SAM period (i.e. up until 2013 included), the most frequent omissions detected during the monitoring exercise were missing explicit compatibility conditions in the legal basis, modification without a notification to the Commission (for notified schemes) and a wrong legal basis. In the post-SAM period (i.e. as from 2014) the most frequent omission remains by far the missing explicit reference to some of the compatibility conditions in the legal basis, followed by a wrong legal basis, but also by an increased number of unclear legal bases.⁸⁹

⁸⁷ Internal European Commission data.

⁸⁸ The SAM rules entered into force in 2014 and SAM schemes were implemented thereafter by Member States. These numbers only relate to SAM measures. There are additional "legacy" measures monitored between 2015-2018 under pre-SAM rules.

⁸⁹ It should be underlined, that GBER does not require for its application that the compatibility conditions established thereby are transposed into national legal basis. However, the Commission experience has

The most frequent omissions found in the implementation for the pre-SAM period are other, insufficient control mechanisms and excessive level of aid. In the post-SAM period, it is insufficient control mechanisms. No more cases of excessive level of aid have been registered, however firms in difficulty have significantly gained importance as irregularity type (i.e. insufficient controls on the nature of aid beneficiaries) and “incentive effect”⁹⁰ has become slightly more frequent.

3.2.4. EX-POST EVALUATION OF THE IMPLEMENTED NATIONAL MEASURES AND TRANSPARENCY

In the SAM context, it is of crucial importance for the Commission to be able to observe and track the whole implementation of State aid measures, from the notification of the aid or introduction of the GBER scheme through the granting and payment to individual beneficiaries, to the evaluation of the results achieved, which are then used to fine-tune future similar measures.

The aim of the **ex-post evaluations conducted under State aid rules** is to provide evidence on both the direct impact of the aid on its beneficiaries and its indirect impacts, positive and negative, as well as on the proportionality and appropriateness of the aid measure. That evidence will enable Member States to improve the design of future schemes by making them less distortive and more effective, and the Commission to design better State aid rules.

According to the “big on big and small on small” approach, the requirement applies mainly to domains with large overall expenditure and annual budget (namely RDI, regional aid, energy and environmental protection, aid to SMEs) as well as areas in which expenditure and annual budget are proportionately lower, but concentrated in a limited number of schemes (e.g. broadband).⁹¹

The criteria used by DG Competition to assess the quality of the evaluations produced are the consistency between evaluation plan approved and the evaluation produced, or – failing it – the consistency between the evaluation produced and the minimum standards foreseen by DG Competition’s Common Evaluation Methodology. Each report is reviewed in terms of compliance with the evaluation plan (compliance), adequacy of the methodologies applied to estimate the causal impact of the aid (causality), clear identification of the evaluation questions not tackled and eventually the reasons to justify the choice (consistency), existence of an analytical framework to effectively communicate consistent results (clarity), and the existence of issues in the collection and handling of sufficient, consistent and accurate data (data issues).

By the end of March 2020, the Commission had approved evaluation plans under the SAM requirement for ex-post evaluation of the implemented national measures

demonstrated that when all compatibility conditions of GBER are explicitly spelt out in the national legal basis, the rate of mistakes in the implementation phase is lower.

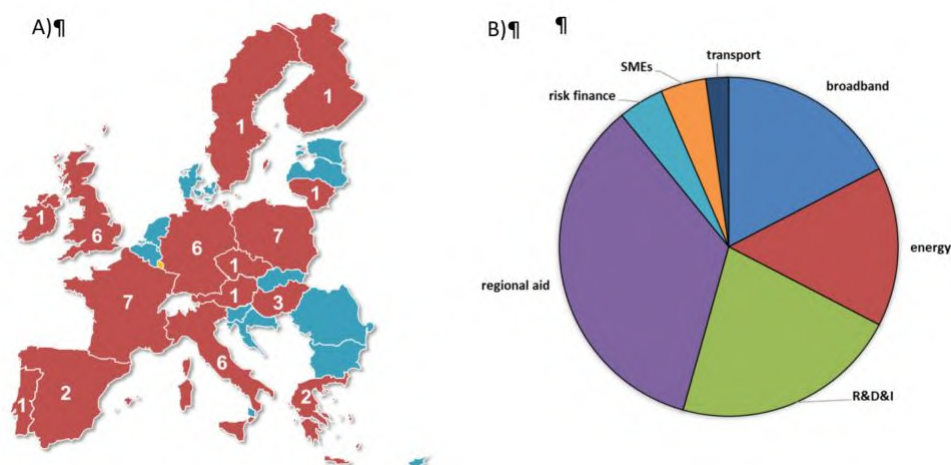
⁹⁰ As explained in Box 2, the existence of incentive effect means that the aid must change the behaviour of the undertaking(s) concerned in such a way that it engages in additional activity that it would not carry out without the aid, or it would carry it out in a restricted or different manner or location.

⁹¹ With regard to the rules covered by the current Fitness Check, currently, no ex-post evaluation of the implemented national measures is foreseen for GBER schemes concerning aid in the form of reductions in environmental taxes (Article 44), regional airports and ports (Article 56), and regional operating aid (Article 15).

(“evaluation plans”) covering 47 State aid schemes. Three additional schemes are currently under analysis, covering a total of 15 Member States. Until the end of March 2020, six final reports have been received. Twenty-three additional final reports are expected in the second half of 2020.

Figure 12: State aid schemes under ex-post evaluation⁹²

A) by Member State and B) by aid category



impact evaluations are credible. However, there is still limited focus on indirect effects.

Transparency of State aid awards is a key component of the State aid modernisation (SAM). The purpose of the transparency requirements, as spelled out in the GBER and several State aid Guidelines, is to foster market discipline by providing publicly accessible information on State aid interventions that might have potentially distortive effects on competition and intra-EU trade. It facilitates enforcement for national and regional authorities by increasing awareness of aid granted at various levels. Better transparency also makes it possible to reduce reporting obligations and the administrative burden linked to reporting.

The transparency obligation provided for in the GBER and in the relevant guidelines and frameworks requires Member States to report as of 1 July 2016⁹³, in a publicly accessible repository, all aid awards to individual beneficiary undertakings exceeding EUR 500,000⁹⁴. The so-called Transparency Award Module (“TAM”) was made available by the Commission and can be used by the Member States on voluntary basis to facilitate the implementation of the transparency requirements. Currently, 24 Member States and Iceland publish their aid awards in TAM, the IT platform developed by the Commission in 2016 to facilitate compliance with the transparency obligation. Spain, Poland and Romania use their own national transparency websites.

The State aid transparency public search⁹⁵ gives access to these individual State aid award data provided by Member States in compliance with the transparency requirements. Citizens and companies can easily access information about awarded aid, which include (but is not limited to): name of the beneficiary, amount of aid, location, sector, and objective. From the perspective of EU State aid control, the transparency database is a tool that enables monitoring the granting behaviour of national authorities, rather than a tool to verify expense.

3.3. RECENT RELEVANT COMMISSION POLICY DEVELOPMENTS

The new European Commission took office on 1 December 2019 and presented its six priorities for 2019-2024.⁹⁶ Those recent policy developments will be taken into account, to the extent possible, in the current SWD.⁹⁷

In particular, on 11 December 2019 the Commission unveiled its **European Green Deal**⁹⁸ (“Green Deal”) which sets out a list of policy initiatives and projected legislative proposals with the aim of the EU reaching climate neutrality by 2050, decoupling growth from resource use and enhance EU’s natural capital. The Green Deal is one of the key priorities of the current Commission. Delivering on these objectives, including climate neutrality and accompanying the transition to it will

⁹³ Including aid based on schemes that predate 1 July 2016.

⁹⁴ Aid granted before 1 July 2016 does not fall under the transparency obligations, even if (part of) the aid is actually paid out after 1 July 2016.

⁹⁵ <https://webgate.ec.europa.eu/competition/transparency/public/search/home/>.

⁹⁶ New priorities: https://ec.europa.eu/info/strategy/priorities-2019-2024_en.

⁹⁷ As those events occurred after the evaluation period, they will only be taken indirectly and to a limited extent into account.

⁹⁸ The Communication from the Commission on the European Green Deal (11/12/2019, COM(2019) 640 final, “Green Deal Communication”).

require significant efforts and an appropriate framework for the required kind of investment at scale. To accompany the Green Deal, on 14 January 2020 the Commission adopted a Communication on the European Green Deal Investment Plan setting out its sustainable investment plan to finance the achievement of the Green Deal objectives.⁹⁹ One of the key elements is “enabling sustainable investments through a supportive State aid framework”, stating that the relevant State aid rules will be revised by 2021 in light of the policy objectives of the Green Deal.

As regards the Digital Strategy, on 19 February 2020, the Commission issued a Communication on **Shaping Europe’s digital future**¹⁰⁰ which summarises the key objectives to promote technological solutions that will help Europe pursue its own way towards a digital transformation that works for the benefit of people and respects fundamental values.¹⁰¹

On 10 March 2020, the Commission adopted its new **Industrial Strategy package**. One of the main elements is the Communication on a new **Industrial Strategy for a globally competitive, green and digital Europe**.¹⁰² It has three key priorities: maintaining European industry's global competitiveness and a level playing field at home and globally, making Europe climate-neutral by 2050 and shaping Europe's digital future. It proposes a comprehensive set of future actions, including the ongoing review of EU competition rules. A new **SME Strategy**¹⁰³ was also adopted within the Industrial Strategy package. The SME Strategy aims to help to lead the twin transitions towards sustainability and digital leadership; therefore the Commission will upgrade the European Enterprise Network with dedicated Sustainability Advisors and will expand Digital Innovation Hubs across every region in Europe to empower SMEs to integrate digital innovations.

3.4. RECENT EVENTS

Recognising the COVID-19 outbreak as also a major shock to the global and Union’s economies and the need to mitigate those negative repercussions on the EU economy, on 19 March 2020, the Commission adopted a Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak.¹⁰⁴ The Temporary Framework was amended on 3 April 2020, on 8 May 2020 and on 29 June 2020.¹⁰⁵ It was amended and prolonged on 12 October 2020.¹⁰⁶

⁹⁹ COM(2020) 21 final.

¹⁰⁰ https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_4.pdf.

¹⁰¹ The Communication was complemented by a Communication on a European Strategy for data, COM(2020) 66 final) and a White Paper on Artificial Intelligence (<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1582551099377&uri=CELEX:52020DC0066>, https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf).

¹⁰² The Communication on the New Industrial Strategy (10/03/2020 COM(2020) 102 final, “Industrial Strategy Communication”, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-industrial-strategy_en) also declares that the Commission will ensure revised State aid rules are in place in 2021 in a number of priority areas, including energy and environmental aid. This is also reinforced by the SME Strategy, see footnote 103.

¹⁰³ https://ec.europa.eu/info/sites/info/files/communication-sme-strategy-march-2020_en.pdf.

¹⁰⁴ C(2020) 1863 final, OJ C 091 I, 20 March 2020.

¹⁰⁵ OJ C 112 I of 4 April 2020, p. 1; OJ C 164 of 13 May 2020, p. 3, OJ C 218 of 2 July 2020, p. 3.

¹⁰⁶ OJ, C 340 I, 13 October 2020, p. 1-10.

On 27 May 2020, the Commission also adopted its Recovery Plan¹⁰⁷ to tackle the consequences of the crisis stemming from the COVID-19 outbreak.

The aim of the Temporary Framework is to tackle the severe liquidity needs of undertakings due to the exceptional circumstances created by the COVID-19 outbreak.

Unlike the State aid rules evaluated by the Fitness Check, the Temporary Framework is mostly based on the second limb of Article 107(3)(b) TFEU, which constitutes an exceptional legal basis for compatibility with the internal market, according to which "aid to remedy a serious disturbance in the economy of a Member State" may be declared compatible. Having recognised the COVID-19 outbreak as such a serious disturbance, in line with case law, the Temporary Framework, laid down the conditions under which the COVID-19 measures would be compatible with the internal market. As such, the Temporary Framework has been developed to cater for an emergency situation and led to extraordinary financial commitments. It will remain temporary and is currently set to expire on 30 June 2021 (with the chapter on recapitalisations to expire on 30 September 2021).¹⁰⁸

On the other hand, State aid rules evaluated by this Fitness Check are mostly based on Article 107(3)(c) TFEU where State aid, which facilitates the development of certain economic activities or certain economic areas without unduly distorting competition, may be considered compatible. For that purpose, SAM has developed the five common compatibility principles, mirrored in the respective rules, where the overall goal remains that the positive effects of the aid measure outweigh its negative effects.

This is not the case under Article 107(3)(b) TFEU on which the Temporary Framework is based, and which therefore does not reflect the common compatibility principles developed by SAM. Instead, the use of the "serious disturbance" clause remains very limited. Prior to the current Temporary Framework, aid measures were declared compatible under that Treaty provision only as a result of the 2008 financial crisis and prior to that only at a few occasions, in the 1980s and 1990s in Greece. The Temporary Framework thus complements the existing State aid rules in this crisis. The findings of the Fitness Check (which was a backward-looking exercise) are based on how well rules have worked since SAM and before the COVID-19 crisis. The qualitative and quantitative data used in the Fitness Check do (and can) accordingly not take account of the crisis.

The end of the crisis is still difficult to predict. Public support under the Temporary Framework targets the problems companies are currently facing and is limited in time. Aggregate data will need to be collected to better assess the economic and financial consequences of the crisis.

The full impact of the COVID-19 outbreak on different sectors is not yet known. However, it can already be anticipated, that for example the aviation sector might be one of the most heavily affected sectors by the pandemic.

¹⁰⁷ https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/recovery-plan-europe_en#documents "Europe's moment: Repair and Prepare for the Next Generation" COM(2020) 456 final.

¹⁰⁸ Initially, the Temporary Framework was set to expire on 31 December 2020 (with the chapter on recapitalisations to expire on 30 June 2021).

The possible impact the COVID-19 crisis is expected to have on the various SAM instruments is further analysed in Annex 8.

4. METHODS

4.1. DATA COLLECTION AND ASSESSMENT

The current Fitness Check is based on a wide range of data sources/inputs.

Stakeholders had the opportunity to provide their feedback on the **Roadmap** on the Fitness Check¹⁰⁹ from 7 February 2019 to 7 March 2019 (see in detail Section 2 of Annex 2, Synopsis report).

The Commission also carried out an **open public consultation** (“public consultation”) in order to gather inputs from a broad range of stakeholders. The public consultation reached out to all relevant stakeholders and in addition gave unlimited access to everybody who wishes to contribute. It took the form of an extensive questionnaire covering certain provisions of all specific State aid rules at stake as well as the horizontal provisions from a SAM perspective. The public consultation covered, among others, the SAM common principles (see in detail Annex 2, Synopsis report).

The public consultation, targeting citizens and stakeholders, took the form of an online survey published on the Commission’s Better Regulation Portal (“BRP”). The questionnaire was published in all 24 EU official languages. Participants to the questionnaires could reply in any of those languages. This public consultation was also promoted through Twitter, LinkedIn, DG Competition’s State aid Newsletter, DG Competition’s website and the Working group of Member States on SAM. A letter informing the European Parliament’s ECON committee about the public consultation was sent out on 26 April 2019. The questionnaire contained a total of 15 questions (including sub-questions), with a mix of closed and open questions, which were devised around the five evaluation criteria effectiveness, efficiency, coherence, relevance and EU added value.

A factual summary report (see Annex 2, Synopsis report), giving a simple statistical presentation of the responses was published on the BRP on 21 October 2019. In addition to the replies and position papers provided through the questionnaires, submissions were sent outside the online tool, mainly by public authorities and associations. In total, the public consultation received 137 replies: 74 from organisations, 49 from public authorities, 6 from individuals and 8 from other respondents. The number of position papers attached to the questionnaire was 38. No campaigns were identified.

The current Fitness Check is a holistic exercise aiming at the evaluation of SAM as a whole. However, the current SWD also focuses on certain specific issues the Commission deems relevant and which it encountered during its case practice. Therefore, the Commission also gathered information on certain aspects of selected individual rules.

Therefore, for certain State aid rules covered by the Fitness Check, the Commission made use of **targeted consultations** in the form of online questionnaires addressed to the main stakeholders and interested parties (beyond the general public) on specific issues related to the individual policy areas and rules. The selection of

¹⁰⁹ See footnote 4.

stakeholders to which the targeted questionnaires were addressed depended on the State aid rules concerned and included those who are directly impacted by those rules, for example Member States, regional and local authorities, other granting authorities or beneficiaries. Some of these targeted consultations were open (i.e. published on DG Competition's website), some of them closed (i.e. only sent to a selected, very specific group of stakeholders). The choice of the type of consultation was driven by the degree of specificity of the questions. The following rules were subject to a targeted consultation: *de minimis* Regulation, RAF, EEAG, Aviation Guidelines, Risk Finance Guidelines, IPCEI Communication, and STEC. (See in detail Annex 2, Synopsis report.)

As described above in Section 2.1, **the interlocutor of the Commission to State aid procedures are the Member States**. It is the Member States and other public authorities (for instance regional and local authorities) who design public policies in line with State aid rules and apply the State aid rules when granting public support. They are also the ones to disburse State aid. As such, this Fitness Check pays special attention to the responses of the public authorities as they are of particular relevance to the analysis.

For the sake of completeness, it has to be noted that the public consultation as well as the targeted consultations took place before the announcement of Commission's recent policy strategies, such the Green Deal, the Digital or Industrial Strategies (see Section 3.3.), although some comments/position papers were received thereafter. The consultations took place well before the COVID-19 crisis.

Table 2: Summary of targeted consultations

	EEAG	RAF	de minimis Stakeholders	de minimis Member States	Risk Finance	IPCEI	Aviation	STEC
Date	14 May 2019 - 19 July 2019	14 May 2019 - 19 July 2019	24 May 2019 - 31 July 2019	24 May 2019 - 31 July 2019	25 April 2019 - 19 June 2019	9 August 2019 - 31 October 2019	24 May 2019 - 31 July 2019	25 March 2019 - 31 May 2019
Open/Closed	Open	Open	open	closed	closed	closed	Open	closed
Number of replies	250	62	207	23	20	35 (out of which 1 arrived outside EUSurvey)	81 (out of which 5 arrived outside EUSurvey)	37
Language of the consultation	All EU official languages (except Irish)	All EU official languages (except Irish)	All EU official languages (except Irish)	All EU official languages (except Irish)	English, but respondents were invited to submit their contributions in any EU language	English, but respondents were invited to submit their contributions in any EU language	All EU official languages (except Irish)	English, but respondents were invited to submit their contributions in any EU language
Target group	Businesses/business associations; public authorities (regional and local); NGOs, consumer organisations, academic/research institutions and environmental organisations.	Public authorities, an academic research institute, business associations, companies/business organisations, EU citizens and other contributors (not specified).	All stakeholders	All Member States	All Member States	Member States' authorities; members of the Strategic Forum for Important Projects of Common European Interest	Member States, airline companies, airport operators and relevant associations	Export credit agencies, Member States, private insurers, trade and insurance associations and "others"

Moreover, several **external experts** were commissioned for studies on specific aspects of certain individual rules. The selection of the rules and the focus of the studies was inspired by case practice. The objective of those studies was to receive an independent evidence-based assessment on how the rules worked. The following rules were subject to an independent expert study: RAF¹¹⁰, EEAG¹¹¹, RDI Framework¹¹², Risk Finance Guidelines¹¹³, and Aviation Guidelines¹¹⁴ (see in detail Annex 7). Multiple research methods were applied during the studies, in order to

¹¹⁰ Retrospective evaluation of the regional aid framework, "RAF external study", https://ec.europa.eu/competition/state_aid/modernisation/RAF_study.zip.

¹¹¹ Retrospective evaluation support study on State aid rules for environmental protection and energy, "EEAG external study", https://ec.europa.eu/competition/state_aid/modernisation/EEAG_study.zip.

¹¹² Retrospective evaluation of State aid rules for RDI and the provisions applicable to RDI State aid of the GBER applicable in 2014–2020, "RDI external study", https://ec.europa.eu/competition/state_aid/modernisation/RDI_study.zip.

¹¹³ Evaluation support study on the EU rules on State aid for access to finance for SMEs, "Risk Finance external study", https://ec.europa.eu/competition/state_aid/modernisation/risk_finance_study.zip.

¹¹⁴ Support study for the evaluation of the rules for operating aid under the EU aviation framework, "Aviation external study", https://ec.europa.eu/competition/state_aid/modernisation/aviation_study.zip.

obtain a holistic reply to the different evaluation questions. They include desk research, case studies on specific schemes which were selected on qualitative grounds, web-based surveys, structured interviews with experts and with selected stakeholders from different Member States. The conclusions of those studies were partly based on econometric analysis.

One of the most important data sources is the State Aid Scoreboard¹¹⁵ which comprises State aid expenditure made by Member States falling under the scope of Article 107(1) TFEU. The data is based on annual reporting by Member States pursuant to Article 6(1) of the Implementing Regulation. Expenditure refers to all active aid measures, for which the Commission adopted a formal decision or received an information sheet from the Member States in relation to measures qualifying for exemption under the GBER. In practice, the figures do not include funding granted in line with the *de minimis* Regulation rules since that spending is not deemed to constitute State aid. They also exclude most of the aid to railways and SGEI.¹¹⁶ This Fitness Check uses data from the 2019 State aid Scoreboard, unless otherwise specified.¹¹⁷

DG Competition has conducted its own internal assessment of the application of SAM rules, the sectors governed by those rules and its market developments. Internal Commission/DG Competition data used for the internal assessment include for instance monitoring results and interpretation questions by Member States. DG Competition's case practice is a major source of insight. As described in Section 2.1, all new aid measures which do not fall under the GBER or an existing (approved) scheme, have to be notified to the Commission. In 2019 alone, DG Competition received over 180 State aid notifications. Those notifications have to be assessed and ultimately, a Commission decision is taken on the State aid character and compatibility of the notified measure. In order to be coherent, all new decisions must therefore not only take account of newest developments in EU legislation and judgments by the Union Courts but also take account of that body of decisions which evolves through DG Competition's case practice.

Court judgments, desk research, literature review and internal statistics such as the Transparency Award Module have also played a role in data gathering. DG Competition's Chief Economist Team supported the econometric analysis.

DG Competition also used several other reports, such as the "Sixth report on monitoring development of the rail market"¹¹⁸, the final report of the "Study on Single Wagonload Traffic in Europe – challenges, prospects and policy options"¹¹⁹, the "Commission Final Report of the Sector Inquiry on Capacity Mechanisms"¹²⁰, the Report "Energy prices and costs in Europe"¹²¹, the 2018 Trinomics report on Energy Prices, Costs and Subsidies¹²² and the final report of the "Study on the financing models for public services in the EU and their impact on

¹¹⁵ https://ec.europa.eu/competition/state_aid/scoreboard/index_en.html#what.

¹¹⁶ https://ec.europa.eu/competition/state_aid/scoreboard/index_en.html.

¹¹⁷ The 2019 Scoreboard contains data reported for the year 2018.

¹¹⁸ <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52019DC0051>.

¹¹⁹ <https://ec.europa.eu/transport/sites/transport/files/2015-07-swl-final-report.pdf>.

¹²⁰ https://ec.europa.eu/competition/sectors/energy/capacity_mechanisms_final_report_en.pdf.

¹²¹ <https://ec.europa.eu/energy/en/data-analysis/energy-prices-and-costs>.

¹²² <https://publications.europa.eu/en/publication-detail/-/publication/d7c9d93b-1879-11e9-8d04-01aa75ed71a1/language-en>.

competition”¹²³. Other publicly available data included in the analysis include company data, and data from EUROSTAT and OECD, as well as a Eurobarometer flash commissioned by DG Competition in 2016.¹²⁴

DG Competition also reviewed for this SWD several external consultancy reports which were prepared/commissioned prior to SAM. They include the studies “Ex post assessment of the impact of state aid on competition” carried out by Oxera¹²⁵ on behalf of the European Commission, Ex-post evaluation of the impact of restructuring aid decisions on the viability of aided (non financial) firms”, prepared by a consultation consortium¹²⁶ on behalf of the European Commission, and a study on counterfactual scenarios to restructuring state aid “Should aid be granted to firms in difficulty?” by Oxera.¹²⁷

Finally, several bilateral meetings were organised with stakeholders at their request. For the Aviation Guidelines, the Commission met the German Airport Association, the French Airports Association, a group of Swedish airports, Ryanair and ACI Europe. For the EEAG, meetings were organised with Member States, industry associations, companies, consumers’ organisations, NGOs, environmental organisations and investors. Commission staff also participated to a number of forums and conferences on the matter; the relevant case team participated in a number of aviation related conferences and workshops to talk about the evaluation of the Aviation Guidelines (Krakow, Luxembourg, Münster, Brussels, Paris).

For an overview of methods per rule, please refer to Annex 7.

4.2. LIMITATIONS AND CHALLENGES

As explained above in Section 1.2, the present Fitness Check aims at assessing SAM as a whole and not carrying out individual evaluations of the specific rules. In addition, it is also to be seen as a “mid-term review” or an “implementing evaluation” that examines whether everything is on track or if there is a case for making any changes.

As such, one limitation stems from the fact that in some of the areas, the impact of the rules is not tangible yet. The effects of State aid measures often only materialise with a certain delay and not sufficient time has elapsed in order to fully capture the impact. Most of the new rules entered into force on 1 July 2014 and the associated benefits started materialising gradually. This is in particular the case for long-term investment projects which need to be first constructed and operational for a number of years in order to measure the impact of the rules. Moreover, Member States also had to design their new schemes according to the new rules as well as to update their existing schemes to bring them in line with the new compatibility conditions, which took several months (see also Section 3.1.1). Therefore, there is also a

¹²³ <https://ec.europa.eu/competition/publications/reports/kd021641enn.pdf>.

¹²⁴ 27,818 European citizens in all Member States were interviewed face-to-face and the results of the interviews were published on 13 July 2016. The Eurobarometer report can be downloaded here: <http://europa.eu/!qt44mu>. The data collected is published here: <http://europa.eu/!UD38yv>.
The “2017 Oxera study”.

<https://ec.europa.eu/competition/publications/reports/kd0617275enn.pdf>.

¹²⁶ The “2016 Restructuring aid study”,
<https://ec.europa.eu/competition/publications/reports/kd0116104enn.pdf>.

¹²⁷ The “2009 Oxera study”, <https://op.europa.eu/en/publication-detail/-/publication/fe654e1e-6737-4284-8007-e9651f9182a4/language-en>.

significant time gap between the adoption or entry into force of the SAM rules and the actual application of the rules in practice.¹²⁸

“The time lag effect” is even more valid for obligations and rules which came into force only during the period analysed by the Fitness Check (e.g. the transparency obligation applicable as of July 2016 or port and aviation provisions of the GBER applicable as of July 2017). Combined with the time gap due to the set-up of the Member States’ reporting obligations (the last available 2019 State aid Scoreboard figures concern the aid granted in 2018), those limitations make the evaluation of SAM objective aimed at fostering good aid particularly difficult. Indeed, so far there are only limited data available that would allow assessing whether the actual effect of the aid was positive or not.

In addition, the evaluation plans prepared by the Member States for certain schemes where such an evaluation plan is required, are only partially available. Until the end of March 2020, six final reports have been received under the requirement for ex-post evaluation of the implemented national measures introduced by SAM. The vast majority of those evaluations are expected only end 2020. Those ex-post evaluations, also when available, will also not give the full picture, as for the time being not all Member States are covered (see also Section 3.2.4 above). One evaluation report only covers a certain scheme in a given Member State (which meets the requirements for such an ex-post evaluation in terms of budget). Such a scheme does not necessarily cover several measures, it can just focus on one specific State aid instrument under a given objective. The ex-post evaluation requirement is a forward-looking policy tool that would allow Member States to gather evidence on the effectiveness of their individual State aid scheme and enable them to improve the future design the scheme or the design of new schemes with similar objective. By its nature, that evaluation requirement is thus aimed at evaluating national measures and not the Commission’s compatibility rules or State aid policy as such. The evaluations thus cannot be conclusive in terms of “quality of the Commission’s compatibility rules” at most they give indications on how individual national schemes performed in terms of incentive effect, proportionality, appropriateness, and distortions to competition and trade.

There is a general limitation attached when it comes to the extrapolation of punctual evidence, such as the results of case studies. In particular, State aid rules cover a diversity of aid objectives, economic sectors and amounts of aid. Some of those rules are very broad and combine several different aid measures (even for the same objective). The results of such a case study would be restricted to the specific circumstances of the beneficiary, aid measure and Member State, and therefore they would not provide a sufficient basis for concluding on the overall State aid rule concerned. Caution should be used when extrapolating findings of case studies to future cases, as those may be not be fully relevant to all Member States specific schemes and also inference can depend on macroeconomic factors linked to external circumstances.¹²⁹

¹²⁸ It would seem possible to partially fill this gap through looking at the long-term impact of pre-SAM projects. DG Competition carried out in the past several studies, which also fed into the analysis.

¹²⁹ As also stated by the 2017 Oxera study.

In addition, the construction of a counterfactual scenario for State aid is very complex and may be specific to the facts of the case.¹³⁰

Another major limitation is the difficulty to find available data on all the different topics covered by the rules.

In some areas, the data are not available due to the lack of obligation for the Member States to gather and report such data (e.g. amounts of *de minimis* measures granted). In other areas, the available data are not sufficiently granular in order to enable a full analysis of all types of aid¹³¹. It also has to be recalled that with regard to GBER measures – which are not notified to the Commission – limited ex-ante information is available. Ex-post there is basic information available for all measures as reported by the Member States and summarised in annual Scoreboard (expenditures, objectives pursued etc.) and more detailed information only for a sample of GBER measures (monitoring/evaluations, transparency for measure above the threshold and, if applicable, complaints).

In addition, in some instances where the DG Competition or external experts asked data from the granting authorities and beneficiaries there was a certain reluctance to provide sufficient data either due to business sensitivity or for fear of additional scrutiny of the particular aid measures by the Commission. The difficulty of gathering data in State aid control as opposed to other competition instruments, such as mergers and antitrust, partially stems from the fact that the counterpart of the Commission in the proceedings is the Member States and information gathering tools are extremely limited (and many of them relatively recent) under the Procedural Regulation.¹³²

Further, in certain areas (such as IPCEI Communication or some areas of EEAG) there has been only a limited number of decisions adopted/schemes put in place limiting thus the practical experience of both the Commission and the Member States with the application of those rules.

There is also a general problem with measuring the impact of State aid rules. As explained in Section 2.1, compatibility rules on State aid merely allow Member States to grant support, but they do not oblige Member States to grant aid, this remains in their discretion and some Member States decide to grant more aid than others. The ultimate policy choice whether to grant aid and if so, to which beneficiaries/sectors and in which forms lies with the Member States.

¹³⁰ As also stated by the 2017 Oxera study and the 2009 Oxera study.

