

Reducing the Red Tape?

The Effects of State Aid Modernisation on Municipalities



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Executive Summary

In summary, state aid exists of government measures that provide a financial benefit to one or more undertakings or a certain industry, with the potential to distort competition or affect trade between MSs within the EU. The rules for state aid are laid down in Art. 107, 108 and 109 TFEU and the different Regulations and Guidelines. In principle, state aid is prohibited, as it is considered to be incompatible with the internal market. However, Art. 107 TFEU provides many exemptions, which allows municipalities to grant aid measures.

The Procedural Regulation sets out the procedures for notifying an aid measure and the granting of unlawful aid. With the Enabling Regulation, the Council has given the EC the power to adopt regulations to declare certain categories of aid compatible with the internal market and allows the EC to adopt a regulation on *de minimis* aid, which means that aid can be granted to the same undertaking over a period of time which does not exceed a certain amount of money.

With the modernisation of state aid control the EC wants to focus on the most distortive aid and wants to simplify the procedures. With the revised Procedural Regulation, the EC wants to limit the amount of requests for information MSs receive when a complaint is lodged, it wants to deal with groundless complaints rapidly, it wants to inform complainants, MSs and other interested parties frequently about the progress and result of the examination and it wants to improve the efficiency and reliability of the gathering of information. With the revised Enabling Regulation, the list of group exemptions will be extended. Regarding *de minimis* aid, the EC wants to introduce a central register for every MSs with all the data of *de minimis* aid granted. The threshold for *de minimis* aid will remain at € 200.000,-.

Regarding the Procedural Regulation, a frequently heard disadvantage is the amount of time it takes for local authorities to deal with a complaint. In addition, SMEs often do not use the complaint form which makes it difficult for municipalities to respond. Therefore, a simplified complaints procedure and the EC focussing on the most distortive cases would be convenient. In addition, gathering market information and not dealing with complaints forms that are not filled in properly, will reduce the workload for municipalities. An extension of the group exemptions is very useful in reducing the administrative burden for municipalities and in particular the group exemption for culture, as municipalities grant a lot of aid for culture which usually does not distort competition. However, a group exemption for social, educational, health and small amounts of ad hoc aid to large enterprises could be implemented as well. The biggest disadvantage of the revised *de minimis* Regulation is the obligatory central register, as it obliges municipalities to report all data to the EC when the register is not public.

To conclude, by streamlining the complaints procedure, gathering market information, strengthening the role of the national courts, exempting more categories from prior notification and setting up a central register, the EC should be able to focus on the most distortive state aid cases in order to reduce the administrative burden for all interested parties. It can be concluded that the revised complaints procedure is more efficient and will lead to more transparency, less uncertainty, a decrease of the workload and less time-consuming bureaucracy. The EC cooperating more with national courts mean a more rapid process when a complaint has been lodged. However, the obligation to set up a central register for *de minimis* aid cannot be considered as a tool to diminish the administrative burden. When the data will not be public, municipalities are obliged to report to the EC on an annual basis.

Table of Contents

Preface	6
List of Abbreviations	7
Chapter 1: Introduction	8
1.1 Problem indication	8
1.2 Problem Statement.....	8
1.3 Research Questions.....	9
1.4 Scope	9
1.5 Research method	9
1.6 Thesis outline	10
Chapter 2: What is State Aid?	11
2.1 Introduction.....	11
2.2 Definition of state aid.....	11
2.3 Criteria for state aid	11
2.4 Prohibition on state aid	12
2.5 Exemptions.....	13
2.6 Role of the EC.....	14
2.7 Role of the national judges.....	14
2.8 Conclusion	15
Chapter 3: State Aid Regulations.....	16
3.1 Introduction.....	16
3.2 Procedural Regulation (Council Regulation No 659/1999)	16
3.3 Enabling Regulation (Council Regulation No 994/98)	17
3.4 General Block Exemption Regulation (Commission Regulation No 800/2008)	18
3.5 <i>De minimis</i> Regulation (Commission Regulation No 1998/2006)	19
3.6 Conclusion	20
Chapter 4: State Aid Modernisation Initiative	21
4.1 Introduction.....	21
4.2 Objectives of the SAM Initiative	21
4.3 Reform of the Procedural Regulation.....	22
4.4 The handling of complaints	22
4.5 Complaints form.....	23
4.6 The role of the national courts	23

4.7 Gathering market information	23
4.8 Extension of group exemptions	24
4.9 <i>de minimis</i> aid	25
4.10 Conclusion	26
Chapter 5: Municipalities and State Aid	27
5.1 Introduction	27
5.2 Methodology	27
5.3 General matters to take into account	28
5.4 Avoiding unlawful aid	29
5.6 Opinion of the Committee of the Regions	30
5.7 Procedural Regulation	30
5.8 Block exemptions	32
5.9 <i>de minimis</i> aid	33
5.11 Conclusion	33
Chapter 6: Conclusion	35
Chapter 7: Recommendations	37
Reference List	38
Appendix I: Charts	42
Appendix II: Consultation Dutch Provinces	44
Appendix III: Interview	46
Appendix IV: Consultations Used	49

Preface

With great pleasure I hereby present my bachelor thesis for European Studies at The Hague University of Applied Sciences. European Studies does not pay significant attention to European law in its courses. This is why I decided to broaden and deepen my knowledge about this particular subject by looking for an internship in the field of European law.

During my internship at *Kenniscentrum Europa decentraal*, an organisation that explains European law and policy to decentralised governments, I noticed that state aid is one of the prior subjects within European law and that municipalities find many difficulties with when applying the state aid rules. My main task at *Kenniscentrum Europa decentraal* was writing news articles for the weekly news letter. During that time, the European Commission was proposing several revised Regulations and Guidelines in the framework of modernising state aid control. In that respect, I decided to examine what the effect of the state aid modernisation would be for municipalities.

Writing this thesis was an extremely educational experience, although sometimes exhausting and frustrating. Therefore, I would like to thank some people for their support during this process and which helped me to come to the realisation of this thesis.

First, I would like to thank my supervisor Ms Van den Haspel for keeping me on the right track and providing me with helpful feedback. Second, I would like to thank Mr Aalbers, expert at *Kenniscentrum Europa decentraal*, for his expertise on the subject, taking me to consultations and directing me to the right people in the field of state aid.

Evelien den Boer

The Hague, 20 May 2013

List of Abbreviations

Art.	Article
CoJ	Court of Justice of the European Union
CoR	Committee of the Regions
DG	Directorate-General
EC	European Commission
ECJ	Court of Justice of the European Communities
EEC	European Economic Community
EU	European Union
GBER	General Block Exemption Regulation
MEIP	Market Economy Investor Principle
MIT	Market Information Tools
MS	Member State
SAM	State Aid Modernisation
SANI	State Aid Notifications Interactive
SGEI	Services of General Economic Interest
SIGI	Services of General Interest
SME	Small and Medium Enterprises
SSGI	Social Services of General Interest
TFEU	Treaty on the Functioning of the European Union
WLGA	Welsh Local Government Association

Chapter 1: Introduction

1.1 Problem indication

One of the core objectives of the European Economic Community (EEC) was to develop a single market with free movement of goods, services, people and capital. This meant that all barriers had to be removed in order for free trade to be possible. In addition, people who are resident of a country in the European Union (EU), are able to work and live in any other country in the EU. Therefore, competition crosses borders and the EU considers fair competition as important. (Shuibhne, 2006)

Within the EU, trade and industry is under strain due to the financial crisis which led to companies facing difficult times. Because of this, companies require aid from national governments. The past couple of years many news items on the television and in news papers consisted of cases of banks and companies that were asking national governments for financial aid. In addition, there were many cases of municipalities granting aid to sport clubs or local projects. Thus, state aid is not just a matter for national governments.

In the framework of the financial crisis, the EC adopted a Communication on the State Aid Modernisation (SAM). The Initiative sets out the objectives of an ambitious reform package. With this initiative the EC wants to foster growth in a strengthened, dynamic and competitive internal market and focus enforcement on state aid cases with the biggest impact on the internal market. In addition, it wants to streamline the state aid rules and come to faster decisions. (EC, “State aid: Commission launches major initiative”, 2012) For MSs and local governments, this means that new rules shall be applied when granting aid.

1.2 Problem Statement

Not just central governments have to do with state aid, also decentralised governments, such as municipalities, water boards, provinces and regions have to apply the state aid rules when providing aid measures. Items in the news mostly concern very large state aid cases by national governments. However, municipalities are granting all kind of subsidies. Currently, the EC is changing several Regulations and guidelines. On one hand, the EC desires to simplify the procedures and exempt more categories from the notification procedure, on the other hand, it wants more supervision with less resources and a focus on the big state aid cases. This means that the responsibility of the enforcement of the state aid rules will have to be carried more by the MSs. In addition, more categories will be exempted from prior notification to the EC when

granting aid. This thesis will examine what the revised Regulations will mean for municipalities. While taking this in consideration, the research question of this thesis will be:

With the European Commission giving more responsibility to national governments, revising the procedures and exempting more categories from the notification procedure, what will be the effects for European municipalities?

1.3 Research Questions

The main research question cannot be answered without a clear structured research. In order to achieve this, there had to be set up several sub questions:

1. What is state aid?
2. What contain the state aid Regulations?
3. What changes with the SAM Initiative?
4. What current problems do municipalities face regarding state aid and how can municipalities avoid granting unlawful aid?
5. What is the opinion of the Committee of the Regions about the SAM Initiative?
6. Regarding the consultations the EC held last year, what responses do representatives of local authorities give?

1.4 Scope

Competition law involves collusion and cartels, mergers and acquisitions, market dominance and state aid. This thesis exclusively deals with one of the most important categories of the competition policy: state aid. State aid is a very broad subject as well. For instance, the EC evolved policies regarding transport, environment and agriculture. This means that the state aid rules apply to many different parties, both in the private and public sphere. This thesis will only deal with a part of decentralised governments, namely municipalities. With the EC modernising the state aid rules, the SAM Initiative will be used to examine. With this Initiative, most of the state aid guidelines will be streamlined. For instance, the guidelines regards to regional aid, research & development & innovation, environmental aid, risk capital and broadband. It is not possible to examine what each of these streamlined guidelines will mean for municipalities. This is why this thesis will only deal with the four state aid Regulations that will be revised: the Procedural Regulation, the Enabling Regulation, the General Block Exemption Regulation (GBER), the *de minimis* Regulation.

1.5 Research method

The research method that was used for this thesis was primarily desk research. Sub question one was answered through literature study, informative documents of the EC and by consulting the

Treaty on the Functioning of the European Union (TFEU). Sub question two was answered by using the different Regulations. To clarify and understand these Regulations, additional literature was used. Sub question four could be answered through the new Regulations and documents about the SAM Initiative the EC publicised. Sub question three was mainly answered by the use of different literature. Additionally, consultations about the Procedural Regulation were consulted as well. Theory that was used consisted mainly of books by experts in the field of state aid relating to municipalities, such as professor Hessel. By consulting the opinions publicised by different European institutions and press releases, sub question five could be answered. The last sub question, number six, was partly answered by referring to consultations the EC held, and partly through consultations of representatives of decentralised governments and an interview with an employee at a Dutch municipality specialised in the field of state aid.

1.6 Thesis outline

Chapter two provides an outline of the term and criteria of state aid. In addition, it deals with the prohibition of state aid, the exemptions and the role of the EC and the national courts. Chapter three outlines the most important Regulations regarding state aid, which have been revised within the framework of the modernised state aid rules. Chapter four provides a description of the SAM Initiative and will outline what the main changes are regarding the revised Regulations. Chapter five will outline what matters municipalities have to take into account when applying the current state aid rules and it will display how municipalities can avoid the granting of unlawful aid. In addition, it displays how European institutions and municipalities observe the modernised state aid rules. Chapter six, provides an answer to the actual problem statement. It draws conclusions on the basis of the literature, consultations and interviews. The last chapter, chapter seven, will provide several recommendations based on the examination and the drawn conclusions.

Chapter 2: What is State Aid?

2.1 Introduction

Before examining and understanding the SAM Initiative, it is very useful to first introduce the term state aid. The rules for state aid are laid down in Article (Art.) 107 and 108 TFEU. Subordinated to this are the different Regulations and guidelines. This chapter will mainly explain Art. 107 and partly Art. 108 TFEU, regarding the role of the EC. Last, it deals with the Commission Notice on the enforcement of State aid law by national courts.

2.2 Definition of state aid

The rules for state aid are based on Art. 107, 108 and 109 TFEU. The TFEU does not provide a definition for the term state aid. However, the Court of Justice of the European Communities (ECJ), which was renamed to the Court of Justice of the European Union (CoJ) after the Treaty of Lisbon came into force, has stated that “the concept of aid encompasses advantages granted by public authorities which, in various forms, mitigate the charges which are normally included in the budget of an undertaking”. (French Republic v Commission of the European Communities, 1996, para.34) An undertaking is “every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”. (Klaus Höfner and Fritz Elser v Macrotron GmbH, 1991, para.21) In other words, state aid exists of government measures that provide a financial benefit to one or more undertakings or a certain industry, with the potential to distort competition or affect trade between MSs within the EU. It involves direct subsidies as well as indirect measures. In other words, an aid measure is not necessarily a payment in cash. Other methods can also be observed as a prohibited aid measure. An indirect measure can be, for instance, the sale of land or buildings or loans that are not in line with the market prices. (Dekker & Van der Wal, 2008) There are different reasons why governments provide state aid. First, in order to protect weak and threatened sectors. Second, for the development of backward areas. Third, for the support of certain aspects of the government’s policy. Last, aid can be provided for public tasks by undertakings. (Barents, 2012)

2.3 Criteria for state aid

There are different criteria in order to determine whether a measure consists of state aid. First, it has to be an intervention by the state or through state resources, in any form. Second, the intervention has to grant an advantage to the recipient on a selective basis, for example to specific companies or sectors of the industry. Third, it must distort or threaten to distort competition. Last, the intervention is liable to affect trade between MSs. (Rydelski, 2006) In addition, the advantage

of the aid measure cannot be acquired against the normal market conditions elsewhere. (Barents, 2012)

About first criterion that the intervention has to be by the State or through State resources, the ECJ says: “the distinction between ‘aid granted by a Member State’ and aid granted ‘through State resources’ does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State”. (PreussenElektra AG v Schleswag AG, 2001, para.58) The second criterion is that the intervention must favour certain undertakings or a sector. Therefore, Art. 107(1) TFEU will not be applicable if the aid measure benefits the economy as a whole. The third criterion, that the intervention distorts or threatens to distort competition, means that the EC has to identify the relevant product and geographical market in order to establish distortion of competition. When examining this, the EC has to define the market in detail and see if the intra-Community trade is, or threatened to be, distorted. The fourth criterion is that this intervention must be liable to affect trade between the MSs. When an aid measure is exclusively national, it is not likely that it will affect intra-Community trade. Nevertheless, it is possible that a certain aid measure may affect trade between MSs, even if the actual undertaking is not engaged in intra-Community trade, and thus it is considered to be state aid. (Pisuisse & Teubner, 2009)(Rydelski, 2006)

2.4 Prohibition on state aid

Competition on the European market can be falsified by both undertakings and governments. In principle, state aid is prohibited, as it is considered to be incompatible with the internal market. Art. 107(1) TFEU reads as follows:

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

With European competition law coming into force, governments cannot unconditionally grant aid measures to national undertakings. (Huzen & Wormsbecher, 2002) “The objective of State aid control is, as laid down in the founding Treaties of the European Communities, to ensure that government interventions do not distort competition and trade inside the EU” (EC, 2012, “Overview” section, para. 1). However, the TFEU provides many exemptions, that permit certain categories of state aid. This in order to ensure equal competition opportunities.

2.5 Exemptions

Art. 107 (2) considers three categories as compatible with the internal market. It states:

“The following shall be compatible with the internal market:

- (a) Aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
- (b) Aid to make good the damage caused by natural disasters or exceptional occurrences;
- (c) Aid granted to the economy of certain areas of the Federal Republic of Germany in order to compensate for economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.”

Aid measures under these three categories are automatically exempted from Art. 107(1) TFEU. Art. 107(3) TFEU provides five other categories that might be considered as compatible with the internal market:

“The following may be considered to be compatible with the internal market:

- (a) Aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in article 349, in view of their structural, economic and social situation;
- (b) Aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- (c) Aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- (d) Aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
- (e) Such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.”

In particular, aid for regional development and aid for certain economic activity is considered to be important. An example of aid that was considered to be compatible with the internal market is the aid provided to banks and insurers during the economical crisis, as this can be seen as a remedy to a serious disturbance in the economy of a MS. Due to the large opportunities regards to aid measures, the condition is laid down, that the common interest shall not be damaged. Therefore, the EC has determined certain criteria for aid measures. For instance, with regional aid, maxima per area apply. Lines of businesses that are in crisis, aid only can be granted when a

reorganisation plan is set up. The distinction between by definition allowed and in certain cases allowed aid measures is not that important, as every measure that might be an aid measure, has to be notified to the EC. (Barents, 2012)

2.6 Role of the EC

Together with the national governments, the EC enforces the EU competition rules. The EC has the ability to interfere when undertakings and countries do not comply with the competition rules. Art. 108 TFEU provides that the EC has supervision over state aid rules. Art. 108(1) deals with the review of existing aid measures. Art. 108(2) sets out the power of the Council investigation and decision by the EC. Art. 108(3) deals with the notification of aid measures and the preliminary examination. Art. 108(4) is lays down that the EC has the ability to adopt block exemptions. At first instance, the directorate-general (DG) Competition is authorised to control the state aid measures. The DG cannot act without prove of an infringement. Besides, its decisions are subject to appeal before the CoJ. Thus, DG Competition is concentrating on action against MSs when it thinks it breaches the competition rules. This is unlike other parties of the EC, that are focussing on proposing new legislation. (EC Competition, 2011)

2.7 Role of the national judges

The EC is the only body that can review whether or not aid is compatible with the internal market. However, national courts do play an important role in the enforcement of state aid law. The role of national courts is laid down in the Commission Notice on the enforcement of State aid law by national courts. First, parties affected by unlawful aid can go directly to national courts for damages, which are usually directed at the public authority granting the aid. When unlawful aid has been granted, the national court must order full recovery from the beneficiary, even when the aid is compatible with the internal market. This occurs, for example, when a municipality grants aid before approval of the EC or it has not notified the EC about the aid measure. If this is the case, the national courts have to intervene in order to protect the rights of parties affected by the unlawful aid. National courts are obliged to examine the case, regardless any parallel procedure before the EC. Second, national courts may play an important role in the enforcement of recovery decisions. Mostly this is the case when beneficiaries, who received aid which turned out to be unlawful and had to be recovered, ask to review the legality of the repayment. Last, national courts play a role when applying block exemptions. Aid measures under the GBER can lead to disputes and national courts can assess whether an aid measure meets the requirement of the Regulation. (Kaoutzanis, 2009) Art. 79 of the Commission Notice on the enforcement of State aid law by national courts explains two different forms where the national courts may ask for support of the EC when needing assistance in reaching a decision in a pending case:

- “The national court may ask the Commission to transmit to it relevant information in its possession;
- The national court may ask the Commission for an opinion concerning the application of the State aid rules.”

2.8 Conclusion

In summary, State aid exists of government measures that provide a financial benefit to one or more undertakings or a certain industry, with the potential to distort competition or affect trade between MSs within the EU. There are four different criteria for to determine whether a measure is considered to be state aid. First, it has to be an intervention by the State or through State resources, in any form. Second, the intervention has to grant an advantage to the recipient on a selective basis. Third, it must distort or threaten to distort competition. Last, the intervention is liable to affect trade between MSs. In principle, state aid is prohibited, as it is considered to be incompatible with the internal market. However, Article 107 TFEU provides many exemptions, which allows municipalities to grant aid measures. Together with the national governments, the DG Competition of the EC enforces the EU competition rules. Unlike other parties of the EC, that are mainly focussed at proposing legislation, the DG Competition is concentrating on action against MSs when it thinks it breaches the competition rules. National courts also play an important part regarding the state aid rules. Parties affected by unlawful aid can go directly to national courts for damages or recovery. In addition, national courts may play an important role in the enforcement of recovery decisions and in applying block exemptions.

Chapter 3: State Aid Regulations

3.1 Introduction

When providing aid measures, municipalities may have to deal with different Regulations and guidelines. For example guidelines for Regional aid, Environmental aid, or Broadband. This thesis deals with the different Regulations for State aid that are revised by the SAM Initiative. In order to answer the question what actually changes with the SAM Initiative as regards to the Regulations, there has to be outlined what the different Regulations exactly contain. This chapter will explain the Procedural Regulation, the Enabling Regulation, the General Block Exemption Regulation and the *de minimis* Regulation.

3.2 Procedural Regulation (Council Regulation No 659/1999)

The procedure for notifying the EC about an aid measure and the procedure for examination by the EC is laid down in Art. 108 TFEU. This article obliges public authorities to notify every potential aid measure to the EC, as the EC is the only institution is authorised to decide whether one of the exemptions is applicable. The aid measure can be notified to the EC via the online system ‘State Aid Notifications Interactive’ (SANI). In addition, Art. 108 TFEU deals with the so called ‘*standstill-principle*’. This means that an aid measure cannot be put into effect before the EC has authorised it. When a public authority does grant the aid before approval of the EC, this is considered as unlawful aid and has to be recovered. Art. 108(3) TFEU lays down that the EC has the opportunity to start an examination procedure when it considers that the aid measure might be incompatible with the internal market. (Rydelski, 2006)

Subordinated to Art. 108 TFEU is Council Regulation 659/1999 (The Procedural Regulation) which contains rules about the application of Art. 108 TFEU. This Regulation provides more detailed procedures and was created by case law of the ECJ. The Procedural Regulation deals with definitions for aid and existing aid, it sets out procedures regarding notified and unlawful aid, the misuse of aid and existing aid schemes. In addition, it deals with interested parties, monitoring and common provisions. The notification of an aid measure has to be done by the Permanent Representation of a MSs. In the EU, most MSs have a decentralised administration, which means that municipalities have to notify their aid measure via their national government, which will then send it to the Permanent Representation in Brussels. After the aid measure is notified to the EC, the EC starts the preliminary examination procedure. The EC has two months to complete this examination. During this examination, MSs are obliged to reply to any request for information by the EC in order to assess the aid measure. It is possible, that the EC will come to the decision that the notified measure does not constitute state aid. Another possibility is that

the EC will come to a decision not to raise objections. In this case, the measure is considered to be compatible with the internal market and the aid will be provided. When the EC does raise objections to the aid measure, it will initiate the formal investigation procedure. With this procedure, the proposed aid measure will be examined on every positive and negative aspect. This procedure is also initiated when the aid measure has not been notified to the EC. The MS and all other interest parties will be questioned and consultation will take place. In many cases, the aid measure will be adapted, for example, a less amount of money will be granted. When the formal investigation procedure is completed, it will result in a decision of the EC. Herein, the EC sets out the reasons why it perceives the measure as state aid, why the aid measure influences competition and trade negatively and whether the aid measure will be considered for exemption. When the MS does not agree with the EC's decision, it can turn to the General Court and request for annulment. (Brants, 2012) (Piscuisse & Teubner, 2009)

One of the main parts of the Procedural Regulation the EC is changing, is the complains procedure. Interested parties have the ability to lodge a complaint against alleged unlawful aid. These interested parties can be any person, undertaking or association that can be affected by the granting of the aid. The EC encourages interested parties to use the complaints form in order to efficiently deal with the lodged complaints. When interested parties do not fully complete the form, it might be difficult for the EC to handle the complaint which can result in delay in treatment of the complaint. (Braun & Ritter, 2005)

3.3 Enabling Regulation (Council Regulation No 994/98)

Through Council Regulation No 994/98 (Enabling Regulation), the Council gives the EC the power to adopt regulations to declare certain categories of aid compatible with the internal market. In other words, it exempts certain horizontal aid measures from notifying. Horizontal measures are aid measures that are meant to solve problems that could occur in every economic sector and region. Art. 1 of the Enabling Regulation describes certain categories of aid that may be covered by a group exemption regulation. This categories exist of aid in favour of Small and Medium Enterprises (SMEs), research and development, environmental protection and employment and training. Art. 2 of the Enabling Regulation allows the EC to adopt a regulation on *de minimis* aid, which means that aid can be granted to the same undertaking over a period of time which does not exceed a certain amount of money. On the basis of the Enabling Regulation, the EC adopted the General Block Exemption Regulation (GBER) and the *de minimis* Regulation. Measures under these two regulations do not need to be notified to the EC and can be implemented without waiting for a decision by the EC. The EC proposed the Enabling Regulation to the Council with the aim to introduce prioritisation and simplification in the field of state aid. (Hancher & Ottervanger & Slot, 2012) With the Enabling Regulation there was aimed for three

different effects. First, in areas where the EC lacks experience to define general compatibility criteria, MSs can implement aid without further proceedings. Second, due to the direct applicability of regulations within MSs, compliance with the GBER can be ensured through private enforcement before national courts. Last, the GBER makes it possible for the EC to concentrate mainly on cases where distortion is most likely. (“Evaluation report on the application of the Council Regulation(EC) No 994/98”, 2006) The next two sections will outline both the GBER and the *de minimis* Regulation.

3.4 General Block Exemption Regulation (Commission Regulation No 800/2008)

The GBER was adopted on 29 August 2008 by the EC, with the aim to reduce the administrative burden for the public sector, the beneficiaries and the EC. The GBER declares certain categories of aid compatible with the internal market, which means that these categories are pre approved and do not require to be formally notified to the EC. These categories only have to be reported to the EC twenty days after the aid has been granted using a simple information sheet. Within the GBER, there are three chapters. The first and the third chapter deal with common provisions and final provisions and are applicable to all aid provided. The second chapter provides specific conditions. These conditions deal with the eligible costs, the maximum percentage of aid that can be granted (aid intensities) and the notification threshold or upper limits of how much aid can be reported. The following aid categories are under the GBER:

- “Regional aid;
- SME Investment and employment aid;
- Aid for creation of enterprises by female entrepreneurs;
- Aid for environmental protection;
- Aid for consultancy in favour of SMEs and SME participation in fairs;
- Aid in the form of Risk capital;
- Aid for Research, Development & Innovation;
- Training aid;
- Aid for disadvantaged or disabled workers” (Department for Business Innovation & Skills [BIS], 2001, p.3).

The GBER applies to nearly all sectors of the economy except for fisheries and aquaculture, coal, agriculture, regional aid in the steel sector, shipbuilding and synthetic fibres sector, and regional aid schemes targeted at specific sectors of economic activity. (BIS, 2001) In addition, it does not apply to ad hoc aid granted to large enterprises and to undertakings in difficulty. For undertakings in difficulty there exist separate guidelines, namely the guidelines on state aid for rescuing and restructuring firms in difficulty. According to these guidelines, the EC sees an undertaking in

difficulty “a firm as being in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term” (EC DG Communication, n.d., p.1). Municipalities are able to exempt aid under the GBER. However, there are certain conditions when using the GBER. First, the municipality has to explicitly mention the GBER and it has to make sure that it is compliant with all the requirements. Second, the *Deggendorf clause* has to be mentioned. In this clause, payment is excluded to an undertaking, where previously, aid was unlawful and incompatible with the internal market. In other words, new aid cannot be granted when previously granted aid still has to be recovered. When this clause is absent, the GBER cannot be applied and the EC will have to be notified about the aid measure. Third, the municipality has to inform the EC about the aid measure via SANI. Within twenty days after the implementation of the aid measure a summary of the data of the measure has to be sent to the EC. Moreover, the aid measure has to be publicised on the internet. Last, the municipality needs to maintain a dossier in which sufficient records are demonstrated to comply with the GBER requirements for 10 years in case of a monitoring exercise or complaint. Additionally, information on spending to an annual report has to be submitted. (Hessel, Kühler & Perton, 2012)

3.5 De minimis Regulation (Commission Regulation No 1998/2006)

Governments can grant one undertaking up to € 200.000,- in any form, over a period of three fiscal years. This is *de minimis* aid. (Hessel et al., 2012) For each new *de minimis* measure, the total amount of the *de minimis* aid granted within that fiscal year has to be determined, as well as the previous two fiscal years. The Regulation only applies to transparent aid. Art. 13 of the *de minimis* Regulation describes transparent aid as: “Transparent aid is aid for which it is possible to calculate precisely the gross grant equivalent ex ante without a need to undertake a risk assessment.” In other words, it must be possible to precisely calculate the amount of *de minimis* aid in advance, without the execution of a risk assessment. For the Agriculture, Fisheries and Road Transport sectors are separate rules regarding the granting of *de minimis* aid. Additionally, the Regulation does not apply to undertakings in difficulty, as these kind of measures are assessed under the Guidelines on State aid for rescuing and restructuring firms in difficulty. MSs are not obliged to notify the EC. The MS has to inform the undertaking in writing of the amount of aid and whether it fits the *de minimis* Regulation. (Hessel et al., 2012) There also counts a restriction to cumulated state aid. Excluded from *de minimis* aid are:

- Undertakings active in Agriculture (ceiling of € 7.500,-), Fisheries (ceiling of € 30.000) and Road Transport sector (ceiling of € 100.000,-);
- Export related activities and aid favouring domestic goods over imports;

- Undertakings active in the coal sector;
- The acquisition of road freight transport vehicles and the
- Undertakings in difficulty. (EC, Commission Regulation (EC) No 1998/2006, art.1)

When granting *de minimis* aid, certain conditions apply. First, the ceiling for *de minimis* aid counts for just one single undertaking. Second, previously received aid has to be cumulated. The total amount of *de minimis* aid shall not exceed the maximum for aid. There are two options to determine this: the public authority granting the aid requests all information from the undertaking regarding previous *de minimis* aid or the MS sets up a central register for all *de minimis* aid granted by any authority within that MSs during three fiscal years. (Hancher et al., 2012) Third, according to art. 2(5) of the Regulation, when cumulating the expenses, these have to be different, identifiable and eligible. Last, to avoid exceeding the *de minimis* ceiling, the government granting the aid, has to request the undertaking for a clarification. In this clarification, the undertaking has to report all regular and *de minimis* aid received in the previous two fiscal years. (“Voorwaarden de-minimis”, n.d.)

3.6 Conclusion

In summary, the Procedural Regulation sets out the procedures for notifying an aid measure and the granting of unlawful aid. The most important aspect of this is that the MS or other governmental body has to notify the aid measure to the EC and the measure cannot be put into effect before the EC has authorised it. After the measure has been notified, the EC starts the preliminary examination procedure, if the EC raises objections after this procedure, it will start the formal investigation procedure. With the Enabling Regulation, the Council has given the EC the power to adopt regulations to declare certain categories of aid compatible with the internal market and allows the EC to adopt a regulation on *de minimis* aid, which means that aid can be granted to the same undertaking over a period of time which does not exceed a certain amount of money. On the basis of the Enabling Regulation, the EC adopted the General Block Exemption Regulation (GBER) and the *de minimis* Regulation. The GBER declares certain categories of aid compatible with the internal market, these categories do not need to be formally notified to the EC. The *de minimis* Regulation provides governments with the opportunity to grant one undertaking up to € 200.000,- in any form, over a period of three fiscal years.

Chapter 4: State Aid Modernisation Initiative

4.1 Introduction

To foster growth, a new strategy had to be set up: the Europe 2020 strategy. With this strategy, the EC wants to make Europe a smart, sustainable and inclusive economy. To reach this objective, the internal market is Europe's best asset. Competition is an important driver for growth, with state aid control playing a crucial role regarding the protection and strengthening of the internal market. On 8 May 2012, the EC adopted a Communication on the Modernisation of EU State aid Policy. This chapter outlines the objective of the SAM Initiative and the major changes the SAM Initiative brings.

4.2 Objectives of the SAM Initiative

The financial crisis threatened the integrity of the internal market and showed how important the streamlining and enforcement of State aid control is. According to the Communication of 8 May 2012, the growth potential can be increased by better focussing on public expenditure. Therefore, public spending should become more efficient and effective. In addition, it should target at growth-promoting policies. A part of this public spending is in the form of state aid, for instance in the form of direct expenditure, tax incentives and state guarantees. The three objectives of the modernisation of state aid control are:

- "To foster sustainable, smart and inclusive growth in a competitive internal market;
- To focus Commission *ex ante* scrutiny on cases with the biggest impact on internal market whilst strengthening the Member States cooperation in State aid enforcement;
- To streamline the rules and provide for faster decisions." (EC, "Communication from the Commission", 2012, p.3)

State aid control has to focus on the least distortive aid and simplify the procedures as regards to provide this kind of aid ("good aid"). The modernised State aid control is key to ensure a well functioning internal market. The major measures to modernise state aid control are:

- Revision of several guidelines based on common principles. In particular, the guidelines for regional aid, environmental aid, risk capital aid and aid for research, development and innovation are revised;
- The EC reviewed the rescue and restructuring guidelines, which is considered to be a very distortive type of aid;

- To focus on the large state aid cases. The analysis of cases with limited effect on the internal market was simplified. To achieve this, the GBER, the Enabling Regulation and the *de minimis* Regulation were extended and simplified;
- The Procedural Regulation was revised. With this, the handling of complaints has been streamlined;
- The EC wants to clarify the term State aid. (“A brave new world? Implications of state aid modernisation”, 2013)

4.3 Reform of the Procedural Regulation

One of the elements that is considered very important by the EC is the revision of the Procedural Regulation. The objective of revising the procedures is to make State aid control more effective. On 5 December 2012, the EC proposed the new Procedural Regulation. The proposed amendments have two objectives; to improve the handling of complaints and to strengthen the EC’s means of gathering market information. In particular, the EC wants to limit the amount of requests for information MSs receive when a complaint is lodged. In addition, the EC wants to deal with groundless complaints rapidly. Furthermore, the EC wants to inform complainants, MSs and other interested parties frequently about the progress and result of the examination. Last, the EC wants to improve the efficiency and reliability of the gathering of information. (EC, “Proposal for a Council Regulation Amending Regulation (EC) No 659/1999”, 2012)

4.4 The handling of complaints

Complaints are very useful for the EC, as it makes it easier for the EC to determine where distortion takes place. However, the EC receives more than 300 complaints every year. Many of these complaints are not motivated by genuine competition concerns or are not sufficiently substantiated. Within the current legal framework, the EC is obliged to examine every complaint that is brought by a third party and take a decision without undue delay. There do not exist formal conditions when handing in a complaint. When the EC decides that there exists no State aid, as alleged by the complainant, the EC is obliged to explain to the complainant why it took this decision. Most of these complaints are not prioritised by the EC, which leads to the notion that the handling of complaints is unpredictable and not transparent. The amendments aim at improving the quality of information received and it aims at a staged, predictable and transparent procedure. Therefore, the EC is now able to require a certain amount of obligatory information from the complainant. In this respect, the EC is empowered to adopt implementing provisions. Herein, the EC can determine what the form and content of the complaint has to be. In addition, complainants will now have to prove that they are interest parties and therefore have a legitimate interest to lodge a complaint. Where the EC decides that the received information cannot be classified as a complaint, the EC is not obliged anymore to adopt a formal decision. The submissions will,

however, be registered as market information and can be used at a later stage. Last, when the complainant cannot provide the EC with the requested information or does not want to cooperate during the further procedure, the EC may consider the complaint as withdrawn. According to the EC, the handling of complaints can be streamlined and improved this way. (EC, “Proposal for a Council Regulation Amending Regulation (EC) No 659/1999”, 2012)