¹³¹ In the Railway sector for example, the aid beneficiary is often the incumbent railway company and no detailed accounting categories are used by the latter concerning the form of aid, such as guarantees, debt reduction, or other. Other examples are Airports, where the participation of local authorities in the transfer of public resources often inhibit detailed knowledge about the different forms of aid granted.

¹³² This was also confirmed by the 2017 Oxera study. Oxera summarises the limitations on data gathering as follows: “*All competition assessments rely on the availability of robust and reliable data and information. In the case of mergers and antitrust investigations, competition authorities may exercise their legal powers to obtain data and information from the relevant parties. In state aid cases, such data-gathering powers can usually not be relied on, which shifts the emphasis onto data and information in the public domain or provided by parties on a voluntary basis. [...] Our experience from the case studies therefore suggests that without the authority to formally require parties to provide the information, obtaining all of the necessary data to enable the full set of hypotheses to be tested may not always be feasible.*”

Furthermore, despite DG Competition's efforts to publicise the various public and targeted consultations via appropriate communication channels depending on the target audience (see in detail Annex 2, Synopsis report.), the representativeness of the replies to both the public and most of the targeted consultation (with a notable exception of EEAG with 250 replies and a number of position papers) are limited. For example, the public consultation of SAM as a whole attracted in total 137 replies, which is a tiny number compared to the reference population of companies and public authorities potentially affected by the State aid rules. In addition, it is likely that the stakeholders who answered self-selected into the consultation due to their interests or connections, and thus do not represent a representative sample of the whole population of stakeholders. That limitation is taken into account when analysing the results of the public consultations and always attempts to mitigate its impact by triangulating with other data sources described above.

Finally, as explained above, this SWD cannot take into account the impact of the COVID-19 crisis (which is an unprecedented situation) and possible future policy measures which might be adopted by the Commission to deal with the impact of this crisis on the economy.

5. ANALYSIS AND ANSWERS TO THE EVALUATION QUESTIONS

This section presents the assessment of the fitness of State aid rules, based on the five evaluation criteria (effectiveness, efficiency, relevance, coherence and EU value added) using the evaluation questions as listed below.

EVALUATION QUESTIONS

Effectiveness – Section 5.1

1. To what extent have the desired objectives of SAM been achieved?
 - 1.1. to foster sustainable, smart and inclusive growth in a competitive internal market (**fostering “good aid”**);
 - 1.2. to focus the Commission’s ex-ante scrutiny on cases with the biggest impact on the internal market whilst strengthening the Member States’ cooperation in State aid enforcement (**“big on big, small on small”**);
 - 1.3. to streamline the rules and provide for faster decisions (**“faster access to aid”**).

Efficiency – Section 5.2

2. To what extent SAM rules ensured efficient State expenditure?
3. Have the SAM rules allowed to decrease administrative burden?
4. To what extent are the costs associated with SAM proportionate to the benefits it has generated?

Relevance – Section 5.3

5. How well do the overall SAM objectives and the objectives of the individual State aid rules under the Fitness Check still correspond to the needs within the EU?
6. How well adapted are the State aid rules under the Fitness Check to subsequent market developments and technological advances?

Coherence – Section 5.4

7. To what extent are the State aid rules covered by the Fitness Check coherent with other EU policies/legislation?
8. To what extent are the State aid rules covered by the Fitness Check coherent with each other?

EU added value – Section 5.5

9. What is the additional value resulting from the fact that the Commission has adopted the State aid rules covered by the Fitness Check, compared to what could have resulted from a case-by-case assessment of the notified State aid measures?

Moreover, as already explained above, this SWD focuses on the overall effects of SAM. In addition, this Fitness Check focuses on certain, relevant aspects of the individual rules. An assessment of those selected issues is in Annex 8.

5.1. EFFECTIVENESS

This section evaluates the extent to which the SAM objectives have been achieved and also identifies the areas where effectiveness could be improved.

The findings of the analysis on effectiveness are subject to the limitations stemming from the stakeholder consultation and constraints on the possibility of full triangulation.

The analysis in this section has to be read together with Annex 8.

To what extent have the desired objectives of SAM been achieved?

The analysis suggests that the SAM as a whole largely meets its triple objective and hence is effective as a State aid architecture. As regards the General Block Exemption Regulation, while there might still be scope for a further increase of expenditure under the current block-exemption rules in the coming years, in line with the approach to focus on cases with a big impact on competition, the current system also ensures that the Commission keeps examining a limited number of measures involving large amounts which have to be notified. The implementation of the common assessment principles seems to have led to a clearer methodological framework for the various State aid rules contributing to the achievement of the objective of fostering “good aid”. In addition, SAM seems to have contributed to a significant clarification of the relevant State aid rules, even though some problematic areas have still been identified.

The individual rules seem to have, to a large extent, also proven to be effective in achieving their specific objectives, even though the present Fitness Check has also revealed various issues that may need further clarification or fine-tuning.

As described in detail in Section 2.2, there were three main objectives of SAM:

1. to foster sustainable, smart and inclusive growth in a competitive internal market (**fostering “good aid”**);
2. to focus the Commission’s ex-ante scrutiny on cases with the biggest impact on internal market whilst strengthening the Member States’ cooperation in State aid enforcement (**“big on big, small on small”**);
3. to streamline the rules and provide for faster decisions (**“faster access to aid”**).

Therefore, this section will analyse individually the performance of SAM with respect to those three separate, overall objectives.

However, those objectives are strongly interlinked and have to be seen in the context of the overall objective of State aid control which aims at minimising distortions of competition in the internal market. That aspect will thus be taken into account in the analysis of all the three individual objectives.

As already explained above in Section 2.2, all the SAM initiatives (including the GBER and other SAM instruments) are complementary tools for achieving all the three SAM objectives and both have their role to play for each of the objectives.

- **Fostering “good aid”** – both GBER and other SAM instruments define, based on common assessment principles, what type of aid would be considered as “good” and thus compatible with the internal market; in addition, a number of generally applicable measures aimed at ensuring good aid (e.g. evaluation, transparency, exclusion of undertakings in difficulty, enhanced *ex post* monitoring) relate to both GBER and other SAM instruments.
- **Big-on-big, small-on-small** – simplification for manifestly compatible measures with aid amounts below the notification thresholds thanks to GBER on the one hand (small-on-small) and streamlined rules based on unified common principles for assessment of more complex cases (with aid amounts above the GBER thresholds or not falling under the GBER at all) under the various SAM instruments (big-on-big); non-GBER rules thus enabled proper assessment of complex and/or large measures with potentially big effects in the market and to ensure that their distortive effects are kept to the minimum and are balanced by their positive effects in fulfilling an objective of common interest.
- **Faster access to aid** – that objective is not limited to GBER measures but extends as well to all measures assessed under the other instruments; indeed SAM aimed at providing faster access to good aid also outside the scope of GBER – by ensuring a streamlined and coherent framework for their assessment; the fact that the other SAM instruments defined in a transparent way what is considered as good aid enables the Member States to design their aid measures from the very beginning in line with those rules, avoiding thus unnecessary delays.

In addition to the SAM overall objectives, each of **the individual rules pursue specific objectives**. Table 3 summaries the objectives per rule (see also in details Annex 3 and Annex 5).

Table 3: Overview of the specific objectives of the individual rules under the Fitness Check

State Aid rules under Fitness Check	Objective
GBER	To declare specific categories of State aids (see Art. 1 GBER) compatible with the TFEU and exempt them from the requirement of prior notification and Commission approval.
de minimis Regulation	To provide a ceiling below which aid measures are deemed not to constitute State aid within the meaning of Article 107 TFEU, and are exempted from the notification procedure, because they are considered not to have any effect on cross-border competition among Member States.
Regional aid Guidelines	To support regional economic development in disadvantaged areas within the EU while ensuring a level playing field between Member States and to limit the effects of regional aid on trade and competition to the minimum necessary.
RDI Framework	To declare compatible with the internal market a series of RDI measures (see para. 12 of the RDI Framework).

State Aid rules under Fitness Check	Objective
IPCEI Communication	To provide for a simplified compatibility assessment whereby it is to be presumed that certain compatibility criteria are met for IPCEIs that fulfil the eligibility conditions. To create a clear framework consolidating the relevant assessment criteria in one single document, applicable to all sectors of the economy and across all policy objectives.
Risk Finance Guidelines	To facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. To encourage the development and expansion of new businesses, especially innovative and high-growth ones, that can have a great potential to create jobs.
Aviation Guidelines	To offer sector-specific guidance on the notion of aid in the aviation sector and to describe the compatibility conditions for State aid based on three different legal bases: public service compensation, assessed under Art 106(2) TFEU, aid to airports and airlines under 107(3)(c) TFEU and aid of a social character assessed under Art. 107(2)(a) TFEU.
Energy and Environmental Aid Guidelines	To assist Member States in achieving the 2020 renewable energy targets while minimising the distortive effects of support schemes by promoting a gradual move to market-based support for renewable energy and providing criteria on how Member States can relieve energy intensive companies that are particularly exposed to international competition from charges levied for the support of renewables. To contribute to ensuring the required generation adequacy level and security of supply of the Union's energy system while minimising competition distortions by including new provisions on aid to energy infrastructure and generation capacity.
Rescue and Restructuring Guidelines	Rescue and restructuring aid are among the most distortive types of State aid. It is therefore important to ensure that aid is only allowed under conditions that mitigate its potential harmful effects and promote effectiveness in public spending.
Railway Guidelines	To provide guidance on the compatibility with Art. 107 and Art. 93 TFEU of State aid to railway undertakings in accordance with Directive 91/440/EEC. To improve the transparency of public financing and legal certainty with regard to the Treaty rules in the context of the opening-up of the railway markets.
STEC	To ensure that State aid does not distort competition among private and public or publicly supported export-credit insurers and to create a level-playing field among exporters in different Member States.

5.1.1. SAM OBJECTIVE 1: FOSTERING “GOOD AID”

With SAM, the Commission increased the emphasis on the quality and efficiency of public support. One of the key ideas was that State aid control should facilitate **aid which is well-designed, targeted at identified market failures and objectives of common interest, and the least distortive**. For that to happen, it was essential that State aid is: (i) effective in achieving the desired public policy objective and has an incentive effect; (ii) designed in a way that limits distortions of competition; and (iii) addressing situations where the market cannot deliver itself.

Common assessment principles

In order to establish a consistent framework for identifying and fostering “good aid” in different policy areas, the Commission within the framework of SAM

established “**common principles**” for assessing compatibility of aid (see above Section 2.2).

Overall, compared to the baseline scenario (see also Section 2.3.1), the implementation of the common principles has led to a **clearer methodological framework** for the various State aid rules contributing to the achievement of the objective of fostering good aid.

All the rules under SAM (GBER and other SAM instruments) enshrine the above-mentioned common principles, explicitly referring to each of them in the relevant guidelines/frameworks. Those rules contain descriptive parts that develop specific criteria on how to ensure the compliance of the measures with the common principles. More specifically, one can observe the description of the principles in the EEAG (Section 3); Rescue and Restructuring Guidelines (Section 3); IPCEI Communication (Sections 3-4); Risk Finance Guidelines (Section 3); Aviation Guidelines (Section 5 and Section 8); RDI Framework (Section 4); and RAG (Section 3). The responses to the public consultation (Question 2) confirm this finding. In particular, 96% of all respondents (and 90% of public authorities) confirmed that these common principles facilitated the compliance with the State aid rules by the Member States.

The STEC and Railway Guidelines were not part of the SAM package. They still contain some references to the mentioned principles such as the transparency (STEC, Section 4), the avoidance of undue negative effects (STEC, Section 4 and Railway, Section 5), the need for State intervention (Railway, Section 6) and the proportionality of the aid amount (Railway, Section 5 and 6). However, they do not implement systematically and explicitly all the common principles and thus diverge from the SAM rules. As also indicated by one respondent to the public consultation with respect to STEC, implementing those common principles would in general help facilitate compliance with the rules by Member States¹³³ (see also Section 5.4).

An **overview of the implementation of the common principles** in the individual SAM rules analysed is provided in Table 4. This table also shows in the first row **the individual objectives of common interest pursued by the individual rules translating the overall SAM objective of fostering “good aid” in more concrete objectives** pursued in those specific areas of application of the State aid rules.

¹³³ See reply to the public consultation by EKF - Denmark's Export Credit Agency.

Table 4: Implementation of the common principles in the individual SAM rules

	EEAG	RAG	IPCEI	Risk Finance	Aviation	RDI	Rescue and restructuring
1.Contribution to a well-defined objective of common interest	Section 3.2.1: to increase the level of environmental protection and ensure a competitive, sustainable and secure energy system in a well-functioning Union energy market	Section 3.2: to reduce development gap between the different regions in the EU (cohesion).	Section 3.2: to support projects representing an important contribution to the Union's objectives.	Section 3.2: to improve the provision of finance to viable SMEs from their early-development.	Sections 5.1/2: mobility of citizens and connectivity of regions, regional development, combatting air traffic congestion.	Section 4.1: to promote RDI in the EU.	Section 3.1: to prevent social hardship or market failure by restoring viability of a company.
2. Need for state intervention	Section 3.2.2: aid targeted towards situations where aid can bring a material improvement that the market alone cannot deliver.	Section 3.3: aid targeted towards situations of market failure.	Section 1: the market would not otherwise finance such protects.	Section 3.3: market failure related to financing of certain groups of SMEs.	Sections 5.1/2: need for aid varies according to the size of the relevant airport.	Section 4.2: MS to show how the aid can mitigate the market failure.	Section 3.2: comparison with a credible alternative scenario without aid.
3.Appropriateness of State aid	Section 3.2.3: The same positive contribution cannot be achieved through a less distortive policy instrument or less distortive aid instrument.	Section 3.4: less distortive policy instruments do not achieve the same contribution to regional development.	Section 4.1: aid instrument chosen according to the market or systemic failure.	Section 3.4: <i>ex-ante</i> assessment of alternative policy actions targeting the same market failures.	Sections 5.1/2: MS to demonstrate that the aid measure is an appropriate policy instrument.	Section 4.3: advantages established by MS, after considering other policy options.	Section 3.3: Aid in appropriate form depending on the type of difficulty and properly remunerated.
4. Incentive effect	Section 3.2.4: aid induces the beneficiary to increase the level of environmental protection or to improve the functioning of energy markets.	Section 3.5: to change the behaviour of an undertaking in a way it engages in additional activity in an area.	Section 4.1: whether by aid a new project is triggered or the size, scope or speed of a project is enhanced.	Section 3.5: if aid mobilises additional investments from market sources.	Sections 5.1/2: identified through counterfactual analysis or assumed when there is a capital cost funding gap.	Section 4.4: evidence that the aid had impact on the decision to pursue the RDI activities.	Section 3.4: without aid the beneficiary restructured, sold or wound up in a way not achieving objective of common interest.
5. Proportionality	Section 3.2.5: aid limited to the minimum necessary to achieve the environmental protection or energy objective aimed for.	Section 3.6: limited to the minimum needed to induce additional investment or activity in an area.	Section 4.1: aid limited to the minimum necessary for the project to be sufficiently profitable.	Section 3.6: the total amount of syndicated funding limited to the funding gap identified in the <i>ex-ante</i> assessment.	Sections 5.1/2: limited to the minimum necessary for the aided activity to take place.	Section 4.5: aid intensities based on acuteness of the market failure, size of beneficiary, closeness to the market.	Section 3.5: limited to the minimum necessary for short-term rescue and long-term restructuring (plus own contribution and burden sharing).
6. Avoidance of undue negative effects on competition and trade	Section 3.2.6: negative effects outweighed by positive effects.	Section 3.7: negative effects outweighed by positive effects.	Section 4: negative effects outweighed by positive effects.	Section 3.7: negative effects outweighed at each level where aid is present.	Sections 5.1/2: minimising negative effects considering airports' catchment area and existing services on a route.	Section 4.6: negative effects limited to the minimum in view of e.g. project size and aid amount.	Section 3.6: "one time, last time" principle and measures to limit distortions of competition.
7.Transparency	Section 3.2.7: aid measures published on a central website.	Section 3.8: aid measures published on a central website.	Section 4.3: aid measures published on a central website.	Section 3.8: aid measures published on a central website.	Sections 8.2: aid measures published on a central website.	Section 4.7: aid measures published on a central website.	Section 3.7: aid measures published on a central website.

Clearer rules for identifying “good aid”?

The legal clarity of the SAM instruments ensures that the Member States know in advance what measure would be considered as compatible “good aid” under the relevant instruments. They are thus able to adapt their measures from the very beginning in a way ensuring that they can be considered as “good aid”. Especially in the context of the GBER, clear rules for acceptable aid ensure that aid measures granted under the GBER fulfil all the conditions of “good aid” and thus do not lead to any inappropriate distortion of competition (which would have otherwise been detected only in the context of an ex post monitoring or based on a complaint).

The public consultation indicates that the SAM package has led to clearer rules compared to the baseline scenario (i.e. old rules in place, see also Section 2.3.1).

The majority of all respondents agreed (65% - 94% depending on the rule – see Table 5) that SAM has led at least partially to clearer rules. For public authorities only this rate was even higher in the case of most of the rules. Depending on the rule, only 3-10 respondents (out of which 1-4 public authorities) per rule replied that SAM did not lead to clearer rules at all.

Table 5: Replies to question 1 of the public consultation

*Has the SAM package led to clearer rules?*¹³⁴

	All respondents								Public authorities only							
	Yes		No		Partially		Yes, at least partially		Yes		No		Partially		Yes, at least partially	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
GBER	30	29%	8	8%	67	64%	97	92%	17	39%	2	5%	25	57%	42	95%
<i>de minimis</i>	29	31%	6	7%	58	62%	87	94%	16	38%	3	7%	23	55%	39	93%
RAG	17	28%	7	12%	37	61%	54	89%	7	30%	4	17%	12	52%	19	83%
RDI	13	21%	4	6%	46	73%	59	94%	5	19%	2	7%	20	74%	25	93%
IPCEI	8	20%	5	13%	27	68%	35	88%	2	15%	1	8%	10	77%	12	92%
RF	4	13%	5	16%	23	72%	27	84%	-	-	1	8%	12	92%	12	92%
Aviation	8	28%	10	35%	11	38%	19	66%	4	31%	3	23%	6	46%	10	77%
EEAG	11	19%	5	9%	42	72%	53	91%	3	15%	1	5%	16	80%	19	95%
R&R	5	15%	5	15%	23	70%	28	85%	2	14%	2	14%	10	71%	12	86%
Railway	8	29%	8	29%	12	43%	20	72%	3	33%	1	11%	5	56%	8	89%
STEC	8	40%	3	15%	9	45%	17	85%	2	22%	2	22%	5	56%	7	78%

Any incoherence in the percentages is due to rounding.

The lowest agreement rate and the most "No" replies were recorded with respect to Aviation and Railways. In case of the **Aviation Guidelines**¹³⁵, the main problematic point concerns the transition period for operating aid that did not prove successful as many airports will continue to need operating aid beyond 2024 (see below the separate analysis for aviation rules in point e). As regards **the Railway Guidelines**, they predate SAM and thus are not fully adapted to the common assessment principles. In addition, the Railway Guidelines also need to be better aligned with the development of the sector and the relevant regulatory framework (for more details see the analysis of individual rules below as well as Section 5.4 on "Coherence").

Various position papers submitted during the public consultation also explicitly acknowledge that **SAM contributed to a significant clarification of the relevant State aid rules, even though some problematic areas have still been identified.**

¹³⁴ Source: replies to the public consultation.

¹³⁵ Hereto, it has to be noted that only 16 responses were received for the Aviation rules. Only 10 respondents replied that the Aviation guidelines did not lead to clearer rules.

As an example for all of them, the German position paper¹³⁶ indicated that the SAM process "has also achieved a great deal in terms of clarifying previously unanswered questions around State aid. In particular, the clarifications with regard to infrastructure financing, which were issued by the Commission in its Notice on the notion of State aid [...], the relevant provisions of the GBER rules, the specific information on the exemption from the state-aid rules of financing provided within the RDI Framework and the Guidelines on State aid to promote risk finance investments, have all been helpful. That said, there are still some poorly defined legal concepts to be found in both GBER and the Commission Guidelines, which are continuing to cause a lack of legal certainty in certain cases."

Therefore, while SAM compared to the baseline scenario contributed to a substantial clarification of the State aid rules based on a common assessment methodology, there is **still scope for additional clarification** with respect to various specific terms and situations. More detail on each of the rules can be found in Annex 8. For an assessment on the clarity of the rules in terms of their contribution to the reduction of administrative burden please also refer to Section 5.2 Efficiency. Further elaboration in the context of "Effectiveness" per rule on clarity can be found in the sections below.

Fostering good aid in case of individual State aid rules

As demonstrated above (see in particular Table 4), the implementation of the common principles in the individual rules differs in view of the particularities of the sector or area concerned (e.g. the relevant objectives of common interest, market failures etc.). Therefore, the effectiveness of achieving the objective needs to be assessed at the level of the individual State aid rules. For more details on the assessment of individual rules complementing and supporting the below findings, please see also Annex 8.

a) Regional aid framework (RAF and the relevant GBER articles)

As regards the regional aid framework ("RAF"), **its main objective** is to contribute to the reduction of the development gap between the different regions in the European Union (equity or cohesion objective) while ensuring a level-playing field and limiting effects on trade and competition. A detailed analysis to be found in Annex 8.

The RAF external study confirms that the availability of regional investment aid in the EU's disadvantaged regions does attract investments to those regions. The relative importance of regional aid as an incentive to attract investment varies depending on the stage in the decision process, the type of investment, enterprise, sector and the eligibility status of the region. This conclusion comes robustly from the econometric analysis, the survey of aid granting authorities, literature review and the expert interviews.

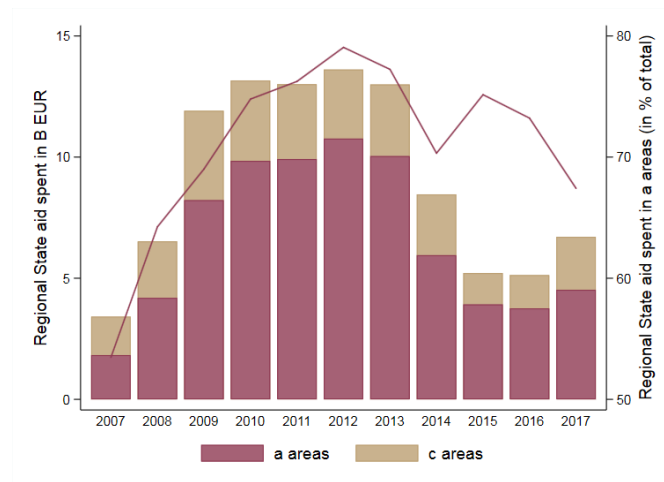
On the one hand, internal figures on the reduction of so-called a-regions over time illustrate a positive development related to the reduction of the development gap

¹³⁶ https://ec.europa.eu/competition/state_aid/modernisation/190815_en.pdf.

between the regions of the European Union. This was also supported by the most recent Eurostat statistics on GDP and unemployment.¹³⁷

Regional aid maps are adopted for each Member State. They define geographical areas where companies may receive regional State aid, and at which intensities. The maps delineate the a-regions (Article 107(3) (a) TFEU) and the c-regions (Article 107(3) (c) TFEU). A-regions are, in general, regions with GDP per capita at or below 75% of EU average.¹³⁸ Based on currently available figures (2015-2017 data), 28.6% of the EU-27 population would live in a-regions compared to around 31.4% under the currently applicable regional aid maps. The number of a-regions would drop from 79 to 78. Figure 13 illustrates the allocation of regional aid spent between a- and c-regions.

Figure 13: Regional State aid spent, distinguishing between a- and c-areas in the period 2007-2017¹³⁹



On the other hand, this was confirmed by the public consultation, where a relative majority indicated that the regional aid provisions allow for the development of disadvantaged areas in the EU (24.5%), while 69.8% agree to some extent, and only 5.7% disagree¹⁴⁰. Several stakeholders that replied to the targeted consultation also indicated that the attraction of additional investments to disadvantaged regions with the help of well-targeted aid contributed to this development. Regional aid is therefore considered as an important tool to promote regional development¹⁴¹.

¹³⁷ See Eurostat regional data for 2016-2018.

¹³⁸ A-regions are NUTS 2 regions with GDP per capita below or equal to 75% of the EU27 (At the time the RAG was adopted, Croatia was not an EU Member State.) average as well as outermost regions (Article 349 TFEU) The NUTS classification (Nomenclature of territorial units for statistics) is a hierarchical system for dividing up the economic territory of the EU. For socio-economic analyses of the regions, there are three levels of classification: NUTS 1: major socio-economic regions; NUTS 2: basic regions for the application of regional policies; and NUTS 3: small regions for specific diagnoses. C-regions are classified in 'predefined' and 'non-predefined' c-areas: (i) predefined c-areas fulfil certain pre-established conditions (former 'a' areas and sparsely populated areas); (ii) non-predefined c-areas are areas that fulfil certain socio-economic criteria. These include areas which constitute part of NUTS 3 regions. Member States define whether NUTS 3 regions are totally or only partially eligible for regional aid.

¹³⁹ RAF external study. *The total regional State aid spent is computed for EUR 27 until 2012 and for EU 28 from 2013 onwards.*

¹⁴⁰ See public consultation Q5.3.

¹⁴¹ See qualitative replies to Q1 of the RAG targeted consultation.

However, the Fitness Check revealed several **barriers** hampering even better achievement of the cohesion objective of regional aid.

A first barrier results from the current **design of the regional aid maps**¹⁴² delineating the less developed regions eligible for regional aid. While the majority of respondents to the targeted consultation¹⁴³ confirmed an effective coverage of the regions, the use of outdated data for the calculation of the maps was however criticised. Indeed, the maps are based on GDP statistics from 2008-2010 and no longer reflect the actual reality. The current design of the rules is thus lacking flexibility for regions to react to recent developments. This finding is supported by the results of the public consultation, where only 26.8% of the respondents (42.9% of public authorities) agreed that the RAG are well adapted to recent market developments, while 58.8% only partially agreed and 14.6% disagreed¹⁴⁴.

Even though **restrictive rules on regional aid for large enterprises in c-regions** were considered as a second major barrier (in particular by the affected granting authorities), it needs to be reminded that the more restrictive rules for c-regions were introduced with the objective to support the economic development of the even more disadvantaged a-regions. However, as evidenced by the RAF external study, for the affected granting authorities in c-areas, the impact of the revised rules for c-areas was a reduced investment level due to relatively lower maximum aid intensities compared to a-regions¹⁴⁵. The RAF external study show also that the effort related to the compatibility assessment under RAG is not justified for cases with low aid amounts such as new process innovation cases in c-areas¹⁴⁶.

According to the RAF external study¹⁴⁷, the restrictions of the RAF are considered as major constraints by investors, especially in the case of a **counterfactual scenario outside of the EU** that is often related to less strict rules and which puts the assisted European regions even more in competition with third countries, such as China or the US.

The internal research and RAF external study (case study) revealed a **high number of withdrawn regional aid notifications**, in particular related to investment projects in c-regions¹⁴⁸. For ten out of eleven notifiable investments by large enterprises in c-regions, the notifications were withdrawn. The RAF external study also shows that out of 561 aid applications by large enterprises for which no aid could be provided, at least 121 projects (and possibly even more since for a majority of projects no information could be obtained – see Figure 14 below) were still implemented in the same region even without the aid. This suggests that for many investment projects that unsuccessfully applied for regional aid, the aid was actually not necessary for the investment to take place in the region concerned. This confirms that the restrictive rules for State aid in the c-regions are justified.

¹⁴² As explained above, the regional aid maps are a list of areas designated by a Member State as eligible for regional aid under Articles 107(3)(a) and 107(3)(c) TFEU and approved by the Commission.

¹⁴³ In total 40% compared to only 21% who disagreed while 39% were neutral or did not know the answer. The sample used for the survey included in total 63 aid-granting authorities both at national and regional level.

¹⁴⁴ See public consultation Q12.

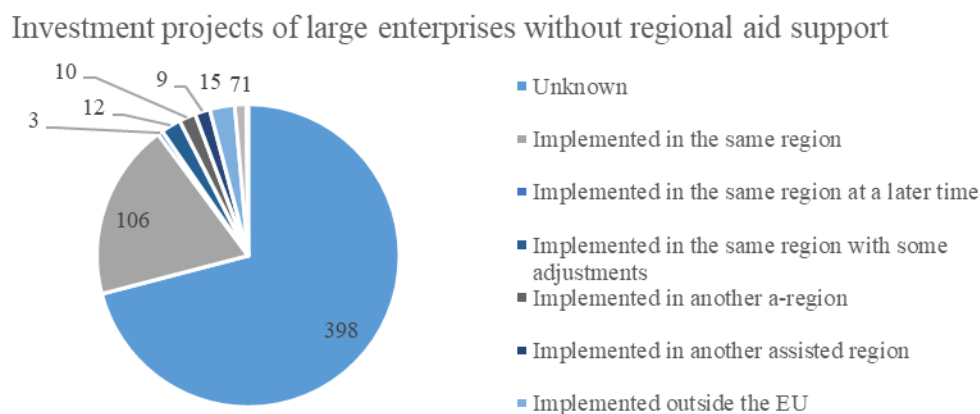
¹⁴⁵ See Section 4.3 on the restrictions on large enterprises in c-regions of the RAF external study.

¹⁴⁶ See Section 5.1 of the RAF external study. Results of the case study by the external consultant.

¹⁴⁷ Interviewed experts.

¹⁴⁸ See Section 4.3 of the RAF external study.

Figure 14: Investment projects of large enterprises without regional aid support



The findings of the RAF external study (replies received during expert interviews), suggest that regional aid represents one of the relevant elements in the decision making process, but is not the major decision making factor. The **proportionality rules of the RAF** seem to be appropriate and to limit the aid to the minimum necessary. If the aid was disproportionately high, then it would not just represent an additional factor leading to the investment decision, but would represent the key factor. The public consultation confirms the efficient spending, whereas 40.9% of the stakeholders confirmed that the regional aid rules ensure efficient State expenditure, 50% agreed to some extent, and 9.1% disagreed.

As evidenced by the RAF study, one of the major changes in comparison with the previous rules included **the reduction of maximum aid intensities**¹⁴⁹. The results of the econometric analysis indicate that the most disadvantaged regions spent the highest amount of aid (relative to its GDP), which suggests that regional aid is well-targeted. A detailed overview on the development of regional aid spent relative to its GDP is available in Appendix 8 of the RAF external study. The figures are based on an analysis based on the Scoreboard Database, EC search database, TAM Database and the European Commission. The results showed also a positive correlation of private investment with the reduction of maximum aid intensities, providing preliminary suggestive evidence that the changes in aid intensity may affect actual investment flows.