4.5 Complaints form

For complainants it can be difficult to know which information the EC requires. The revised Procedural Regulation obliges complainants to use a new complaints form. This form will guide the complainant in the process of collecting and presenting the information the EC needs. This will make it easier for the EC to determine whether a complaint involves State aid and what degree of priority it should give to the complaint, without constantly asking the complainant for additional information. A more predictable and more transparent procedure will give the complainant a better view on the state of play. (EC, “Proposal for a Council Regulation”, 2012)

4.6 The role of the national courts

“In order to provide an alternative to complaints before the Commission in the enforcement of State aid rules, the proposed amendments also strengthen the role of national courts.” (Cleary Gottlieb Steen & Hamilton LLP [CGSH], 2012, p.2) It stresses that national judges have the right to receive information from the EC when a national judge has to apply the TFEU or needs assistance with cases in relation to the state aid rules. Besides this, the amendments propose to empower the EC with the right to make submission to national courts in oral or written form. The EC can use this provision exclusively in the interest of the EU and not to support one of the interested parties. The aim of this provision is to draw the attention of national courts to issues of importance for the application of the state aid rules across the entire internal market. When complainants will lodge a case before a national court, the national judge will now have the required tools at its disposal to obtain the support of the EC. This cooperation will also facilitate the implementation of state aid law by national courts. (EC, “Proposal for a Council Regulation Amending Regulation (EC) No 659/1999”, 2012)

4.7 Gathering market information

The revised Procedural Regulation introduces market information tools (MIT). Moreover, it introduces a legal basis to investigate certain sectors of the economy and into particular aid instruments. All of this was introduced in order for the EC to be able to obtain timely, reliable, correct and complete information from the market. Currently, the EC is dependent on the information it receives from the concerned MSs. When it is difficult for these authorities to gather the information this leads to delays. To make the procedure more efficient and transparent the EC

will need to have the opportunity to consult the market. Regarding to notified and unlawful aid, the EC will be able to require information via a simple request or by decision from other entities after the opening of the formal investigation. In addition, the EC will have the possibility to sanction the involved undertakings through fines or penalty payments when the concerned undertaking is not replying or providing sufficient information. (Art. 6 and Art. 10) “Market information tools would be mostly used in complex individual cases requiring an in-depth assessment, in order to tackle a series of issues as regards the qualification of aid or its compatibility assessment.” (EC, “Proposal for a Council Regulation Amending Regulation (EC) No 659/1999”, 2012, p.8) The market information will consist of factual market data, company data and a facts-based analysis of the functioning of the market. The introduction of MIT should reduce the administrative burden for public authorities, as the authorities do not have to gather the information anymore. This would particularly reduce the administrative burden in cases where the information is not directly available and therefore takes significant more time and effort to obtain the information. Ultimately, this will lead to a better balance between the aid grantor and the beneficiary of the aid. With the EC wanting to focus on the most distortive cases, it now wants to apply an enhanced horizontal approach in its examinations. In this way, it would become easier for the EC to determine distortion in a specific sector. This can raise issues linked to a specific sector in multiple MSs, which gives the indication that similar problems may exist in other MSs. Art. 20 proposes the introduction of a specific legal basis to start investigations into sectors of the economy and into types of aid measures. The EC will execute such investigations by using its right to send requests for information to the concerned MS and all market parties. At the end of its investigation, the EC will publicise a report about the results of the investigation to specific economic sectors. According to the EC, the initial workload for the public authorities will be outweighed by the reduction of the workload in the future of individual cases because the EC will not send as much information requests as before because it already has the information at its disposal. Moreover, it will lead to more transparency. (EC, “Proposal for a Council Regulation Amending Regulation (EC) No 659/1999”, 2012)

4.8 Extension of group exemptions

The amount of block exempted measures has been increasing throughout the years (see Appendix I). As already mentioned, with the modernisation of the state aid rules the EC is focussing on the most distortive cases for the internal market. On one hand this means that the most (potentially) distortive aid is being examined more deeply. On the other hand this means that the assessment of the least distortive aid will be simplified by allowing more group exemptions. In the proposed amendment of the Enabling Regulation, the EC suggest to expand the list of group exemptions. The new list of exemption categories does not mean that all of the categories will be exempted automatically. “Rather, it enables the Commission to adopt block exemptions gradually, when

experience acquired is sufficient to allow the Commission to define clear compatibility criteria for certain types of aid measures, ensuring that the effect on competition and trade between Member States is limited.” (EC, Proposal for a Council Regulation amending Council Regulation (EC) No 994/98, 2012, p.2) Thus, when the EC acquired sufficient experience with certain categories it will be able to formulate general compatibility criteria to block-exempt these categories. The EC proposed to block-exempt the following list of categories from notification:

- Culture and heritage conservation;
- Making good the damage caused by natural disasters;
- Innovation;
- Forestry and promotion of certain food products;
- Conservation of marine biological resources;
- Amateur sports;
- Residents to remote regions, for transport;
- Coordination of transport or reimbursement for the discharge of certain public service obligations;
- Certain broadband infrastructure (civil engineering works and passive broadband infrastructure).

The EC has gained sufficient experience with these categories and has determined that the categories usually have limited effect on competition and trade. In addition, the EC has revised different types of aid. As part of regional aid, there are new block-exemptions for operating aid in remote regions, aid for enterprises for activities and the same aid intensities for European Territorial Cooperation projects. The EC has also revised aid for SMEs, for example a revision of risk finance measures and start-up aid. The EC regards research and development as an important part of the Europe 2020 strategy. Therefore, there have been set up improved definitions of aid for research and development and broader aid for SMEs in respect of innovation. Regarding aid for training and development, the definition of disadvantage workers was enlarged. The last type of aid that was revised, was aid for environmental protection. The calculation of eligible costs has been simplified and there are new block exemptions for support for efficient district heating. (EC, Proposal for a Council Regulation amending Council Regulation (EC) No 994/98, 2012)

4.9 *de minimis* aid

The revision of the *de minimis* Regulation is linked to the ambition of prioritisation and therefore an important part of the SAM Initiative. To prepare the revision, the EC carried out a large consultation. With the current Regulation, the ceiling for granting aid, without the obligation to notify the EC, is set at € 200.000,- per undertaking over three fiscal years. Initially, the EC was going to increase the ceiling to € 500.000,-. However, the consultations made clear that an

increase of the *de minimis* threshold is not justified. According to the EC, the lack of monitoring is one of the weakest points of the current monitoring system. Authorities do not have sufficient resources at their disposal, in order to check compliance with the ceiling. Besides, the lack of data makes the setting of the appropriate ceiling and accompanying conditions very difficult for the EC. With the current Regulation, MSs can choose between a central register with all of the *de minimis* measures and a system with declarations, that relies totally on information from undertakings. Therefore, the EC wants to oblige MSs to set up a central register for *de minimis* aid. In this register, all *de minimis* aid granted by all the public authorities in that MSs will be registered. MSs shall provide the information about the amounts of aid granted on a yearly basis. However, when the central register will be public, MSs and other governments, such as municipalities, will not be obliged to report to the EC. (EC, “The first draft”, n.d.)

4.10 Conclusion

In summary, the notion of the EC is that state aid control has to focus on the most distortive aid and simplify the procedures for granting aid. Because of this, the EC has revised several guidelines, wants to focus on the large State aid cases and wants to clarify the term State aid. The main Regulations that were revised were the Procedural Regulation, the Enabling Regulation, the GBER and the *de minimis* Regulation. With the revised Procedural Regulation, the EC wants to limit the amount of requests for information MSs receive when a complaint is lodged, it wants to deal with groundless complaints rapidly, it wants to inform complainants, MSs and other interested parties frequently about the progress and result of the examination and it wants to improve the efficiency and reliability of the gathering of information. Ultimately this should lead to a reduction of administrative burden for all interested parties, in particular for public authorities. With the revised Enabling Regulation, the list of group exemptions will be extended. This list contains categories where the EC acquired sufficient experience with these categories so it will be able to formulate general compatibility criteria to block-exempt these categories. Moreover, these categories do not significantly distort competition or influence trade. Regarding *de minimis* aid, the EC wants to introduce a central register for every MSs with all the data of *de minimis* aid granted. The threshold for *de minimis* aid will remain at € 200.000,-.

Chapter 5: Municipalities and State Aid

5.1 Introduction

Municipalities may have the notion that state aid law is not directly applicable, as European law first has to be converted into national law. This is a misunderstanding as state aid rules apply to both centralised governments and decentralised governments, such as municipalities, regions and water boards. In 1999, Barents, already ascertained that decentralised governments are more and more confronted with state aid rules (as cited in Hessel & Neven, 2001). State aid law is not just very extensive, but also very dynamic. While the basic Treaty articles remained more or less the same throughout the years, the Regulations and guidelines have been revised and extended regularly. First, this chapter outlines what matters municipalities have to take into account when applying the state aid rules. In addition, there will be outlined how municipalities can avoid unlawful aid. Second, it deals with the opinion in relation to the SAM Initiative of the Committee of the Regions (CoR), as this is the European body that represents the local and regional governments in the EU. Furthermore, it displays the opinions of European municipalities about the modernisation of state aid.

5.2 Methodology

In order to provide an accurate and reliable answer to the research question, utilising exclusively desk research was not sufficient. Parts of this chapter are based on literature review. In addition, questionnaires of the EC were consulted. During 2012, the EC held different consultations in order to gather opinions about the draft Regulations of the modernisation package. Institutions, public bodies, citizens, firms and other organisations were all able to respond to the consultations. Nevertheless, the consultations were mainly aimed at national authorities that deal with state aid measures. Representatives of municipalities did not reply to the consultations individually. Instead of this, some MSs collected the opinions of different local and regional authorities and responded to the consultations on behalf of these authorities. However, some of these consultations were answered by associations representing local authorities. To the consultation about the Procedural Regulation, seventeen public authorities responded. Unfortunately, only two of the responses were available in English. This means that information about the Procedural Regulation is based on only two interested parties. To the consultation about the GBER, the EC received remarkable more responses from public authorities, namely 45. To the consultation about the *de minimis* Regulation, the EC received even more responses from public authorities, namely 58. The consultations that were mainly consulted can be found in Appendix IV. In addition, the Dutch provinces held a consultation, in which *de minimis* aid was one of the main subjects. This gives a good notion about what public authorities think about the modernisation of the *de minimis*

Regulation. Although a province is not the same type of administration, both provinces and municipalities are decentralised governments, so the application of the new state aid rules will be similar. In order to gather opinions about the SAM Initiative at municipalities, a state aid expert at the Dutch municipality The Hague was interviewed. In order for the responses to be as representative as possible, the interviewee gathered opinions of other employees at the municipality beforehand.

5.3 General matters to take into account

It might be difficult for municipalities to comprehend the state aid rules. There are certain matters that municipalities have to take into account when providing aid to undertakings. Firstly, the term undertaking can be considered as very broad. As already mentioned, an undertaking is “every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed (Klaus Höfner and Fritz Elser v Macrotron GmbH, 1991, para.21).” An economic activity is offering goods or services on the market. Municipalities have to take into account that health care institutions, such as hospitals, or non-profit foundations can be undertakings as well, as these entities offer their services on the market. Secondly, aid has to be granted to certain undertakings or a specific sector. For municipalities this means that when it provides its own state aid measures, these measures are only applicable to a part of the MS. In other words, these measures are considered to be selective, even when the measures apply to all undertakings within a certain municipality. Thirdly, municipalities often have the notion that state aid only incorporates subsidies to undertakings. However, state aid also encloses interest-free loans or the selling of a piece of ground against a lower price than the market price. This means that when a municipality rewards an advantage to certain undertakings that the undertaking could not require under normal market conditions, is considered to be state aid. Moreover, certain measures do not necessarily have the purpose to provide an advantage to certain undertakings, it can, however, be a consequence. Therefore, municipalities have to take into consideration how certain measures will work out in practice, as many measures do not appear to be state aid on paper. Lastly, the EC sees most aid measure cases as falsifying the competition rules. When the EC is examining a measure that is (potentially) falsifying competition, it will look at the undertaking’s position on the market before and after the receiving of the aid. When the situation of the undertaking has improved after receiving the aid, it distorts competition. In addition, municipalities have to take into account the influence on trade between MSs. The EC is not obliged to prove that there is actual influence of trade, it is sufficient to declare that it is likely that an aid measure will influence trade. (Hessel et al., 2012)(Expertisecentrum Europees Recht [ECER], n.d.)

5.4 Avoiding unlawful aid

Under the current state aid rules, municipalities have different opportunities to avoid the granting of unlawful aid. First of all, municipalities have the opportunity to support local activities and regulations with social characteristics. A clear social or cultural character of a measure can be of great importance, as the chance of approval increases with this. (Hessel et al., 2012)

A second opportunity might be the Market Economy Investor Principle (MEIP). “The essence of the MEIP is that when a public authority invests in an enterprise on terms and in conditions which would be acceptable to a private investor operating under normal market economy conditions, the investment is not a state aid.” (Slockock, 2002, p.23) In this case, the municipality is operating as an undertaking on the market. Rydelski (2006, p.245) states that “The MEIP is an artefact used to compare the situation of the beneficiary of a measure with public participation to that of a hypothetical private investor operating under normal market economy conditions.” The MEIP contains that there has to be sufficient prospect of profitability of the investment. Market conformity of the investment has to be demonstrated thorough and extensively. According to the EC this can be guaranteed through a reference to a significant participation of private investors or through a proper business plan that appears to have a suitable profitability to the investment. How the MEIP has to be applied is laid down in Commission’s Communication on government capital injections and in the Communication on financial transfers to public enterprises. (Slockock, 2002)

Third, municipalities can burden an undertaking with the execution of a activity in the public interest, as long as it does not distort the internal market. These are so called Services of General Economic Interest (SGEI), which are part of Services of General Interest (SGI). Another example of SGI’s are the Social Services of General Interest (SSGI). SGI’s contain all market and non-market services (economical and social activities), that are not exclusively left to the market mechanism. These kind of services are regulated and controlled by the government to a certain degree. SSGI’s are social security schemes, “covering the main risks of life, such as those linked to health, ageing, occupational accidents, unemployment, retirement and disability” (EC, “Commission Staff Working Document”, 2013, p.22). Examples of this is social housing or child care. SGEI’s are market services that serve the public interest. Examples of this are transport and postal services, or television broadcasts by regional broadcasters. SGEI’s are on the border of public interest on a national and decentralised level and the rules of the internal market. When executing a SGEI, a municipality can compensate the undertaking under certain conditions. In short, before the SGEI is executed, the municipality has to clearly define the public service. The amount of the compensation has to be objective and transparent, which has to be determined in advance, and must exceed the amount that is necessary. In addition, the undertaking that is going

to execute the SGEI has to be selected through a procurement procedure. (Andenaes, Bekkedal, Davies & Szyszczak, 2011)

Last, municipalities often try to apply the *de minimis* Regulation at first instance. However, it is more convenient to see whether the aid falls under the GBER or one of the other Block Exemption Regulations. The reason for this is the advantage that the *de minimis* Regulation offers the opportunity to provide *de minimis* aid for other activities next to the GBER aid. In other words, a municipality can grant additional aid under the *de minimis* Regulation when it already granted aid that could be block-exempted. In addition, there is a possibility that the undertaking already received the maximum aid for *de minimis* or the aid can be an infringement of the cumulation stipulations, which can lead to the granting of unlawful aid. (Hessel et al., 2012)

5.6 Opinion of the Committee of the Regions

On 29 November 2012, the CoR adopted an opinion on the SAM Initiative. The CoR is pleased with the fact that the EC notices that the current state aid rules brings a lot of administrative burden for all interested parties. It agrees with the EC that it should concentrate on the most distortive State aid cases and thus moving towards prioritisation of State aid procedures. This will reduce the burden on the EC, MSs, regional and local governments. In addition, it wants clarification of the criterion impact on cross-border trade and the notion undertaking, as this can lead to a sharper focus on aid that is distortive. The CoR points out that aid for local activities might legally be considered as state aid, but only have a very limited effect on trade. Therefore, the CoR would like to see a simplified procedure for this type of aid. The CoR also points out that the increase of reporting to the EC means significant bureaucratic rigmarole for both the public authorities and the EC. The CoR welcomes the fact that the EC wants to exempt more categories of aid from prior notification, as this reduces the administrative burden for local authorities. However, it would additional group exemptions for social, educational and health aid, as long as they do not involve commercial seeking activities. In addition, group exemptions for broadband provision and animal disease counter measures could be implemented as well. The EC is already transferring more responsibility to the national governments regarding small amounts of *de minimis* aid. However, the CoR would like to see this as well for larger *de minimis* aid. Municipalities would benefit from this, as the national governments are closer to the local governments than the EC. Therefore, the CoR would like an increase of the *de minimis* threshold to € 500.000,-. (Committee of the Regions [CoR], 2012)

5.7 Procedural Regulation

Regarding the consultations the EC held about the complaints handling policy, an often heard disadvantage is the amount of time it takes for municipalities to deal with a complaint.

Fortunately, it does not occur that often that municipalities have to deal with a complaint, but when it does, it is a huge administrative burden. This is mainly because of the fact that the EC reacts very slowly, which leads to uncertainties for all involved parties. One of the main difficulties as a result of the delay, is the fact that it is not clear whether an aid measure is legal or not. This means that it is very likely that other municipalities are providing the same aid measure elsewhere in the country. One of the questions asked in the consultation about the Procedural Regulation is whether the complaints form is an adequate tool for local authorities to respond to a complaint. According to the United Kingdom, the complainant form is too long and too detailed, which leads to companies not using the form or not filling it in properly. For municipalities, this means that it is very difficult to respond to the complaints because of the lack of information. In addition, because of the fact that every party is able to use the complaints form, it can be used by parties that do not have a direct interest and can be misused as a tactic to delay local policy measures, as the EC has to settle every complaint. When the EC receives a complaint, it has to request information from the municipality that wants to grant the aid. In many cases, the complaint procedure is often initiated at the same time as pending cases before a national judge. This means that municipalities have to provide the same information to both the EC and the national court in a slightly different form. Thus, the current complainant procedure means an enormous administrative burden for municipalities. Moreover, a municipality postponing its activities is a very expensive practice. Based on the different consultations, there can be concluded that municipalities welcome the idea to revise the complaint procedure and focus on the most distortive state aid cases. This is especially the case since the EC wants to increase growth within the EU, as the EC needs to detect abuse more rapidly and prevent as many cases of abuse as possible. Municipalities would prefer a more rapid process which can be achieved by focussing on the cases that have a serious impact on the internal market. In addition, municipalities point out that as a result of the time it takes for the EC to handle a complaint, it occurs that municipalities continue to grant aid or aid is granted elsewhere within the MS, which eventually leads to a higher amount of money that needs to be recovered, including interest, when the EC comes to the conclusion that the aid granted was unlawful. Thus, a faster and more innovative complaints system would mean better protection for undertakings and more certainty for municipalities and other public authorities. Moreover, municipalities are satisfied about the fact that the EC will not deal with a complaint if the undertaking did not fill in the complains form properly, as this will reduce the work for a municipality. Based on the consultations, public authorities are satisfied about how the EC will gather market information in the future. The information requests the EC sends are very detailed and can be an administrative burden for public authorities, in particular when it concerns data of the company. Requesting information directly from companies will reduce this.

5.8 Block exemptions

Regarding the consultation on the GBER, the only organisation representing local authorities that responded was the Welsh Local Government Association (WLGA). According to the WLGA, municipalities were very pleased with the introduction of the GBER as it removed unnecessary levels of bureaucracy for both companies and authorities granting the aid. In addition, it also reduced the workload for municipalities regarding notifying the EC about an aid measure. In this respect, municipalities are content about the extension and simplification of the block exemption as it will reduce the administrative burden. It would give municipalities more flexibility to provide aid in support of economic growth, jobs and social inclusion. The Welsh municipalities would welcome the introduction of a mechanism whereby the GBER can be reviewed regularly in order to respond more appropriately to the market conditions. In addition, the WLTA states that the GBER should be extended to cover new and better ICT, investments for Research and Development, innovation and training. Replies to the consultation about the GBER express that authorities are in favour of the extension of the group exemptions, as it reduces the administrative burden. However, it should be taken into consideration if the categories are eligible and aid with the most distortive effect on competition and trade should be kept under the obligation to the notification procedure. When an municipality wants to grant ad hoc aid and it exceeds the *de minimis* ceiling, it is obliged to notify the measure to the EC, as ad hoc aid to large enterprises is excluded from the GBER. Therefore, a group exemption for ad hoc aid would be preferred. One matter outlined at the consultation with the Dutch provinces was that the EC already proposed a block exemption for culture in the previous state aid modernisation package. However, it was never implemented. Most employees were very sceptic about this, although the group exemption for culture would be very convenient for municipalities. Many municipalities provide aid for regional festivals, which is not distortive for competition. At the moment, many municipalities are not notifying aid for culture to the EC because of the fact that it very time-consuming and because municipalities have the notion that it is unnecessary. Ultimately, this can lead to big problems when a interested party decides to lodge a complaint. Thus, the block exemption for culture would mean a significant decrease of the administrative burden for municipalities. However, it should be regulated how this will work out in practice. For example, local festivals will not distort competition, but when a municipality is going to finance the coming of a popular band to their city, it is an entirely different story. As the CoR already pointed out in its opinion, is that a group exemption for health care would be welcomed. For instance, for the Dutch municipality The Hague, the Ministry of Education, Culture and Science is its biggest subsidy provider. There was pointed out that these kind of subsidy regulations need to be simple, because it will not distort competition or influence trade. Regarding the consultation about the GBER, the Finnish government has expressed that it thinks the requirements set out in the current GBER are very restrictive. For example, the requirement for an aid scheme should be revised, in order to include

small ad hoc measures within the GBER. According to the Finnish government, ad hoc aid is mostly granted to local projects, which are implemented by municipalities. In general, this type of aid is not distortive.

5.9 *de minimis* aid

As already mentioned, it is difficult for municipalities to determine whether an aid measure is already executed elsewhere. This can be a problem as well when granting *de minimis* aid. For municipalities it is difficult to apply the cumulation rules for *de minimis* aid, as aid granted to one specific undertaking might come from different levels of government and through different schemes. Like the CoR, the WLGA would prefer an increase of the ceiling for *de minimis* aid to € 500.000,- or € 600.000,-. In addition, municipalities want more frequent revisions of the *de minimis* threshold. One of the main points of the WLGA is the desire of a more relaxed approach to the cumulation of aid, as the application of the cumulation rules is very bureaucratic and time-consuming. A lower threshold would be acceptable when the administrative burden due to cumulation control would be reduced. At first instance, the EC did propose to increase the threshold. However, the EC publicised a document which states that, based on the consultation, a higher ceiling would not be justified. A higher ceiling might mean that trade or competition will be effected. Above all, from the consultation, the EC concluded that most aid granted under the *de minimis* Regulations consists of relatively small amounts. Therefore, an increase of the threshold seems unnecessary. In addition, the Dutch municipality The Hague pointed out that an increase of the threshold would be convenient, but not necessary as it never happened that the municipality was unable to grant *de minimis* aid because of exceeding the threshold of € 200.000,-. One of the main disadvantages of the revised *de minimis* Regulation is the obligation to set up a central register for *de minimis* aid and in particular the obligation to report to the EC. A central register can be useful as it makes it easier to determine for municipalities whether other governments have already granted *de minimis* aid to a specific undertaking. However, the obligatory reporting to the EC about this, means a huge administrative burden for municipalities. Local and regional authorities expressed their confusion about this, as the EC wants to focus on the big state aid cases and decrease the red tape for public authorities, but is now obliging authorities with reporting about fairly small amounts of money. Moreover, it will increase the work for the EC as well.

5.11 Conclusion

When municipalities grant aid there are certain matters that have to be taken into account. First, the term undertaking is considered by the EC as very broad. Second, state aid does not only incorporate subsidies, but, for instance, also interest-free loans. Third, the EC sees most measures as a distortion of competition. However, under the current state aid rules, municipalities have several opportunities to avoid unlawful aid. First, municipalities can support local activities and

regulations with social characteristics. Second, a municipality can use the MEIP, which basically means that it is operating as an undertaking on the market. Third, a municipality has the opportunity to burden an undertaking with the execution of a activity in the public interest, which means that it can compensate the undertaking under certain conditions. Last, a municipality can see if the aid measure can be block-exempted. Regarding the Procedural Regulation, a frequently heard disadvantage is the amount of time it takes for local authorities to deal with a complaint. In addition, SMEs often do not use the complaint form which makes it difficult for municipalities to respond. The current complaint procedure is an enormous administrative burden as municipalities have to provide the same information twice in a different form to both the EC and the national court. Therefore, a simplified complaints procedure and the EC focussing on the most distortive cases would be convenient. In addition, gathering market information and not dealing with complaints forms that are not filled in properly, will reduce the workload for municipalities. An extension of the group exemptions is very useful in reducing the administrative burden for municipalities and in particular the group exemption for culture, as municipalities grant a lot of aid for culture which usually does not distort competition. However, a group exemption for social, educational, health and small amounts of ad hoc aid to large enterprises could be implemented as well. An increase of the *de minimis* ceiling would be convenient, however it is not necessary, as most *de minimis* aid granted never exceeds the threshold. The biggest disadvantage of the revised *de minimis* Regulation is the obligatory central register, as it obliges municipalities to report all data to the EC when the register is not public. This is not in line with the EC wanting to decrease the red tape.

Chapter 6: Conclusion

This thesis examined what the effects of the revised Regulations in the framework of the SAM Initiative will be for municipalities. By streamlining the complaints procedure, gathering market information, strengthening the role of the national courts, exempting more categories from prior notification and setting up a central register, the EC should be able to focus on the most distortive state aid cases in order to reduce the administrative burden for all interested parties. The EC wants a stricter controlling system with less resources.

Based on the findings in chapter four and five there can be drawn several conclusions about the revised Procedural Regulation. First, the streamlined complaints procedure will mean a reduction of workload for municipalities when a complaint has been lodged. Currently, it happens too often that a complaint has been lodged by a party that has no interest or the complainant did not provide sufficient information, which leads to delay in handling the complaint and ultimately to a delay of granting the aid. By introducing a simplified complaints form and by the EC not taking a formal decision about complaints that have not been lodged properly or complaints received by non-interested parties, municipalities will not need to reply to these complaints. It can be concluded that the revised complaints procedure is more efficient and will lead to more transparency, less uncertainty, a decrease of the workload and less time-consuming bureaucracy. In addition, a more effective complaints procedure means that the EC will be able to detect significant distortive aid more rapidly, which can prevent municipalities from granting unlawful aid. Eventually, when municipalities do not need to postpone their activities because every lodged complaint has to be settled, this will lead to less expenses.

Second, with the EC cooperating more intensively with the national courts, it will become easier for national judges to adopt a decision in a case lodged by a complainant. For municipalities, this means a more rapid process before a national court and less uncertainty about, for instance, damages for the affected party.

Last, the introduction of the MIT and the EC investigating certain sectors of the economy will reduce the administrative burden for municipalities. The information requests the EC sends are often very detailed, which takes a lot of time and work to reply, by requesting information directly from undertakings, the workload for municipalities will diminish. Municipalities might be hesitant about the EC starting investigations into sector of the economy and into types of aid measures, because the EC will send requests for information when it starts such an investigation, which will increase the initial workload. However, ultimately, municipalities will benefit from

this, as the EC will not need to send as many requests as before in individual cases because the information is already at its disposal.

As far as the Enabling Regulation concerned and with that the GBER and *de minimis* Regulation, there can be noticed some very convenient matters for municipalities. The extension of the list of group exemptions means a significant decrease of the administrative burden as municipalities do not need to notify the EC about these measures anymore. In addition, it allows municipalities to act more rapidly. In particular, the block exemption for culture will be frequently used, as municipalities grant a lot of aid to local culture activities.

However, the introduction of a central register for *de minimis* aid is very contradictory in respect of the EC wanting to decrease the red tape and focus on the most distortive cases. According to the EC, it is difficult for authorities to monitor whether *de minimis* aid is already granted by a level of government, because of the fact that the information is not at those authorities' disposal. By giving every the responsibility of setting up its own central register might indeed be helpful for municipalities in order to apply the cumulation rules. However, if the MS decides that this register will not be public, municipalities will be obliged to send annual reports to the EC about their data. This will be very time-consuming and is in conflict with the EC wanting to focus on the cases with the most distortive impact on the internal market.

This thesis describes the effects of the SAM Initiative on the long term. The Regulations will not be implemented before 2014, which means that regarding the state aid rules nothing will change on short term. As far as the block exemptions concerned, the list of new categories does not mean that all those categories will be exempted automatically. The EC will adopt these block exemptions gradually, when it has gained sufficient experience in order to define clear compatibility criteria. This means that it can take a significant amount of time before municipalities can apply the GBER for certain aid measures.

To summarise, the Communication on the Modernisation of EU State aid Policy describes that the EC wants to decrease the administrative burden for public authorities. There can indeed be concluded that the administrative burden will be reduced eventually. For instance, by the streamlined complaints procedure, the MIT, investigations in specific sectors of the economy, exempting more categories from notification and by setting up a central register with all *de minimis* aid. While the EC considers the central register for *de minimis* aid as a tool to diminish the red tape, this can be interpreted differently, as the obligatory reporting to the EC will extent the workload for municipalities.

Chapter 7: Recommendations

Deadlines for the complaint procedure

One of the reasons why the EC is taking so long to handle a complaint is because of the fact that there do not exist any formal deadlines. Although the EC has proposed a revised complaints procedure and will probably receive less complaints in the future, there still are no formal deadlines that determine how long the EC can take to handle a complaint. This may still lead to undue delay. For a further decrease of the administrative burden for municipalities, this is something that should be implemented.

Pending cases before both the EC and national court

The revised Procedural Regulation still obliges national court to examine every complaint lodged, despite any parallel procedure going on before the EC. For a municipality this means that it has to provide the same information to both the national judge and the EC in a slightly different form. It is clear that this is an unnecessary administrative burden for the concerned municipality. This problem could easily be solved by the EC introducing a similar information form.

Extension of block exemption

In the future there can be examined whether another extension of the block exemptions would be justified. Regarding the opinion of the CoR and the municipality of The Hague a group exemption for health care would be very convenient for municipalities as this is one of the categories where most aid is provided, with a minimum distortive effect. In addition, a group exemption for ad hoc measures to large enterprises might be convenient as well. For the EC, it is important to check how a measure, that will fall under the new block exemption, will work out in practice.

A public central register

The only way to avoid the obligatory reporting to the EC about *de minimis* aid is for MSs to set up a public central register. In the end, a central register with all *de minimis* aid granted by all the public authorities in a MSs might be very useful for municipalities. This way, a municipality can check whether or not *de minimis* aid has already been granted to a specific undertaking by another layer of government. In that respect, cumulation can be avoided.

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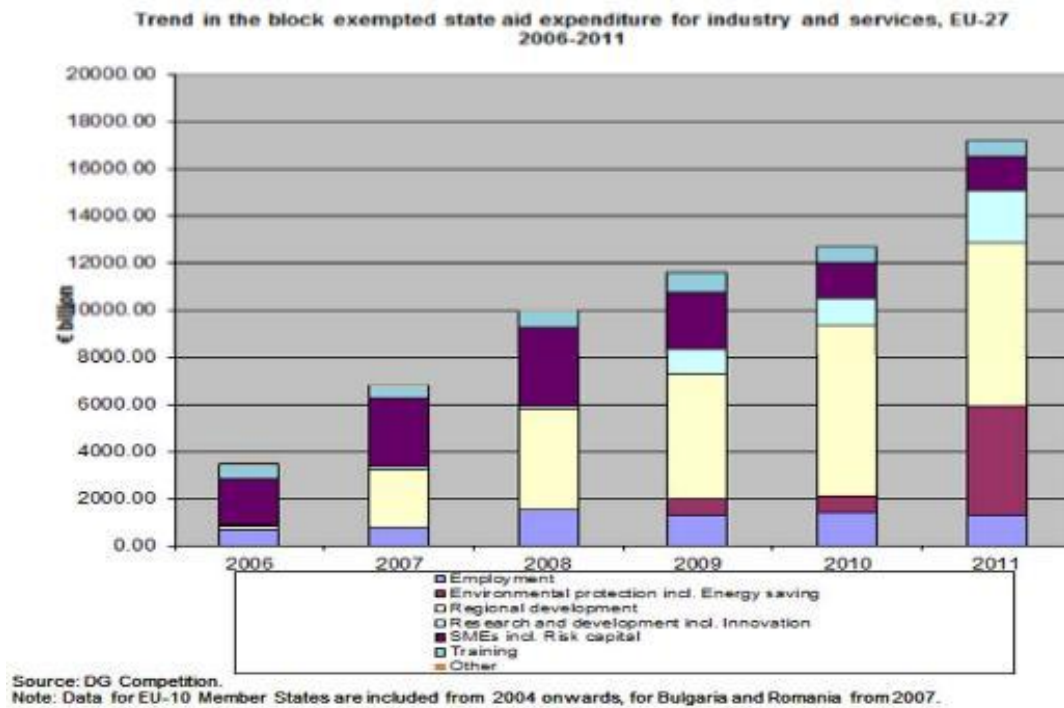
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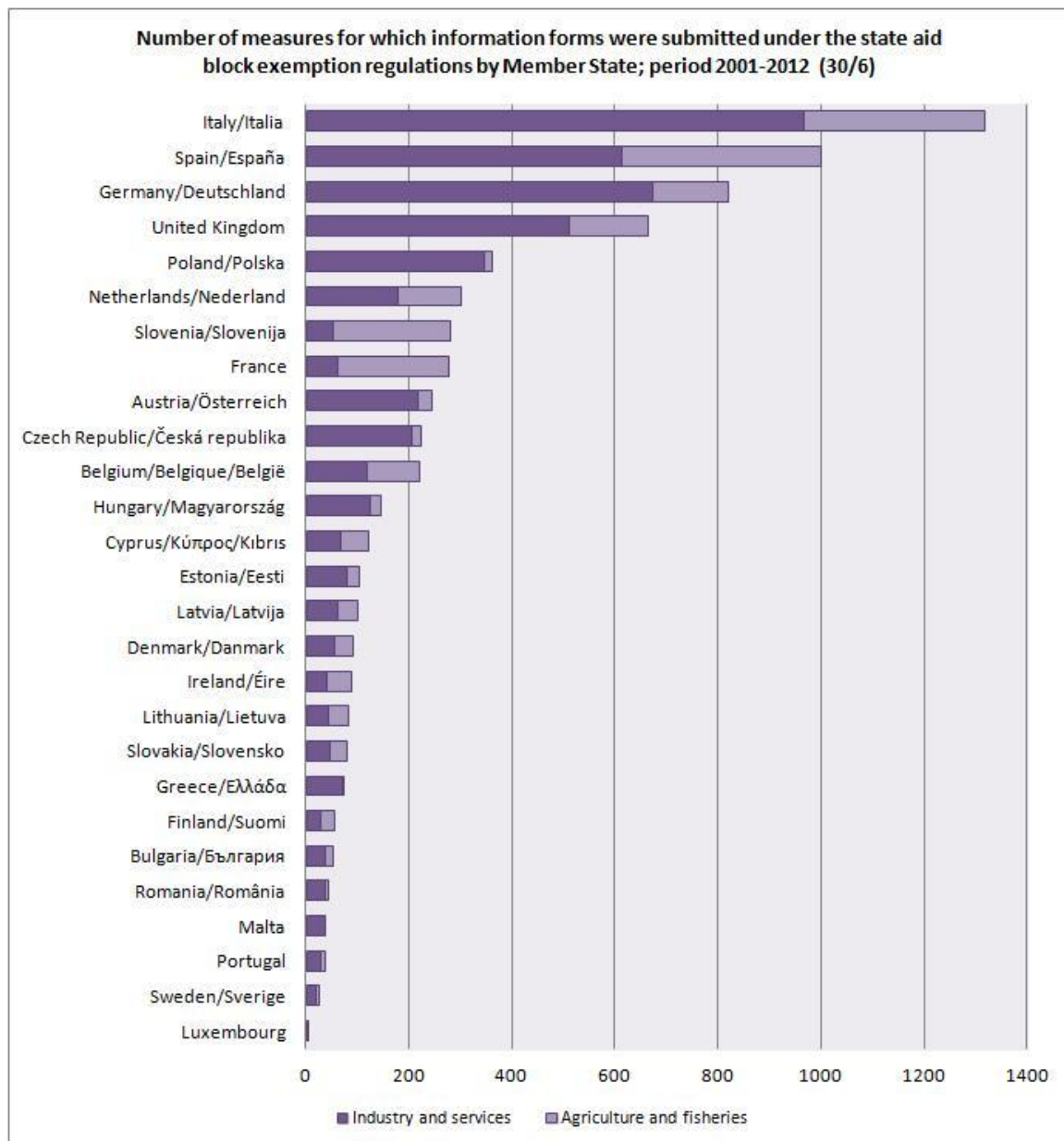
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Appendix I: Charts