As regards the **clarity of the rules for regional aid**, while the overall design of the rules was perceived as positive¹⁵⁰, an additional need for clarification on definitions in the regional aid rules was raised with the qualitative comments and occasional misalignments between GBER and RAG highlighted¹⁵¹. This mixed finding is supported by the results of the public consultation: whereas 28% of the respondents agreed that the State aid modernisation led to clearer rules on regional aid, while the relative majority of 60.7% only partially agree to this statement and even 11.5%

¹⁴⁹ As in Section 4.2.1 of the study on the RAF, see also Annex 7.

¹⁵⁰ According to the results of the RAF targeted consultation to question 4 in total 34% of the respondents agreed that the eligibility conditions on regional aid in GBER are appropriate and justified, while 23% disagreed, and 37% could not provide an answer. For RAG, 21% of the respondents agreed to the appropriateness of the eligibility conditions, while 17% disagreed and in total 61% could not provide an answer.

¹⁵¹ See results of the RAF targeted consultation on questions 4 and 5.

disagree¹⁵². In addition, a relatively high number of questions compared to other State aid rules related to various specific concepts (such as for example initial investments in favour of new economic activities, relocation rules, or the change in the production process) also suggest scope for further clarification of the regional aid rules. The literature review confirms a need for a clarification and simplification of the current rules.

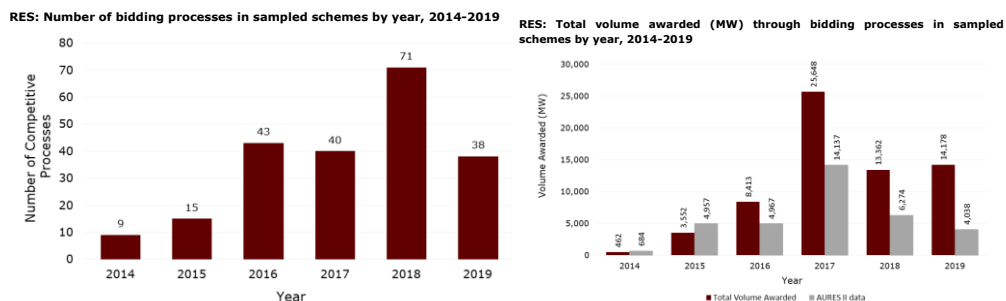
b) EEAG and the relevant GBER articles

The available data (State aid Scoreboard, Transparency Award Module) and the internal analysis of case practice show an **increasing volume of compatible aid** granted in the period 2014-2018 in the environmental and energy field (more than 180 decisions adopted under the EEAG and more than 1,000 schemes or amendments communicated under the GBER). This shows that the State aid framework has been instrumental to provide a common legal framework for EU Member States' efforts to reach their 2020 climate targets with a set of tools compatible with the internal market. A detailed analysis to be found in Annex 8.

In addition, the public consultation on the Fitness Check shows that a large majority of those respondents that expressed an opinion, are of the view that the EEAG have allowed for a **clean and secured supply of energy** (28% to a large extent and 58% to some extent) and for an **increased environmental protection** (38% to a large extent and 53% to some extent) while maintaining a **competitive internal market** (40% to a large extent and 54% to some extent). This corroborates with the findings of the targeted consultation on the EEAG, which shows that more than 90% of those respondents that expressed an opinion believe that the EEAG and GBER related provisions have achieved (~20%) or partially achieved (~70%) these objectives.

In particular, the EEAG external study shows that following the introduction of the tendering requirement for **renewables support schemes** in the EEAG, the number of auctions/competitive processes has increased and that the amount of aid per kilowatt hour ("kWh"), resulting from the different auctions for the different technologies, has significantly decreased over the period. However, the prices paid per unit of renewable energy vary significantly depending on the different types of technology.

Figure 15: Number of bidding processes and volume awarded¹⁵³

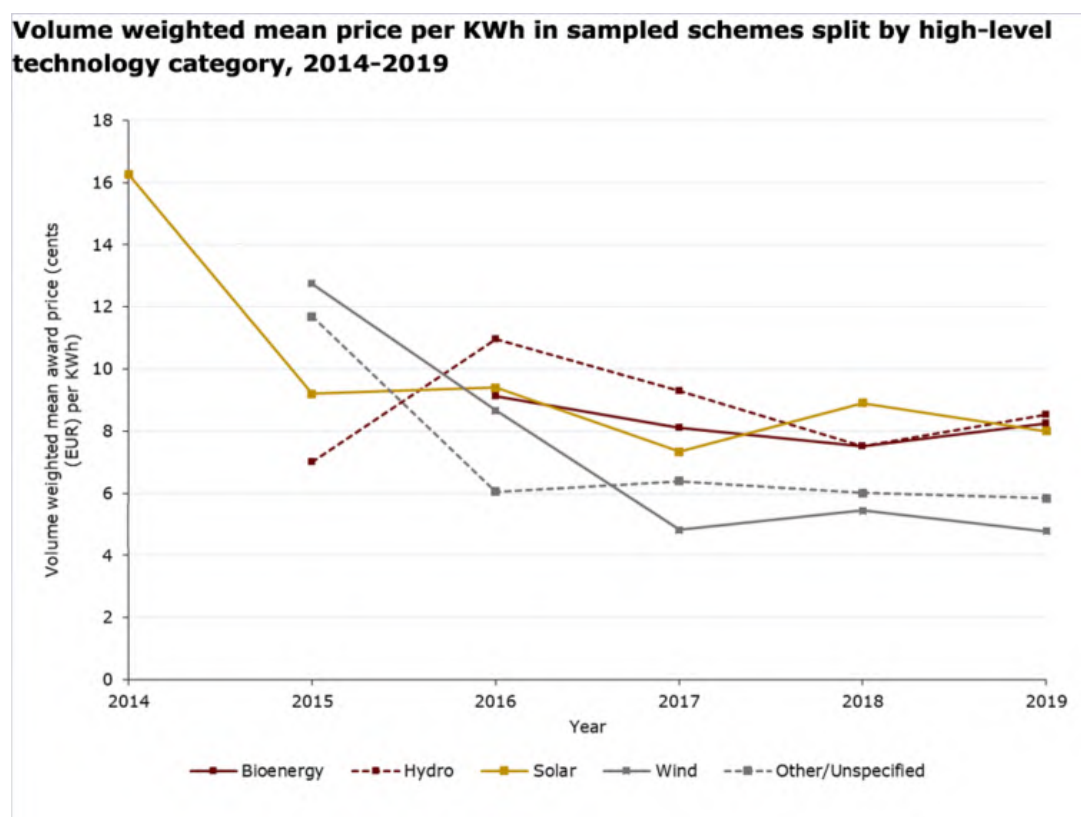


¹⁵² See results to Q1 of the public consultation on the RAG.

¹⁵³ Source: Consultant report.

Figure 16: Volume weighted mean price per kWh in sampled schemes¹⁵⁴

Split by high-level technology category, 2014-2019



The results of the EEAG external study, case practice, as well as the consultation activities suggest that it cannot be concluded that there is a correlation between the existence of **reductions for energy intensive users** (“EIUs”) and the introduction of ambitious renewables policies across all Member States. The effectiveness of those measures seems to vary depending on the proportion of the RES charge over the electricity bill for EIUs in the various Member States.

On the basis of the analysis of the different sources on input used in this exercise, such the EEAG external study, internal data and case practice as well as the public and targeted consultations, has shown that the EEAG have achieved to a great extent the objective of ensuring that **capacity mechanisms** were cost-effective in providing security of supply and least distortive of competition, taking into account the applicable regulatory context. The application of the rules on generation adequacy has benefitted from the results of the sector inquiry on capacity mechanisms¹⁵⁵, which has provided the Commission with valuable information on the functioning of previous, existing or planned capacity mechanisms in the Member States covered by the inquiry. However, this area of State aid enforcement still remains relatively new compared to others covered by the EEAG.

¹⁵⁴ EEAG external study.

¹⁵⁵ In April 2015 the Commission launched a sector inquiry into the financial support that EU Member States grant to electricity producers and consumers to safeguard security of electricity supply (capacity mechanisms). The final report of this sector enquiry was published in November 2016.

Further, EEAG and the GBER have been overall effective in allowing aid to foster sustainable and smart growth in **re-use and recycling of waste** while avoiding disproportionate distortions of competition. However, the EEAG external study, the targeted consultation and the review of GBER questions on the eWiki (interpretation questions) also show that at least some Member States have encountered difficulties in understanding how they can call on the GBER, specifically the scope of Article 47 of the GBER (investment aid for waste recycling and re-utilisation), which may have led to a suboptimal use of that GBER category, and how to use other GBER articles (such as Article 36).

As regards **energy-efficiency in buildings**, the State aid Scoreboard data¹⁵⁶ demonstrate that many energy-efficiency projects including for buildings are supported under Article 38 of the GBER. However, Article 39 of the GBER that was aimed at facilitating support to energy-efficiency projects in building through financial instruments was hardly used, as demonstrated by the data of annual reports, the stakeholder consultation and the EEAG external study. In particular, the EEAG external study¹⁵⁷ has shown for Member States and stakeholders that Article 39 was difficult to understand and consequently to implement.

Overall, in general terms, the EEAG and relevant GBER provisions have contributed to achieve the relevant climate, environmental and energy objectives while maintaining a competitive internal market.

c) RDI and the relevant GBER articles

The extended GBER provisions on RDI adopted under SAM have given Member States more autonomy in implementing RDI measures. According to the State aid Scoreboard, RDI State aid expenditure increased steadily from EUR 10.5 billion in 2014 to EUR 11.27 billion in 2018, and 96% of all RDI measures (more than 80% in value terms) has been disbursed under the GBER. In particular, the positive evolution of State aid expenditure can be observed for measures targeted by the Fitness Check: support for RDI projects (in particular experimental development activities), research infrastructure, innovation clusters, process and organisational innovation, innovation aid to SMEs. These measures have been considered **key in further facilitating effective RDI investments**, which would contribute to increasing companies' competitiveness.

The RDI external study confirms that in general the rules implemented following SAM, have **helped to increase collaborations** between undertakings (SMEs and large enterprises) and between undertakings and research organisations¹⁵⁸.

The State aid Scoreboard data show that the interventions targeting innovation clusters were overall effective, leading to a steady and continued increase in public State aid expenditure, from EUR 53.2 million in 2015 to EUR 192 million in 2018 (see Figure 17). State aid expenditure for measures targeting innovation aid for SMEs increased from EUR 39 million in 2015 to EUR 199 million in 2018 (see

¹⁵⁶ See below Table 7: Number of active measures under the individual 2014 GBER articles/objectives.

¹⁵⁷ Under the EEAG external study, a survey of a sample of authorities was conducted.

¹⁵⁸ Approximately 55% of stakeholders contacted in the context of the external study took a positive view as to whether the rules have facilitated collaboration between SMEs and large enterprises, while 68% reply positively as concerns the rules' positive impact on collaboration between undertakings and research organisations.

Figure 18). As outlined in the State Aid Scoreboard 2019, there was also a significant increase in public State aided investments implemented under aid for research infrastructures between 2015 and 2018 (from circa EUR 34 million in 2015 to circa EUR 143 million in 2017 to 240 million in 2018). This was a new provision introduced in the 2014 GBER setting out the conditions to provide State aid for research infrastructures. The evaluation found that overall the measure was effective in stimulating RDI investments for the given objective.

Figure 17: Evolution of aid for innovation clusters under Article 27 GBER (EUR million)¹⁵⁹

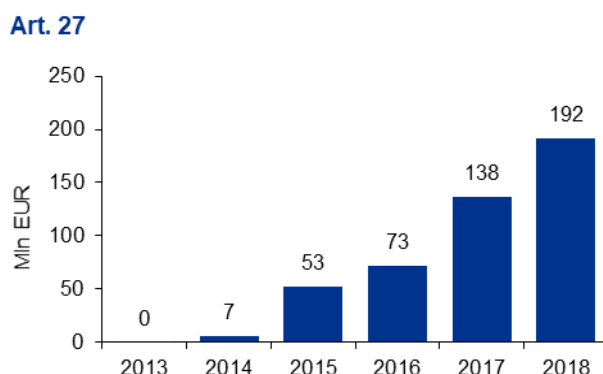
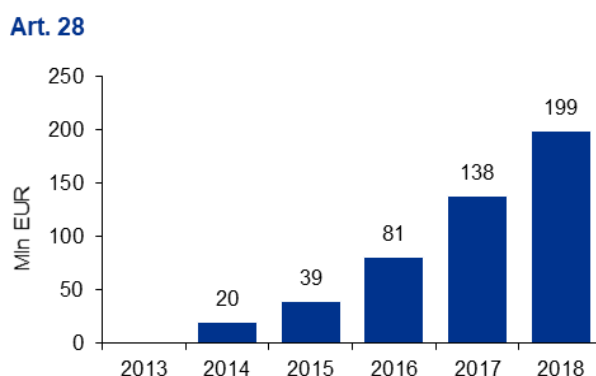


Figure 18: Evolution of aid for innovation clusters under Article 28 GBER (EUR million)¹⁶⁰



Further, the RDI external study confirms that **State aid was essential to carry out the evaluated RDI activities** and helped companies and/or research organisations to receive **adequate funding**.¹⁶¹ At the same time, the RDI external study interview results indicated the existence of market failures affecting investments into research infrastructures, innovation clusters, innovation activities of SMEs as well as RDI projects focused on experimental activities. The RDI external study also found that

¹⁵⁹ DG Competition data and RDI external study.

¹⁶⁰ DG Competition data and RDI external study.

¹⁶¹ According to the results from the interviews performed by the external contractor, more than 80% of the respondents confirmed that State aid was essential to carry out the evaluated RDI activities and helped companies and/or research organisations to receive adequate funding.

State aid had **no material negative impact on competition** or would lead to crowded out private investments.¹⁶²

It has to be acknowledged that RDI investments in the EU have not yet reached the 3% of GDP target and the EU is **still lagging behind** other global competitors in this regard. However, the Fitness Check provided no indications that RDI State aid rules would be obstructive in this respect. On the contrary, the evolution of State aid expenditures demonstrates that the enlarged scope of the GBER rules for RDI could be interpreted as **enabling the Member States to effectively disburse their RDI public expenditures** according to their national priorities.

Therefore, despite the **room for further clarification** on interpretation of certain provisions identified both by the internal analysis and the interviews by the RDI external study (in particular concerning knowledge transfer activities, research infrastructures, innovation clusters, interplay of those measures with innovation aid provisions, on process and organisational innovation), the RDI rules achieved their objectives.

d) Railway Guidelines

Concerning the **general objectives** of the Railway Guidelines, the majority of respondents considered that they stimulated the railway sector only to some extent (60.7%) and that they helped maintaining a competitive internal market to only some extent (55.2%). However, the specific contributions submitted by Member States and sectorial stakeholders considered that the Railway Guidelines have been working reasonably well but that they have not kept entirely pace with the 4th Railway Package¹⁶³ adopted in 2016 and completing the liberalisation of the rail sector (see for more details Section 5.4 on "Coherence") and to provide the incentives, which are necessary to encourage modal shift from road to rail. Section 6 of the Railway Guidelines **on aid for the coordination of transport** is the part of the guidelines that can be considered the most successful in terms of implementation by means of measures introduced by Member States (until now 64 decisions in total) and in terms of results achieved. These rules led to a consistent approach in the Member States granting such kind of support including an improved compliance by Member States and contributed to establish a common practice of "good" aid to support the coordination of transport. They also led to achieve the objectives of modal shift from road to rail as well as increased interoperability across Member States. The results from the public consultation have been confirmed by internal assessment, as presented in detail in Annex 8. As

¹⁶² According to the results from the interviews performed by the external contractor, above 80% of interviewees considered that State aid had no material negative impact on competition or would lead to crowded out private investments.

¹⁶³ Set of 6 legislative texts designed to complete the single market for Rail services (Single European Railway Area): Regulation (EU) 2016/796 on the European Union Agency for Railways and repealing Regulation (EC) n° 881/2004 (OJ L 138, 26.5.2016, p. 1–43), Directive (EU) 2016/797 on the interoperability of the rail system within the European Union (OJ L 138, 26.5.2016, p. 44–101), Directive (EU) 2016/798 on railway safety (OJ L 138, 26.5.2016, p. 102–149), Regulation (EU) 2016/2338 amending Regulation (EU) 1370/2007, which deals with the award of public service contracts for domestic passenger transport services by rail ('PSO Regulation') (OJ L 354, 23.12.2016, p. 22–31), Directive 2016/2370/EU amending Directive 2012/34/EU, which deals with the opening of the market of domestic passenger transport services by rail and the governance of the railway infrastructure ('Governance Directive') (OJ L 352, 23.12.2016, p. 1–17), Regulation (EU) 2016/2337 repealing Regulation (EEC) 1192/69 on the normalisation of the accounts of railway undertakings (OJ L 354, 23.12.2016, p. 20–21).

regards **other sections of the Railway Guidelines** (purchase of rolling stock, debt cancellation of incumbents and restructuring of freight divisions of railway undertakings), the Member States had only to a very limited extent used the opportunity to provide aid under these rules and the Commission issued only very few decisions.

e) Aviation rules (Aviation Guidelines and relevant GBER articles)

The **main focus points of the evaluation** of effectiveness of the aviation rules in delivering good aid were the provisions on operating aid for smaller airports (as the transitional period allowing such aid will end in 2024), as well as the passenger thresholds, aid intensities and the criterion of the “catchment area”.

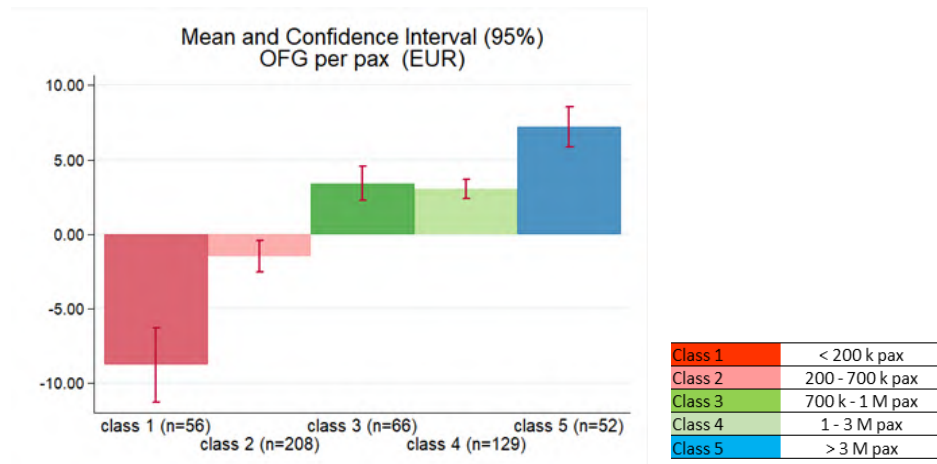
As regards the **operating aid to airports**, the introduction of the transitional period did not prove successful since the Commission received only a very small number of notifications (10 individual cases and 2 schemes) and the case practice showed that not all of the assessed airports have adapted their business models to changing market conditions (see Annex 8 for more details). Figure 19 below shows that in class one and two, many of the selected airports are still not able to cover their operating costs, while Figure 20 evidences that smaller airports did not achieve a positive EBITDA. The Aviation Guidelines thus improved only to a very limited extent compliance by Member States.

*Figure 19: Fraction of airports (whole sample) that cover their operating costs (2015-2018)*¹⁶⁴



¹⁶⁴ Aviation external study.

Figure 20: EBITDA per passenger for the whole sample of airports 2010 - 2018¹⁶⁵



In addition, the assessment in Annex 8 has shown that many small airports will not expected become cost covering by 2024. Based on the available data from the Aviation external study, stakeholder information and the targeted consultation, a majority of airports below 500,000 passengers per annum (“p.a.”) and many airports below 1 million passengers p.a. will continue to need operating aid after 2024.

Airports and other stakeholders have explained that this is due amongst others to the increase of security costs, as well as recent bankruptcies of airlines and the consolidation of the airline market. Therefore, the categorisation of airports to establish the need for operating aid, aid intensities and the transition period for operating aid in the Aviation Guidelines are only partly still fit for purpose, especially for smaller airports, see in detail in Annex 8.

It is also apparent at this stage that the aviation sector is one of the sectors heavily affected by the COVID-19 pandemic. In March 2020, the sector observed an 88% fall in passenger traffic compared with last year. Therefore, various actors active in this sector, including regional airports, suffered significant losses due to the COVID-19 pandemic, which might have implications on their ability to become cost covering by 2024. While the impact of the COVID-19 pandemic had not been assessed in this external study, the International Air Transport Association predicts that the air passenger traffic will go back to its pre-COVID-19 levels by 2023.

The information received during the targeted consultation and stakeholder meetings shows that the **mechanism and the passenger thresholds for investment aid** contained in the Aviation Guidelines are appropriate, and that larger airports above 5 million passengers p.a. seem to have no need for investment aid. However, both the public consultation and the Aviation external study indicated that the existing investment aid intensities for very small airports of 75% do not reflect current market needs. In particular small airports below 200,000 passengers p.a. are unable to provide the 25% own contribution for the necessary investments.

¹⁶⁵ Aviation external study.

As part of SAM, the **criterion of the “catchment area”** of an airport was introduced in order to create a safeguard to avoid distortion of competition due to aid to airports. This objective has been achieved partly since the Commission only in two instances,¹⁶⁶(both concerning new or recent airport infrastructure) concluded that the aid to an airport would lead to the duplication of unprofitable airport infrastructure or creation of unused capacity. On the one hand, in all cases of established infrastructure, the Commission has come to the conclusion that due to different business models of the airports in the same catchment area or due to other factors aid to the airport was unlikely to have a negative effect on competition. On the other hand, the Aviation external study observed that, in particular regional and medium size airports perceive their own catchment area to be much larger than the 100 km or 60 minutes travelling time indicated by the aviation rules.

f) Risk Finance aid rules (Risk Finance Guidelines and relevant GBER articles)

Section 3 GBER and the Risk Finance Guidelines mainly target SMEs either before establishment or up to 7 years after their first commercial sale. These companies are the ones mostly affected by the existing **market failure** preventing SMEs from attracting the financing required for them to grow and succeed.

The Risk Finance external study and the targeted consultation carried out by DG Competition with Member States confirm the **general adequacy of the rules** as a means to address this market failure. The Risk Finance external study¹⁶⁷ also shows that the rules specifically address those companies mostly affected by the market gap.¹⁶⁸ This is also confirmed by the targeted consultation: 15 out of 19 Member States’ responses to the targeted consultation make specific reference to the existence of a market failure regarding SME access to finance and 10 of them deem that the rules contribute to tackle this specific market failure. However, in spite of the overall positive feedback, stakeholders as well as case practice show the need for limited clarification and streamlining of some provisions.

The requirement of the current rules to ensure private participation (with varying thresholds) plays a substantial role for the intended **crowding-in of additional private capital**. The Risk Finance external study confirmed that they could attract additional private funds. The Risk Finance external study also confirmed that (i) beneficiaries have in general gained relevant expertise for attracting additional funds, (ii) the presence of public money functions as a reassuring signal to investors, further supporting private participation¹⁶⁹. The case studies carried out by the external experts also generally show consistent results in this respect.

According to the Risk Finance external study, a **lack of critical size of financial markets and investor bases in certain countries** (e.g. Poland, Romania and Greece) constitutes a limiting factor for attracting private capital. This is corroborated by the fact that 10 Member States out of 19 indicated in the targeted consultation that these requirements were sometimes difficult to meet in their

¹⁶⁶ Zweibrücken airport, SA.27339 and Gdynia airport, SA.35388.

¹⁶⁷ Interviews with stakeholders conducted by the external experts.

¹⁶⁸ In particular, a majority of beneficiaries (74%) and financial intermediaries (55%) agree.

¹⁶⁹ During the interviews conducted by the external experts conducting the Risk Finance external study, 89% of financial intermediaries have indicated that commercial financial providers have continued investing alongside the public measures, or even increased their investments.

jurisdictions. However, in its analysis, the Commission has to balance that concern against the fact that the requirement to ensure private participation is a key element in the SME access to finance framework not only to foster crowding in, but also to ensure market driven investments.

On the level of individual beneficiaries, the Risk Finance external study seems to confirm that the rules may actually have had a **pro-competitive effect**: on the one hand, a majority (71%) of beneficiaries interviewed by the external experts has stated that they had been able to improve their competitive position in their market thanks to the aid schemes. On the other hand, the external experts suggest that many of those companies absent the aid would not have survived long enough to impose competitive pressure on incumbents in their respective markets.

In light of the above, the available evidence suggests that the existing rules **have in general been effective** in crowding-in additional private capital and on the level of competition both among financial providers and among beneficiaries in the SME financial market.

g) *STEC*

The limited number of only seven export-credit insurance schemes notified since the entry into force of the STEC in 2013 represents an indication that **the private market is generally functioning well**. This corresponds to recently published information by the global export credit and investment insurance association Berne Union, according to which public credit insurance predominantly regards longer-term transactions¹⁷⁰, leaving to a large extent the short-term business in marketable countries to be catered for by the private insurance market.¹⁷¹

The fact that **no formal complaints were** submitted to the Commission with respect to short-term export-credit insurance could be seen as a confirmation that the current rules ensure sufficiently well that any distortion of competition is kept to the minimum. In addition, the large majority of respondents to the targeted consultation (70% with respect to competition amongst insurers and 60% with respect to competition amongst exporters) found that the STEC **achieved its main objective** of ensuring an adequate competition level between players in the short-term export-credit insurance market. In the public consultation, the majority of respondents who expressed a view (58%) stated that the scope of the STEC is adequate, while the majority of those who expressed a view (over 96%) were of the opinion that the STEC rules **reduced, at least partially, the risk of subsidy race** among Member States. In particular, 46% of all respondents (57% of public authorities) agreed that STEC reduced subsidy races, while 41% (43% of public authorities) were of the opinion that STEC partially reduced subsidy races.

The available evidence thus suggests that the STEC **reached the intended purpose** of ensuring that State aid does not distort competition in the internal market among private and public or publicly supported export-credit insurers as well as among exporters in different Member States.

¹⁷⁰ John Lorié: Public credit insurance benefits international trade. But How much? (Berne Union Newsletter, July 2019, p. 12).

¹⁷¹ Ferdinand Schipfer: ECAs and the aid community – two universes in close proximity (Berne Union Newsletter, May 2019, p. 9).

h) *IPCEI*

The rules for IPCEI aim at ensuring that the supported projects represent an important **contribution to the EU's objectives** such as economic growth, jobs and competitiveness in view of their positive **spill over effects** on the internal market and EU society.

The relatively limited case practice on the application of the IPCEI Communication¹⁷² may constitute limitations in evaluating those rules, and hence the evaluation was mainly based on stakeholder feedback.

Nevertheless, the emergence of two major RDI related IPCEIs in the last two years gives a positive indication that, thanks to the clarifications brought by the IPCEI Communication, Member States see **more scope for notifying aid for the execution of IPCEIs**. More than 85% of respondents in the targeted consultation (Member States' authorities and members/stakeholders of the Strategic Forum for IPCEIs¹⁷³) took the view that the IPCEI Communication has the potential to facilitate the emergence of IPCEIs and provide Member States with a tool to address market failures in financing large projects of a strategic importance for the EU, and approximately 90% of respondents in the public consultation considered that the IPCEI Communication has achieved the objective of facilitating the emergence of IPCEIs, of which 26% "to a large extent".

In addition, more than 85% of contributors to the public consultation indicated that the IPCEI Communication allowed for **clearer and more consistent rules**. However, some comments corroborated by the Commission case practice suggest that some notions and definitions (e.g. on first industrial deployment, spillover effects, integrated projects) have proved particularly difficult to interpret. Concerns were also expressed by participants in the targeted consultation with regard to the eligibility requirements. Therefore, it may be necessary to slightly amend/ improve the definition of certain notions.

With regard to the **minimum number of participating Member States** it emerged from the consultations that the requirement of at least two Member States alone might not be sufficient to allow for a geographically balanced participation of Member States. That could contribute to an undesired effect of deepening the imbalances in the economic development of Member States or regions. In addition, it may not be adequate to ensure that the benefits of an IPCEI extend to a wide part of the EU. It may therefore be necessary to enhance IPCEIs' European character by slightly increasing the minimum number of participating Member States and providing for additional openness.

¹⁷² Following the entry into force of the IPCEI Communication, the Commission adopted two decisions approving State aid for an IPCEI consisting in an infrastructure project (Commission decisions C(2015) 5023 final and C(2020) 1683 final on the Financing of the Fehmarn Belt Fixed Link project (SA.39078)), and two decisions approving State aid for the execution of IPCEIs in the area of RDI, one in December 2018 (Commission decision C(2018) 8864 final on the IPCEI on Microelectronics (SA.46578, SA.46705, SA.46590, SA.46795)) and one in December 2019 (Commission decision C(2019) 8823 final on the IPCEI on Batteries (SA.54793, SA.54794, SA.54796, SA.54801, SA.54806, SA.54808, SA.54809)).

¹⁷³ See Commission Decision C(2018)475 of 30.1.2018 setting up the Strategic Forum for Important Projects of Common European Interest. The Strategic Forum is composed of: (a) individuals appointed in a personal capacity; (b) organisations representing the interests of academia and research, finance, Industry, SMEs and employees and workers; (c) Member States' authorities; (d) other public entities.

Further, responses to the general public and targeted consultations indicate that **additional guidance** on the IPCEI Communication would have been welcomed as regards the types of spill-over activities that the Commission would consider acceptable. The respondents also indicated that the strengthening of the role of the Commission as a facilitator of the IPCEI would contribute to ensuring the openness of the projects to all Member States. Further, a significant level of uncertainty is perceived by stakeholders as to the procedure that should be followed in case additional Member States or additional individual projects from the participating Member States wish to access an already existing and approved IPCEI. The rules applicable to such situations may therefore need to be clarified to guarantee a sufficient level of legal certainty, on the basis of the experience gained in individual cases.

A significant majority¹⁷⁴ of the respondents in the targeted consultation indicated that the so-called “**matching clause**”¹⁷⁵, provided for in paragraph 34 of the IPCEI Communication, is appropriate to meet its objectives.

i) Rescue and Restructuring Guidelines

The Rescue and Restructuring Guidelines adopted in 2014 as part of SAM are based on the 2004 Rescue and Restructuring Guidelines. However, the basic principles of the Rescue and Restructuring Guidelines were laid down long before, as the European Commission at least since the 1970s allowed State aid to undertakings in difficulty and specific guidelines were adopted in 1994, 1997, 1999 and 2004. Given **the low number of cases under the 2014 Rescue and Restructuring Guidelines**, in particular as concerns compatible restructuring aid (only six cases), the case practice is not sufficient to evaluate all the changes brought about in the 2014 modification of the Guidelines. There is general consensus that rescue and restructuring aid is one of the types of aid that is most distortive to competition and detrimental to productivity and should be allowed only under strict conditions. The Fitness Check thus focused in particular on evaluating the appropriateness of the **definition of the undertaking in difficulty** (for more details see Section “*Correct definition of undertakings in difficulty*”).

Correct definition of undertakings in difficulty

An important horizontal safeguard ensuring that "good aid" is promoted is the general **exclusion of undertakings in financial difficulty** from obtaining other aid than rescue and restructuring aid. The safeguard is based on the premise that companies in financial distress should restructure their operations first and are not

¹⁷⁴ 50% of respondents to the IPCEI targeted consultation (17 out of 34, involving both Member States authorities and other stakeholders) agreed, while 26.5% (9 out of 34) disagreed, and 23.5% (8 out of 34) did not know.

¹⁷⁵ Point 34 of the IPCEI Communication, according to which “in order to address actual or potential direct or indirect distortions of international trade, the Commission may take account of the fact that, directly or indirectly, competitors located outside the Union have received (in the last three years) or are going to receive, aid of an equivalent intensity for similar projects. However, where distortions of international trade are likely to occur after more than three years, given the particular nature of the sector in question, the reference period may be extended accordingly. If at all possible, the Member State concerned will provide the Commission with sufficient information to enable it to assess the situation, in particular the need to take account of the competitive advantage enjoyed by a third country competitor. If the Commission does not have evidence concerning the awarded or proposed aid, it may also base its decision on circumstantial evidence”.

suitable vehicles for the promotion of objectives of common interest. Good aid may be also wasted if the company goes out of business when carrying out an aided project due to its difficulties. For that reason, companies in difficulty are excluded from most of the other types of aid and are normally eligible only for rescue and restructuring aid which is subject to strict conditions due to its distortive effect.

A correct definition of an undertaking in difficulty ("UID") capturing a strong likelihood that the company will run out of business if not restructured ensures the effectiveness of all other types of aid. This is particularly important in case of GBER as it is applied by the Member States' authorities directly.

Within the framework of SAM the definition of an **UID was modified** in 2014 compared to the baseline scenario by (i) removing the soft criteria, i.e. any situation where the usual signs of an undertaking being in difficulty are present without quantifiable ratios to measure the difficulty, (ii) extending the time frame of calculation of the capital disappearing following losses criterion (i.e. not requiring a 25% loss in the preceding year, which was in the definition since 1999), (iii) adding share premium to share capital for the calculation of capital lost (before share premium was not added to share capital and could absorb cumulated losses) and (iv) introducing a new criterion combining a debt to equity ratio and an EBITDA to interest coverage ratio. Since SAM, the undertakings in difficulty are defined as follows¹⁷⁶:

Box 1: Definition of an undertaking in difficulty

[A]n undertaking is considered to be in difficulty if at least one of the following circumstances occurs:

- a) In the case of a limited liability company, where more than half of its subscribed share capital⁽¹⁾ has disappeared as a result of accumulated losses. This is the case when deduction of accumulated losses from reserves (and all other elements generally considered as part of the own funds of the company) leads to a negative cumulative amount that exceeds half of the subscribed share capital.*
- b) In the case of a company where at least some members have unlimited liability for the debt of the company), where more than half of its capital as shown in the company accounts has disappeared as a result of accumulated losses.*
- c) Where the undertaking is subject to collective insolvency proceedings or fulfils the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors.*
- d) In the case of an undertaking that is not an SME, where, for the past two years:*
 - i. the undertaking's book debt to equity ratio has been greater than 7,5 and*
 - ii. the undertaking's EBITDA interest coverage ratio has been below 1,0.*

⁽¹⁾ Where relevant, 'share capital' includes any share premium.

DG Competition carried out a **detailed analysis of the modified UID criteria compared to corporate ratings applied by rating agencies to see whether the**

¹⁷⁶ See recital 20 of the Rescue and Restructuring Guidelines.

UID criteria captures companies which are likely to go out of business. The analysis is based on the 2017 and 2018 financial data of all companies in EU28 with (1) Standard and Poor's (S&P), with focus on ratings of BB+/BB/BB-, B+/B/B- and CCC+/CCC/CCC-, and (2) credit scores assigned by the CreditModel of S&P. First, DG Competition investigated the debt to equity, EBITDA interest coverage and disappearing capital ratios of companies in the above rating groups. Second, DG Competition analysed what are the ratings and credit scores of companies, which fulfil the combined criterion of interest coverage and debt to equity ratio, and the disappearing capital criterion. Furthermore, it was also reviewed whether the companies subject to rescue and restructuring decisions were indeed companies in difficulty, and whether they met the financial criteria of UID. The detailed assessment is to be found in Annex 8.

As regards the **criterion of capital disappearing as a result of losses** (points a) and b) in Box 3), the analysis indicated that that criterion also qualified companies with investment grade ratings. This could be the result of the latest modifications of the UID definition, in particular because the capital lost criterion became more inclusive, as the share capital was increased by the share premium and the time frame for calculating the disappearing capital was extended by the modification of the UID definition in 2014. In practice those changes meant that (i) companies with high level of share premium could become an UID, and (ii) undertaking with historical losses could become UID as not only the recent operation of the undertaking is considered for determining whether an undertaking is in difficulty, but the performance throughout its operation. That approach is not problematic if the UID definition is used to verify eligibility for rescue and restructuring aid because it does not overly restrict eligibility. However, since the UID criterion of disappearing capital as modified in 2014 also excludes undertakings from GBER and other aid, beneficiaries that would not necessarily go out of business in the medium term may not be subject to counterchecks of their actual financial strength and not be eligible e.g. to RDI or environmental aid, which is not intended. Compared to the baseline scenario, the number of undertakings excluded from GBER and other aid could possibly be lower after the modification, as before 25% of the capital loss should have come from the preceding year and the share premium could be used to absorb losses.

The newly introduced **combined criterion of the debt to equity ratio and EBITDA coverage ratios** (letter d) of the box) indicates a high level of indebtedness, which cannot be served with the operating revenues of the company. The analysis confirmed that the combined ratios can with high probability identify companies going out of business in the short and medium term. In the baseline scenario, high indebtedness of the undertaking and a low EBITDA relative to the interest service, would not have excluded an undertaking from GBER and other aid. Therefore, that new criterion most likely is further limiting the number of undertakings eligible for GBER and other aid. However, the analysis of DG Competition has shown that highly indebted companies which are not able to service the interest charges of their debt are more likely to go out of business; therefore, that result is intended.

In addition, respondents to the public consultation took the view that the modified definition of UID **facilitates compliance with State aid rules, though that there are also elements to improve or clarify** (42% of the respondents who answered,

said 'yes', while 40% said 'partially', and only 18% said 'no'). Moreover, to the question to what extent have State aid rules achieved the objective of identifying companies in difficulty by setting correct definition criteria¹⁷⁷, 35 respondents (61.4%) replied 'to some extent only', 13 respondents said (13%) 'to a large extent' and 9 respondents replied 'not at all'. When asked to what extent has the definition for companies in difficulty achieved the objective of maintaining a competitive internal market¹⁷⁸, 22 respondents (47.8%) replied 'to some extent only', 17 respondents (37%) replied 'to a large extent' and 7 respondents said 'not at all'.

As regards the scope of the UID, some respondents also **suggested that the definition is not fit for certain types of companies**, in particular for start-ups, scale-ups, companies developing new technologies (especially when using venture capital financing)¹⁷⁹ or for public companies or NGOs¹⁸⁰.

It overall appears that among the UID criteria, the disappearing capital criterion is **overly conservative** on a stand-alone basis. In effect that criterion may be met by companies with an investment grade rating which are not expected to default on their payments. They could be companies whose business model is based on limited share capital, companies with high level of share premium, companies with high historical losses, or, more generally, companies that would not go out of business in the medium term with near certainty and, therefore, were not intended to be excluded from good aid.

Overall, based on the econometric analysis and stakeholder feedback, the UID criterion largely meets its objective to identify companies in difficulties correctly but it is not entirely clear and easy to apply for national authorities and guidance and/or clarification might be needed.

Avoiding subsidy races

Avoiding subsidy races refers to measures and not the overall spending levels of a Member State.

The common principles for the assessment of compatibility ensure that the amount of aid is kept to the minimum necessary and proportionate to achieve an objective of common interest. In other words, if for every State aid measure, Member States must demonstrate, that it is kept to the minimum to change the behaviour of companies and if the same change in behaviour could have been obtained with less aid, these principles inherently thereby ensure that Member States are not spending "too much" overall. In addition, due to the principle of "cumulation of aid", all aid measures related to each project need to be taken into account when assessing the aid intensities. This guarantees that the aid is limited to the minimum necessary for the activity to take place. It has been confirmed that those common principles are valid and correctly defined (see beginning of Section 5.1.1).

There are several safeguards to ensure that there is no excessive spending by Member States with respect to a specific project. Compatible State aid measures are often capped by an absolute amount, others by a maximum aid intensity (i.e. the aid

¹⁷⁷ See replies to Q5.10a of the public consultation.

¹⁷⁸ See replies to Q5.10b of the public consultation.

¹⁷⁹ See e.g. position papers of Germany, France, Luxembourg or the Netherlands.

¹⁸⁰ See the position paper attached to the reply of Romanian authorities to the public consultation.

cannot exceed a certain maximum percentage of well-defined eligible costs), some undergo a strict funding gap calculation. There are strict cumulation rules stipulated by the various SAM instruments: in principle, State aid is always given to a specific undertaking (or undertakings) for a specific purpose or for a well-defined project and State aid cannot be given for the same purpose twice. So-called “operating aid” is also normally prohibited. In addition, artificial splitting of aided projects in order to benefit from the GBER is not allowed by the GBER conditions or under other compatibility rules.

Moreover, State aid generally *complements* private money and is designed in a way to attract additional private investment. For instance, when assessing rescue and restructuring measures, own contributions by the company and burden sharing is an unavoidable criterion for compatibility. In other instances, the aid intensity is capped at a certain share of eligible costs of the aided project while the remaining costs of the project need to be financed from private funds.

It is also important to underline that under the cohesion objective, regional investment aid can only be granted in the Union’s most disadvantaged regions – thus, “wealthier” Member States cannot make use of such aid. The RAF external study also evidenced that regional aid rules prevent wasteful subsidy races, when regional authorities compete with each other to attract investment to their region. The regional aid rules reduced regional State aid eligibility and maximum aid intensities compared to the previous regional aid rules and it prohibited State aid from relocating existing investment between Member States. In theory, those measures restricted aid granting authorities in their ability to bid for investments against other EU regions.¹⁸¹

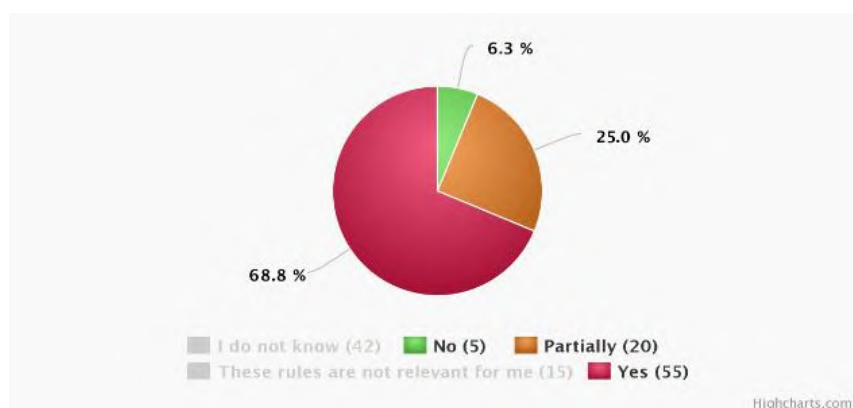
In the public consultation there seemed to be an agreement that the SAM rules have reduced the risk of subsidy races in the EU. In particular, **the shift to more GBER measures was regarded as an appropriate tool to avoid subsidy races**. As shown by Figure 21 below 69% of respondents stated that the new GBER contributed to avoiding subsidy races (for public authorities only, this rate was even higher 73%). No public authority replied in the negative). One stakeholder mentioned in particular: *“Subsidy race between EU Member States has been successfully restricted.”*¹⁸²

¹⁸¹ RAF external study.

¹⁸² See replies to Q15.1 of the public consultation.

Figure 21: Replies to question 4 of the public consultation

Has the GBER reduced the risk of subsidy races in the EU?



As regards individual rules, the highest share of negative replies to that question concerned **Aviation rules** (41.4% replied "no"). The results of the Aviation external study suggest that this is likely to be related to the problems with compliance with the rules for operating aid (see for more details the Section on Aviation rules).

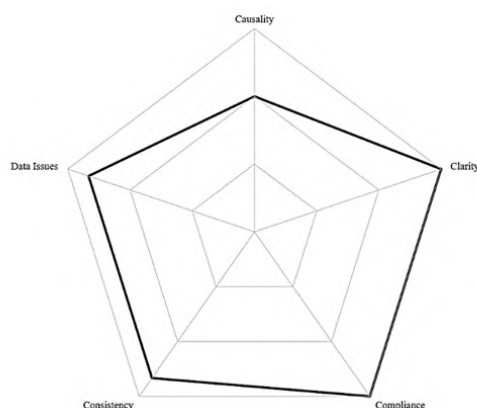
Ex-post evaluation of the implemented national measures as a way to ensure “good aid”

Traditionally, State aid control was mostly based on a system of ex-ante scrutiny and compatibility assessment. The relevance of the requirement for ex-post evaluation of the implemented national measures stems from the fact that its introduction has **allowed to “close the circle” of the State aid assessment cycle and ensure that ex-post evaluation results can be used in the policy design of future State aid measures**. In that sense, the inherent role of State aid evaluation is to analyse the EU added value of the individual State aid schemes by assessing their incentive effect, proportionality, appropriateness, and eventual distortions to competition and trade.

So far, only limited evidence is available on the effectiveness of the requirement. As indicated above, most schemes will deliver the final evaluation report later in 2020. Based on the six final reports already received¹⁸³, the average quality of the State aid evaluations completed is generally positive. Member States are producing clear documents that are compliant with the approved evaluation plans. The quality and limitations of the data are addressed in detail and the (overall positive) results of the counterfactual impact evaluations are credible. However, there is still limited focus on indirect effects. DG COMP and the JRC have therefore already planned a meta-analysis of all evaluation reports submitted by the end of 2020.

¹⁸³ DG Competition and the JRC have concluded an administrative arrangement for the “Support to the quality assessment of evaluation plans and reports in the area of State Aid, 2018-2020” (“EVALSA”). The JRC analyses in detail the characteristics and overall quality of all evaluation plans and evaluation reports received.

Figure 22: Summary analysis of the characteristics of final evaluation reports received



Current evaluation rules **focus on the final evaluation report**, mentioning that it has to be submitted to the Commission six months before the end of the scheme at the latest. (An overview table on the six reports received so far is in Annex 9.) Although **interim reports** are a common practice, there is no binding requirement to produce them. A more systematic use of those tools could be beneficial to gather early information on the effectiveness of the schemes and assess data quality or identify potential data gaps.

Those considerations are supported by the results of the public consultation. Overall, the majority of respondents expressed a positive assessment of the ex-post evaluation rules, acknowledging that this requirement has facilitated the compliance with State aid rules (55% of all respondents 81% of public authorities). Only 26%, 14 respondents (out of which 10% or 2 public authorities) replied that the evaluation requirement did not at all facilitate the compliance with State aid rules. As the requirement for ex-post evaluation of the implemented national measures concerns only a limited number of schemes (see Section 3.1.1), the questions related to ex-post evaluation were only answered by roughly one third of the respondents to the public consultation (between 46 and 53 out of 137). Most respondents were public authorities (around 50% on average).

In terms of the characteristics (and especially size) of the schemes assessed, 85% of the respondents believe that the **threshold for ex-post evaluation is appropriate or even too high** (the latter being reported by 33%) thereby suggesting that the requirement for ex-post evaluation of the implemented national measures could be applied to a larger share of schemes in the future.

Some answers to the public consultation **suggested possible ways to improve its application**, for instance by linking the threshold to the size of the sector or the economy. Internal DG Competition analyses on all State aid cases between 2015 and 2019 did not find substantial differences between applying a standard threshold across all Member States and using different weighting systems by sector and/or Member State. However, case practice has shown that the reference to the “average annual State aid budget” (instead of an overall budget or the budget for any specific year) is a potential source of uncertainty, as Member States may realise that they have exceeded the ex-post evaluation threshold only after several years into the implementation of the scheme. Moreover, case practice shows that the ex-post

evaluation of short-term schemes (with a duration of one to three years) is problematic, since there is only very little data available for the exercise¹⁸⁴.

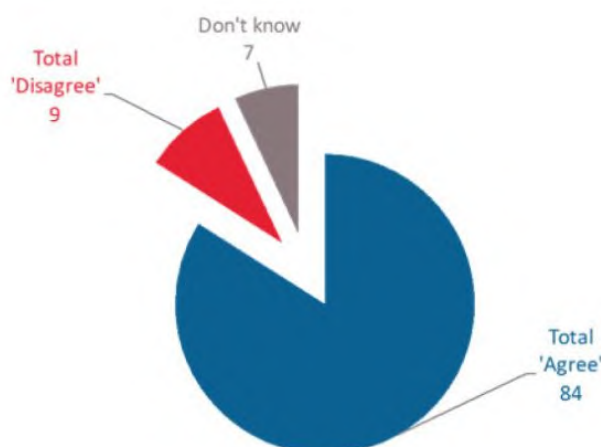
Transparency to foster market discipline

By providing publicly accessible information on State aid interventions that might have potentially distortive effects on competition and intra-EU trade, the transparency requirements **foster market discipline and assist in ensuring that Member States target their support measures in line with the applicable State aid rules** based on the common principles.

According to a flash Eurobarometer commissioned by DG Competition in 2016¹⁸⁵ to discover citizens' perceptions of transparency in State aid, citizens' attitudes towards transparency, and their opinions about the ease of accessing relevant information, overall, 84% of citizens agree that they should have full access to information about State aid given to companies see Figure 23.

Figure 23: Results of the 2016 Eurobarometer flash

“Please tell to what extent you agree or disagree with the following statement about state aid: Citizens should have full access to information about state aid granted by public authorities to companies (% -EU)”



Respondents to the Eurobarometer flash (53%) also believed that the most effective way to ensure transparency regarding State aid is to publish information automatically when public authorities give such aid.¹⁸⁶ Those Eurobarometer results show that citizens are seeking access to information regarding State aid and its effects, and therefore confirm that the necessity of transparency.

This corroborates with the findings of the public consultation, according to which transparency obligation enables companies to monitor, at least to some extent, their

¹⁸⁴ For example, considering the technical time to start spending, the fact that data is available only with a time-lag (usually) and that the final evaluation report is delivered 6 month before the end of the scheme, schemes of 3 years or less would only have 1 year of data available at most.

¹⁸⁵ See footnote 124.

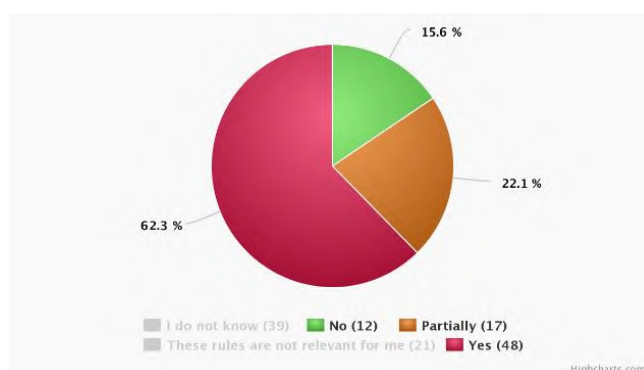
¹⁸⁶ Responses to the Eurobarometer question “Which of the following two options would be most effective for ensuring transparency about state aid? (% - EU)?” Source: see footnote 124 above.

competitors (according to more than 90% of the respondents) and promotes, at least to some extent, the accountability of Member States' actions (88%).

The public consultation also **confirms the effectiveness of the obligations** and hence the need to maintain and even extend them. Around 62% of the respondents confirmed that transparency has facilitated compliance with State aid rules – one of the main objectives of SAM. Only 15.6% of all respondents (15.2% of public authorities) replied that the new transparency requirement did not at all facilitate compliance with State aid rules.

Figure 24: Replies to question 2 of the public consultation

Based on your experience, did the new transparency provisions facilitate the compliance with the State aid rules by the Member States?



As regards the threshold triggering transparency obligation, 70% of the respondents in the public consultation believe that the **EUR 500,000 threshold is appropriate or even too high**.

5.1.2. SAM OBJECTIVE 2: BIG ON BIG, SMALL ON SMALL

As shown below, SAM did strike the right balance between allowing unproblematic aid without delays on the one hand (GBER) and focusing detailed scrutiny on the more distortive measures with significant impact in the market on the other hand.

Enhanced use of GBER for non-problematic aid

In the outset, it has to be noted that higher levels of *overall* State aid do not necessarily imply higher levels of competition distortions. Instead, aid must be well-designed and kept to the minimum necessary to meet its objectives. Better-targeted and less wasteful aid are therefore the objectives of SAM, not restricting higher levels of overall State aid. State aid control has continuously evolved in this regard. As mentioned above, many State aid measures are also co-financed by centrally managed or co-managed spending programmes or through the European Investment Bank and therefore intrinsically reflect the EU policy priorities, such as the green and digital transformations. It is hence also the EU's objective to spend the money in a well-targeted and less wasteful way.

The GBER did form the cornerstone of SAM, because its design put an emphasis on “manifestly compatible measures”. This does not mean, however, that GBER measures have become “invisible” to the Commission. The GBER conditions make

sure that in case an aid measure would not be manifestly compatible, it must be notified.

As also explained above, here is also a **presumption that higher levels of aid lead to higher distortions**. For instance, the *de minimis* Regulation is based on this presumption, namely that below a certain amount of support there is no distortion of competition. As also observed in the 2017 Oxera study on the magnitude of aid: “[w]hen considering the likely effects of an aid measure on competition, it can be helpful to put the size of the measure (in monetary terms) into the context of the size of the affected markets. As highlighted by the case studies selected for this report, the smaller the relative size of an aid measure, the smaller likelihood of that measure distorting competition in the affected market(s).” In the GBER, aid measures are often subject to so-called **notification thresholds**¹⁸⁷: once the aid amount exceeds a certain threshold, the entire aid amount falls outside the GBER and has to be notified individually (because the presumption is that higher aid amounts –depending on the aid measure and objective – need closer scrutiny).

In addition, for measures fulfilling the conditions of the GBER, monitoring efforts have increased with SAM as described in the present Fitness Check, thus ensuring that no unduly distortive measures slip under the GBER. Neither the ex-post monitoring exercise, nor the feedback from stakeholders (e.g. competitors of the beneficiaries) indicate that there would be any systemic problem with more aid distorting competition being granted under the GBER as compared to the period before the SAM.

Member States’ own powers for evaluating potentially distortive measures have increased as outlined in the present Fitness Check. The frequent use by the Member States of the possibility to ask interpretation questions on various GBER provisions confirms that they do take compliance with GBER seriously. This is even more important in view of the case-law clearly requiring that in order to benefit from the GBER, an aid measure must fulfil all the relevant GBER conditions which must be interpreted strictly as otherwise it would constitute an unlawful aid that would need to be recovered¹⁸⁸. Moreover, the introduction of the transparency requirement enables the competitors to check the aid received and to submit complaints to the Commission if there are any doubts on the compliance with the rules.

The data reported by the Member States as presented in the State Aid Scoreboard¹⁸⁹ demonstrate that compared to the baseline scenario the Member States are **increasingly using GBER measures since the implementation of SAM**. In 2018, Member States implemented 1,666 new¹⁹⁰ GBER measures representing **94.7% of new State aid measures**. That upward trend gets more pronounced each year in the

¹⁸⁷ **That is also a legal requirement.** Pursuant to the **Enabling Regulation** (Article 1(2)(c) of Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid, OJ L 248, 24.9.2015, p. 1.) which is the legal basis for the GBER: “The regulations [...] shall specify for each category of aid [...] thresholds expressed in terms of aid intensities in relation to a set of eligible costs or in terms of maximum aid amounts or, for certain types of aid where it may be difficult to identify the aid intensity or amount of aid precisely, in particular financial engineering instruments or risk capital investments or those of a similar nature, in terms of the maximum level of state support in or related to that measure, [...]”

¹⁸⁸ See e.g. Case C-349/17- 5 March 2019 - Eesti Pagar AS v. Ettevõtjate Arendamise Sihtasutus, EU:C:2019:172.

¹⁸⁹ https://ec.europa.eu/competition/state_aid/scoreboard/index_en.html.

¹⁹⁰ “New” measures are measures for which positive expenditure was first reported in 2018.

actual expenditure of the schemes: among the measures active in 2018, 86.0% are GBER measures, against 54.8% in 2014.

Therefore, the **objective of SAM aiming at enhanced use of the GBER as compared to the baseline scenario has been clearly achieved as regards the number of measures.**

However, the **increase of the share of the GBER in terms of expenditure has been less significant.** Even though the share of GBER measures in the aggregated expenditure keeps increasing, the relative importance of the GBER becomes more visible once *the largest State aid scheme in the EU, Erneuerbare-Energien-Gesetz 2014-2017 (or EEG 2014-2017)*¹⁹¹ is singled out (see Figure 11).

*Table 6: Breakdown of State aid spending by type of procedure*¹⁹²

Year	BER	GBER (2008)	GBER (2014)	Non (G) BER	Share of all GBER in expenditure excluding the largest measure (%)	Share of notified cases in expenditure excluding the largest measure (%)
2009	5.4	8.6	0.0	51.8	14.2	85.8
2010	3.0	9.9	0.0	50.2	16.5	83.5
2011	1.9	15.1	0.0	40.8	27.0	73.0
2012	1.2	19.5	0.0	43.6	30.9	69.1
2013	1.4	20.1	0.0	40.6	33.2	66.8
2014	1.4	14.6	10.0	40.8	37.6	62.4
2015	0.7	6.8	21.7	39.6	41.9	58.1
2016	0.6	4.1	29.5	39.4	46.0	54.0
2017	0.4	3.1	38.5	44.4	48.4	51.6
2018	0.2	2.6	42.4	46.8	49.0	51.0

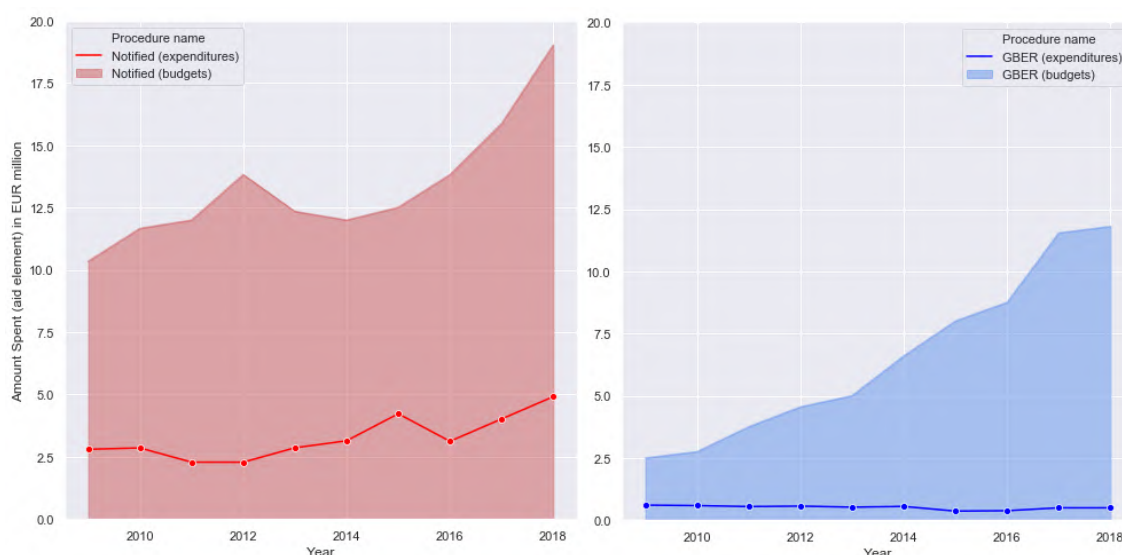
If we exclude the largest State aid scheme, the share of GBER in State aid spending (49.2%, i.e. EUR 45 billion) is **at a comparable level to spending for notified cases** (51%, i.e. EUR 46.8 billion) in 2018. Moreover, the share of notified measures in total expenditure is on a stable downward trend since 2009 at least (Table 6 above). In 2018, among the measures with reported expenditure above EUR 1 billion, 7 out of 20 (around one third) are GBER measures, while that proportion reaches 48.4% for measures with reported expenditure above EUR 100 million (75 GBER measures out of 155 measures).

Therefore, while the share of GBER measures in the total State aid spending has been increasing as well, it is significantly lower than in case of the number of measures. However, this is also a **logical consequences of the “big on big, small on small” approach** as the notified measures involve in general significantly higher amounts of aid both as regards the planned budget and actual expenditure (see Figure 25). They are thus more likely to lead to more significant distortions of competition and thus merit a more detailed and ex-ante scrutiny.

¹⁹¹ In light of the judgment of the European Court of Justice in Case C-405/16 P concerning the Erneuerbare-Energien-Gesetz 2012, expenditure corresponding to this scheme has been removed from the 2019 Scoreboard.

¹⁹² In EUR billion, with identification of the largest State aid measure. Source: State aid Scoreboard.

Figure 25: Median of budgeted and actual expenditures of State aid schemes¹⁹³



In addition, the overview of the evolution of the number of active measures under the individual GBER articles/objectives provided in Table 7 indicates that the **growing uptake of GBER compared to the baseline scenario is significant in all respective areas.**

Table 7: Number of active measures under the individual 2014 GBER articles/objectives

Objective	Article ("Art.")	2014	2015	2016	2017	2018
RDI	Fundamental research (Art. 25(2)(a))	7	33	64	68	81
	Industrial research (Art. 25(2)(b))	25	125	197	292	446
	Experimental development (Art. 25(2)(c))	26	142	203	285	402
	Feasibility studies (Art. 25(2)(d))	3	24	40	63	106
	Aid for the establishment of research infrastructures (Art. 26)	3	6	19	31	53
	Aid for innovation clusters (Art. 27)	4	36	86	107	153
	Innovation aid for SMEs (Art. 28)	7	54	73	102	139
	Aid for process and organisational innovation (Art. 29)	1	14	25	42	56
	Aid for research and development in the fishery and aquaculture sector (Art. 30)	0	8	3	5	9
	RDI – TOTAL	76	442	710	995	1445
Regional Development	Regional aid - investment aid (Art. 14) for scheme	28	103	151	196	255
	Regional aid - investment aid (Art. 14) for ad-hoc	15	33	12	28	207
	Transport costs of goods in eligible areas (Art. 15(2)(a))	2	5	5	5	5
	Additional costs in outermost regions (Art. 15(2)(b))	7	9	9	8	8
	Regional urban development aid schemes (Art. 16)	3	1	1	1	3

¹⁹³ From 2009 to 2018 in EUR million. Source: State aid Scoreboard.