Number of measures for which information forms were submitted under the state aid block exemption regulations; EU-27, period 2001 - 2012 (30 June)													
Type of state aid block exemption	Year												Total number 2001-2012 (30.06)
	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012 (until 30.06)	
SME*	102	123	139	149	197	183	308	209					1410
Training*	48	80	55	79	68	57	108	99					594
Employment*			8	21	26	35	31	36					157
Regional investment							189	110					299
General block exemption**								194	968	469	405	227	1867
Agriculture				72	88	119	496	433	267	258	188	91	1845
Fisheries				1	22	24			17	43	21	3	116
Total	150	203	202	322	401	418	1132	1081	1252	770	614	321	6288
Total less agriculture and fisheries	150	203	202	249	291	275	636	648	968	469	405	227	4327

Source: DG Competition



Source: DG Competition

Appendix II: Consultation Dutch Provinces

Summary consultation provinces

During the consultation of the Dutch provinces a state aid expert of the Ministry of the Interior and Kingdom Relations spoke about the *de minimis* Regulation. The proposed amendments were explained: the threshold remains the same and the Commission wants a central register. When this register will be public there is no obligation for reporting, when it is a closed central register, public authorities have to report this annually. This means quite a lot for decentralised governments, as they often provide *de minimis* aid. The declarations of *de minimis* are fairly well organised and there is no index for decentralised governments to control cumulation themselves. Regarding this, a central register could have advantages.

After this, employees of the twelve Dutch provinces expressed their opinions about the central register. There is mentioned that with every type of aid, whether *de minimis* or not, governments have to take into account the cumulation stipulation. However, when there is approval for one type of measure, *de minimis* aid can still be granted to the same undertaking. An employee at one of the provinces outlines that it is very difficult to determine whether a municipality already has granted aid to an undertaking and the province wants to grant aid to the same undertaking. In that respect, a central register could be useful. The problem however is the obliged reporting to the Commission when applying the closed register, this means a heavier administrative burden. After all, the Commission is saying that *de minimis* aid is not really aid, so what is all the fuss about? In addition, there are many conditions for *de minimis* aid, which is contradictory. The Commission wants to reduce the red tape for public authorities, but this is the opposite. On one hand Commission wants to focus on the large state aid cases, on the other hand it imposes decentralised governments with a large administrative burden by being difficult about the small amounts of money. Some employees think that a national central register would be convenient, but without the obligation to Europe, so the reporting. One of the employees mentions that she finds it strange that there was a settlement for the economic crisis to increase the *de minimis* threshold to € 500.000,- which now has been withdrawn while the crisis is only getting worse. An increased threshold would be welcomed. However, it is not necessary at the moment because decentralised governments have less money so less subsidies are granted.

The provinces are very sceptic about the group exemption for culture, due to the fact that the Commission has had plans for this group exemption for years now and it still is not implemented. The provinces express that this group exemption is necessary because municipalities are not

notifying subsidies for culture at this point because no one suffers from it, so notification is unnecessary. However, this could easily go wrong at some stage. In addition, there was pointed out that there is a new consultation about the GBER about the new draft version.

Appendix III: Interview

Interviewee: Henk Blankenstein, state aid expert at the municipality of The Hague

General introduction of the municipality and state aid

The municipality The Hague, despite all the economising, we now have slightly less than 7000 public servants, which means that we are a gigantic organisation. When you are going to look at how the municipality is organised, we have a *concern dienstenmodel*, which you see quite often at municipalities, especially at the larger municipalities. In The Hague we do not have sub-municipalities, like you have in Rotterdam and Amsterdam, but which are disappearing as well. We do have the *concern dienstenmodel*. This means that we have to deal with several compartment services, that have their own household and have to take care of themselves, this includes policies as well as financial and legal issues. The result of this, is that it is quite a challenge to get all this different policies, with the different facts and numbers, together. I work at the management bureau and to get to the central legal department and to get an insight of what they do is quite difficult. I have to say that, and this might sound strange, for the big projects this is fairly easy. That kind of projects always pass our department. For example, we are now busy with the *Spuiforum*, the theatre disappears and a lot of new things will come in return. We know what happens there. To get to the small things, and in particular the good things, that is the biggest difficulty for a decentralised government. In particular this applies to several subsidies. In practice, most aid is granted via subsidies and the really big things I will see passing in a check, but what happens with that factually and how it is executed, the reality is rough I have to say. To give an example, last week I saw some kind of subsidy whereby a demolition stipulation was provided and there was determined that it was not state aid. When starting with something like this, apart from how you want to solve it as regards content, is a lot of work. Something general I can tell you is that with the big cases it mostly goes well, but with the small cases I notice some things that go wrong. Then you have to repair things afterwards and that takes a lot of time.

One thing the Commission wants to change within the Procedural Regulation is the complaints procedure. What problems does your municipality face in relation to the handling of complaints?

It does not occur that often I have to say. But when it does, it is something that is difficult, which is not much of a European problem but more of the household of the municipality. It happens that, for example, with a integrated physical environment permit that is at DSO (organises the growth of the city The Hague, in corporation with companies and citizens), while aid is already granted

from our department. To gather all this information is sometimes difficult.

It is something that the Commission points out, the complaints form is very difficult for companies, which results to incomplete forms, which makes it difficult for municipalities to handle a complaint.

What you are saying I can confirm. What you would like to see at that point is that you could look each other in the eye and ask questions, if you know what I mean. When I am at a hearing you can get this information, however, sometimes not at all. For instance, when someone wrote something in his official complaint and says “I have nothing to add”. But sometimes you hear things and you think “If we knew this before” or “Oh that is what you mean”. The problem behind it is then very difficult than on paper.

The Commission is introducing a simplified complaints form. When a company does not fill in this properly the complaint will not be handled. What do you think about this?

I think that would be a step in the right direction. I have to say that it has to come from both sides, the complaints form has to be simplified then. When it becomes easier for companies or citizens to hand in a complaint you can expect that when a company does not fill in the form properly, that we do not take the effort. When it comes from both ways, yes fine, I think that will reduce the amount of work for everyone.

From the provinces I understood that the Commission is saying for years now that it wants a group exemption for culture. Therefore, they did not really have confidence in the Commission that it would be implemented this time. Now this type of aid is not notified to the Commission, while it is obligatory. How is this at your municipality?

I see the problem, I can be very short about that. For these different festivals there can be several reasoning's, it is all local, but strictly speaking, it could be arranged better. There has to be a regulation that monitors how it works in practice. For example, when we are organising liberation festival here in The Hague or a festival for the Hindustani community, no one in Brussels or Berlin is affected by this. But when we are going to finance a concert of Coldplay, then it will be a different story.

Are there any categories of aid that needs a group exemption?

What we spoke about earlier, that would be a good thing when it could be arranged better

(culture). Another category where the municipality grants a lot of money, of which you can wonder whether it is all arranged properly, is health care. I do not have the exact amounts of money but OCW (Ministry of Education, Culture and Science) is by far our biggest subsidy service. When we are going to grant money to an institution that is washing elderly people or to people that have a criminal record and to help them to get on the right track, does that hurt anyone across borders? With these kind of things you have to know the rules of the concerning country, how the facilities are arranged, how to acclimatise and where you can apply for social requests. These are all kind of categories of which I think, keep it simple. I cannot imagine that the Commission has any interest in this.

How does your municipality feel about increasing the *de minimis* threshold?

Well, let's put it this way, it would be easier if it would be increased. But have we ever had the problem of not being able to grant an intended subsidy because of not receiving a *de minimis* declaration? No, this never occurred.

So it is not necessary to increase it?

No, I cannot speak for the entire municipality of course, but I never saw it happen that a dossier had to be withdrawn because an entrepreneur that could not sign the declaration because otherwise it would exceed the €200.000 ceiling. What conclusion you can draw from this is another thing. The Commission draws the conclusion that the threshold is high enough. The other conclusion that you could draw is that those declarations are filled in very frivolous.

Something I noticed is that the provinces were very hesitant about a central register because of the obligatory reports. What do you think about that?

I agree with this entirely. They should at least leave the reporting out. But even with a central register you could ask yourself, okay we register it and then? What's the use? Nice to save it somewhere, but it is more important that the provider of the aid has a good insight about it. It might be useful to inform the aid providers more about this. I think that a central register does not fit the image of the reduction of the administrative burden. You have to save all the information yourself, after that you have to send it somewhere so they can save it there as well. There have to be more civil servants to maintain it and they have to notify it because of the personal data, which has to comply with the archive law. So, no, I do not see the use.

I think you have a reasonable image of how things work here now.

Appendix IV: Consultations Used

This appendix provides the consultation the EC held about the Procedural Regulation, Enabling Regulation, GBER and *de minimis* Regulation. Only the consultations that have been consulted for this thesis are included.

For the Procedural Regulation this contains responses of the Ministry of Economic Affairs, Agriculture and Innovation of the Netherlands and the Department of Business, Innovation and Skills of the United Kingdom.

For the GBER this contains responses of the WLGA and the Ministry of Employment and the Economy of Finland.

The consultation used for *de minimis* aid was the response of the WLGA.



Brussels, 13 July 2012

Consultation Paper

STATE AID MODERNISATION: REFORM OF STATE AID PROCEDURES

The purpose of the present consultation is to invite both **Member States** and **stakeholders** to provide comments on **the handling of State aid complaints** and **the methods of the Commission to gather information in State aid investigations**, the two aspects of the State aid procedural framework which the State Aid Modernisation (SAM) initiative launched on 8 May 2012 proposes to reform.

The Commission invites Member States and stakeholders to submit their comments to DG Competition by **5 October 2012**.

1. INTRODUCTION

On 8 May 2012, the Commission adopted the [Communication on "EU State aid modernisation \(SAM\)"](#)¹ which officially launches a comprehensive reform of the State aid framework. It will ensure that State aid policy contributes both to the implementation of the Europe 2020 agenda², which is Europe's growth strategy for this decade, and to budget consolidation by pursuing the following objectives:

- Foster growth in a strengthened, dynamic and competitive internal market;
- Focus enforcement on cases with the biggest impact on the internal market;
- Streamlined rules and faster decisions.

The planned revision of [Council Regulation \(EC\) No 659/1999 of 22 March 1999](#) laying down detailed rules of procedure to deal with State aid cases ("the Procedural Regulation") is one of the building blocks of the State aid modernisation package.

State aid procedures, as foreseen by Article 108 TFEU and further detailed by the Procedural Regulation, are built around three main axes:

- Prior notification by Member States of all planned aid measures is compulsory, except in cases covered by a block exemption regulation, and the Member State concerned

¹ 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)*, 8.05.2012, COM(2012) 209 final.

² Communication from the Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth*, 3.3.2010, COM(2010) 2020 final.

may not put the measure into effect until a Commission authorisation decision; to that end, following an essentially bilateral (Member State/Commission) preliminary investigation, limited in principle to two months, the Commission may either approve the aid or open a formal investigation, subject to a best endeavour deadline of 18 months, with a view to thereafter approving (if need be, subject to certain conditions) or prohibiting the aid;

- The Commission is also bound to examine any information, from whatever source, concerning alleged unlawful (non-notified) aid. In particular, the Commission is required to conduct a diligent and impartial examination of the complaints lodged before it, and take a decision without undue delay. Where the Commission takes a decision finding that no State aid as alleged by a complainant exists, the Commission must at least provide the complainant with an adequate explanation of the reasons for which the facts and points of law put forward in the complaint have failed to demonstrate the existence of State aid;
- Finally, the Commission shall keep under constant review all existing aid systems in Member States and may propose to them any appropriate measures required by the progressive development of the functioning of the internal market.

While reforming the Procedural Regulation should primarily allow the Commission to take decisions faster, it will also help the Commission focus on cases with the highest impact at the EU level. Also, the objective to promote growth can only be achieved if the Commission has the powers to prioritize its work. In that context, the SAM Communication announced that the Commission will initiate:

*"A modernisation of the State aid Procedural Regulation with regards to **complaint-handling and market information tools**, in order to enable the Commission to **better focus its action on cases which are most relevant for internal market**. It requires **enabling the Commission to set priorities for complaints handling**, in order to prioritise allegations of potential aid with a large impact on competition and trade in internal market. In parallel, in order for the Commission to be able to effectively investigate cases of aid with significant impact, **it should be endowed with more efficient tools to obtain all the necessary information from market participants and in good time** so as to deliver decisions within business relevant timelines. Such modernisation of procedures would also **allow the Commission to undertake more ex officio investigations into significant distortions of competition** hampering internal market. It should also permit a quick verification of market effects of aid measures which would enable quicker decision-taking."*

The present consultation will therefore mainly aim at collecting the views of the Member States and stakeholders on two aspects of the State aid Procedural framework: **improving the handling of complaints** and **ensuring that the Commission obtains complete and correct information**.

2. How to contribute to the consultation

Member States and other interested parties are invited to respond to the questionnaire hereunder. Replies can be submitted in all official EU languages³.

While some of the questions are specifically aimed at public authorities, others are aimed at both public authorities and other interested parties (stakeholders). For your convenience, the questions are sorted by their principal target audience. If you do not feel concerned by a particular question please reply "not applicable".

Questions referring to "your Member State" or "your authorities" and the like may be read by international entities with no particular Member State affiliation as referring to "Member States" and "Member State authorities".

The deadline for the replies is **5 October 2012**. Replies should be sent to the European Commission, DG COMP, State aid registry, 1049 Brussels, reference "**HT 2664**", preferably via e-mail to Stateaidgreffe@ec.europa.eu.

The Commission services plan to make the replies to this questionnaire accessible on their website <http://ec.europa.eu/competition/consultations/open.html>.

Therefore, if respondents do not wish their identity or parts of their responses to be disclosed, that fact should be clearly indicated and a non-confidential version should be submitted at the same time. In the absence of any indication of confidential elements, DG COMP will assume that the response contains none and that it can be published in its entirety.

³

Given the possible delays in translating replies in certain languages, an English working translation would be welcome.

ABOUT YOU

Specific privacy statement: All contributions received, together with the identity of the contributor, will be published on the Internet, unless the contributor objects to the publication of personal data on the grounds that such publication would harm its legitimate interests. In that case the contribution may be published in anonymous form.

For rules on data protection on the EUROPA website, please see:
http://ec.europa.eu/geninfo/legal_notices_en.htm#personaldata

1. Do you object to the disclosure of your identity?

Yes ☐ No ☐

2. Do any of the exceptions foreseen in Article 4 of Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents⁴ apply to your response? If so, please indicate clearly which parts should not be disclosed, justify the need for such confidential treatment and provide a non-confidential version of your response for publication on the Commission website.

Please provide your contact details below.

Name

Organisation represented

Main business activities

Location (country)

E-mail address:

NOTE: You are requested to follow the order of the questions, even though you are not required to reply to all questions. You can also submit additional information that you consider relevant and which does not fit any specific question.

SECTION 1: HANDLING OF STATE AID COMPLAINTS

Complaints are a very useful source of information to direct Commission investigations towards those economic sectors where unlawful State aid hampers competition at the EU level.

Currently, the Commission has to investigate every alleged infringement of State aid rules received from whatever source, since no specific formal requirement is attached to the lodging of a State aid complaint. To close the examination of complaints, the Commission must issue a decision stating either that the measure complained of (i) is not an aid or (ii) is a compatible aid, or (iii) opening the formal investigation because there are doubts on the compatibility of the aid.

The Commission receives on average more than 300 complaints per year. The Commission is entitled to give different degrees of priority to the complaints brought before it, depending for instance on the scope of the alleged infringement, the size of the beneficiary, the economic sector concerned or the existence of similar complaints. In the light of its workload and its right to set the priorities for investigations, it can thus postpone dealing with a measure which is not a priority. Most complaints are therefore not given priority treatment and the duration of those cases thus tends to increase.

First attempts to tackle those issues were made in the 2009 Simplification Package, and in particular in the [Best Practices Code](#) which introduced a staged procedure for dealing with complaints. Based on priority assigned to the relevant complaint, the Commission endeavoured to send, within two months from the receipt of a complaint, a letter to the complainant informing it about the priority status given to its complaint. Within one year, the Commission then endeavoured to close the investigation of priority complaints by formal decision and send a preliminary assessment letter for non-priority complaints.