Objective	Article ("Art.")	2014	2015	2016	2017	2018
	Investment aid for local infrastructures (Art. 56)	3	10	34	86	76
	Regional Development – TOTAL	58	161	212	324	554
Compensation of damages caused by natural disaster	Aid to make good the damage caused by certain natural disasters (Art. 50)	3	13	22	24	26
Culture	Aid for culture and heritage conservation (Art. 53)	64	711	793	535	663
	Aid schemes for audio-visual works (Art. 54)	9	68	114	154	185
	Aid for sport and multifunctional recreational infrastructures (Art. 55)	1	24	49	66	124
	Culture – TOTAL	74	803	956	755	972
Employment	Aid for the recruitment of disadvantaged workers in the form of wage subsidies (Article 32)	1	25	37	53	55
	Aid for the employment of workers with disabilities in the form of wage subsidies (Article 33)	2	16	22	29	32
	Aid for compensating the additional costs of employing workers with disabilities (Art. 34)	5	16	21	26	34
	Aid for compensating the costs of assistance provided to disadvantaged workers (Art.35)	0	0	3	2	2
	Employment – TOTAL	8	57	83	110	123
Environmental protection including energy savings	Investment aid enabling undertakings to go beyond Union standards for environmental protection or increase the level of environmental protection in the absence of Union standards (Art. 36)	5	29	42	61	92
	Aid for early adaptation to future Union standards for SMEs (Art. 37)	5	8	8	8	9
	Environmental investment aid for energy efficiency measures (Art. 38)	9	41	60	86	116
	Aid for energy efficiency projects (Art. 39)	3	5	2	7	7
	Investment aid for high-efficiency cogeneration (Art. 40)	3	9	13	13	18
	Investment aid for the promotion of energy from renewable energy sources (Art. 41)	10	39	55	90	109
	Operating aid for the promotion of electricity from renewable energy sources (Art. 42)	0	2	1	5	4
	Operating aid for the promotion of energy from renewable sources in small scale installation (Art. 43)	0	1	1	1	4
	Aid in the form of reductions in environmental taxes under Directive 2003/96/EC (Art. 44)	9	27	45	48	53
	Investment aid for remediation of contaminated sites (Art. 45)	1	6	12	22	18
	Investment aid for energy efficient district heating and cooling (Art. 46)	2	21	23	39	45
	Investment aid for waste recycling and re-utilisation (Art. 47)	1	3	4	7	8
	Investment aid for energy infrastructure (Art. 48)	6	3	6	16	16
	Aid for environmental studies (Art. 49)	6	16	24	29	34
	Environmental protection including energy savings – TOTAL	60	210	296	432	533

Objective	Article (“Art.”)	2014	2015	2016	2017	2018
Sectoral development	Investment aid for regional airports (Art. 56a)	n.a.	n.a.	n.a.	4	28
	Investment aid for maritime ports (Art. 56b)	n.a.	n.a.	n.a.	8	22
	Investment aid for inland ports (Art. 56c)	n.a.	n.a.	n.a.	1	2
	Sectoral development – TOTAL	n.a.	n.a.	n.a.	13	52
SMEs including risk capital	Investment aid to SMEs (Art. 17)	22	144	153	203	214
	Aid for consultancy in favour of SMEs (Art. 18)	2	14	42	77	99
	Aid to SMEs for participation in fairs (Art. 19)	0	4	15	25	31
	Aid for cooperation costs incurred by SMEs participating in European Territorial Cooperation projects (Art. 20)	0	2	6	9	8
	Risk finance aid (Art. 21)	6	19	24	25	34
	Aid for start-ups (Art. 22)	11	39	53	81	121
	SME aid - Aid to alternative trading platforms specialised in SMEs (Art. 23)	0	0	0	2	0
	Aid for scouting costs (Art. 24)	0	0	0	0	0
	SMEs including risk capital	41	222	293	422	507
Social support to individual consumers	Social aid for transport for residents of remote regions (Art. 51)	2	4	4	6	6
Training	Training aid (Art. 31)	18	109	113	158	174
Other	Aid for broadband infrastructure (Art. 52)	7	13	20	31	38

Table 7 demonstrates that the gradual increase in the total number of measures was significant in all main objectives covered by GBER. Moreover, the **number of GBER articles with no or only a minimal uptake is very limited** and most of the GBER articles are thus extensively used by the Member States.

Commission investigation focusing on the most distortive cases

Individual rules are now based on common assessment principles, which are more streamlined than before. By way of example, non-GBER measures must evaluate whether the aided measure has an incentive effect, where the counterfactual scenario (i.e. what would have happened if the aid had not been granted) is assessed against the future (what happens with the aid). Applying that common principle in all State aid instruments thus necessarily leads to evaluating the level of distortion introduced by the measure. SAM has therefore led, by applying the common principles, to the situation where the level of distortion is assessed almost automatically for all notified measures.

In general, State aid policy is constantly in the spotlight and the Commission’s services are regularly approached by Member States and stakeholders on various policy issues. Advisory Committee and Member States’ multilateral meetings in the legislative process or the SAM working group are instances where Member States can voice their opinion or raise issues.

Other stakeholders also have various ways to “express disagreement”. In particular, anybody is entitled to submit so-called market information to the Commission’s services while complainants with legal standing (e.g. competitors of a beneficiary of State aid) are entitled to submit a formal complaint, on which the Commission is

obliged to take a formal view through a decision. Interested parties and other Member States can submit comments on any case where an in-depth investigation has been opened. In addition, they have the right to challenge any of the Commission's State aid decisions in front of the Union courts. Furthermore, interested parties can even challenge the legality of GBER aid in front of the courts.

As a result of SAM the changes introduced to the rules were to further allow the Commission to focus its ex ante control on measures with a significant impact on the internal market, while allowing Member States to implement, under their own responsibility, well targeted measures expected to have only a limited impact on competition. That approach was for instance also confirmed by the 2017 Oxera study, where **based on an exemplary analysis**, the study concluded that when the amount of aid was small relative to the market size (less than 1%), the aid was unlikely to have distorted competition; likewise, the absolute amount of aid is considered to be a factor to determine the potential effects on competition.¹⁹⁴

The effective achievement of the objective of promoting the use of GBER and thus focussing Commission investigation on the most distortive cases was also largely **confirmed by many submissions to the public consultation**:

- *"There is no doubt that the widening of the exemptions of the GBER has simplified the grant process and sped up the relevant proceedings. The principle underlying the 2014 modernisation of State aid law (lean procedures for small-scale cases) has proven its worth and ought to be upheld."*¹⁹⁵
- *"The Dutch authorities endorse the general objectives of the State aid modernization process as started in 2012. Focusing enforcement on cases with the biggest impact on the internal market is an important principle that can be endorsed. The General Block Exemption Regulation (hereafter: GBER) is a good instrument to achieve this goal and is widely used in the Netherlands. Also improvement has been made in identification and definition of common State aid principles and in streamlining the State aid rules."*¹⁹⁶
- *"Overall, the 2014 SAM reform has been a success in many ways: the wider scope of the General Block Exemption regulation (GBER) has reduced the administrative burden of authorities and enabled the Commission to focus its scrutiny on cases with the biggest impact on competition."*¹⁹⁷

In addition, the public consultation indicates that the **increased use of GBER has generally not compromised the objective of ensuring a competitive internal market**. In reply to Question 5 enquiring whether according to the experience of the respondents the GBER achieved the objective of maintaining a competitive internal market, there was no negative reply while a majority of respondents considered that that objective has been achieved to a large extent (see Figure 26).

¹⁹⁴ The 2017 Oxera study.

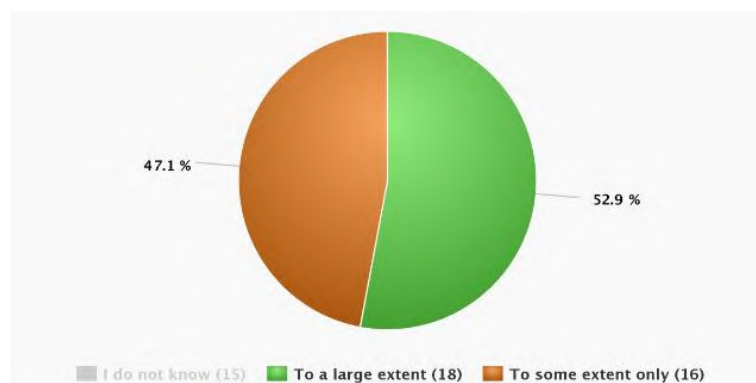
¹⁹⁵ See position paper by Germany, page 10.

¹⁹⁶ See the reply of the Dutch authorities to question 1.1 of the public consultation.

¹⁹⁷ See the position paper submitted by Finland, page 1.

Figure 26: Replies to question 5 of the public consultation

To what extent have the rules for low amounts of aid under the GBER achieved the objective of maintaining a competitive internal market?

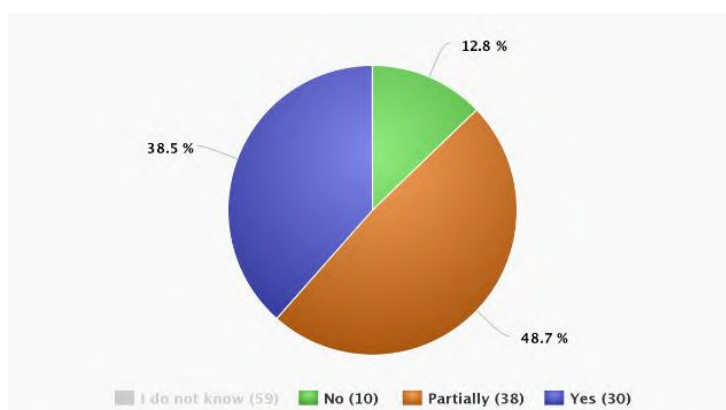


Also the **notification thresholds in GBER have been largely considered as appropriate**. Member States' authorities in their submissions indicated for example that “[i]n general the GBER thresholds are the correct ones, given the objective of focus on cases with the biggest impact.”¹⁹⁸, or that “the current notification threshold [in Article 4 of the GBER] are adequate. Any increase would lead to a disproportionate distortion of competition, which must be subject to [ex-ante] notification.”¹⁹⁹.

Question 3 sought the public view whether, as a result of SAM, the Commission succeeded in **focusing its scrutiny on cases having a significant impact** on the internal market. Only 13% of respondents (merely 3% of public authority) replied in the negative, while 87% (68) of all respondents (see Figure 27 below) and 97% (31) of all public authorities were of the opinion that this is the case, at least partially.²⁰⁰

Figure 27: Replies to question 3 of the public consultation

For SAM as a whole, has the Commission focused its scrutiny on cases having a significant impact on the internal market?



¹⁹⁸ See the reply of the Dutch authorities to question 5.1.2 of the public consultation.

¹⁹⁹ See the Position Paper submitted by Luxembourg, page 4.

²⁰⁰ For more granular results, see Annex 2.

5.1.3. SAM OBJECTIVE 3: FASTER ACCESS TO AID

As explained above, the third objective of the SAM reform was to ensure faster access to aid. That objective is strongly linked to the reduction of administrative burden and the clarity of the rules as compared to the baseline scenario. This will be assessed in detail in Section 5.2, the section evaluating the efficiency of the SAM reform.

5.2. EFFICIENCY

This section evaluates the efficiency of the rules subject to the Fitness Check and will mainly focus on the SAM rules. In a first step, it evaluates whether the SAM rules allowed to decrease administrative burden overall. In a second step, it tries to verify whether they played a role to ensure efficient State expenditure and avoid distortions on the internal market. In a third step, it assesses to what extent are the costs associated with SAM proportionate to the benefits it has generated.

The findings of the analysis on efficiency are subject to the limitations stemming from the stakeholder consultation and constraints on the possibility of full triangulation.

The analysis in this section has to be read together with Annex 8.

Have the SAM rules allowed to decrease administrative burden?

The analysis suggests that the SAM rules have to a certain extent allowed to decrease administrative burden. There still seems to be room for improvement, in particular with regard to the clarification of certain definitions and concepts.

In line with the “big on big and small on small” approach, the rapid proliferation of block-exempted cases since 2014 has been welcomed as an opportunity to shorten the average duration of Commission’s case assessment process, to allow Member States to grant State aid more easily and to create a more agile public administration compared to the baseline scenario. The large GBER uptake observed implies that State aid measures could be processed more rapidly than before SAM, since the increasing share of GBER measures does not require any procedure with and decisions from the Commission before being implemented.

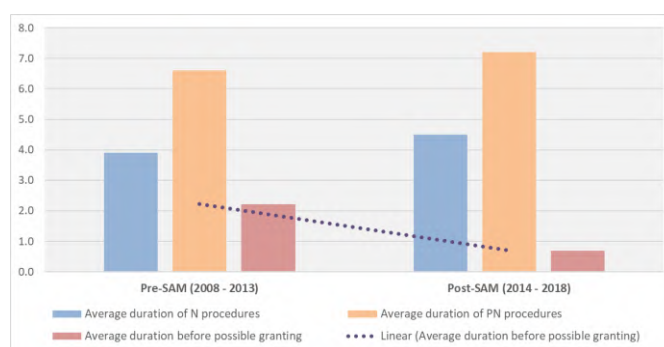
For the analysis below it is important to understand how block-exempted versus notified measures work in practice. In the case of **block-exempted measures**, the Member State designs its project to be fully in line with all the conditions of the GBER, which implies that the measure is compatible with the internal market. State aid can then be disbursed on the basis of the national scheme and no interaction/approval is needed from the Commission. With regard to **notified measures**, the Member States, in addition to whatever steps are needed at national

level, has to seek the approval of the Commission. This may include informal pre-notification contacts²⁰¹ and then the notification procedure²⁰² itself.

The increased use of GBER measures has also a significant impact on beneficiaries, because due to the omission of the procedure with the Commission, they have access to aid faster.

Figure 28 plots the average duration of notification and pre-notification procedures before (baseline scenario, see also Section 2.3.1) and after SAM and compares this with the number of months from the notification to the Commission of a new State aid measure to the moment Member States can start granting the aid. (As explained above in Section 2.1, the main counterpart of the Commission in State aid cases are the Member States.) While the average duration of both notification and pre-notification procedures has slightly increased after SAM, **the relevant impact of the GBER uptake can be seen in average time length before it becomes possible for Member States to grant the aid.** The latter **decreased** from about 2.2 months in the pre-SAM period to 0.6 months in the post-SAM period.

Figure 28: Average duration of procedures pre and post-SAM, in months²⁰³



²⁰¹ In the so-called pre-notification phase, the Member State contacts DG Competition informally, before formally notifying potential State aid measures to the Commission. Such contacts have several objectives. DG Competition and the Member State can discuss what information is needed for the notification of the State aid measure in question to be considered as complete. Pre-notification contacts generally also lead to better and more complete notifications. During the pre-notification contacts, DG Competition and the Member State can discuss the legal and economic aspects of a proposed measure in an informal and confidential manner before it is formally notified.

²⁰² Member States must wait for the Commission's decision before they can put the measure into effect. DG Competition start their preliminary examination of each notified measure when they receive its notification.

²⁰³ State aid Scoreboard. In more details, Figure 19 plots the average case assessment duration for the two periods 2008-2013 (*i.e.* Pre-SAM) and 2014-2018 (*i.e.* Post-SAM). First, only measures with a “starting date” between 1 January 2008 and 31 December 2018 are selected. The sample obtained is split further into two sub-samples following the same logic. The first sample only includes measures whose starting date is between 1 January 2008 and 31 December 2013 (*i.e.* Pre-SAM), while the second comprises all the remaining measures whose starting date is between 1 January 2014 and 31 December 2018. For each individual procedure, the duration is obtained by computing the difference (in months) between the “starting date” and the “end date”. The dates are obtained from ISIS, the internal case management application used in DG COMP. After computing all individual durations, the (total) average duration by type of procedure is estimated. The averages are calculated for three key procedure types; average duration of notified procedures (“N”), average duration of pre-notification procedures (“PN”) and a “total average” across N, PN and GBER procedures. The charts intends to show the effect of the State Aid Modernisation (SAM) on the average duration of the case assessment process in DG COMP. The inclusions of PN and N procedures shows the impact of the “big on big and small on small” strategy adopted by DG COMP as part of its modernisation process. As shown in figure 9, the average duration of both PN and N procedures is higher in the “Post-SAM” period. This suggests that DG COMP has been focusing its efforts on the biggest and most complex cases, as foreseen by the SAM.

It is also intuitive that focusing on the most complex and, potentially, distortive cases (with the most straightforward measures dealt with under the GBER) which tend to cover bigger budgets and spending than in the past, has resulted in an overall longer assessment process for notified measures. **This is in line with the “big on big, small on small” objective.** Moreover, a more detailed analysis at the level of individual State aid rules reveals that the increase is partly due to certain specific rules which in particular show a substantial increase in the average length of both notification and pre-notification procedures.²⁰⁴

The results of the public consultation showed that only 30% of the overall respondents **who expressed an opinion considered that the State aid rules subject to the current Fitness Check have not reduced the administrative burden** for public authorities **compared to the State aid rules in force before the State aid modernisation while the other 70% considered that those rules have reduced at least partially the administrative burden.** When singling out the replies of the public authorities - mostly affected with the State aid process (as explained in Sections 2.1 and further above) - themselves, only 23% reply that **their administrative burden has not been reduced with the new rules.**

Regarding the administrative burden for **beneficiaries of the aid**, although lower, there is still a majority of 54% of the overall respondents who confirmed that the State aid rules subject to the current Fitness Check have reduced at least partially the administrative burden for those stakeholders. **Respondents who replied “partially” highlighted the longer assessment process for complex cases**, as shown in Figure 18. *“The burden was significantly increased for large-scale projects and significantly reduced for small-scale projects”*²⁰⁵. *“The reporting of aid above 500,000 euros is too heavy”*.²⁰⁶ When filtering the replies of the public authorities only, the majority grows to 61% of the respondents considering a decrease, even partial, of the administrative burden. When filtering the replies by types of stakeholders:

- To the question whether SAM had reduced administrative burden for the beneficiaries (who could be public companies). out of the 33 replies received from public authorities, nine replied “Yes” and 11 replied “Partially” However, exactly half of the business associations, organisations and companies (16 out of 32) replied that that SAM (as a whole, and not specifically GBER) has not reduced administrative burden for the beneficiaries. Of nine stakeholders who provided some explanations, there is no real clarity and trend allowing to find explanations. Two of them point

²⁰⁴ For instance, the RDI Framework which registered the highest (increase from around 11 months to 24 months).

²⁰⁵ See replies to Q10 of the public consultation. The reply comes from a company active in microelectronics, therefore we can assume, the statement targets IPCEI projects in RDI area. Those types of projects are quite massive, involve many companies from several Member States, carry many uncertainties, involve a lot of funding and are exposed to many potential powerful EU and non-EU complainants. It is therefore normal for the Commission to have a more in-depth scrutiny on those projects. For instance, in December 2018, the Commission approved the plan by France, Germany, Italy and the UK to give EUR 1.75 billion public support to joint research and innovation project in microelectronics, while in December 2019, the Commission approved EUR 3.2 billion public support by seven Member States for a pan-European research and innovation project in all segments of the battery value chain.

²⁰⁶ See replies to Q10 of the public consultation.

to difficulty for SMEs to get access to aid or to fulfil conditions (which is not specific to State aid but seems rather linked to the SME recommendation, which is outside the scope of the Fitness check, one points to complexity of EEAG (which is not GBER, but a guideline, where the evidence in the present Fitness Check indeed suggests that it needs clarifications), another one to difficult tender process for wind turbine (which is a national issue), one points to burden and cost for small airports without more details and another one argues that calculation methods by EBITDA instead of cash flow bring complexity without more details (the aviation guidelines were looked into in detail by the present Fitness Check). Other stakeholders mention without much details to which instruments: “more bureaucracy in GBER”, “increase in administrative burden for training centres”.

The negative views from some businesses on decrease of administrative burden for beneficiaries are not representative in terms of issues or instruments or group of respondents. The issues raised often refer to details or particular situations and do not relate to the SAM architecture. In any case, it is acknowledged that if a beneficiary receives aid under GBER, it still has to comply with the eligibility and compatibility conditions (e.g. demonstrating that the company is not in difficulty, incentive effect, etc.) and those conditions are important for minimising distortions of competition.

When it comes to the general impact of SAM and the wider GBER on administrative burden compared to the baseline scenario, several Member States authorities raised positive results. Indeed the Finnish authorities argued: *“Overall, the 2014 SAM reform has been a success in many ways: the wider scope of the General Block Exemption Regulation (GBER) has reduced the administrative burden of authorities and enabled the Commission to focus its scrutiny on cases with the biggest impact on competition.* Similarly, the Belgian authorities mentioned: *“The intentions of the Commission with the State Aid Modernization (SAM) go in the right direction, in particular to tackle the administrative burden”* while the Dutch authorities endorsed *“the general objectives of the State aid modernization process as started in 2012. Focusing enforcement on cases with the biggest impact on the internal market is an important principle that can be endorsed. The General Block Exemption Regulation is a good instrument to achieve this goal and is widely used in the Netherlands. Also improvement has been made in identification and definition of common State aid principles and in streamlining the State aid rules. The Dutch authorities welcome the commitment by the European Commission for a swift decision-making process.* In the same vein, the Danish authorities found that: *“the GBER generally contains clear and comprehensive principles for assessing compatibility of state aid measures. The GBER provides legal certainty and level playing field for Member States and beneficiaries. The possibility to grant more state aid without prior notification to the Commission has contributed to lower administrative burdens. Therefore, we find that the GBER since 2014 generally has been fit for purpose. The current levels of notification thresholds and aid intensities have been comprehensive and should as a main rule be maintained.”* The German authorities summarise: *“There is no doubt that the widening of the scope of the General Block Exemption Regulation (GBER) has simplified the grant process and spe[el]d up the relevant proceedings. The principle underlying the 2014 modernisation (lean procedures for*

small-scale cases) has proven its worth and ought to be upheld.” One of the stakeholders also noted that “Real progress has been made to clarify the procedures and to cut red tape.”²⁰⁷

However, some Member States also suggested **room for improvement**: the Belgian authorities for instance raise areas of improvement such as *“the procedures to be followed are not sufficiently “user friendly” as the aim of the different procedures are not always clear to the different funding authorities. The Commission should avoid any duplication in the requested information and develop tools and regulations more in line with the concerns of the stakeholders.*

The efficiency of the rules is also linked to their simplicity. According to the public consultation and for all specific rules, a minimum of 84% of the respondents (who expressed an opinion) considered that **SAM package led at least partially to clearer rules compared with the baseline scenario.**²⁰⁸ Stakeholders also emphasise that, while SAM was a step in the right direction, **further clarification of certain concepts and definitions might be necessary.** *“We do believe that both the revised GBER [has] broadly met their objectives in delivering clearer rules.”²⁰⁹, The State Aid Modernisation [...] has helped clarify and streamline competition processes (notification, etc.) [...] “²¹⁰ “[M]ore clarification is required with regards to certain definitions/terms used in various State aid acquis.”²¹¹ “Overall, the current set of State aid rules are a major step forward compared to the last set and have simplified and clarified many areas including those that were causing issues of interpretation or didn’t reflect how businesses were actually operating.”²¹²*

As explained above in Section 3.1.1 (Footnote 70), DG Competition set up an online tool accessible to Member States’ authorities to ask questions about the interpretation of the SAM rules (this is the so-called eWiki), in particular for the GBER where Member States have the responsibility to apply them. That tool is perceived by stakeholders as a useful instrument, albeit one that could be further improved.

Those interpretation questions asked by Member States to the Commission have also shown that certain provisions are not always clear. The “FAQ” on the GBER published by DG Competition (see also footnote 70) is a comprehensive summary of all the relevant interpretation questions. The FAQ shows that while **the core concepts of GBER are clear, certain definitions might need refinement.**

Focussing on selected specific rules, according to the targeted consultation, the introduction of the new **Aviation rules** on operating aid and investment aid under the Aviation Guidelines did not help to lower the administrative burden of Member States compared to the baseline scenario. Stakeholders and Member States have for instance explained during the targeted consultation and individual meetings that the

²⁰⁷ See replies to Q1.1 of the public consultation.

²⁰⁸ Apart from the Aviation Guidelines as well as Railway Guidelines. Respectively 65% and 72% of the respondents who expressed an opinion considered that SAM led to clearer rules regarding Aviation Guidelines and Railway Guidelines.

²⁰⁹ See replies to Q1.1 of the public consultation.

²¹⁰ See replies to Q15.1 of the public consultation.

²¹¹ See replies to Q1.1 of the public consultation.

²¹² See replies to Q1.1 of the public consultation.

provisions on the calculation of the operating and capital cost funding gaps are too complex and not sufficiently clear. However, the introduction of Article 56a GBER did help to lower the administrative burden of Member States and to simplify the rules, as testified in the targeted consultation. Therefore, on balance, the level of complexity appears to be adequate. The simplification of the rules partly participated to the SAM objectives “Big on big, small on small” and “Faster access to aid”

Overall, the majority of respondents (53%) to the **EEAG** consultation is of the view that the amount of administrative costs are low with respect to the total amount of aid²¹³. In addition, respondents to the targeted consultation rated the clarity and simplicity of application of the GBER and EEAG provisions. In general, around 66% of contributors deemed the provisions clear and simple. Almost 70% of the contributions rated the methodology for the calculation of eligible costs for investment aid to go beyond standards as clear and easy to apply. The EEAG external study as well as interpretation questions and case practice suggest that Article 39 of the GBER (aid for energy-efficiency in building) is difficult to understand and use. Apart from specific rules, contributors deemed the EEAG provisions clear and simple therefore fulfilling the SAM objectives of “Big on big, small on small” and “Faster access to aid”

Regarding the **IPCEI**, the targeted consultation revealed that approximately 65% of respondents consider that the gathering of necessary information for the Commission’s assessment is not satisfactory. In particular, it was noted that the notification process is too administratively burdensome and the gathering of information, differently from other aid instruments, is currently not facilitated through templates or information sheets. In addition, open comments submitted in the public consultation and the targeted consultation regarding the IPCEI Communication – confirmed by case practice – suggest that some notions and definitions have proved particularly difficult to interpret, such as those of “first industrial deployment”, “commercial activities” or “spill-overs”. Therefore, taking into account the novelty of the rules and the absence of case practice on their application, IPCEI rules only moderately helped to reach the “Big on big, small on small” objective and did not really led to “Faster access to aid”.

The results of the internal research for the **regional aid rules** revealed an uptake of regional aid under the GBER during the period 2014-2020 and in parallel a reduction of the notifications that compared to the baseline scenario. At the same time, during the targeted consultation a relative majority of respondents confirmed that regional aid provisions in the GBER 2014 are quite clear, sufficiently detailed, appropriate, and relatively easy to implement. It seems that the revised GBER provision had a positive impact on granting authorities, due to an improved and faster implementation that leads to a reduction of administrative efforts. However the updated RAG lead to a different impact related to the administrative effort for

²¹³ Almost 37% of the respondents to the EEAG targeted consultation believe that the administrative costs represent between 1% and 5% of the actual amount of compensation received, while 16% think the percentage of those costs lays below 1%. Around 24% believe these costs represent 5-10%, while 18% think they are high, representing 10-20% of the compensation received. Only 2 respondents believe administrative costs represent more than 20% of the aid.

beneficiaries and granting authorities²¹⁴. In general, the results of the targeted consultation, literature review and expert interview confirmed a high level of administrative burden related to the notification procedure for regional aid, especially related to investments focused on new process innovation²¹⁵. According to experts, the lengthy and burdensome procedure bears the risk to lose the investment. It was reported that some investors reduce their project scope or are discouraged to apply for aid when they risk having to go through a notification procedure. Because of the RAG, the regional aid rules have only partly contributed to achieve the SAM objectives of the “Big on big, small on small” and “Faster access to aid”.

According to the results of the public consultation on the **State aid rules for RDI**, the SAM package appears to have been overall successful in significantly reducing the administrative burden for all relevant stakeholders and leading to clearer rules. Also, a large majority of respondents to the consultation took a positive view on the question of whether the State aid rules on RDI ensured efficient public expenditure²¹⁶. However, results of the consultation and findings of the RDI external study showed that Member States called for a clearer definition on innovation clusters and wider application of simplified cost options to calculate eligible costs of research activities receiving support under State aid rules for RDI as the current Article 7 of the GBER only allows Member States to use simplified cost options in case the project or activity is at least partially financed through a Union fund. As regards the clarity of the rules, the lack of sufficient clarity with regard to the possibility for Member States to provide funding to both innovation clusters for their set-up and functioning (under Article 27 of the GBER), and to users of the clusters (under different legal bases, e.g. Article 28 of the GBER in case of SMEs), is also perceived as a hindering factor in the effective and efficient use of the measures by the Member States and eligible beneficiaries. This was confirmed by both the significant amount of interpretation questions that the Commission services received in that respect, as well as the findings presented in the RDI external study. Apart from specific concepts, contributors deemed the RDI provisions clear and less burdensome, therefore fulfilling the SAM objectives of “Big on big, small on small” and “Faster access to aid”

Certain Member States indicate that some provisions regarding **Risk Finance Guidelines and relevant GBER provisions**, in particular in Article 21 of the GBER, are overly complex and would benefit from further simplification. Stakeholders interviewed by the external experts echo as well that perceived lack of clarity of certain rules of the Risk Finance Guidelines (identification of market definitions with sufficient legal certainty, inconsistencies between rules on EU-funding and on State aid as regards SME access to finance, interpretation the date of the first commercial sale can be interpreted in different ways, etc.). Moreover, Member States have identified the need to produce a specific ex-ante assessment

²¹⁴ It should be noted that in the current period 01/07/2014-01/11/2019 (compared to the period of 01/01/2007-30/06/2014), there has been strong decrease of the total number of notified cases, from a total number of 453 to 101 while total number of measures exempted increased.

²¹⁵ As mentioned in Section 5.3 of the RAF external study and the replies to question 5 of the targeted consultation on RAG.

²¹⁶ In particular, more than 90% of those who responded to that question in relation to both the RDI Framework and the GBER had a positive view on the capability of these rules to allow for efficient public expenditure.

under the Risk Finance Guidelines to be a particular administrative burden. This is mirrored by the Commission's experience from the practical application of that requirement, which also suggests that the quality and usefulness of those ex-ante assessments may benefit from additional guidance. So, although several specific provisions should be reviewed and improved to enable an even more efficient implementation, the existing rules are mostly clear and do not put unjustified administrative burden on Member States, then fitting into the SAM objectives of “Big on big, small on small” and “Faster access to aid”

As far as case practice is concerned, DG Competition has not encountered problems in applying the “undertakings in difficulty” criteria for the purposes of the **Rescue and Restructuring Guidelines**. However, the lack of assessing compliance with the criterion of undertakings in difficulty for the sake of establishing eligibility for GBER and other aid is a relatively recurring irregularity type when it comes to the monitoring exercise (see also Section 3.2.3). DG Competition often observed insufficient controls of the financial situation of the aid beneficiaries by the implementing authorities. Furthermore, some Member States expressed **concerns that the practical application of that exclusion principle, in particular for determining whether a beneficiary is eligible for GBER aid might turn out to be difficult in certain instances**.²¹⁷ In particular, respondents to the public consultation took the view that, whilst the new definition of an undertaking in difficulty facilitated the compliance with State aid rules, there may be **elements to improve**. More precisely, 42% of the respondents who expressed an opinion replied 'yes', while 40% said 'partially', and only 18% said 'no'. For public authorities these figures are of a similar magnitude.²¹⁸ In addition, the interpretation questions from Member States suggest that national authorities may have some practical difficulties in applying that criterion for the purposes of the GBER. The questions mainly relate to three areas of the application: (i) the calculation of the financial criteria, in particular the calculation of the 50% share capital lost; (ii) the application of the UID criteria for a group of companies; and (iii) the application of the UID criteria for undertakings that do not have a capital requirement under national law. While the first point of concern for the national authorities understandably reflect the changes in the UID definition, the two other areas of concern have not been addressed by the SAM changes, and are therefore areas to better regulate for the next revision of the definition of UID.

Regarding the **transparency obligations**, 70% of the respondents considered the current threshold for publication of EUR 500,000 as appropriate or even too high and only 30% took the view that transparency increases the administrative burden on granting authorities. DG Competition's internal assessment indicates that the presence of the transparency threshold combined with the lack of an EU-wide project definition have led to difficulties in several Member States in determining the threshold when grouping aid awards granted to the same beneficiary and for the same project. Moreover, the efficiency of the transparency obligations is suboptimal with regard to the categorisation for schemes that are reported in ranges

²¹⁷ For instance, Denmark argues that excluding companies in the same sector from the reimbursement will create unequal treatment within the sector. Moreover, it leads to significant and disproportionate administrative burdens for Member States and beneficiaries in ensuring that undertakings (temporarily) in difficulty do not use such schemes in a system based on their own declarations, as is normally the case for tax schemes.

²¹⁸ 42% yes, 40% partially and 18% no.

(such as tax advantages). Commission data indicates that the currently highest range category (> EUR 30 million) may cover significantly larger aid awards.

Regarding the administrative burden amongst the various stakeholders group

This section summarizes all the above and focus at the administrative burden and cost from the stakeholders' perspective with additional tools.

As already spelled out before, overall, the extended GBER of course still implies that a Member State sets up a measure, which fulfils the compatibility criteria and the compatible scheme, thus still contains several requirements towards the Member States and the beneficiary, the same way as in the case of compatibility on the basis of guidelines/frameworks. The main “gain” compared to the baseline scenario is the omission of the Commission procedure (the so-called notification procedure). The GBER, being a regulation that is directly applicable, contains also in general more straightforward criteria than guidelines/frameworks on the basis which the Commission has to issue a reasoned decision.

EU authorities: The Commission is in principle the sole authority in the EU with powers to determine the compatibility of State aid with the internal market. As shown in the figures in the SWD, SAM lead to overall shorter duration of procedures (see Figure 19 of the SWD) and new GBER measures (i.e. without notification) represented 94.7% of new State aid measures in 2018 against 54.8% in 2014. As a consequence DG COMP had to concentrate on more distortive cases, but had to deal with much less notification and consequently adopted much less decisions since SAM (decreased by more than 50 % between 2013/2014 and 2018/2019).

Table 8: State aid notifications and decisions 2013-2018²¹⁹

	2013	2014	2015	2016	2017	2018	2019
Number of State aid notifications	580	345	255	236	228	169	183
Number of decisions	559	519	316	292	261	220	246

Public authorities seems to have widely benefitted from the SAM in terms of reduction of administrative burden and reduction of costs compared to the baseline scenario. As said in the SWD, 77% of the public authorities who replied considered that SAM had reduced administrative burden at least partially for public authorities. It seems to be straightforward. For public authorities, while their internal procedures may be the same, the significant “cost” reduction materialises in terms of much less notifications to the Commission. The GBER provides clear criteria, on the basis of which they can design a compatible scheme. The elimination of the procedure with the Commission implies time gain. At the same time, the Commission provides assistance to Member States, in the form of working groups and replying to interpretation questions.

²¹⁹ Table produced for the purpose of the SWD and based on the yearly number of State aid notifications and number of State aid decisions from 2013 to 2018.

As regards **beneficiaries**, for them the main positive impact is the shortened time to get access to aid due to the omission of the Commission's approval procedure. However, according to the survey of the RAG study, which is the most explanatory in terms of costs and administrative burden, a few aid-granting authorities reported that they or the beneficiary reduced the requested regional State aid budget for an investment project just below the notification thresholds in order to avoid the administrative burden related to notifying the measure to the Commission. In addition, experts considered the level and depth of confidential internal information that the beneficiaries have to provide to the aid granting authorities in case of notification as very high. Beside the lengthy and burdensome notification process, there is the risk of losing the whole State aid budget if the aid is prohibited. Without notifying State aid, investors can get the amount up to the notification threshold without any risk, which would be an important advantage.

According to the evidence collected in the case studies about the Risk Finance Guidelines, the burden is generally not perceived as excessive by the stakeholders. The perceived administrative burden to apply for and comply with finance measures may depend on the level of experience and specialization of the stakeholder, and more experienced SMEs might be able to rely on specialized human resources and be able to better deal with the requirements.

Further, it is important to underline that national authorities may impose additional requirements with respect to the EU framework, meaning that the burden may come from the national rules rather than the European rules.

Finally and as explained before, the negative views from some businesses on decrease of administrative burden for beneficiaries were neither representative in terms of Member States nor in terms of issues or instruments or group of respondents. The issues raised often refer to details or particular situations and do not relate to the SAM architecture.

Has the SAM reform allowed for more efficient State expenditure?

The analysis suggests that the SAM rules, in light of the achieved objective of "good aid", allowed for a more efficient State expenditure compared to the baseline scenario.

According to the State aid Scoreboard, the Member States are increasingly using GBER measures since SAM. **Member States implemented 1666 new²²⁰ GBER measures in 2018, now representing 94.7% of new State aid measures.** This upward trend gets more pronounced each year in the actual expenditure of the schemes: **among the measures active in 2018, 86.0% are GBER measures,** against 54.8% in 2014.

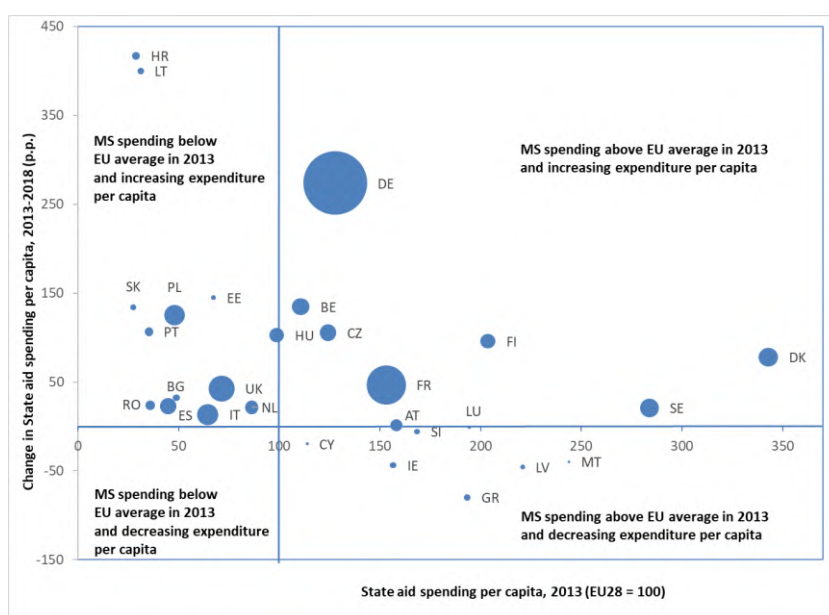
If wealthier Member States were allowed to support their domestic industries in an unrestrained manner, this would increase disparities and hinder the integration of the Single Market. Figure 29 looks at how State aid spending has evolved across the different Member States from 2013 (the year before the introduction of SAM) until 2018.

²²⁰ "New" measures are measures for which positive expenditure was first reported in 2018.

Figure 29 shows the relation between State aid spending per capita, including co-financed aid, in 2013²²¹ (on the x-axis) and the change in State aid spending per capita²²² registered in the period 2013-2018 (on the y-axis)²²³. Each bubble in the chart corresponds to a different Member State. The size of the bubbles corresponds to the nominal amount of spending in 2018.

Figure 29: Change in State aid spending per capita²²⁴

Change in State aid spending per capita (2013-2018) versus State aid spending per capita in 2013 (EU 28 = 100)



The chart is divided into four quadrants: (i) on the upper right-hand side, there are Member States who were spending already more than the EU average in 2013 and have kept increasing their expenditure in per capita terms; (ii) on the upper left-hand side are Member States who were spending less than the EU average in 2013, but have increased since then; (iii) the lower left-hand side of the chart would represent Member States that were spending less than the EU average in 2013 and have decreased spending since then. Finally (iv) Member States reported in the lower right-hand side of the chart are Member States which were above the EU average in 2013, but have decreased their spending per capita in the period 2013-2018.

It results from the above **that overall, Member States' State aid spending capacity has increased in the last five years** compared to the baseline scenario. All Member States that were spending below EU average five years ago, mostly EU13 or Member States seriously affected by the European sovereign debt crisis, are catching up. Some of the largest and wealthiest Member States, which were

²²¹ EU28 average spending in 2013 set at 100.

²²² Including co-financed aid. Since 2014, Member States must report the total amount of aid that is co-financed including both national and EU Structural Funds expenditure.

²²³ In percentage points.

²²⁴ State aid Scoreboard.

spending above EU average in 2013, have further increased their spending capacity. Only a few smaller Member States have decreased their spending capacity.

As also explained in Section 2.2, SAM was designed to be a more focused framework allowing Member States to better contribute both to the implementation of the Europe 2020 strategy for sustainable growth as well as to budgetary consolidation following the years of the financial and economic crisis. In particular, stronger and better targeted State aid control can encourage the design of more effective growth-enhancing policies and it can ensure that competition distortions remain limited so that the internal market remains open and contestable. It can also contribute to improving the quality of public finances.

Those facts, together with the findings on the objective on good aid, indicate that SAM contributed to an efficient State expenditure. The underlying idea is that Member States are budgetary constrained, and “good aid” helps to steer them to spend the money better and to facilitate the EU priorities in that point of time. Hereto, it also has to be underlined that, under certain circumstances, the definition of State aid comprises funds coming from the EU budget. As much of the State aid expenditure is actually coming from the EU budget or is complemented by the budget, it is also the Commission’s objective to steer the spending where the EU priorities are.

Those findings corroborate with the results of the public consultation, where a wide majority of respondents consider that State aid rules under the Fitness Check have ensured efficient State expenditure. Indeed, for all the specific rules, more than 83% of the respondents, who expressed an opinion, consider that the State aid rules under the Fitness Check have ensured efficient State expenditure to some extent or to a large extent.²²⁵ Those who replied “to some extent only” mostly made technical comments regarding the individual rules.

Finally, except the Railway Guidelines and to some extent the de Minimis Regulation and the Aviation Guidelines, all the other rules clearly achieved their established objectives and participated to the SAM objectives of “Fostering good aid”.

To what extent are the costs associated with SAM proportionate to the benefits it has generated?

The analysis suggests that benefits derive from SAM, compared to the baseline scenario not only for public authorities, but also for undertakings and indirectly for consumers. The costs associated with SAM seem rather low compared with the benefits observed.

The lack of quantifiable cost and savings data has hampered analysis of the costs of the measures evaluated. Annual costs incurred by the national administrations are often difficult to estimate precisely. No stakeholder or known studies has been able to provide an estimation. Also the valuation of the benefits that can be attributed to the SAM is challenging. First, this is because it is difficult to attribute benefits to so

²²⁵ For more granular results, please see Annex 2. The only exception are the Aviation Guidelines for which “only” 67% of the respondents considered that the State aid rules under the Fitness Check have ensured efficient State expenditure to some extent and to a large extent.

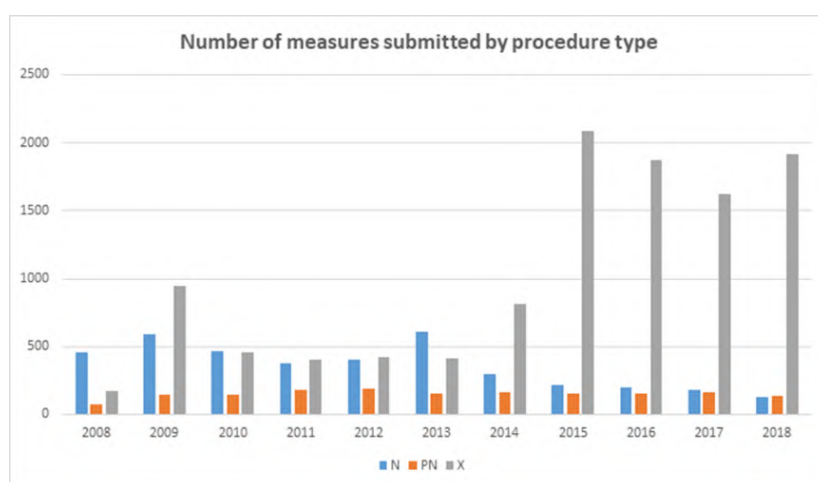
many specific measures. In addition, many measures are multifunctional and have multiple benefits that contribute to the objectives of several policies. The discussion below is therefore based mostly on qualitative inputs and an assessment of the overall impression of administrative burden as reported previously by the stakeholders as well as benefits observed following the SAM.

The available evidence in the present Fitness Check has indicated that the SAM rules have generally and in a wide majority of cases allowed to decrease administrative burden successfully compared to the baseline scenario, although there still seems to be room for improvement, in particular with regard to the clarification of certain definitions and concepts. The scope of the GBER has been expanded significantly. As mentioned before, close to 90% of all State aid measures implemented by Member States are now based on GBER provisions. This is a major success for the SAM, as increased use of the GBER relieves Member States from the administrative cost and time of notification. The Commission is also relieved from having to deal with routine or cases with a lower impact on competition. The State aid measures could be implemented more rapidly than before SAM, since the increasing share of GBER measures does not require any procedure with and decisions from the Commission before being put in place. The costs are full part of the administrative burden.

Block-exempted measures (GBER) do not require any case assessment, which reduces to zero the effort otherwise required in the context of a notification. The adoption of the SAM also resulted in a substantially lower amount of notified State aid measures being submitted to DG COMP. Based on the data available on the total number of notification and pre-notification procedures submitted by Member States in the periods before and after the SAM.

The impact of the State Aid Modernisation (SAM) in terms of reduced administrative burden can be seen in Figure 30.

Figure 30: Number of measures submitted by procedure type²²⁶



²²⁶ Graph produced for the purpose of the SWD and based on the number of yearly notified procedures (“N”), pre-notification procedures (“PN”) and GBER measures between 1 January 2008 and 31 December 2013 (i.e. Pre-SAM), but also between 1 January 2014 and 31 December 2018

When looking at the difference in the total number of PN and N procedures/measures submitted by Member States in the periods before and after the SAM, we can observe how pronounced is the decrease (X refers to the number of GBER measures).

When focussing the notification per instrument/guidelines between 2008 and 2018, it is clear that notifications dropped in all the sectors and guidelines.

Table 9: Difference in the total number of PN and N procedures/measures per instrument between the Pre- and Post-SAM period ²²⁷

Legal basis - notified procedures (Pre-SAM)	Total notifications	Legal basis - notified procedures (Post-SAM)	Total notifications	Difference in number of notified measures
Environmental Aid Guidelines, 2008-2014	361	Guidelines on State aid for environmental protection and energy 2014-2020	229	-132
Regional Aid Guidelines, 2007-2013	371	Regional Aid Guidelines, 2014-2020	134	-237
Rescue and Restructuring Guidelines, 2004-2012	209	Rescue and Restructuring Guidelines, 2014-2020	27	-182
Research, Development and Innovation Framework, 2007-2013	420	Research and development - Framework for State aid for research and development and innovation, 2014-2020	5	-415
Risk Capital Guidelines, 2006-2013	124	Risk Capital - Guidelines on risk finance aid, 2014-2020	5	-119

Moreover, the general compatibility of State aid is now based on the same principles – the so-called common assessment principles, as described in detail in Section 5.1.1. It makes the enforcement of the rules more uniform across all types of aid and allows Member States to gain more experience on how State aid is assessed by learning from practice across the spectrum of the various types of aid. In particular, the common assessment principles require market analysis and proof that State aid is an appropriate, necessary and proportional intervention that can address a policy problem without causing an undue distortion of competition. The task of carrying out a credible market analysis and designing a measure that can satisfy those principles is considerably more cumbersome. Member States are naturally less reluctant to notify a measure if it will be more costly in terms of administrative resources to have it approved and if a fairly similar measure could be adopted on the basis of the GBER at much less cost. The GBER has thus become more attractive and more used, while the alternative option of the guidelines is less used and potentially more costly. Therefore, overall, compared to the baseline scenario (see also Section 2.3.1), the implementation of the common principles has led to a clearer methodological framework for the various State aid rules contributing to the achievement of the objectives of fostering good aid and providing faster access to aid.

²²⁷ Difference in the total number of PN and N procedures/measures per instrument submitted by Member States between Pre-SAM period (1 January 2008 to 31 December 2013) and SAM period (1 January 2014 to 31 December 2018).

In addition, as already explained above, the results of the public consultation showed that 70% of the overall respondents who expressed an opinion considered that the State aid rules subject to the current Fitness Check have reduced at least partially the administrative burden for public authorities compared to the State aid rules in force before the State aid modernisation. When singling out the replies of the public authorities themselves, only 23% reply that their administrative burden has not been reduced with the new rules. Regarding the administrative burden for beneficiaries, 54% of the overall respondents who confirmed that the State aid rules subject to the current Fitness Check have reduced at least partially the administrative burden for those stakeholders. When filtering the replies of the public authorities only, the majority grows to 61% of the respondents considering a decrease, even partial, of the administrative burden. This is also reflected in some certain sectors like EEAG, where overall, the majority of respondents (53%) to the EEAG consultation thinks the amount of administrative costs are low with respect to the total amount of aid²²⁸.

In more detail, the Italian authorities have notably argued: *“By strictly reducing the number of [...] procedures subject to a decision, the Commission, in addition to the responsibility of the Member States in the decisions concerning the compatibility of the aid schemes with the derogations provided for, has ensured considerable cost savings resulting from the management of notification and timing procedures, since the Member States, since they no longer have the obligation to comply with the suspension clause, can proceed directly with the implementation of the scheme and can intervene more quickly and effectively”*²²⁹ while the French authorities concluded their analysis by arguing: *“The French authorities consider that the current rules have effectively decreased the burden of notifying to the Commission, which is a real benefit and should be safeguarded”*²³⁰ while the same French authorities also point that when it comes to notification or ex-post control, an important amount of work and cost not only on the public authority side but also for the beneficiaries, sometimes leading to withdrawing the State aid requests.

It is expected that costs borne by the companies have decreased or at least not increased substantially. The cost are mainly borne by public authorities for notifying or designing a GBER scheme. But the lighter and mainly used GBER process and, ultimately the fact State aid measures could be processed more rapidly than before SAM should bring less cost and more benefits to the companies. It should be pointed out that the wide majority of public consultations coming from companies or associations of companies did not point specifically to an increase of costs due to the adoption of SAM.

As regards benefits, an improved State aid system, like the SAM fitting into the Competition Policy in general, is about applying rules to make sure businesses and companies compete fairly with each other. This encourages enterprise and

²²⁸ Almost 37% of the respondents to the EEAG targeted consultation estimate that the administrative costs represent between 1% and 5% of the actual amount of compensation received, while 16% estimate the percentage of these costs lays below 1%. Around 24% believe these costs represent 5% to 10%, while 18% think they are high, representing 10-20% of the compensation received. Only 2 respondents believe administrative costs represent more than 20% of the aid.

²²⁹ See replies to Q6 of the public consultation.

²³⁰ Position paper outside EU Survey, Q.8.

efficiency, creates a wider choice for consumers and helps reduce prices and improve quality.²³¹

Box 7: General benefits of competition policy

- **Low prices for all:** the simplest way for a company to gain a high market share is to offer a better price. In a competitive market, prices are pushed down. Not only is this good for consumers - when more people can afford to buy products, it encourages businesses to produce and boosts the economy in general.
- **Better quality:** Competition also encourages businesses to improve the quality of goods and services they sell – to attract more customers and expand market share. Quality can mean various things: products that last longer or work better, better after-sales or technical support or friendlier and better service.
- **More choice:** In a competitive market, businesses will try to make their products different from the rest. This results in greater choice – so consumers can select the product that offers the right balance between price and quality.
- **Innovation:** To deliver this choice, and produce better products, businesses need to be innovative – in their product concepts, design, production techniques, services etc.
- **Better competitors in global markets:** Competition within the EU helps make European companies stronger outside the EU too – and able to hold their own against global competitors.

More into details, the State aid Scoreboard²³² shows the positive role of State aid in steering public aid towards common interest objectives, while minimising the negative impact of State aid on competition, and confirms the benefits of SAM:

- In 2017, Member States spent EUR 116.2 billion, i.e. 0.76% of EU GDP, on State aid, compared to EUR 106.6 billion, i.e. 0.72% of EU GDP, in 2016. About 53% of total spending was attributed to State aid to environmental and energy savings, largely due to the approval and implementation of numerous renewable energy initiatives in many Member States.
- State aid control does not prevent Member State governments from focusing aid on their own legitimate policy objectives and priorities. In 20 Member States, environmental protection and energy savings represent one of the two main policy objectives for which they spent the most in 2017, followed by regional development in 9 Member States, research, development and innovation in 9 Member States and culture in 6 Member States
- Total expenditure on measures falling under the General Block Exemption Regulation (GBER) in the EU represented about EUR 41.7 billion in 2017, a remarkable increase of about EUR 7.8 billion compared to 2016. For the first time, spending under GBER increased for all possible objectives. In particular, GBER spending strongly increased for local and multi recreational infrastructures (+129%), for aid to SMEs and risk finance (+81%), for social support to individual consumers (+ 56%), for research, development and

²³¹ Why is competition policy important for consumers? <https://ec.europa.eu/competition/consumers/>
²³² State Aid Scoreboard 2018 https://ec.europa.eu/competition/state_aid/scoreboard/index_en.html.

innovation (+30%), for aid to culture and heritage conservation (+28%) and for employment (+21%).

- The growing share of spending falling under GBER implies that, on average, State aid measures can be implemented much more quickly than in the past by Member States.
- At the same time, notified State aid measures tend to cover bigger budgets and spending than in the past, in line with the Commission's approach to be “big on big things and small on small things”. In 2017, the average annual budget of notified measures implemented was about EUR 230 million, an increase of about 18% and 126% compared to 2015 and 2013 respectively

The 2018 State aid Scoreboard confirms the benefits of SAM: quicker implementation of public support by Member States, to the benefit of citizens, businesses and regions; less bureaucracy, red tape and delays. It also highlights the role of State aid control in steering public aid towards objectives of common interest (e.g. RDI and investment in renewable energy), while ensuring benefits for society and minimising the negative impact of State aid on competition.

Which instruments have the greatest potential for further burden reduction?

By way of example, the present Fitness Check identified the following instruments with the greatest potential for further burden reduction for both the Member State concerned and the beneficiary: IPCEI, RFG, RAG, RDI.

First, it seems that some stakeholders are not aware of the Guide on GBER, which provides 72 pages of explanations (some of them addressing some of the stakeholder's issues).

Furthermore, as mentioned by Executive Vice-President Vestager in January 2020, the present Commission has committed to support a rapid transition to a green, digital economy, involving to check urgently whether our State aid rules and guidelines are up to date (namely 6 set of rules including EEAG, RAG, RDI, IPCEI, RF and the relevant GBER parts). In that spirit, the EVP committed to decrease complexity, which should naturally help on the administrative burden *“The transition ahead will be complex – and the state aid rules shouldn't add to that complexity. On the contrary – **we should make it as straightforward as we can**, to support the investments that are so vital for our future”*.

Finally, following the assessment in the SWD and the feedbacks in Annex 8, the instruments with the greatest potential for further burden reduction for both the Member State concerned and the beneficiary seem to be:

- IPCEI, as the administrative burden comes from a lot of different parameters, namely, the notification including the gathering of documents (different from other instruments) and the interpretation of specific notions (such as “first industrial deployment”, “commercial activities”);
- RFG is also considered burdensome because of procedural aspect (ex ante assessment, notification, such as paperwork) as well as the lack of clarity of certain rules of the Risk Finance Guidelines (identification of market definitions...);

- RAG for which the results of the targeted consultation and expert interview confirmed a high level of administrative burden related to the notification procedure for regional aid, potentially leading to some investors reducing their project scope or being discouraged to apply for aid;
- RDI would mainly need clearer definitions of some key concepts such as innovation clusters and clearer rules (scope for providing funds to innovation clusters).

5.3. RELEVANCE

This section evaluates whether the SAM objectives and those of the individual State aid rules under the Fitness Check still correspond to the needs within the EU.

In a first step, it thus examines whether the overall SAM objectives and those of the individual State aid rules under the Fitness Check were appropriate and whether they are still appropriate in light of potentially changing needs, and therefore whether the action as set out in the intervention logic above continues to be justified.

In a second step, it examines how well adapted are the State aid rules under the Fitness Check to subsequent market developments and technological advances.

The findings of the analysis on relevance are subject to the limitations stemming from the stakeholder consultation and constraints on the possibility of full triangulation.

The analysis in this section has to be read together with Annex 8.

How well do the overall SAM objectives and the objectives of the individual State aid rules under the Fitness Check still correspond to the needs within the EU?

The analysis suggests that the overall SAM objectives are appropriate for meeting the needs within the EU.

It also suggests that the objectives of the individual State aid rules have been to a large extent appropriate for meeting the needs within the EU so far, but that they do not fully reflect recent EU policy developments and Commission priorities for the future, in particular the Green Deal, as well as the Digital and Industrial Strategies. The potential impact and the uncertainties brought by the COVID-19 crisis cannot be fully evaluated yet.

As explained above in Section 2.2, the three **overarching SAM objectives** (that is to say fostering good aid; “big on big, small on small” and faster access to aid) aimed at contributing to the achievement of the EU 2020 policy objectives, Europe's growth strategy²³³. The single market is Europe's best asset for generating sustainable growth and competition policy (including State aid control) is a major driver of growth through its fundamental role in defending and strengthening the single market. Those principles remain valid under the six Commission priorities

²³³ <https://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf>.

for 2019-24²³⁴ and as such, the three SAM objectives continue to contribute to them.

In particular, the recent Digital Strategy also underlines that *“EU competition law serves Europe well by contributing to a level playing field where markets serve consumers.”* The new Industrial Strategy also emphasises the importance of EU competition policy which *“has served Europe well by helping to level the playing field, driving innovation and giving consumers more choice. Competition brings the best out of our companies and enables them to stay competitive globally. In a fast changing world, and a time when Europe is embarking on its major twin transitions, we should ensure that competition rules remain fit for today’s world.”* *“State aid rules ensure a level playing field within Europe, avoiding a fratricidal subsidies race while supporting important public interest objectives.”* The new SME Strategy reinforces that stance from an SME perspective: *“Rigorous enforcement of EU competition rules ensures that all companies active in the single market, in particular SMEs, can compete and innovate on their merits, preventing the abuse of market power and the concentration of wealth by a few big businesses.”* More recently, the Commissions Recovery Plan (see Section 3.4 above), also underlines that *“EU competition policy is essential to ensuring a level playing field in today’s economy, driving innovation and giving consumers more choice”*.

As also emphasised in Section 4.1, it has to be noted that the public consultation as well as the targeted consultations took place before the announcement of Commission’s recent policy strategies, such the Green Deal, the Digital or Industrial Strategies, although some comments/position papers were received afterwards. The consultations took place well before the COVID-19 crisis. Hence, possible misalignments with new general policy goals were perhaps not fully visible to stakeholders.

In addition, there seems to be a consensus among stakeholders that the SAM objectives correspond to the needs within the EU. In particular, merely 10% of the respondents who expressed a view in the public consultation²³⁵ stated that the objectives of SAM do not at all correspond to the current EU priorities. Among the main stakeholders of State aid control, public authorities, this is even less, amounting to 7%. As regards specifically the main building blocks of the simplification package, the GBER and the de minimis Regulation, that figure was even at around 6% for all stakeholders and merely a fraction, 2% and 3% respectively for public authorities. Those who replied to that question “partially only” mention very specific issues and refer to the State aid rules which should be better adapted to its own priorities rather than SAM not having the right objectives, for instance *“increased concern for the environment”* while State aid rules are perceived *“too restrictive [...] and hold[ing] back environmental investments”*.

Many respondents explain in their qualitative replies (mainly public authorities) that the objectives of SAM remain fully relevant and in line with the Commission’s overall political objectives. In particular, reducing administrative burden for Member States and focusing the Commission’s scrutiny on cases with the biggest

²³⁴ New priorities: https://ec.europa.eu/info/strategy/priorities-2019-2024_en, see also Section 3.3 above.

²³⁵ See replies to Q11 of the public consultation.

impact on the internal market contributes to that overall objective. *“We believe that the modernisation of the rules still pursues its purpose and continues to be responsible for the EU’s priorities [...]”*²³⁶ *“Robust State aid control is essential for a level playing field to ensure a well-functioning competitive internal market. [We] endorse the general objectives of the [SAM] process [...]. [We] endorse the objective of focusing enforcement on cases with the biggest impact on the internal market.”*²³⁷ *“The fundamental objective of state aid law are to foster competition in the internal market and this should be in target in future as well.”*²³⁸ The simplification aspect of SAM was underlined by respondents as a fundamental principle to deliver on other priorities. *“Simplifications in the area of state aid have been and are fundamental to mitigate the inherent hardship of the transition to a climate-friendly economy.”*²³⁹

However, concluding that the three SAM objectives still correspond to the needs within the EU does not automatically mean that the same can be concluded for the **individual rules**. As explained in detail in Section 2.1, State aid is intrinsically linked to overall EU policy objectives, as the compatibility grounds are laid down directly in the Treaty. In addition, the compatibility of State aid is closely linked to the common principles, according to which **compatible aid must contribute to a well-defined objective of common European interest**. Therefore, all the compatibility rules contain a common objective goal which are in line with EU policies. Those common objectives may however differ from rule to rule (see also Annex 5).