To achieve the objectives of the State aid modernisation, a reform in that area should "*enable the Commission to better focus its action on cases which are most relevant for internal market. It requires enabling the Commission to set priorities for complaints handling, in order to prioritise allegations of potential aid with a large impact on competition and trade in internal market*".

To prepare such a proposal, the present questionnaire aims at collecting the views of the Member States and other stakeholders on the State aid complaints handling policy and getting your feedback on your experience as granting authority, complainant, aid recipient etc... in State aid complaint cases.

SECTION 1.A. GENERAL QUESTIONS - FACTUAL INFORMATION

Questions aimed at Member States

1. On how many complaints are you consulted on average every year?

On about 30 complaints. However, that does not mean that 30 complaints are lodged against the Dutch authorities on an annual basis as complaints usually are not dealt with within one calendar year.

2. On average, what are the resources and time needed to reply to requests for information from the Commission concerning a complaint? How does it compare to, for example, notifications?

In general, dealing with requests for information from the Commission concerning a complaint does not take the Dutch authorities longer than a notification. However, after submitting the requested information concerning a complaint it often takes a long time before the Commission reacts again or closes the examination. This leads to uncertainty for the parties involved.

Questions aimed at other interested parties

3. Have you ever lodged a State aid complaint with the Commission?

Yes ☐ No ☐

4. If yes, how did you lodge your complaint(s) (paper, e-mail, web-based)?

5. Have you lodged more than one complaint with the Commission on State aid matters?

Yes ☐ No ☐

6. If yes, how many complaints have you lodged over the past five years?

7. If you have already lodged State aid complaints, could you specify the type of measures, the beneficiaries and the amount of alleged aid you complained about and the economic sector concerned?

8. As a complainant, what were the resources and the time needed to provide the Commission with the necessary information to reply to its requests for information to clarify the content of your complaint(s)?

9. Have you ever consulted the dedicated webpage on State aid complaints of DG Competition (http://ec.europa.eu/competition/forms/intro_en.html)? Is the information available helpful to understand the purpose of complaints handling for State aid control?

10. As a recipient of an alleged illegal/incompatible aid, what were the resources and the time needed to provide the national authorities with the necessary information to reply to requests for information from the Commission concerning a complaint?

11. Have you used other means of action before or at the same time or after lodging a complaint? Which means of action did you use? What was the outcome? What was in the end the most effective instrument?

SECTION 1.B. STATE AID COMPLAINTS HANDLING POLICY

Questions aimed at all respondents

12. In your experience, do you consider that a complaint to the European Commission is an adequate way of protecting business and consumer interests?

Yes NoX

13. If not, please describe the main shortcomings of the handling of State aid complaints and explain which redress mechanisms would be more adequate in your view, and why.

Whether a complaint is an adequate way of protecting business or consumer interests very much depends on the case at hand. The complaints procedure can easily be invoked by parties which have no direct interest in the case and hence it can in certain cases be (ab)used e.g. as a tactic to hamper or delay local policy measures.

14. In your opinion, does the current complaints-handling procedure in State aid help detect those measures which produce the most distortive effect on competition and trade in the internal market? Please substantiate your reply.

Yes ☐ NoX

Experience shows that many complaints are lodged by Dutch citizens or local political parties on purely local expenditure issues with no real impact on trade and competition.

15. If not, based on your experience, how could the focus of State aid complaints handling be better targeted at measures with a large impact on trade and competition in the internal market?

By being able to handle small or unfounded complaints in a more expedient way resources will be made available to focus on those cases which potentially have a large impact on trade and competition in the internal market. A possible way to distinguish between small/unfounded complaints and complaints on measures with a large impact on trade and competition, would be to require more evidence from the complainant to substantiate his complaint.

SECTION 1.C. LODGING STATE AID COMPLAINTS

Questions aimed at Member States

16. Do you consider that the non-confidential version of a complaint transmitted by the Commission to your authorities allowed you to properly assess the problem identified? If not, what was the nature of the missing information? Which impact did that missing

information have on your ability to properly answer the Commission's information request? Please substantiate your reply with concrete examples.

In most of the cases, the non-confidential version of the complaint suffices, especially when it is accompanied by concrete questions posed by the Commission. In the past the Dutch authorities also received mere information requests without being able to take note of the complaint itself. This made it very difficult to respond adequately to the request.

17. Based on your experience, do you consider that use of the complaint form by complainants makes it easier for your authorities to comment on complaints?

No, the form has not made it easier for the authorities to comment on complaints. The complaint form has not contributed to the necessity to actually substantiate a complaint with arguments in order to allow the Commission to assess whether the complaint in question should be taken seriously or not..

18. Based on your experience, how could the Commission best ensure that its investigations of complaints prioritize complainants truly affected by the alleged illegal State aid?

A complaint filter could be introduced, requiring the complainant to actually be directly concerned. Furthermore, it could be considered to create the possibility for the Commission to dismiss the case at an earlier stage..

Questions aimed at other interested parties

19. Based on your experience, have you encountered difficulties to lodge a complaint with the Commission? If yes, could you indicate the most serious and/or the most frequent problems encountered (e.g. access to evidence, gathering the relevant information...) ?

20. Have you ever used the complaint form available on DG Competition's website (http://ec.europa.eu/competition/forms/intro_en.html)?

Yes ☐ No ☐

21. If yes, does the scope and the content of the complaint form facilitate the lodging of complaints? If not, please specify for each of the following criteria the problems that you may have faced:

- a. existence of the complaint form:
- b. accessibility of the complaint form on the Commission website:
- c. complexity of the complaint form:
- d. length of the complaint form:
- e. possibility to attach additional information to the complaint form:
- f. confidentiality of the identity of the complainant:
- g. confidentiality of the information submitted to the Commission:
- h. acknowledgement that the form has been registered by the Commission:

- i. response of the Commission services:

SECTION 1.D. COMPLAINTS HANDLING PROCEDURES

Questions aimed at all respondents

22. In your experience, do you consider that the Commission has kept you sufficiently informed of the different steps involved in the processing of a complaint? If not, could you indicate the most serious and/or the most frequent problems encountered?
23. Did you contact the Commission services to get guidance on how to respond to the Commission's request for information? Were they able to provide the technical guidance you needed to prepare the answer?
24. In your experience, did the Commission conclude the investigation of complaint in good time? If not, why not?
25. Were you satisfied with the way in which the Commission informed you of the outcome of the investigation of your complaint(s)? If not, why not? What could the Commission services have done better? Please be as specific as possible in your reply.
26. Based on your experience, do you consider that the [2009 Notice on the enforcement of EU State aid law by national Courts](#) has raised the awareness of your national courts as regards State aid issues? If not, could you explain how this cooperation could be reinforced? In particular, do you consider that a more pro-active stance of the Commission in national State aid litigation could have been of assistance to the courts concerned?

SECTION 1.E. MISCELLANEOUS

27. Do you have any additional comments on State aid complaints handling, other than those covered in the previous questions?
- The duration of the complaint procedure is an issue. The complaints procedure does not have any formal deadlines. In some instances, the Commission takes a long time to reply to information submitted by the Member State, whereas the Member States are allowed a mere 20 days to reply to information requests from the Commission. This imbalance is perceived as inappropriate. It would be advisable to provide for and start using fixed deadlines.*
 - Complaint procedures are often initiated in parallel with procedures pending before a national judge. Authorities then have to deliver the same information again, albeit often in a slightly different form. If the Commission would put the complaint procedure on hold while the national judge is dealing with the case, this would diminish administrative burden and corresponding costs for the authorities in question.*

28. Please provide copies of any documents or studies which may be relevant for assessing the Commission's State aid complaints handling policy and practice.

SECTION 2: INFORMATION-GATHERING IN STATE AID INVESTIGATIONS

Over recent years, there has been a significant evolution in the compatibility assessment of State aid measures, especially as regards large individual cases. The Commission has refined an effects-based approach which seeks to balance the positive and negative effects of State aid measures under assessment.

In the current procedural setup, Member States are the primary information source for that assessment. They have to answer the Commission's information requests, which in turn may imply commissioning market studies, exchanging information with the beneficiary, gathering information from the market as well as preparing responses to complainants' arguments. The Commission is therefore largely dependent on information provided by the Member State, which can lead to delays when the information is not readily available to the national authorities and may place a heavy burden on those authorities.

The Commission tried to tackle some of those issues in the Best Practices Code⁵. It was in particular formalised that the Commission services can send, in the context of the formal investigation procedure, a copy of the decision to initiate the formal investigation procedure to interested parties and invite them to comment on specific aspects of the case.

To achieve the objectives of State aid modernisation, the current State aid procedures need to be improved in order to be able to effectively investigate cases with significant impact. In that respect, the Communication adopted on 8 May 2012 proposes that the Commission should be endowed with more efficient tools to obtain all the necessary information directly from market participants and in good time, to deliver decisions within business-relevant timelines.

To prepare such a proposal, the present questionnaire aims at collecting the views of the Member States and other stakeholders on the possibility for the Commission to collect information in the context of State aid investigations, and feedback on your experience as granting authorities, aid recipient, interested parties or others on the gathering of information in the context of State aid investigations.

⁵ Point 34, Communication from the Commission, *Best Practices Code for the conduct of State aid procedures*, cited above footnote 9.

SECTION 2.A. GENERAL QUESTIONS - FACTUAL INFORMATION

Questions aimed at Member States

29. How many information requests do you receive on average per year from the Commission?

On average about 20 information requests per year have been received from the Commission.

Based on your experience, could you specify the major difficulties you encountered in replying to these information requests? In particular, could you specify the type of information (business plan; market shares; pricing policy...) you found difficult to obtain?

In general it is difficult to obtain straightforward information in individual cases proving stimulating effect of aid measures.

In many instances the information requests are sent either shortly before the two month period has expired or even after expiration.

In individual cases the Commission asks not only for return of a certain investment, but also for return of comparable investments by the aid beneficiary. This information is often difficult to obtain as it concerns confidential business data. More generally, it is questionable whether the two situations are comparable in the first place.

In small cases, the questions the Commission poses are disproportionately detailed and comprehensive.

Finally, on one occasion the Dutch authorities have received similar information requests from both DG AGRI and DG COMP, which clearly were not coordinated. Sometimes (in financial crisis cases) also DG Market initiated information requests, which were not coordinated with DG COMP.

30. In how many cases were responses difficult to obtain because the information requested concerned market information not publicly available?

Responses about market information were not very difficult to obtain. The fact that the information can be qualified and treated as confidential usually contributes to this.

31. Based on your experience, how technical and/or long were the information requests sent by the Commission, especially in case of State aid schemes?

The requests are disproportionately detailed and comprehensive. The information can be delivered as a result of the interaction between the authority and the beneficiary, but it often is very burdensome for the administration. This is particularly the case when the requested information concerns data of the company. In such a case, intensive contact with the company in question is required. Furthermore, in certain cases the information requests seemed to be designed for other purposes than the State aid examination itself as very detailed and theoretical information was requested by the Commission.

32. In your experience, did you find it preferable to request the necessary data from companies directly, or did you prefer to commission a study? In the latter case, did your authorities have sufficient expertise to carry out the study, or did you have recourse to external expertise? How much did it cost you to do so, both in monetary terms and in terms of time and resources spent?

The Dutch authorities have always directly requested the companies to deliver the required information. Furthermore, certain market information is publicly available.

Questions aimed at other interested parties

33. Were you aware that the Commission offers the possibility for interested parties to comment on the decision to open a formal investigation regarding alleged incompatible aid?
34. Have you ever provided comments to the Commission following the publication of a decision to open the formal investigation in the Official Journal of the EU? If yes, please specify:
- a. the form of your comments sent to the Commission (letter, e-mail)
 - b. the type of information submitted (financial documents, business plans, commercial information, etc.)
 - c. the time needed to prepare your comments
35. Have you ever had informal contacts with the Commission in the course of a State aid investigation during the preliminary examination phase? After the opening of the formal investigation? What was the impact of those contacts on the overall course of the investigation?

SECTION 2.B. INFORMATION-GATHERING POLICY

Questions aimed at all respondents

36. Based on your experience, to what extent do you consider that the information-gathering tools at the Commission's disposal are sufficient to detect potential incompatible aid with a large impact on competition and trade in the Internal market? If not, could you explain why those tools are insufficient in your view?

Based on the experience of the Dutch authorities the Commission has enough tools at its disposal to gather the necessary information to detect potential incompatible aid with a large impact on competition and trade in the Internal market .

More generally, it is often unclear whether the Commission is starting a broad investigation into certain practices or whether it just requires certain information from one particular Member State. It would be preferable if the Commission could further clarify its reasons when issuing an information request, for instance reference to an article in a paper.

37. Do you consider that the Commission has enough information on the functioning of the various markets concerned by its investigation and the State aid granting system of the Member States to effectively tackle illegal and incompatible State aid in a particular economic sector across all Member States and thereby ensure equal treatment?

The Dutch authorities are of the opinion that the Commission has the tools to obtain the required and relevant information on the functioning of the market in case it is not already available.

38. In light of your experience, do you consider that the Commission should have other tools to obtain the necessary information from market participants and in good time to deliver decisions within more business-relevant timelines? Which tools would have been more appropriate?

No.

SECTION 2.C. DESIGN OF INFORMATION-GATHERING PROCEDURES

Questions aimed at Member States

39. Do you consider that the invitation to provide comments on the decision to open the formal investigation published in the Official Journal of the EU is sufficient to collect relevant information from third parties? If not, why not?

It is sufficient.

40. Based on your experience, do you consider that the information that the Commission receives from third parties after the opening of formal investigations is relevant for the investigation? Is it complete? Is it reliable?

Based on our experience, it varies from case to case. The Commission shall have to assess in each individual case whether the information obtained from third parties can be considered relevant, complete and reliable. Member States should be able to confirm or contest the relevance, completeness and reliability of the information received from third parties.

Questions aimed at other interested parties

41. Do you consider that the invitation to provide comments on the decision to open the formal investigation published in the Official Journal of the EU is sufficient to collect relevant information from third parties? If not, why not?

42. Based on your experience, do you consider that you would have been in a better position than the authorities of your Member State to provide the Commission with the information needed for its investigation in State aid cases?

43. Based on your experience as an aid recipient, do you consider that direct contacts with the Commission would have facilitated and accelerated the investigation?

44. Would you voluntarily be willing to reply to information requests from the Commission on State aid granted to your competitors?

SECTION 2.D. MISCELLANEOUS

45. Do you have any additional comments on the gathering of information in the context of State aid investigations, other than those covered in the previous questions?

- *A clear distinction should be made between the simplified notification procedure (article 4, Regulation 794/2004) and the normal notification procedure. The Dutch authorities have experienced instances in which the authority in question indicated that notification was done under the simplified procedure and the Commission subsequently followed, without stating reasons for it, the normal notification procedure .*
- *The distinction between the different simplified notification procedures should be clarified, as it is unclear what deadlines apply and which forms have to be used in categories 1, 2 and 3 of the Communication concerning the simplified procedure (OJ C 136, 16 June 2009).*
- *At the beginning of the notification procedure in SANI Member States are asked whether the notification could be dealt in accordance with the Communication concerning the simplified procedure (OJ C 136, 16 June 2009). This would mean that the case is immediately going to be public in the form of a small case summary. This may cause reluctance to use this procedure. The Dutch authorities wonder whether the procedure has led to the results the Commission expected. If not, now is a good opportunity to consider repealing this procedure.*
- *When filing a (pre)notification it is often unclear which DG is actually responsible. Our experience is that there is a certain overlap between DG AGRI and DG COMP. It can take a considerable time before the Commission provides clarity as to which DG will take the lead in a certain case. This leads to unnecessary delays.*
- *The pre-notification stage is sometimes dragged on for a long period by continuously asking further questions because formal deadlines for the Commission are not applicable at this stage. From notification onwards it can all of a sudden go very quickly, which gives the false impression that the notification procedure is in fact reasonably quick. It might be worth considering a fixed term within which the pre-notification stage should be completed.*
- *Withdrawing a measure from SANI is not possible.*
- *The Dutch authorities have more than once experienced that the authority concerned receives a set of questions just before the Commission decisionmaking deadline expires, which automatically extends the deadlines for the Commission. Whenever questions are posed, they must be relevant to assess the measure and may not serve as a means to circumvent formal deadlines. The Dutch authorities have also noticed that the deadlines the Commission sets for the national authorities to provide the requested information usually are extremely short.*

- *The information requests tend to be limited to the market situation in one Member State even though it is imperative to assess the effects on competition and cross border trade .*
- *The Commission should focus on proportional differentiation; in cases with a big potential to disturb the market, the Commission should proceed on a more detailed level, whereas in relatively small cases, (which probably do not affect market conditions) such level of detail is not required. In these smaller cases a shortened procedure could be considered .*
- *The Dutch authorities have experienced that even relatively small cases often take a year to complete. As a consequence, the authority in question will have to postpone his activities, which is a an expensive practice. In fact, long procedures are becoming a factor in the risk assessment of authorities. Moreover, even small changes to existing schemes are subject to a formal review which takes a long time. Especially when these measures are aimed at achieving EU goals (f.i. for renewable energy), such delays are regretful.*
- *There tends to be overlap in consecutive information requests by the Commission. Certain information is requested multiple times. Direct contact with the Commission could be of help to clarify such instances.*
- *In banking cases (e.g.ING) the Commission at some point temporarily approved the measures while at the same time it started a formal investigation procedure. This is legally impossible under the current procedural regulation, but it was a solution in times of crisis. If the Commission intends to go down this path more often, the possibility should be explicitly created in the Procedural Regulation.*
- *In a tax measure dossier the Commission did not follow the right procedure to label certain aid as existing aid. After extensive investigations, DG COMP stated in a letter (and not in a Commission decision) that the aid in question was to be considered as existing aid and as a next step was going to propose appropriate measures. As there was no formal decision, the authorities concerned had no possibility to challenge a decision before the Courts. The follow up to the letter should have been the opening of a formal investigation procedure by an formal decision, which could be challenged before the Courts.)*

46. Please provide copies of any documents or studies which may be relevant for assessing the gathering of information in State aid cases.