That question has to be also seen in the context of the new Commission priorities for 2019-24, see also Section 3.3. Stakeholders in the public consultation also underlined that *“the objectives [of the existing State aid rules] [...] need to be updated on the basis of the new priorities (e.g. the strengthening of the environmental sustainability objective).”*²⁴⁰ At the same time, the Communication on the Green Deal Investment plan also acknowledged the link of the new priorities to State aid policy by stressing the necessity to continue effective implementation of State aid rules, which are key enablers for the transition and apply the current rules with flexibility in crucial areas for the green transition including to a climate-neutral economy.

In addition, stakeholders in the public consultation also confirmed that the objectives of the individual State aid rules still correspond to the current EU priorities, fully or partially. The agreement was particularly high for the RDI Framework (96% for all respondents and 100% for public authorities). On the other hand, linked to the Railway Guidelines, the agreement rate was only 82% for all respondents, although 100% for public authorities. Stakeholders noted that the rules *“should be better aligned with the EU climate and energy priorities [...]”*²⁴¹ An assessment of the objectives of the individual rules in the light of current EU priorities is to be found below and in detail in Annex 8.

²³⁶ See replies to Q11.1 of the public consultation.

²³⁷ See public consultation, reply by the Netherlands.

²³⁸ See replies to Q15.1 of the public consultation.

²³⁹ See replies to Q11.1 of the public consultation.

²⁴⁰ See public consultation, reply by Italy.

²⁴¹ See public consultation, reply by Finland.

As regards the common objectives of the specific rules, for instance, the primary objective of the RAF is the EU's **cohesion objective** enshrined in the TFEU (Article 174), and that aims to strengthen economic, social and territorial cohesion by reducing disparities in the level of development between regions. Regional aid will remain also relevant in the future to contribute to new objectives, such as the sustainable green transition of the European Union that was manifested with the Green Deal Communication, published in December 2019²⁴² or to achieve the objectives of the Digital and Industrial Strategies.

Other rules, such as the Aviation Guidelines, play also a key role in regional and social cohesion but also in regional development by **improving transport connectivity**. Increased connectivity of citizens and regional development remain valid EU objectives²⁴³. However, the announced Green Deal and the increased focus on the aviation sector in that respect is likely to have a curbing effect on the growth/connectivity in aviation. It is thus relevant to question whether the State aid rules applying to the aviation sector need to be rebalanced between development of connectivity and sustainability.

The EEAG, together with the relevant provisions of the GBER aimed at creating a stable and appropriate framework for public investments across the EU supporting Member States **to reach their 2020 climate targets and support the Energy union while maintaining a level playing field**. Those objectives do not contradict, but are rather reinforced by the Green Deal, which is however more ambitious and encompasses a full range of objectives and priorities contributing to the 2050 climate neutrality goal, circularity, biodiversity and the prevention of pollution in general.. The EEAG will also support the achievement of the objectives of the new Industrial Strategy for the green and digital transformation of the industry.

IPCEIs are recognised by both Member States and the industry as an instrument that can play a role in the implementation of a renewed and modern **industrial policy** initiative, as well as in the attainment of the objectives set out in the Green Deal Communication²⁴⁴. IPCEIs are regarded as one of the instruments to strengthen European industrial value chains through joint or well-coordinated investment and action. As also recognised by the Green Deal Communication²⁴⁵, IPCEIs represent an important instrument to enable the **shift towards a clean and truly circular economy**. Furthermore, the Digital, Industrial and the SME Strategies attach a great importance to IPCEIs. According to the SME Strategy, the Commission will look to ensure that the rules encourage participation of SMEs in IPCEI. With regard to IPCEIs, the Digital Strategy suggests “*to further clarify the conditions under which major Member State-led projects in key, strategic sectors for the digital and green future of Europe can proceed effectively.*” According to the Industrial Strategy, IPCEIs as key in “[m]obilising private investment and public finance is acutely important where there are market failures, especially for large-scale deployment of innovative technologies”.

²⁴² https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

²⁴³ 2015 Aviation Strategy for Europe.

²⁴⁴ Communication on the European Green Deal, available at https://ec.europa.eu/info/sites/info/files/european-green-deal-communication_en.pdf.

²⁴⁵ See Green Deal Communication, p. 9.

As regards **SMEs**, the core objective of the State aid framework on SME access to finance is to address and overcome a market failure that prevents SMEs from attracting the financing required for them to grow and succeed. The analysis in Annex 8 has shown that SMEs still struggle to attract the required financing, indicating that a market gap still persists, which in turn implies that the State aid rules are still relevant as they still correspond to the SMEs' needs. In particular, while statistical data²⁴⁶ show that access to finance for SMEs in Europe has improved between 2014 and 2018, nevertheless, despite substantial public support programmes at EU and national level, there is still an estimated gap amounted to EUR 15-25 billion in 2017 for SME debt financing alone. Taking all forms of SME financing into account, this amount is likely to be even higher.²⁴⁷ Addressing that market gap is the core objective of the State aid framework on SME access to finance. The rules therefore address an important need of European SMEs and are still relevant. This objective is also in line with the **EU Industrial Strategy** and the **EU SME Strategy** for a sustainable and digital Europe. According to the new SME Strategy, the State aid rules for risk finance should be revised, to further support SME involvement, ensure crowding-in of private investment while avoiding distortions of the level playing field.

The State aid rules for **RDI** maintain their central importance for the achievement of the objectives of key Commission policy initiatives, such as the Green Deal, the Digital and Industrial Strategies. As stated in the Green Deal Communication, “*new technologies, sustainable solutions and disruptive innovation are critical to achieve the objectives of the European Green Deal*”²⁴⁸, i.e. to enable a shift towards a climate neutral economy, halt biodiversity loss, decouple economic growth from resource use and tackle pollution. The centrality of research and development to achieve the objective of transforming the EU industry into a more green and circular – and yet competitive – one is also recognised in the Industrial Strategy communication²⁴⁹. Considering the significant public and private investments that will be necessary to achieve the ambitious goal of making Europe “the first climate-neutral continent by 2050” and ensuring that natural capital is enhanced and the well-being of citizens protected from environment-related risks, targeted and time-bound State aid for RDI activities may play an important role to allow research and development into new and breakthrough, greener technologies and production processes and solutions including social innovation and nature based solutions to take place to the necessary extent. Moreover, State aid in the field of RDI may be beneficial to unlock investment into innovation, in particular by SMEs, with a view to fostering the competitiveness of the EU industry and increasing the share of RDI spending by EU companies, in line with EU Industrial²⁵⁰ and SME Strategy²⁵¹.

The objectives of the Railway Guidelines, that is to say **supporting railway liberalisation and encouraging the modal shift from road to rail**, remain fully

²⁴⁶ Based on the ECB SAFE database

²⁴⁷ Commission Staff Working Document – Impact assessment, Annex 15: Programme specific annex on COSME, SWD(2018) 320 final (https://eur-lex.europa.eu/resource.html?uri=cellar:97218bf4-6a31-11e8-9483-01aa75ed71a1.0001.03/DOC_2&format=PDF), p. 330-331.

²⁴⁸ Green Deal Communication, Section 2.2.3 “Mobilising research and fostering innovation”.

²⁴⁹ Industrial Strategy Communication, Section 2.2 “An industry that paves the way to climate-neutrality”.

²⁵⁰ Industrial Strategy Communication, Section 3.5 “Embedding a spirit of industrial innovation”.

²⁵¹ SME Strategy Communication, Section 2 “Empowering SMEs to reap the benefits of the digital transition”.

relevant and even reinforced by the recent Green Deal. However, the Railway Guidelines predate the most recent 4th railway package (2016), which will complete the liberalisation of the rail sector.

As explained in Section 3.4, the present Fitness Check does not evaluate the effects of the Temporary Framework or the effects of the COVID-19 crisis on the rules subject to the Fitness Check, given that those developments are very recent and their duration and impact cannot be predicted at the current stage. However, in the mid- to long-term, future State aid policy actions will have to take into account all the potential impact of the uncertainties brought by the COVID-19 crisis and the measures undertaken by the Commission on the State aid rules in general, and on the SAM objectives in particular.

How well adapted are the State aid rules under the Fitness Check to subsequent market developments and technological advances?

The analysis suggests that the State aid rules under the Fitness Check are to a certain extent adapted to subsequent market developments and technological advances, but further adaptation in specific areas and a certain degree of flexibility may be needed in the future, depending on the specific rule.

As described in Section 2.1, State aid rules are complex and encompass both horizontal and more sector-focused rules. When assessing how adapted the rules are to market developments and technological advances, the main focus is on rules which have a sectoral focus or a very specific sectoral objective and this SWD will use some selected examples which merit closer attention.

Stakeholders in the public consultation agreed that the State aid rules under the Fitness Check are at least partially adapted to recent developments in markets and technology. While only a relatively small part of respondents consider the rules fully adapted (between 7% to 33%, depending on the rule), for a large majority (53% to 82%, depending on the rule), they are partially adapted. Only 7-17% of respondents, depending on the rule were of the view that the State aid rules are not at all adapted to recent developments in markets and technology, see also in detail Annex 2. The only exception are the Aviation rules, where 33% of all respondents (11% of public authorities found, that the rules are not at all adapted).

In their qualitative replies, stakeholders emphasised that State aid rules could be better adapted to on-going global challenges, in particular, climate change, as well as the digital single market: *“EU state-aid rules should be further optimised based on experience with the existing rules to enable the Member States to implement ambitious energy, environmental and climate policies that are in Europe’s interest as doing so requires greater public investment to be made.”* *“Considering the manifold and major new challenges arising from the changes happening in the global economy and the climate targets, [...] there is room for further improvements of the state-aid rules.”* *“The revised GBER also needs to better take account of technological progress, the increasing importance of the energy sector, and the necessary efforts for mitigating climate change. The current version of GBER does not sufficiently address the issues of eMobility, sustainable and*

innovative types of energy (including hydrogen), or energy efficiency.”²⁵² “State aid rules should be better adapted to developments in the digital single market.”²⁵³

With regard to the specific rules, the **EEAG/relevant GBER provisions** should better cater for new developments in solutions and technologies and in the market. Technology and markets evolve very rapidly in that sector, making some of the rules outdated or insufficient to cater for new developments in the field. This starts to show in case practice. For instance support for low emission mobility infrastructure normally does not fall in the scope of the EEAG and the GBER (when the infrastructure is not for own use) although support for the deployment of such infrastructure pursues a clear environmental objective. Support schemes for such infrastructure are increasingly put in place by Member States. They were assessed under the Treaty. In order to test the relevance of the EEAG and the GBER with respect to low emission mobility infrastructure and in particular verify whether the developments in this field would show that the absence of compatibility conditions in the EEAG and/or the GBER would actually constitute a gap, the Commission verified under the EEAG external study how schemes in that field had been implemented and whether projects deployed outside approved schemes had been deployed without any public support (see below sub-section on low emission mobility).

In addition, the scope of the EEAG is limited to a list of 14 specific aid measures often linked to a specific technology or method to achieve environmental protection. The EEAG therefore present the risk of not being able to deal with new types of measures or technologies that cannot be therefore assessed under the current guidelines. This happens for example when a Member State wants to achieve an overarching common objective (e.g. to reduce Greenhouse Gas, “GHG”, emissions) by putting different technologies (e.g. renewable energy, energy efficiency, electricity storage, carbon capture storage and/or use, electrification, and green hydrogen projects) into competition. Some of the technologies, while contributing to the GHG emission reduction fall outside the scope of the EEAG (for example hydrogen) or could potentially fall under a category of aid measures that target a totally different objective (storage could potentially be covered by the generation adequacy provisions but the compatibility conditions are not suitable for an aid scheme in which storage competes with other low carbon technologies with the objective of reducing emissions instead of securing generation adequacy).

Stakeholders to the EEAG targeted consultation took the view that zero subsidy bids and low or zero emissions vehicles should be better reflected in the new rules, alongside new technologies such as hydrogen, synthetic fuels and low carbon gas (51%) and storage (39%). Some stakeholders claim that given the rapid technological changes and market evolution in the sector, it is important that the guidelines remain flexible enough to accommodate future evolutions. (See also Annex 8).

In relation to the **regional aid rules**, while the main overall objective of regional aid is “horizontal”, i.e. to contribute to the implementation of the cohesion objectives, in a steadily changing business environment the framework needs to

²⁵² See position paper submitted by Germany.

²⁵³ See replies to Q15.1 of the public consultation.

respond to new developments (for example to the transformation of the automotive sector or the rise of new technologies). Continuous development of the European business environment requires regular adaptations of the regional aid rules. Living in a globalised world, more and more companies from third countries are seeking for constant market development and international expansion. While the results of the RAF external study provide only limited evidence on the relationship between maximum aid intensities and worldwide foreign direct investment and could not clearly confirm a clear connection,²⁵⁴ it is clear that European regions will be more and more in competition with third countries and additional efforts on that aspect will be required in order to maintain a level playing field also on a global base. Finally, the rules on sector exclusion are subject to changes in particular related to over capacities and the results of the targeted consultation confirm a necessary re-assessment of the synthetic fibres and shipbuilding sectors due to changed market conditions related to overcapacity. Recent policy initiatives such as the Green Deal, the Digital and Industrial Strategies, require the framework also to be adjusted and provide additional opportunities for private investments to achieve the policy objectives. Although it is too early to estimate the long-term consequences of the COVID-19 outbreak, regional aid will also remain relevant to provide investment opportunities in the future and by providing investment opportunities for the economic recovery of disadvantaged regions in the EU. (See also Annex 8).

The positive feedback from the public consultation on the capability of the **IPCEI Communication** to address recent technological or market developments is also confirmed by experience in cases, suggesting that the IPCEI Communication is sufficiently flexible in allowing to adapt to the different technologies or activities that have formed or may form in the future the subject of the proposed projects. On the one hand, both the integrated projects approved so far concern RDI and First Industrial Deployment (“FID”)²⁵⁵ activities, on the other, the report of the Strategic Forum for IPCEI clearly suggest that the IPCEI Communication is regarded as a relevant instrument to also address market failures in areas other than RDI (e.g. environmental protection, mobility etc.; see also Annex 8).

Another evolving sector are is **aviation**. In particular in the area of airport-airline agreements, case practice has shown that the market is evolving quickly. Moreover, the number of airport networks is growing.²⁵⁶ At present, the Aviation Guidelines do not contain any explanations on how to apply the current State aid rules to airport networks. The results from the targeted consultation point towards the fact that there might be a need for further clarifications or an adaptation of the rules in that regard. Finally, the transitional period for operating aid for airports does not correspond to the current market realities. Due to increasing security costs, the consolidation of the airline market, and recent bankruptcies of airlines, many airports expect to continue to need operating aid after 2024. Furthermore, the Aviation external study has outlined a structural need for operating aid for airports with less than 200,000 passengers p.a. and predicts only very little growth potential for those below 700,000 passengers p.a. (See Annex 8).

²⁵⁴ As in chapter 6.1 of the RAF external study, see also Annex 8.

²⁵⁵ FID comes immediately after RDI but before mass production.

²⁵⁶ A situation where one company manages several airports in one country at the same time.

The **Railway Guidelines** date back to 2008. The ongoing development of the rail freight market calls for more flexibility with regard to scope, which is limited to the railway undertakings only, also to multimodal operators and logistics companies other than “railway undertakings”. In particular, the Commission’s case practice²⁵⁷ also points to the need of specific rules for the financing of the start-up phase of new freight services. Some other cases, where the Commission’s assessment refers to the criteria set out under Chapter 6.1 of the Railway Guidelines, similarly point to the need for specific rules for the financing of infrastructure serving combined transport operations²⁵⁸ (see Annex 8).

With regard to certain rules, such as **STEC** and **de minimis Regulation**, certain economic developments such as for instance inflation or GDP growth in the internal market are not reflected (see Annex 8).

Overall, the State aid rules for **RDI** are well adapted to subsequent market developments and technological advances, and the objectives set by the evaluated measures covered by those rules correspond to the market needs faced by companies operating in the EU. However, there remain specific industry needs, which according to the results of the current Fitness Check are unaddressed or insufficiently addressed by the current rules (see Annex 8).

Stakeholders also emphasised that State aid should take into account **more international dimensions and global competition**, for instance “*European companies increasingly have to compete with non-European companies that gain benefit from low-cost government funding solutions in their home countries.*” Point 34 of the IPCEI Communication and point 92 of the RDI Framework are areas, where this concern by stakeholders is reflected. The so-called “matching clause” (see Section 5.1.1. and Annex 8) allows the Commission to take account of the fact that, directly or indirectly, competitors located outside the Union have received or are going to receive, aid and enables Member States to provide the Commission with information to enable it to assess the situation, where possible. In the alternative, the Commission may also base its decision to apply the matching clause on circumstantial evidence. The consultations revealed that stakeholders find it impossible to apply the matching clause in practice due to the lack of transparency in the granting of subsidies by third countries. While it is true that the matching clause has never been used in practice, it should also be noted that no Member State has ever invoked its application.

As regards international rules, the EU is attached to a rigorous application of the WTO subsidy rules. At the same time, operations involving companies benefiting from third country subsidies or State support may cause distortions in the European

²⁵⁷ SA.31981 – Netherlands – *Start up aid to new combined transport services based on Twin hub railway network*; N 640/2008 -Germany- *Support of transport infrastructure in Saxony (Measure 3: start-up aid for new combined transport services)*; N449/2008 – Italy - *Interporto Campano S.p.A. - Combined road-rail transport for containers from the port of Naples.*

²⁵⁸ SA.34369 (13/C) (ex 12/N) – Czechia – *Construction and operation of public intermodal transport terminals*; SA.48485– AT – *Programme supporting the development of connecting railways and transfer terminals in intermodal transport 2018 – 2022*; SA.49518 – UK – *Freight facilities grant scheme for 2018 – 2023*; SA.47779 – Italy - *Aid for the development of combined transport in Friuli Venezia Giulia Region*; SA.48483 – France – *Construction and upgrade of private rail sidings connecting freight terminal facilities (ITE)*; SA.46341– Germany – *Scheme on funding of transshipment for combined transport*; SA. 39962– CZ – *Scheme for the modernisation and construction of CT terminals*; SA.35124 (2012/N) — Italy - *Investment Aid to Interporto Regionale della Puglia.*

internal market. On 17 June 2020, the Commission has adopted a White Paper²⁵⁹, in which it presents possible ways to address such distortions.²⁶⁰

5.4. COHERENCE

This section evaluates the coherence of State aid rules under the Fitness Check. In a first step, it examines the so-called “*internal*” coherence, that is to say whether the State aid rules under the Fitness Check are coherent with *each other*. In a second step, it examines the “*external*” coherence, i.e. say whether the State aid rules under the Fitness Check are coherent with *other EU/policies/legislation*.

The findings of the analysis on coherence are subject to the limitations stemming from the stakeholder consultation and constraints on the possibility of full triangulation.

The analysis in this section has to be read together with Annex 8.

To what extent are the State aid rules covered by the Fitness Check coherent with each other?

The analysis suggests that the SAM rules form a rather coherent package, albeit some technical alignments may be necessary. Certain SAM provisions, such as on the requirement for transparency and ex-post evaluation of the implemented national measures slightly diverge. The Railway Guidelines and STEC, which predate the reform, should be adapted to SAM.

The Commission’s case practice confirms that the **rules are overall coherent with each other**, although some technical alignments might be necessary. By way of example, Article 4(w) GBER sets the notification threshold for investment aid for the district heating or cooling distribution network at EUR 20 million per undertaking per investment project, while in the EEAG that threshold is EUR 15 million. Furthermore, pursuant to Article 44(2) GBER, beneficiaries of aid in the form of reductions in environmental taxes must be selected on the basis of transparent and objective criteria, while the EEAG (paragraph 173) also requires that it is done on a non-discriminatory basis. As regards the Risk Finance Guidelines, eligible undertakings under Article 21(5)(b) GBER are limited to SME that have been operating for less than 7 years following the “first commercial sale”, while start-up aid under Article 22(2) GBER uses an age definition based on the registration of the undertaking.

The public consultation supports that finding. Overall, the majority of respondents to the public consultation took the view that the State aid rules subject to the current Fitness Check are coherent with each other, fully or partially (86 or 92% for all respondents; 40 or 100% for public authorities).²⁶¹ Only 9% of the respondents (and more importantly, none of the public authorities) are of the view that the rules are not at all coherent with each other).

²⁵⁹ White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final, https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf.

²⁶⁰ The White Paper was open for consultation until 23 September.

²⁶¹ See public consultation, reply by Finland Q.13.

67% of all respondents (70% of public authorities) replied that the rules are partially coherent with each other. Those respondents mainly highlighted some smaller inconsistencies in the definitions in the GBER as opposed to the relevant corresponding guidelines. *“There is a need for the consistency of terminology and text across all of the State aid rules.”*²⁶² *“The linkage between EEAG and the related GBER provisions could be stronger.”*²⁶³

As described in detail in Section 2.2, the rules adopted under SAM included so-called **common principles**.²⁶⁴ Identification and definition of those common principles was one of the main requirements of the SAM Communication and each of the SAM rules then included a section setting out both those general principles common to all rules and their application in their specific context. The common principles apply to the assessment of compatibility of the aid measures by the Commission in line with the SAM objective to foster “good aid”.²⁶⁵

The **Railway Guidelines and the STEC** were adopted before the completion of the State aid modernisation and as such before the common principles were identified. Therefore, they are not fully aligned with the SAM common objectives. Moreover, in the case of the Railway Guidelines, which were adopted in 2008 (i.e. six years before the SAM package entered into force), in point 33 a series of State aid rules are referred to that in the meanwhile have been either repealed or significantly modified.²⁶⁶ Therefore, coherence between the provisions of the Railway Guidelines and the other State aid rules has been fading.

Moreover, as regards the **SAM requirement for ex-post evaluation of the implemented national measures**, the formulation of the requirement differs between the GBER and guidelines/frameworks, which leads to potential uncertainties in the implementation. In particular, while GBER provides for an automatism (ex-post evaluation is required for all GBER schemes in the relevant fields, which have an average annual budget above EUR 150 million), the SAM Guidelines/Frameworks call for additional interactions between the Commission and Member States, since they require the Commission to request the ex-post evaluation of “large or novel aid schemes”. In addition, the GBER does not make any direct reference to the use of evaluation results, while the relevant Guidelines stipulate that the evaluation report must be submitted to the Commission in due time to allow for the assessment of the possible prolongation of the aid scheme, and that any subsequent aid measure with a similar objective must take into account the results of the ex-post evaluation. The requirement for ex-post evaluation of the implemented national measures would therefore benefit from further harmonisation

²⁶² See replies to Q13.1 of the public consultation.

²⁶³ See Reply by the Sustainable Energy Policy Department, the Ministry of Economics of Latvia, Latvia.

²⁶⁴ Contribution to well-defined objective of common interest; need for state intervention; appropriateness; incentive effect; proportionality; avoidance of undue negative effects on competition and trade; transparency.

²⁶⁵ See an overview of the implementation of the common principles in each of the guidelines/frameworks in Section 5.1.

²⁶⁶ The 2001 State aid Guidelines on State aid to small and medium-sized enterprises have been repealed and replaced by specific provisions in the GBER; the PSO Regulation has been modified by the 4th Railway Package through the adoption of Regulation 2338/2016; the Regional aid Guidelines, the Rescue and Restructuring aid Guidelines and the Energy and Environment Aid Guidelines have been deeply overhauled in 2014 during the SAM process.

across GBER and Guidelines/Frameworks, especially as regards a common threshold and the use of ex-post evaluation results.

Finally, as regards the **SAM transparency obligations**, despite the steady growth in the number of aid awards reported in the TAM since 2016 (around 70,000 as of December 2019), the requirements were introduced in different waves between 2014 and 2016 and are therefore currently not harmonised across the various legal bases. Thus, their application remains uneven across the whole State aid “spectrum”.

To what extent are the State aid rules covered by the Fitness Check coherent with other EU policies/legislation?

The analysis suggests that the State aid rules under the Fitness Check are to a certain extent coherent with other EU policies and legislation. It appears however that the rules do not always reflect more recent legislative developments after their adoption. New EU policies and legislation stemming from the Commission’s priorities, in particular the Green Deal and the Digital and Industrial Strategies, are not mirrored/implemented yet.

Whether the State aid rules covered by the Fitness Check are coherent with other EU policies/legislation, has to be seen in the context of the new Commission priorities for 2019-24, see also Section 3.3, in particular the Green Deal, as well as the Digital and Industrial Strategies. The findings in this section might slightly overlap with the above question of “how well do the objectives of the individual State aid rules under the Fitness Check still correspond to the needs within the EU”, since both are marked by recent policy developments. This section focuses mainly on the impact of the recent Green Deal and the Industrial/SME Strategy on the overall SAM rules, while a more detailed assessment of the individual rules can be found in Annex 8.

In addition, as also emphasised in Section 4.1 and Section 5.3, the public consultation as well as the targeted consultations took place before the announcement of Commission’s recent policy strategies, such the Green Deal, the Digital or Industrial Strategies, although some comments/position papers were received thereafter. The consultations took place well before the COVID-19 crisis. Hence, not all recent legislative developments were perhaps fully visible to stakeholders.

Overall, stakeholders in the public consultation took the view that the State aid rules under the Fitness Check are coherent with changes in EU legislation, at least to a certain extent. As to the question to what extent the State aid rules subject to the current Fitness Check are coherent with changes in EU legislation²⁶⁷ which have occurred since the State aid rules were adopted, the majority of respondents to the public consultation stated that they are coherent with changes in EU legislation, fully or partially, with regard to all rules. Despite the fact that the public consultation predates the current Commission and its priorities, stakeholders emphasised climate neutrality and for instance stressed that State aid has to

²⁶⁷ Such as for instance in the Cohesion and Regional policy, Research and Innovation, Energy Union and Climate, Environmental protection and Circular Economy, Entrepreneurship and SMEs, Capital Markets Union, Investment Plan for Europe.

“enabling Member states with better tools to combat climate change, including improving the public financing tools at a level necessary for enabling the transition of the fossil fuels based industry towards more climate friendly technologies”.²⁶⁸

As regards recent policy development, the Green Deal outlining the policies to achieve climate-neutrality in Europe by 2050 and to tackle environmental-related challenges is one of the key priorities of the current Commission. Competition policy, and State aid rules in particular, have an important role to play in enabling Europe to fulfil its Green Deal and Just Transition objectives. The State aid rules will have to accompany the new Green Deal in all its facets, including its ambitious new emissions targets. While the State aid rules have to support the Green Deal objectives, they will also, at the same time, have to preserve their main objectives, mainly the integrity of the internal market.

In particular, the Communication on the Green Deal Investment Plan indicates that the relevant State aid rules will be revised by 2021 in light of the policy objectives of the Green Deal and support a cost-effective and socially-inclusive transition to climate neutrality by 2050. State aid rules will have to provide a clear, fully updated and fit-for-purpose enabling framework for public authorities to reach Green Deal objectives, while making the most efficient use of limited public funds. State aid rules will support the transition by fostering the right types of investment and aid amounts. In this respect, in line with the European Green Deal Investment Plan, the Commission will explore how the EU taxonomy can be used. State aid rules will encourage innovation and the deployment of new, climate-friendly technology at market scale. As also indicated by the Communication on the Green Deal Investment Plan, as part of this, the Commission will also consider further procedural facilitation to approve State aid for just transition regions. They will also facilitate the phasing out of fossil fuels, in particular those that are most polluting, thus ensuring a level-playing field in the internal market.

The Green Deal and follow-up actions are of particular relevance for the EEAG and related GBER provisions. It also has to be noted that the Commission has already set recently out a vision of how to achieve climate neutrality by 2050²⁶⁹. The Commission has also put forward a proposal for a European Climate Law²⁷⁰ that would enshrine the 2050 climate neutrality objective in legislation. Other recent and new regulatory developments relevant to the EEAG and relevant GBER provisions are the Clean Energy Package, Clean Mobility Package, the Circular Economy Package and the forthcoming 2030 Climate Target Plan. Under the Green Deal and the new Industrial Strategy, the EU will have to convert its linear economy to a more circular economy. This will require many transformations and the current State aid rules may be insufficient in particular for the higher challenge of the circular economy. The need to reflect objectives linked to the circular economy in the context of the forthcoming revision of State aid rules has been further recognised in the Circular Economy Action Plan.²⁷¹

²⁶⁸ See position paper submitted by Luxembourg.

²⁶⁹ A Clean Planet for all - A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy COM (2018) 773.

²⁷⁰ https://ec.europa.eu/info/files/commission-proposal-regulation-european-climate-law_en.

²⁷¹ A new Circular Economy Action Plan For a cleaner and more competitive Europe. COM(2020) 98 final.

The Green Deal Communication also emphasises the need for preserving and restoring ecosystems and biodiversity, and nature and biodiversity is a priority under the European Green Deal Investment Plan. While currently the State aid measures in that context have been treated under several rules, the revision process may need to further reflect a more coherent State aid approach among different types of beneficiaries, also to cover the latest policy developments, such as for instance the EU Biodiversity Strategy. Coherency between various objectives will need to be ensured.

As mentioned above, the recent Industrial Strategy package, which includes the new Industrial Strategy and the SME Strategy, aims at maintaining European industry's global competitiveness and a level playing field at home and globally, making Europe climate-neutral by 2050 and shaping Europe's digital future. One of the numerous actions to deliver those objectives is to have revised State aid rules in place in 2021 in a number of priority areas, including energy and environmental aid as well as IPCEIs.

In addition to the EEAG and related GBER provisions, the Green Deal will affect a series of other State aid rules. Regional aid for instance will play a major role in the implementation of the Green Deal Investment Plan. At the same time, as acknowledged by the Green Deal Investment Plan, the cohesion objective must be respected.

In order to reduce competition distortions caused by subsidies globally, EU is advocating for improved international rules on industrial subsidies. It is important to ensure continued coherence between EU's internal State aid rules and EU's external efforts in promoting stricter international subsidy rules.

5.5. EU ADDED VALUE

What is the additional value resulting from the fact that the Commission has adopted the State aid rules covered by the Fitness Check, compared to what could have resulted from a case-by-case assessment of the notified State aid measures?

Overall the existence of the State aid rules evaluated under the Fitness Check has a clear EU added value that is acknowledged by stakeholders as it brings similarities in the design of Member States compensation schemes, reduces administrative costs and provides clarity, stability and predictability.

The findings of the analysis on EU added value are subject to the limitations stemming from the stakeholder consultation and constraints on the possibility of full triangulation.

As explained above in Section 2.1, the provisions on State aid, as part of competition policy, are enshrined in the Treaty. Competition policy represents an area of exclusive EU competence pursuant to Article 3(b) TFEU and therefore the subsidiarity principle does not apply. The State aid rules covered by the current Fitness Check are Commission regulations and guidelines/frameworks (soft law) in the field of State aid law, an area where the TFEU gives the Union exclusive competence. Only the EU can/must act in this area.