47. Please indicate whether the Commission services may contact you for further details on the information submitted, if required.

YES X NO

THANK YOU FOR RESPONDING TO THIS QUESTIONNAIRE.



Brussels, 13 July 2012

Consultation Paper

STATE AID MODERNISATION: REFORM OF STATE AID PROCEDURES

The purpose of the present consultation is to invite both **Member States** and **stakeholders** to provide comments on **the handling of State aid complaints** and **the methods of the Commission to gather information in State aid investigations**, the two aspects of the State aid procedural framework which the State Aid Modernisation (SAM) initiative launched on 8 May 2012 proposes to reform.

The Commission invites Member States and stakeholders to submit their comments to DG Competition by **5 October 2012**.

1. INTRODUCTION

On 8 May 2012, the Commission adopted the [Communication on "EU State aid modernisation \(SAM\)"](#)¹ which officially launches a comprehensive reform of the State aid framework. It will ensure that State aid policy contributes both to the implementation of the Europe 2020 agenda², which is Europe's growth strategy for this decade, and to budget consolidation by pursuing the following objectives:

- Foster growth in a strengthened, dynamic and competitive internal market;
- Focus enforcement on cases with the biggest impact on the internal market;
- Streamlined rules and faster decisions.

The planned revision of [Council Regulation \(EC\) No 659/1999 of 22 March 1999](#) laying down detailed rules of procedure to deal with State aid cases ("the Procedural Regulation") is one of the building blocks of the State aid modernisation package.

State aid procedures, as foreseen by Article 108 TFEU and further detailed by the Procedural Regulation, are built around three main axes:

- Prior notification by Member States of all planned aid measures is compulsory, except in cases covered by a block exemption regulation, and the Member State concerned may not put the measure into effect until a Commission authorisation decision; to that

¹ 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)*, 8.05.2012, COM(2012) 209 final.

² Communication from the Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth*, 3.3.2010, COM(2010) 2020 final.

end, following an essentially bilateral (Member State/Commission) preliminary investigation, limited in principle to two months, the Commission may either approve the aid or open a formal investigation, subject to a best endeavour deadline of 18 months, with a view to thereafter approving (if need be, subject to certain conditions) or prohibiting the aid;

- The Commission is also bound to examine any information, from whatever source, concerning alleged unlawful (non-notified) aid. In particular, the Commission is required to conduct a diligent and impartial examination of the complaints lodged before it, and take a decision without undue delay. Where the Commission takes a decision finding that no State aid as alleged by a complainant exists, the Commission must at least provide the complainant with an adequate explanation of the reasons for which the facts and points of law put forward in the complaint have failed to demonstrate the existence of State aid;
- Finally, the Commission shall keep under constant review all existing aid systems in Member States and may propose to them any appropriate measures required by the progressive development of the functioning of the internal market.

While reforming the Procedural Regulation should primarily allow the Commission to take decisions faster, it will also help the Commission focus on cases with the highest impact at the EU level. Also, the objective to promote growth can only be achieved if the Commission has the powers to prioritize its work. In that context, the SAM Communication announced that the Commission will initiate:

*"A modernisation of the State aid Procedural Regulation with regards to **complaint-handling and market information tools**, in order to enable the Commission to **better focus its action on cases which are most relevant for internal market**. It requires **enabling the Commission to set priorities for complaints handling**, in order to prioritise allegations of potential aid with a large impact on competition and trade in internal market. In parallel, in order for the Commission to be able to effectively investigate cases of aid with significant impact, **it should be endowed with more efficient tools to obtain all the necessary information from market participants and in good time** so as to deliver decisions within business relevant timelines. Such modernisation of procedures would also **allow the Commission to undertake more ex officio investigations into significant distortions of competition** hampering internal market. It should also permit a quick verification of market effects of aid measures which would enable quicker decision-taking."*

The present consultation will therefore mainly aim at collecting the views of the Member States and stakeholders on two aspects of the State aid Procedural framework: **improving the handling of complaints** and **ensuring that the Commission obtains complete and correct information**.

2. How to contribute to the consultation

Member States and other interested parties are invited to respond to the questionnaire hereunder. Replies can be submitted in all official EU languages³.

While some of the questions are specifically aimed at public authorities, others are aimed at both public authorities and other interested parties (stakeholders). For your convenience, the

³ Given the possible delays in translating replies in certain languages, an English working translation would be welcome.

questions are sorted by their principal target audience. If you do not feel concerned by a particular question please reply "not applicable".

Questions referring to "your Member State" or "your authorities" and the like may be read by international entities with no particular Member State affiliation as referring to "Member States" and "Member State authorities".

The deadline for the replies is **5 October 2012**. Replies should be sent to the European Commission, DG COMP, State aid registry, 1049 Brussels, reference "**HT 2664**", preferably via e-mail to Stateaidgreffe@ec.europa.eu.

The Commission services plan to make the replies to this questionnaire accessible on their website <http://ec.europa.eu/competition/consultations/open.html>.

Therefore, if respondents do not wish their identity or parts of their responses to be disclosed, that fact should be clearly indicated and a non-confidential version should be submitted at the same time. In the absence of any indication of confidential elements, DG COMP will assume that the response contains none and that it can be published in its entirety.

ABOUT YOU

Specific privacy statement: All contributions received, together with the identity of the contributor, will be published on the Internet, unless the contributor objects to the publication of personal data on the grounds that such publication would harm its legitimate interests. In that case the contribution may be published in anonymous form.

For rules on data protection on the EUROPA website, please see: http://ec.europa.eu/geninfo/legal_notices_en.htm#personaldata

1. Do you object to the disclosure of your identity?

Yes ☐ No ☒

2. Do any of the exceptions foreseen in Article 4 of Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents⁴ apply to your response? If so, please indicate clearly which parts should not be disclosed, justify the need for such confidential treatment and provide a non-confidential version of your response for publication on the Commission website.

Please provide your contact details below.

Name	Edith Templeton
Organisation represented	Department for Business, Innovation and Skills (UK state aid co-ordination point)
Main business activities	Government Department, Member State contact point on State Aid
Location (country)	UK

⁴ OJ L 145, 31 May 2001, p. 43.

E-mail address:

Edith.Templeton@bis.gsi.gov.uk

NOTE: *You are requested to follow the order of the questions, even though you are not required to reply to all questions. You can also submit additional information that you consider relevant and which does not fit any specific question.*

SECTION 1: HANDLING OF STATE AID COMPLAINTS

Complaints are a very useful source of information to direct Commission investigations towards those economic sectors where unlawful State aid hampers competition at the EU level.

Currently, the Commission has to investigate every alleged infringement of State aid rules received from whatever source, since no specific formal requirement is attached to the lodging of a State aid complaint. To close the examination of complaints, the Commission must issue a decision stating either that the measure complained of (i) is not an aid or (ii) is a compatible aid, or (iii) opening the formal investigation because there are doubts on the compatibility of the aid.

The Commission receives on average more than 300 complaints per year. The Commission is entitled to give different degrees of priority to the complaints brought before it, depending for instance on the scope of the alleged infringement, the size of the beneficiary, the economic sector concerned or the existence of similar complaints. In the light of its workload and its right to set the priorities for investigations, it can thus postpone dealing with a measure which is not a priority. Most complaints are therefore not given priority treatment and the duration of those cases thus tends to increase.

First attempts to tackle those issues were made in the 2009 Simplification Package, and in particular in the [Best Practices Code](#) which introduced a staged procedure for dealing with complaints. Based on priority assigned to the relevant complaint, the Commission endeavoured to send, within two months from the receipt of a complaint, a letter to the complainant informing it about the priority status given to its complaint. Within one year, the Commission then endeavoured to close the investigation of priority complaints by formal decision and send a preliminary assessment letter for non-priority complaints.

To achieve the objectives of the State aid modernisation, a reform in that area should "*enable the Commission to better focus its action on cases which are most relevant for internal market. It requires enabling the Commission to set priorities for complaints handling, in order to prioritise allegations of potential aid with a large impact on competition and trade in internal market*".

To prepare such a proposal, the present questionnaire aims at collecting the views of the Member States and other stakeholders on the State aid complaints handling policy and getting your feedback on your experience as granting authority, complainant, aid recipient etc... in State aid complaint cases.

SECTION 1.A. GENERAL QUESTIONS - FACTUAL INFORMATION

Questions aimed at Member States

1. On how many complaints are you consulted on average every year?

This varies but on average fewer than 10

2. On average, what are the resources and time needed to reply to requests for information from the Commission concerning a complaint? How does it compare to, for example, notifications?

Although the number of complaints in a given year may be small, they take up considerable resource. The Department for Business, Innovation and Skills (BIS) as co-ordinating Department can spend some time finding the appropriate contact within Government, there then often needs to be discussions and meetings on how best to answer the Commission's questions. It can take the appropriate Department some time to find, collate and present the information, particularly if the complaint refers to aid allegedly given a number of years ago. In total this takes at least the full twenty working days allowed and usually more than this. At least two members of staff are involved in BIS and often two or more in the body responding to the complaint.

Questions aimed at other interested parties

3. Have you ever lodged a State aid complaint with the Commission?

Yes ☐ No ☐

4. If yes, how did you lodge your complaint(s) (paper, e-mail, web-based)?

5. Have you lodged more than one complaint with the Commission on State aid matters?

Yes ☐ No ☐

6. If yes, how many complaints have you lodged over the past five years?

7. If you have already lodged State aid complaints, could you specify the type of measures, the beneficiaries and the amount of alleged aid you complained about and the economic sector concerned?

8. As a complainant, what were the resources and the time needed to provide the Commission with the necessary information to reply to its requests for information to clarify the content of your complaint(s)?

9. Have you ever consulted the dedicated webpage on State aid complaints of DG Competition (http://ec.europa.eu/competition/forms/intro_en.html)? Is the information available helpful to understand the purpose of complaints handling for State aid control?

10. As a recipient of an alleged illegal/incompatible aid, what were the resources and the time needed to provide the national authorities with the necessary information to reply to requests for information from the Commission concerning a complaint?
11. Have you used other means of action before or at the same time or after lodging a complaint? Which means of action did you use? What was the outcome? What was in the end the most effective instrument?

SECTION 1.B. STATE AID COMPLAINTS HANDLING POLICY

Questions aimed at all respondents

12. In your experience, do you consider that a complaint to the European Commission is an adequate way of protecting business and consumer interests?

Yes ☐ No ☒ x

13. If not, please describe the main shortcomings of the handling of State aid complaints and explain which redress mechanisms would be more adequate in your view, and why.

Whilst complaints *may* result in illegal aid being recovered and bad practices rooted out the procedure is not completely fit for purpose. It takes too long and has no real means of sorting out aid which may seriously affect the Single Market from aid which will have a more limited affect and may only give rise to problems in one Member State.

It can be many months between a complaint being lodged and being sent on the Member State. The iterative process between the Member State and the Commission to establish the facts can then take some considerable time. This means that if there really is a case to answer, illegal distortive aid continues unchecked. Of course, if the Commission does eventually open a formal investigation and reach a negative Decision the aid will be recovered with interest. However, this is cold comfort to a competitor who has been put out of business in the meantime or to consumers who may have had to pay higher prices as a result of the illegal aid propping up an inefficient company. At a time when the EU is looking to boost growth the Commission needs to speed up its ability to detect and prevent abuse.

From the Member State perspective, delay is also unsatisfactory because we do not know whether an aid measure, which may have been repeated in other parts of the country, is legal or not. The aid giver also does not know whether they should continue to make awards as this could simply increase the future recovery total.

Part of the reason for the delay is the Commission's obligation to consider everything and to ask at least preliminary questions. This means that the same process has to be conducted for alleged aid which may have a limited geographical or sectoral reach – such as aid to a community arts centre in a remote part of the UK, as for alleged aid to a large company in a highly competitive sector such as telecoms.

A complaints system which was faster and smarter (i.e. better able to target allegations of aid concerning large companies operating in a cross border environment) would offer greater protection for businesses and consumers as well as giving greater certainty to Member States.

14. In your opinion, does the current complaints-handling procedure in State aid help detect those measures which produce the most distortive effect on competition and trade in the internal market? Please substantiate your reply.

Yes ☐ No ☒ x

The complaints process can *eventually* discover distortive aid. However, as commented elsewhere, the Commission's obligation to consider everything without prioritisation means that this is only achieved at the end of a very lengthy process.

15. If not, based on your experience, how could the focus of State aid complaints handling be better targeted at measures with a large impact on trade and competition in the internal market?

The Commission needs to introduce a filter system to deprioritise those cases with a lower potential impact on the Single Market. This could be based on size, sector or geographical location of the alleged beneficiary – i.e. is this a very local case such as a leisure centre or on amount of alleged aid. There should also be consideration of the effect this alleged illegal aid has actually had either directly on the complainant or on the market, whether this be competitors or consumers.

DG Competition may also wish to liaise with DG Internal Market to see if there is any learning from the infractions process.

SECTION 1.C. LODGING STATE AID COMPLAINTS

Questions aimed at Member States

16. Do you consider that the non-confidential version of a complaint transmitted by the Commission to your authorities allowed you to properly assess the problem identified? If not, what was the nature of the missing information? Which impact did that missing information have on your ability to properly answer the Commission's information request? Please substantiate your reply with concrete examples.

The quality of the complaints varies enormously. Those which have come from industry tend to be the most detailed and to set out the alleged beneficiary, amount and purpose of the aid. Complaints which have come from the public or from interest groups tend to have little real information and no clear statement of harm. There is a vague allegation that aid has been given but no indication of when this might have been or for what purpose. One particular complaint (CP8/09) about alleged support from one of our heritage bodies (English Heritage) was so unclear the Commission had to offer an interpretation of the complainant's intention. This meant that we did not know whether or not we were actually answering the complaint fully.

17. Based on your experience, do you consider that use of the complaint form by complainants makes it easier for your authorities to comment on complaints?

The complaint form does at least mean that the information is ordered and clear. However, if the complainant either cannot or chooses not to complete the form we still do not have sufficient detail to properly address the complaint.

The current complaint form is very detailed and there are certain parts such as the question on compatibility which may cause difficulty for complainants unfamiliar with the rules or who cannot call on legal advice. The form must balance the need to extract the maximum amount of information and ease of use for complainants. If the form looks too long and daunting, SMEs in particular will be reluctant to use it.

A form by itself is only part of the answer. Whilst this can guide the complainant to give us details of alleged beneficiary, amount and purpose, if this information is not provided we can do little.

18. Based on your experience, how could the Commission best ensure that its investigations of complaints prioritize complainants truly affected by the alleged illegal State aid?

This could be achieved by the Commission prioritising complainants in the same sector as the alleged beneficiary and who can say that, for example, they have lost market share or a contract. Some form of proof of harm should be offered – it should not be enough for the complainant to point to theoretical damage. Priority should be given to those cases where there is a true cross border element – damage within a Member State should have a lesser role.

Whilst we are concerned as a Member State about the poor quality of some complaints, we acknowledge that it can be very difficult for a company, especially an SME, to ever really know what is going on in a particular MS. The complaint may therefore by necessity be rather sketchy. This suggests that the Commission should look very carefully at harm that is claimed rather than whether all boxes have been filled.

Questions aimed at other interested parties

19. Based on your experience, have you encountered difficulties to lodge a complaint with the Commission? If yes, could you indicate the most serious and/or the most frequent problems encountered (e.g. access to evidence, gathering the relevant information...) ?

20. Have you ever used the complaint form available on DG Competition's website (http://ec.europa.eu/competition/forms/intro_en.html)?

Yes ☐ No ☐

21. If yes, does the scope and the content of the complaint form facilitate the lodging of complaints? If not, please specify for each of the following criteria the problems that you may have faced:

- a. existence of the complaint form:
- b. accessibility of the complaint form on the Commission website:
- c. complexity of the complaint form:

- d. length of the complaint form:
- e. possibility to attach additional information to the complaint form:
- f. confidentiality of the identity of the complainant:
- g. confidentiality of the information submitted to the Commission:
- h. acknowledgement that the form has been registered by the Commission:
- i. response of the Commission services:

SECTION 1.D. COMPLAINTS HANDLING PROCEDURES

Questions aimed at all respondents

22. In your experience, do you consider that the Commission has kept you sufficiently informed of the different steps involved in the processing of a complaint? If not, could you indicate the most serious and/or the most frequent problems encountered?

No, the Commission has not been good at keeping us informed. Once we have submitted a response many months can elapse without any further communication. We do not know whether the Commission are satisfied or not and whether they are contemplating further action. As noted above this is particularly difficult if it is a measure which we consider not to be aid and which we are using widely through out the UK. We need to know as soon as possible if there are potential problems.

The Commission also have not told us when they have decided to close a case. We have frequently had to ask our Permanent Representation to chase case handlers for information. This for example was what happened in case CP 226/2004 –National Health Service Professionals. If the Commission finds that there is no case to answer we should be told as a matter of courtesy.

23. Did you contact the Commission services to get guidance on how to respond to the Commission's request for information? Were they able to provide the technical guidance you needed to prepare the answer?

We do not usually seek guidance on how to respond to initial requests for information unless the complaint seems particularly opaque. When we have asked we have been given a steer on what the Commission would expect to see in a response.

Once investigation has been ongoing for some time we have requested meetings and these have all been granted promptly and the Commission have been helpful and receptive to our points.