In the absence of State aid guidelines, frameworks and regulations, all planned State aid measures would have to be notified to the Commission individually by

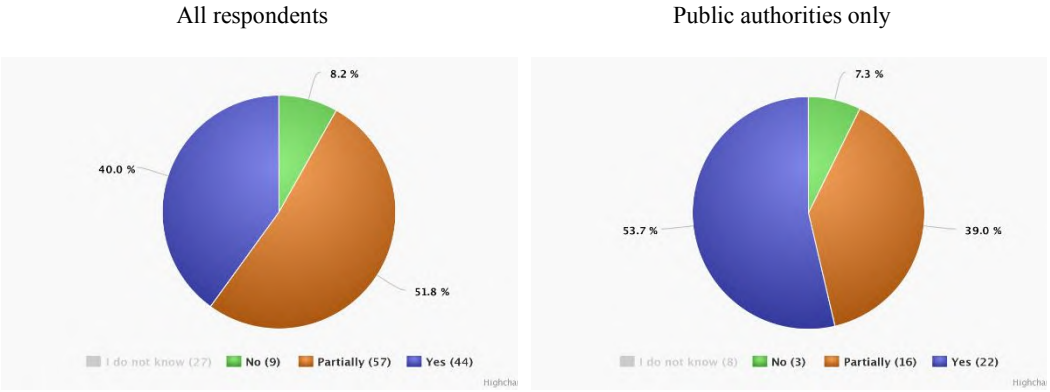
Member States and the Commission would have to assess them directly under Article 107 TFEU and take individual decisions on each of them. The mere existence of such State aid rules thus intrinsically reduces administrative burden.

In addition, the existence of State aid guidelines and frameworks allow Member States and potential beneficiaries to know *ex-ante* the rules that the Commission will use to assess the compatibility with the internal market of the aid schemes notified by Member States. This guarantees predictability and increases the legal certainty of the system. At the same time, the GBER allows for implementation of schemes without notification and de minimis Regulation sets out the conditions under which aid amounts are considered not to distort competition and affect trade. The existence of State aid rules also contributes to the convergence of State aid measure across different Member States and hence delivers on the objective of a level playing field.²⁷²

In order to evaluate the EU added value of the State aid rules subject to the current Fitness Check, stakeholders were asked whether the State aid rules in question helped to deliver EU policies more efficiently. The overwhelming majority of respondents said yes (92% for all respondents; 93% for public authorities), fully or at least partially.²⁷³

Figure 31: Replies to question 15 of the public consultation

Have the State aid rules subject to the current Fitness check helped to deliver EU policies more efficiently?



²⁷² For instance on stakeholder to the public consultation noted that the “GBER has provided guidance against which [State aid measures] have to be established and therefore a [measure] in one country is often very similar to those in other countries.”

²⁷³ See replies to Q15 of the public consultation.

6. LESSONS LEARNT

6.1. SAM AS A STATE AID SYSTEM

The analysis in Section 5 suggests that SAM as a whole is broadly fit for purpose and hence there is no need for an overhaul. The GBER remains the main building block of the SAM architecture. While there might still be scope for a further increase of expenditure under the current block-exemption rules in the coming years, in line with the approach to focus on cases with a big impact on competition, the current system also ensures that the Commission keeps examining a limited number of measures which have to be notified involving large amounts.

In addition, the present Fitness Check identified that SAM as a system would generally benefit from clarifications, further streamlining and simplification of certain rules, and thereby also contribute to the reduction of administrative burden and to overall objective of faster access to aid.

The non-legislative elements of SAM (monitoring, transparency, evaluation, as well as advocacy and the partnership with Member States) remain important building blocks of the current State aid system.

As regards **transparency**, limited and potentially flawed data that vary between Member States appear to undermine the purpose of the transparency requirements. Given the findings of the present Fitness Check, there seems to be a clear need for more complete and better information as well as increased legal certainty, while reducing or at least not increasing administrative burden for Member States.

Internal analyses on the available data on delayed reporting show that the timeliness of reporting is essentially driven by the behaviour of a very small number of awarding bodies in each Member State. In the future, a radical improvement in the timeliness of reporting could be achieved by targeting and training those few organisations that report belatedly. However, timeliness may not necessarily solve the issue of potential mistakes, which seem to be at least partially driven by the complex operations necessary to assess the cumulation of aid to verify whether the transparency threshold of EUR 500,000 is met. While it may increase the total volume of reporting, that source of error may be eliminated by requesting the reporting on all the disbursed State aid irrespective of the amount.

Ensuring and maintaining high-quality **ex-post evaluations** is a necessary precondition to using the evaluation findings in the decision-making process. In pursuing the extension of the evaluation coverage and the reinforcement of the methodological orientations, an ‘incremental’ approach and keeping a right balance between existing and new rules seems to be adequate. It appears to be necessary that the evaluation coverage reach some additional Member States and schemes, keeping at the same time the number of additional evaluations manageable by both the Commission and Member States. The range of accepted methodologies for impact evaluation could be broadened, but such expansions should follow clear and strict standards to preserve the current quality.

Evaluation plans should continue to ensure a reasonable degree of flexibility, delegating to the subsequent interim reports a detailed description of some methodological choices.

The current practice focuses on the final evaluation report, which should be submitted to the Commission six months before the end of the scheme at the latest. Although interim reports are a common practice, there is no binding requirement to produce them. A more systematic use of those tools may be beneficial to gather early information on the effectiveness of the schemes and assess data quality.

Overall, it appears necessary to make the expected use of evaluation results more clear in the rules, as well as to accompany them by support activities to promote the use evaluation results in the decision-making process, especially in Member States where the institutionalisation of evaluation is weaker.

6.2. INDIVIDUAL RULES

For the individual rules the assessment in Section 5 and Annex 8 identified changes needed to a different degree on different aspects. The following section has to be read in conjunction with Annex 8.

6.2.1. GBER

As to the specific provisions, the evaluation revealed that clarifications/adjustments of certain GBER provisions are needed. Moreover, hand-in-hand with the relevant guidelines/framework, certain aspects of the GBER is not up-to-date and more recent policy/legislative as well as technological/market developments and deployment have to be reflected. In order to ensure that all the GBER provisions become relevant and coherent, they may need to be amended.

Possible action: Amendment of the GBER in the short term to mirror the changes in the relevant soft law instruments also in light of the new Commission priorities. Amendment of the GBER in the medium term to allow for further streamlining.

6.2.2. DE MINIMIS REGULATION

The *de minimis* Regulation remains an integral part of the SAM architecture. However, the assessment suggests that the current rules may not reflect the impact of the economic development. In particular, the *de minimis* ceiling may need to be adapted (e.g. by taken into account the inflation in the internal market). The Regulation could also benefit from clarification and simplification, in particular with regard to financial instruments to increase their use. Finally, the requirements on monitoring could be reviewed given the flaws of the current dual system (registers or self-declarations).

Possible action: Amendment of the de minimis Regulation in the medium term, also in order to reflect economic development.

6.2.3. RAG

The rules on regional aid remain an integral part of State aid policy. The assessment suggests that the guidelines worked well but require targeted adjustments.

In general, the results show a need for simplification and clarification of the existing provisions. This refers in general to the overall design of the rules, but also

to the harmonisation of existing definitions (Regional aid Guidelines vs GBER) and for example excluded sectors and other concepts such as relocation.

Overall, the regional aid maps, as designed, seem to work well and contribute to the cohesion objectives. However, additional reflections on the current methodology for the design of the maps may include the level of flexibility for Member States to respond to economic developments that are reflected in the economic data of Member States on GDP and unemployment. While regional development and cohesion are the main objectives of the Regional aid Guidelines, recent policy developments, such as the Green Deal, the Digital and Industrial Strategies should also be reflected in the future rules. Although it is too early to estimate the medium and long-term consequences of the COVID-19 pandemic, regional aid will remain relevant to provide investment opportunities in the future and to support the economic recovery of disadvantaged regions in the EU.

The current restrictions to the eligibility of investments by large enterprises in c-regions (in particular related to new process innovation) appear to be often unclear and causing legal uncertainty. The provisions on aid granting to diversification investments of large enterprises in c-areas result in heavy administrative burden for both Member States and the Commission, while the notified aid amounts are frequently relatively small and cases are often withdrawn. Those specific provisions appear to be ineffective and inefficient and there might be a need to change or remove them.

As regards the sectoral exclusions from regional aid rules, reflection might be needed whether those presumed over-capacities still exist and hence whether the sectoral exclusions are still justified.

Possible action: Amendment of the RAG in the short term, also in light of the new Commission priorities

6.2.4. RDI FRAMEWORK

Based on the assessment in Section 5 and Annex 8, it appears that the State aid rules for RDI rather worked well and contribute to promoting RDI activities in the EU without unduly distorting competition and do not hamper support for R&D and innovation related activities.

Overall, the principles covered by the RDI Framework and the relevant RDI sections of the GBER continue to remain relevant and flexible enough to accommodate changing economic circumstances and technological developments, provide the incentives to invest in RDI contributing to growth in the EU's Single Market based on world leading research and technologies. Moreover, the evaluation did not identify evidence suggesting that State aid provided under the evaluated RDI measures had any material negative impact on competition or crowded-out private investments.

At the same time, however, the evidence base indicate that certain State aid rules on RDI are not sufficiently clear and relevant and some targeted adaptations, including in relation to subsequent and on-going technological and digital developments, may be needed. New current Commission strategic priorities need also to be taken into account, such as the Green Deal, the Digital and Industrial Strategies and the economic recovery.

More specifically, the results of the Fitness Check revealed the need to:

- Simplify the text (without changing substance) of certain provisions (i.e., on innovation clusters), streamline existing formulations, and clarify the definition of experimental development to explicitly refer to digital transition, in a way that allows reducing administrative burden while facilitating investments into RDI.
- Introduce a limited number of technical definitions (digital infrastructures, technology infrastructures) and compatibility criteria for the assessment of investment aid for the development of such infrastructures reflecting market and technology evolution and for RDI investments necessary to deliver the twin green and digital transition, especially of SMEs;
- According to the indications in Section 5 and Annex 8, a very limited number of provisions cause a disproportionate administrative burden (e.g., the notion of ancillary economic activities included in the RDI Framework, and the current rules on how to calculate indirect eligible costs of R&D projects). It is therefore necessary to clarify and simplify the practical application of those provisions.

The importance of addressing these findings is even more critical now, in view of facilitating European recovery from the health and economic crisis caused by the COVID-19 outbreak.

Possible action: Amendment of the RDI Framework in the short term, also in the light of current EU priorities

6.2.5. IPCEI COMMUNICATION

As the assessment in Section 5 and Annex 8 suggests, the IPCEI Communication proved to be an appropriate instrument to achieve the objectives of SAM and facilitate the emergence of important cross-border, integrated and collaborative projects in strategic value chains, which promote the common European interest. In that respect, the replacement of the previous, sector-specific rules for the assessment of IPCEIs with dedicated and cross-disciplinary guidance, appears to have attained its objectives of clarifying the criteria for the eligibility and compatibility of IPCEI State aid and enhancing the predictability of the Commission's assessment. The creation of cross-sectorial rules also allowed for an increased level of consistency of the Commission's action and enabled the rules to respond to different types of technological and societal challenges, including in the area of environmental protection and climate change. It also provided for a more coherent approach with important EU policy objectives such as on innovation, key enabling technologies, sustainability and strategic value chains.

At the same time, however, the assessment revealed that limited amendments or updates may be necessary to ensure that the rules are operational and fully fit to respond to current and future challenges. This is even more crucial in view of the important role that the IPCEI instrument may play in the post-COVID-19 recovery, as well as in the transition towards a greener, digital and more resilient economy. In particular:

- Certain notions referred to in the IPCEI Communication (e.g. on first industrial deployment, spillover effects, integrated projects) do not seem

still sufficiently clear on the basis of both the results of the public and targeted consultations and case practice. Therefore, it may be appropriate to remove the identified uncertainties by codifying the Commission's interpretation of those notions, as applied in approved and ongoing cases in the area of research and innovation.

- The IPCEI Communication may not provide full certainty with regard to certain situations that are currently not regulated by the Communication (e.g., the accession of Member States to an already approved and functioning IPCEI). The rules applicable to such situations may therefore need to be clarified to guarantee a sufficient level of legal certainty, on the basis of the experience gained in individual cases.
- While participation of SMEs was registered in both the R&I integrated IPCEIs approved since 2014, the rules of the IPCEI Communication do not, in themselves, address the specific situation of SMEs. In view of the special role that they play in the EU economy, and considering that State aid to SMEs is less likely to distort competition and affect trade between Member States, it may be appropriate to facilitate SMEs' participation in IPCEIs, in line with what the Commission advocated in its SME Strategy. This appears to be even more crucial in the current circumstances, in which the difficulties such undertakings face to access financing on the market in general have been exacerbated. The existing eligibility requirements (e.g., minimum number of Member States for a project to qualify as an IPCEI) and positive indicators (e.g., openness of the IPCEI and co-financing by a Union fund) are not sufficient to ensure that IPCEIs always have a truly European character. It may therefore be necessary to enhance IPCEIs' European character by slightly increasing the minimum number of participating Member States and providing for additional openness. This appears especially important in the current circumstances, as it may contribute to ensuring that the EU economy collectively and inclusively recovers from the COVID-19 crisis. To attain the same objective of reinforcing the European character of IPCEIs, and to ensure consistency with the EU cohesion policy, it may also be appropriate to clarify the Commission's treatment of clauses conditioning the granting of aid upon the relocation of the beneficiary's activities from a country in the EEA to the territory of the aid granting Member State.
- The IPCEI Communication does not fully reflect recent EU policy developments, in particular the Industrial/SME Strategy. It may therefore need to be updated with references to more recent relevant initiatives.

Possible action: Amendment of the IPCEI Communication in the short term, also in the light of new Commission priorities

6.2.6. RISK FINANCE GUIDELINES

The assessment suggests that the SME access to finance rules are overall fit for purpose. However, specific areas have been identified where improvements could be made to increase efficiency in application by Member States and beneficiaries without jeopardising the goal to protect the level playing field and minimise

potential market distortions. The following areas identified in the Risk Finance Guidelines could be further improved.²⁷⁴

First, the assessment indicates that it is sometimes difficult to identify with sufficient precision the date of the "first commercial sale", which is the baseline for the age requirement under Article 21(5)(a) GBER, allowing aided risk finance investments only up to 7 years after that date. It should also be noted that this provision is different from Article 22(2) GBER, which defines age related eligibility based on the "registration of the company". An alignment of those relevant points in time, with a potentially corresponding adjustment of the age threshold to ensure that the eligibility criteria are not substantially altered, could simplify application of the rules in practice, without changing the focus of the rule on young SMEs.

Second, the current rules provide in Article 21(5)(b) GBER the possibility to support SMEs that extend their business. The evaluation has shown that the corresponding eligibility criterion, which limits aid to undertakings to those entering a new "product or geographic market" may sometimes cause issues in practice. The reason is that it may be difficult to define a relevant product or geographic market with sufficient certainty. The legal risk associated is that a market definition that would not be upheld in court could lead to aid becoming declared illegal. Detaching the possibility to provide risk finance aid from the definition of a specific market, while still focussing on the actual underlying market failure, could lead to an improvement of the rules by simplifying application and eliminating legal risks for Member States and beneficiaries.

Third, the evaluation has shown that the requirement for private co-investments pursuant to Article 21(10) GBER is difficult to achieve in certain Member States that suffer particularly from weak private investment markets. At the same time, the evaluation has confirmed the importance of that requirement to ensure crowding-in as well as adequate due diligence for investment decisions. An improvement of the rules could therefore be to adjust the level of private participation for those areas where financial markets are particularly underdeveloped, without changing the principle of private participation requirements as such. Any such adjustment should be limited to those areas where private risk capital is particularly scarce. Since Member States apply GBER directly with no ex-ante compatibility assessment by the Commission, those criteria should be direct and easy to consult and apply, to avoid legal uncertainty. In that regard, several articles of the GBER outside those addressing regional aid, use the "assisted region" definition to soften the aid conditions.

Furthermore, additional minor clarifications could be made in relation to the calculation of thresholds and the requirements for the use of national promotional banks as financial intermediaries. The structure and readability of the text could be improved without any changes in substance.

As regards the Risk Finance Guidelines, they follow closely the logic of Article 21 GBER, as they account for additional measures beyond what is block exempted.

²⁷⁴ Together with the corresponding Section 3 GBER, and in particular Article 21 therein.

Therefore, the possible improvements identified above should be considered in parallel for both legal instruments at the same time.

In addition, the evaluation has shown that the Risk Finance Guidelines may benefit from some structural improvements that would increase readability and ease of application. In particular, while the evaluation has shown that the basic principle of the Risk Finance Guidelines to require an *ex ante* assessment to proof a specific market failure that should be addressed by a national measure works overall well, the content of the Risk Finance Guidelines on this issue is sometimes perceived as overly complex by some Member States. Without changing the material requirements as such, a possible improvement could be made by consolidating all requirements linked to the *ex ante* assessment and streamlining the specific content and level of evidence needed in different cases.

The evaluation has also shown that, while there is an overall coherence between GBER, Risk Finance Guidelines and other rules, namely those governing centrally managed funds, there is room for further aligning the definitions within the Risk Finance Guidelines to those used elsewhere, where it is possible without significant changes to the scope of the rules as they stand.

Finally, enabling access to finance should also be seen as an enabler in light of the investments required for the Green Deal, Industrial Strategy and the digital transformation.

Possible action: Amendment of the Risk Finance Guidelines in the short term, also in the light of new Commission priorities

6.2.7. AVIATION GUIDELINES

While air passenger transport can stimulate local economies and have important effects on overall connectivity of a given region, the assessment indicates that aid to airports might not always be the most efficient use of public resources to promote regional development.

As the assessment suggests, the transitional period allowing operating aid under the Aviation Guidelines does not seem to be sufficient for many regional airports to become cost covering by 2024. In particular, many airports below 1 million passengers per year will continue to need operating aid after 2024. In addition, there seems to be a structural need for operating aid for airports with less than 200,000 passengers per year, currently covered by the GBER. Therefore, it may be necessary to prolong the transitional period beyond 2024.

It also appears from the assessment that aid to regional airports below 500,000 passengers per year has usually a limited effect on competition, although it needs to be notified to the Commission. Therefore, reflection is needed how to further simplify rules for aid to that category of regional airports to allow the Commission to focus its State aid control on the potentially most distortive cases.

Moreover, there might be a need to better align provisions governing investment and operating aid to airports. The Aviation Guidelines furthermore do not specifically address measures to mitigate the airports' impact on the environment and the climate. Therefore, the Aviation Guidelines may need to be amended in that regard.

The evaluation has revealed the need for an update and further clarification of the rules under the Aviation Guidelines and the relevant GBER provisions.

The full impact of the COVID-19 outbreak is not yet known. However, there are already indications that the aviation sector is one of the most heavily affected sectors by the pandemic. While the impact of the COVID-19 pandemic had not been assessed in the Aviation external study, the International Air Transport Association predicts that the air passenger traffic will go back to its pre-COVID-19 levels by 2023. Therefore, the conclusions of the study (and from the assessment) should be deemed to still be valid in three years' time. However, any possible revision of the Aviation Guidelines will need to take account of the changes in the aviation sector created by the COVID-19 pandemic.

Possible action: Amendment of the Aviation Guidelines in the medium term, also in the light of the impact of the ongoing COVID-19 pandemic

6.2.8. EEAG

The assessment suggests that the EEAG and corresponding GBER rules have generally delivered on their objectives. They already explicitly support the Union's environmental and sustainable energy policy objectives while at the same time ensuring an effective and efficient State aid control. However, some limitations and problems have become visible.

There are indications that the scope of the guidelines might have been too restricted and that the current guidelines are too tightly focused on specific aid categories and technologies. They are thus not sufficiently future-proof, to cater for recent and expected technological and market developments and novel aid designs.

There are some indications that the compatibility rules on environmental protection are not entirely suited to face the climate neutrality challenge, in particular the rules to ensure necessity of aid, proportionality and limitation of distortions. Allowing for other types of aid that have potentially a stronger impact on competition raises the question of how that stronger impact can be mitigated and how the conditions of the necessity of the aid, the proportionality and the limitations of competition distortions can be verified. This relates in particular to industrial decarbonisation.

It is very difficult to measure whether the redistribution of costs inherent in the reductions to Energy Intensive Users (EIUs) from energy charges really increases the acceptability of the underlying policy from the perspective of public opinion. Furthermore, the correlation between the existence of EIU reductions and the introduction of ambitious renewables policies is uncertain.

More could be done to contribute to the Energy Union, by aligning to the more recent legislation in the energy field (in particular Clean Energy Package) and further promoting competition and market integration. In addition, more could be done to align to more recent legislation in the sphere of environmental protection (including climate action) (in particular legislation adopted under the Green Deal, the Circular Economy Package, the Clean Mobility Package).

Finally there is scope for further clarifying and simplifying a series of concepts and provisions, taking into account additional case practice and experience. In terms of relevance as regards EU priorities, the EEAG and GBER related provisions should

be revised to better accompany the Green Deal in all its facets (carbon neutral and circular economy, biodiversity, zero pollution ambition) and the new Industrial Strategy.

Possible action: Amendment of the EEAG in the short term, also in the light of new Commission priorities

6.2.9. RESCUE AND RESTRUCTURING GUIDELINES

Given that the number of cases under the 2014 Rescue and Restructuring Guidelines are limited, the case practice is not sufficient to evaluate all the changes brought by the 2014 modification. Therefore, the Fitness Check focused on one of the major changes of the Rescue and Restructuring Guidelines, namely the modified definition of 'undertaking in difficulty', which is also an exclusion criteria for GBER and other aid.

The assessment suggests that while the 'Undertaking in difficulty' definition largely meets its objective to identify companies in need of rescue or restructuring, it is not entirely clear and easy to apply for national authorities for the purposes of GBER, so that guidance and/or technical clarification might be needed. The criterion of disappearing capital may capture companies which would not necessarily go out of business, and those are consequently excluded from benefitting from GBER and other aid. Furthermore, for specific types of legal entity forms the definition does not appear fit for purpose, for example as regards public institutions, local authorities, NGOs and undertakings without legal requirements on capital. This could lead to diverging application in Member States, in particular when it comes to the assessment of exclusion from GBER and other aid.

As regards the effects of the COVID-19 crisis, the conditions for aid under the Temporary Framework are less stringent than under the Rescue and Restructuring Guidelines. Therefore, in the short term, it is possible that many Member States will provide aid under the Temporary Framework for undertakings in financial difficulty, if possible. However, the need for the rescue and restructuring aid could increase as a result of the crisis in the mid- to long-term. In particular, undertakings, which were in difficulty end of 2019 are not eligible for aid under the Temporary Framework (except for small and micro undertakings). Ultimately, at this stage, the COVID-19 crisis does not seem to have an impact on the findings of the Fitness Check with regard to Rescue and Restructuring Guidelines.

Possible action: Amendment of the Rescue and Restructuring in the medium term

6.2.10. RAILWAY GUIDELINES

The assessment suggests that the Railways Guidelines are not fit for purpose. The Railways Guidelines may need a full-fledged review to align them with the current legislation and to make them fit for the full liberalisation and market opening.

As regards the COVID-19 outbreak, on the one hand, it has produced massive negative demand shocks in passenger transport. On the other hand, rail freight transport has suffered from a substantial loss of intermodal volumes, a disruption of supply chains from China as well as the heavily disturbed intercontinental flow of cargo. In addition, the rail freight sector has been facing increased costs like

unforeseen rolling stock parking fees. At present there is a lack of sufficiently reliable sectorial information to make a thorough assessment of the impact of the pandemic on possible responses. Nevertheless, the effects of the pandemic so far do not change the findings of the present Fitness Check (i.e. that the Railway Guidelines are outdated and need a complete overhaul). On the contrary, they confirm those findings and make them even more topical in the light of the need to improve the take-up of sustainable modes of transport, drawing all lessons from the crisis.

Possible action: Overhaul of the Railway Guidelines in the medium term, also in the light of the impact of the ongoing railway liberalisation

6.2.11. STEC

The Fitness Check showed that STEC ensures an adequate competition level between private and public export-credit insurers as well as between exporters in the EU single market.

One of the minor issues detected relates to the fact that STEC predates SAM. While it reflects well the main objectives of the SAM, also taking into account the specificities of the area it covers, it is not fully aligned with the single common principles as set out in SAM. Furthermore, there may be a need for a technical update of STEC to take into account indicators such as inflation

Possible action: Amendment of STEC in the short term.

7. CONCLUSIONS

The present Fitness Check aims at assessing SAM as a whole and not carrying out individual evaluations of the specific rules. In addition, it is also to be seen as a “mid-term review” or an “implementing evaluation” that examines whether everything is on track or if there is a case for making any changes.

The findings of the analysis are subject to the limitations stemming from the stakeholder consultation and constraints on the possibility of full triangulation at certain instances.

The results of the Fitness Check also need to be interpreted in the light of the COVID-19 crisis because future policy-making cannot disregard the imbalances created in the Member States’ economies due to it. The fact-finding and assessment were done pre-COVID-19 and largely before the adoption of major priorities earlier in spring 2020. While, overall, the conclusions of the Fitness Check appear to be sound to the majority of the rules to a large extent, there might be certain areas, such as aviation for instance, where uncertainties concerning the validity of conclusions reached might be more pronounced.

The analysis suggests that the SAM as a whole largely met its triple objective and hence is **effective** as a State aid architecture. As regards the General Block Exemption Regulation, while there might still be scope for a further increase of expenditure under the current block-exemption rules in the coming years, in line with the approach to focus on cases with a big impact on competition, the current system also ensures that the Commission keeps examining a limited number of measures involving large amounts which have to be notified. The implementation of the common assessment principles seems to have led to a clearer methodological framework for the various State aid rules contributing to the achievement of the objective of fostering “good aid”. In addition, SAM seems to have contributed to a significant clarification of the relevant State aid rules, even though some problematic areas have still been identified.

The individual rules seem to have, to a large extent, also proven to be effective in achieving their specific objectives, even though the present Fitness Check has also revealed various issues that may need further clarification or fine-tuning.

With regard to **efficiency**, the available evidence also suggests that the SAM rules have to a certain extent allowed to decrease administrative burden, albeit there still seems to be room for improvement, in particular with regard to the clarification of certain definitions and concepts. Moreover, the analysis also suggests that the SAM rules, in light of the achieved objective of “good aid”, allowed for a more efficient State expenditure. It appears that benefits derive from SAM, not only for public authorities, but also for undertakings and indirectly for consumers. The benefits deriving from SAM, seem to outweigh the costs associated.

As to the **relevance** of the rules, the Fitness Check indicated that the overall SAM objectives are appropriate for meeting the needs within the EU. It also suggests that the objectives of the individual State aid rules have been to a large extent appropriate for meeting the needs within the EU so far, but that they do not fully reflect recent EU policy developments and Commission priorities for the future, in particular the Green Deal, the Digital and Industrial Strategies. The potential impact

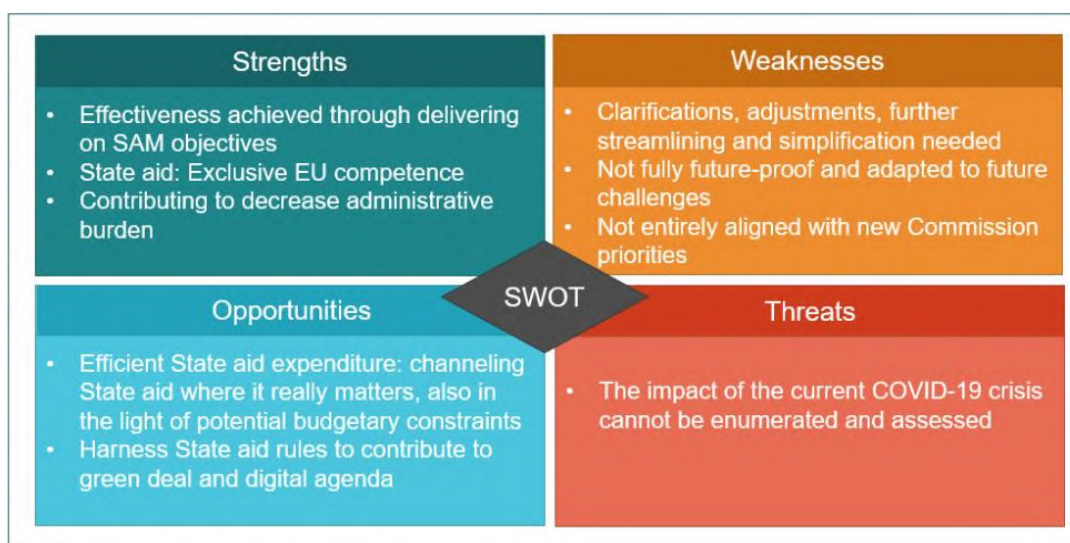
and the uncertainties brought by the COVID-19 crisis cannot be fully evaluated yet. The analysis suggests that the State aid rules under the Fitness Check are to a certain extent adapted to subsequent market developments and technological advances, but further adaptation in specific areas and a certain degree of flexibility may be needed in the future, depending on the specific rule.

As regards **internal coherence**, it appears that the SAM rules form a rather coherent package, albeit some technical alignments may be necessary. Certain SAM provisions, such as on the requirement for transparency and ex-post evaluation of the implemented national measures slightly diverge. The Railway Guidelines and STEC, which predate the reform, should be adapted to SAM.

With regard to **external coherence**, the analysis suggests that the State aid rules under the Fitness Check are to a certain extent coherent with other EU policies and legislation. It appears however that the rules do not always reflect more recent legislative developments after their adoption. New EU policies and legislation stemming from the Commission's priorities, in particular the Green Deal, the Digital and Industrial Strategies, are not mirrored/implemented yet.

Overall the existence of the State aid rules evaluated under the Fitness Check has a clear **EU added value** that is acknowledged by stakeholders as it brings similarities in the design of Member States compensation schemes, reduces administrative costs and provides clarity, stability and predictability.

Figure 32: SWOT analysis of SAM



The assessment in the current Fitness Check suggests that, *overall*, the SAM architecture and State aid rules which were reformed under the SAM initiative, are **broadly fit for purpose**. SAM seems to be largely effective in reaching its triple objective, and in particular, through the objective of “good aid”, State resources are channelled to where it really matters. **There is no need to reform the State aid system of SAM as such.**

However, **the individual rules need revision and/or update**, including clarifications, further streamlining and simplification, as well as adjustments to reflect recent legislative developments, current priorities, market and technology developments.

The rules should also be aligned to future challenges and Commission priorities. This is in particular important as State aid can, and should, contribute to the Green Deal, as well as the Digital and Industrial Strategies. This is key, given the past and, most crucially, future budgetary constraints. In particular, the GBER, Regional aid Guidelines, RDI Framework, IPCEI Communication, Risk Finance Guidelines and the EEAG need to be adapted in the short term, also in light of the new EU priorities. STEC also needs to be revised to align it to SAM. In addition, adaptations of the de minimis Regulation, Aviation Guidelines and Rescue and Restructuring Guidelines are needed in the medium term. The Railway Guidelines are outdated and need a complete overhaul.