24. In your experience, did the Commission conclude the investigation of complaint in good time? If not, why not?

No. As indicated above most investigations take a very long time. Our current record is an investigation which was opened in 2006 which is still on going. We also had an

investigation which took 7 years to resolve (i.e. from the first time the Commission sent questions until the closure of the subsequent 108(2) inquiry – this ended up as C 7/2007 – alleged aid in favour of Royal Mail) and then only because the complainant threatened the Commission with legal action.

It is unclear exactly why this should be. There can be delay in the early stages in the Commission responding to our answers, this may be because of work load or because the complaint is not deemed sufficiently important. In other cases this may be because the subject is so technical. However, at least one of the cases above (Visit Britain) the problem has been that the complainant has refused to let the matter drop and has constantly argued about points when the Commission has decided to end the matter. There does need to be some means of the Commission ending a case if there are really no new substantive points.

Were you satisfied with the way in which the Commission informed you of the outcome of the investigation of your complaint(s)? If not, why not? What could the Commission services have done better? Please be as specific as possible in your reply.

As noted above the Commission has often not told us if a case has been closed. The Member State really needs written confirmation that all the points in the Commission's investigation have been answered satisfactorily.

All too often we only know that a case has been closed when our Permanent Representative make inquiries.

We suggest that the Commission consider using a secure email service – perhaps extending the SANI system – to keep Member States apprised of developments.

25. Based on your experience, do you consider that the [2009 Notice on the enforcement of EU State aid law by national Courts](#) has raised the awareness of your national courts as regards State aid issues? If not, could you explain how this cooperation could be reinforced? In particular, do you consider that a more pro-active stance of the Commission in national State aid litigation could have been of assistance to the courts concerned?

The UK national Courts have always been aware of state aid issues, despite the fact that there is little litigation. However, we consider that the Notice has refocused their attention on this topic.

SECTION 1.E. MISCELLANEOUS

26. Do you have any additional comments on State aid complaints handling, other than those covered in the previous questions?

On the subject of the National Courts we are aware that the Commission often sees action here as an alternative to a complaint. We would point out again that proceedings before the National Courts can never be an adequate substitute for a complaints process. The National Courts are costly and require a higher burden of proof. This could make it almost impossible for SMEs in particular to take forward a case.

We accept that the Commission will need to filter out some cases and welcome this if it speeds up the process and reduces the number of low impact cases. However, every case matters to someone, and there needs to be an adequate means of redress for all complainants within Member States.

27. Please provide copies of any documents or studies which may be relevant for assessing the Commission's State aid complaints handling policy and practice.

SECTION 2: INFORMATION-GATHERING IN STATE AID INVESTIGATIONS

Over recent years, there has been a significant evolution in the compatibility assessment of State aid measures, especially as regards large individual cases. The Commission has refined an effects-based approach which seeks to balance the positive and negative effects of State aid measures under assessment.

In the current procedural setup, Member States are the primary information source for that assessment. They have to answer the Commission's information requests, which in turn may imply commissioning market studies, exchanging information with the beneficiary, gathering information from the market as well as preparing responses to complainants' arguments. The Commission is therefore largely dependent on information provided by the Member State, which can lead to delays when the information is not readily available to the national authorities and may place a heavy burden on those authorities.

The Commission tried to tackle some of those issues in the Best Practices Code⁵. It was in particular formalised that the Commission services can send, in the context of the formal investigation procedure, a copy of the decision to initiate the formal investigation procedure to interested parties and invite them to comment on specific aspects of the case.

To achieve the objectives of State aid modernisation, the current State aid procedures need to be improved in order to be able to effectively investigate cases with significant impact. In that respect, the Communication adopted on 8 May 2012 proposes that the Commission should be endowed with more efficient tools to obtain all the necessary information directly from market participants and in good time, to deliver decisions within business-relevant timelines.

To prepare such a proposal, the present questionnaire aims at collecting the views of the Member States and other stakeholders on the possibility for the Commission to collect information in the context of State aid investigations, and feedback on your experience as granting authorities, aid recipient, interested parties or others on the gathering of information in the context of State aid investigations.

SECTION 2.A. GENERAL QUESTIONS - FACTUAL INFORMATION

Questions aimed at Member States

28. How many information requests do you receive on average per year from the Commission?

Fewer than 20

⁵ Point 34, Communication from the Commission, *Best Practices Code for the conduct of State aid procedures*, cited above footnote 9.

29. Based on your experience, could you specify the major difficulties you encountered in replying to these information requests? In particular, could you specify the type of information (business plan; market shares; pricing policy...) you found difficult to obtain?

There has occasionally been a problem in collating information within the Commission's timeframe. There has not been any specific types of information that has been difficult to obtain and the delay has rather been because of the number of bodies which had to be consulted.

30. In how many cases were responses difficult to obtain because the information requested concerned market information not publicly available?

None

31. Based on your experience, how technical and/or long were the information requests sent by the Commission, especially in case of State aid schemes?

The requests can be very technical in nature – although in our experience this has been more in relation to individual awards of aid rather than schemes. The most technical case we have had so far was C4/2005 – Property Tax on telecommunications Infrastructure which was an individual aid.

32. In your experience, did you find it preferable to request the necessary data from companies directly, or did you prefer to commission a study? In the latter case, did your authorities have sufficient expertise to carry out the study, or did you have recourse to external expertise? How much did it cost you to do so, both in monetary terms and in terms of time and resources spent?

In the case mentioned above we were able to draw on internal expertise. In other cases we have sought information direct from the beneficiaries and from sources in the public domain. We do not seek information directly from competitors.

Questions aimed at other interested parties

33. Were you aware that the Commission offers the possibility for interested parties to comment on the decision to open a formal investigation regarding alleged incompatible aid?

34. Have you ever provided comments to the Commission following the publication of a decision to open the formal investigation in the Official Journal of the EU? If yes, please specify:

- a. the form of your comments sent to the Commission (letter, e-mail)
- b. the type of information submitted (financial documents, business plans, commercial information, etc.)
- c. the time needed to prepare your comments

35. Have you ever had informal contacts with the Commission in the course of a State aid investigation during the preliminary examination phase? After the opening of the formal

investigation? What was the impact of those contacts on the overall course of the investigation?

SECTION 2.B. INFORMATION-GATHERING POLICY

Questions aimed at all respondents

36. Based on your experience, to what extent do you consider that the information-gathering tools at the Commission's disposal are sufficient to detect potential incompatible aid with a large impact on competition and trade in the Internal market? If not, could you explain why those tools are insufficient in your view?

The Commission has the power to seek information from all Member States on a given topic – as in the current information request on financing of football clubs. It would then be at liberty to follow up any of this information in more detail and to open an investigation if necessary. This of course does rely on the quality and quantity of information provided, although given that the Commission can issue information injunctions there may be already be a means of addressing this .

If further tools were to be introduced, and we are not ruling out this possibility, we would expect to see a duly justified reason as to why the Commission felt that current powers were insufficient for its purposes.

Do you consider that the Commission has enough information on the functioning of the various markets concerned by its investigation and the State aid granting system of the Member States to effectively tackle illegal and incompatible State aid in a particular economic sector across all Member States and thereby ensure equal treatment?

The Commission probably does have a reasonably clear idea about the systems in the various Member States – although there may well be gaps in its knowledge on specific areas where a Member State has a very particular system. This was the case with the UK pensions system.

We are also aware from direct experience that it does have expertise on sectors across the EU such as Posts and by now on banking. Given that DG Competition can draw on experts from the other Directorates General such as Enterprise , Internal Market, Energy and Economics and Finance there should be sufficient in-house knowledge available to understand most markets. It would be interesting to know how much use is made of this pool of knowledge. We would certainly wish to know this before considering any further tools.

Inevitably, however, there will gaps in this knowledge. In some investigations under 108(2) the Commission has drawn on external consultants to help provide information. This however can lead to an adversarial approach with the Member State concerned and whilst the report will have to look across the EU, it will concentrate on the aid giving MS.

37. In light of your experience, do you consider that the Commission should have other tools to obtain the necessary information from market participants and in good time to deliver

decisions within more business-relevant timelines? Which tools would have been more appropriate?

There may be a case for considering other information gathering tools , although as suggested above, it may be that a more regular and thorough use of current information tools would be effective. We would certainly agree that decisions should be given in business relevant timelines, but whilst it can take time to collate information this is not the only cause of delay. In our experience, this is more because of the time required for the Commission to consider and assess the information thoroughly in the light of the rules.

It would also be very important that any tool did not actually add to the time taken on investigations or impose burdens on third parties particularly SMEs. Any tool would have to be strictly limited to information gathering only. The primacy of the Member State – Commission relationship must be maintained, and the Commission must not enter into negotiations with companies directly over the design of aid schemes. Member States would need to have the right to see and comment on any information provided.

One means of improving the quality of information provided by firms would be to specify more clearly in guidelines what information the Commission expects firms to keep when in receipt of aid. This would be particularly useful in verifying that firms are not cumulating aid from a number of different schemes or Member States.

SECTION 2.C. DESIGN OF INFORMATION-GATHERING PROCEDURES

Questions aimed at Member States

38. Do you consider that the invitation to provide comments on the decision to open the formal investigation published in the Official Journal of the EU is sufficient to collect relevant information from third parties? If not, why not?

The invitation to provide comments is essential but has some flaws, principally in ensuring that all companies do actually respond.

There are a number of reasons why companies may not respond. They may be concerned about upsetting the Member State Authorities – although anonymity is guaranteed, in many sectors it is actually easy to guess which companies have responded. They may feel that any negative intervention may have an affect on their own future aid requests. They may also not be able to provide any substantial evidence – even if they privately have concerns. There is also the fact that not all companies – especially SMEs –study the Official Journal (OJ) and may miss the opportunity to comment.

An invitation in the OJ whilst important and necessary, may actually cast the net too widely. There are no restrictions on who may reply and therefore we can have lobby groups putting forward partial views because they object to a particular policy. There may need to be priority given to those directly affected by the aid – who would after all be the only entities who could challenge a Commission Decision in the European Courts.

Based on your experience, do you consider that the information that the Commission receives from third parties after the opening of formal investigations is relevant for the investigation? Is it complete? Is it reliable?

In our experience the quality of the information varies greatly. In some cases – particularly two involving nuclear power - respondents have simply criticised the policy rather than given any information about the effect of the aid on the market.

In other cases the information has been produced with a particular bias and has given only a partial picture of the market. We have also had cases where no one apart from the beneficiary actually responded.

Information can therefore be partial and incomplete and is not always relevant. We have not had any cases where information has been produced which proved an impediment to having the case approved or which undermined the picture of the market we had provided to the Commission.

Questions aimed at other interested parties

- 39. Do you consider that the invitation to provide comments on the decision to open the formal investigation published in the Official Journal of the EU is sufficient to collect relevant information from third parties? If not, why not?
- 40. Based on your experience, do you consider that you would have been in a better position than the authorities of your Member State to provide the Commission with the information needed for its investigation in State aid cases?
- 41. Based on your experience as an aid recipient, do you consider that direct contacts with the Commission would have facilitated and accelerated the investigation?
- 42. Would you voluntarily be willing to reply to information requests from the Commission on State aid granted to your competitors?

SECTION 2.D. MISCELLANEOUS

- 43. Do you have any additional comments on the gathering of information in the context of State aid investigations, other than those covered in the previous questions?

No. Although please see our covering letter on wider points on the Procedural Regulation more generally. We would welcome a discussion on the notification process in particular.

- 44. Please provide copies of any documents or studies which may be relevant for assessing the gathering of information in State aid cases.
- 45. Please indicate whether the Commission services may contact you for further details on the information submitted, if required.

YES x NO – We of course stand ready to provide any additional information the Commission may wish.

THANK YOU FOR RESPONDING TO THIS QUESTIONNAIRE.

Our Ref/Ein Cyf:

Your Ref/Eich Cyf:

Date/Dyddiad:

Please ask for/Gofynnwch am:

Direct line/Llinell uniongyrchol: 029 2046 8676

Email/Ebost:

LG

HT.3365 – SAM – GBER review

9th September 2012

Lowri Gwilym

lowri.gwilym@wlga.gov.uk



WLGA • CLILC

European Commission
DG COMP
State Aid Registry
1049 Brussels

Dear Sir / Madam

Response to the General Block Exemption Regulation Consultation Paper

The WLGA welcomes the opportunity to provide comments as part of the consultation on the General Block Exemption Regulation. The GBER has enabled local government to provide modest levels of grant aid in the delivery of economic development and regeneration in Wales.

We have provided our response in the form of this letter as we feel that as a representative body of local government we do not have direct experience as a granting authority or as an aid beneficiary thus are not able to comment fully on the number of technical and detailed questions asked in the consultation. However, as we have worked with all local authorities in Wales during the current programming period to develop appropriate notified schemes in line with the General Block Exemption Regulation to ensure that they are able to provide effective aid to businesses within their areas, we wish to provide the following comments:

- Local government welcomed the introduction of the General Block Exemption Regulation during the current programming period as it removed unnecessary levels of bureaucracy both from the aid recipients and authorities granting the aid, as well as reducing the workload relating to notifying and approving modest levels of aid.
- Local government would welcome a continuation of the trend towards more simplification into the 2014-2020 programming period.
- Local government is in a period of change as activity continues to evolve to meet current local challenges. As a result, local government would welcome a mechanism whereby the GBER can be reviewed more frequently to enable local government to react more appropriately to local market conditions.

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Prif Weithredwr

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- Local government has a wide remit and as a result would welcome the widening of the scope of the GBER in the new programming period in order to allow a broader range of activities to be covered. Of particular interest to local government will be the development of adequate exemptions to allow aid for activities relating to Economic Development, Regeneration, Environment, Transport, Heritage, Culture, Tourism and Services of General Economic Interest. This would give public bodies more flexibility to provide grant aid in support of economic growth, jobs and social inclusion under the Structural Fund and Rural Development Plan programmes in Wales.
- The GBER should continue to focus on SMEs with aid intensity inversely related to the size of the company. The forms of aid should be extended to cover new and improved ICT, start up and one off marketing cost, investment for R&D and innovation and training.
- There is some concern that the timescales for the review of State Aid regulations do not dovetail with those timescales regarding the review of Structural funds. The eligible activities in the new programme should be reflected in the GBER.
- Further clarity is required in relation to state aid and the innovative financial engineering measures that were introduced in the current programming period (JESSICA, JEREMIE etc).

We sincerely hope that our messages and comments will be taken on board as the proposals for the General Block Exemption Regulation (GBER) for the 2014-2020 programming period are further developed and refined. We look forward to providing further comments as part of the review of the GBER in 2013.

We look forward to working with all key partners, including the European Commission, UK Government and Welsh Government, in shaping these proposals and ensuring adequate GBER arrangements and the development of appropriate notified schemes across Wales going forward to enable the continuation of vital aid to businesses to safeguard and create sustainable jobs and growth to assist economic recovery.

Yours Sincerely



Lowri Gwilym
Team Manager – Europe and Regeneration
Rheolwr Tîm – Ewrop ac Adfywio

The General Block Exemption Regulation Consultation Paper

The purpose of the present consultation is to invite both **Member States** and **stakeholders** to provide comments on the application of the **General Block Exemption Regulation ('GBER')**. Those comments will provide valuable input for the review of the GBER in 2013. The Commission invites Member States and stakeholders to submit their comments to DG Competition by **12 September 2012**.

1. Introduction

State funding meeting the criteria of Article 107(1) TFEU constitutes State aid and requires notification to the Commission. However, according to Art 109 TFEU, the Council may determine categories of aid that are exempt from the mandatory notification procedure set out in Article 108(3) TFEU.

In application of Art 109 TFEU, the Council, by adopting Regulation (EC) No. 994/98¹ ('Enabling Regulation') enabled the Commission to declare compatible with the internal market and exempt from the notification procedure aid in the following categories: aid in favour of SMEs, R&D, environmental protection, employment and training, and regional aid.

On the basis of the Enabling Regulation, the Commission adopted the GBER², in force since 29 August 2008.

The GBER simplifies the procedures for aid granting authorities at national, regional or local level. It allows the implementation of a range of measures with horizontal objectives considered to be in the common interest.

The total amount of state aid granted through block exempted measures was 12.6 billion EUR in 2010. The latest version of the state aid scoreboard (autumn 2011)³ shows a continued increased use of block exemptions by Member States in terms of aggregate block exempted aid amounts.

On 8 May 2012, the Commission adopted a Communication⁴ on a State aid modernisation package ('SAM'), which shall launch and frame the political debate on the modernisation of State aid control. The review of the GBER is an important element of SAM.

The Commission invites the other Institutions, Member States and stakeholders to provide input for the revision of the GBER. The GBER contains a variety of measures, many of which are also covered by specific guidelines or frameworks (regional, environmental, risk capital and R&D&I aid). In order to ensure coherence in the revision of the policy for each type of aid, dedicated separate questionnaires will be prepared for the main types of aid (regional aid, aid for R&D&I, environmental aid, risk capital), covering both exempted and non-exempted aid. By contrast, this questionnaire focuses on general questions relating to the GBER as such and on the categories of

¹ OJEC L 142/1 of 14.5.1998.

² OJEU L 214/3 of 9.8.2008.

³ COM(2011) 848
http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html

final,

⁴ http://ec.europa.eu/competition/state_aid/modernisation/index_en.html

aid only covered by the GBER (e.g. training aid, SME aid for consultancy and participation in fairs, SME investment aid, aid for female entrepreneurs and disabled workers). It does not deal with specific guidelines or frameworks. Overlaps were thus avoided to the extent possible, but respondents are invited to cross-reference replies in the parallel questionnaires if appropriate.

2. How to contribute to the consultation

The other Institutions, Member States and stakeholders are invited to respond to the questionnaire. Replies can be submitted in all official EU languages. Given the possible delays in translating comments submitted in certain languages, translations of the replies in one of the Commission's working languages (English, French or German), would be welcome. In addition, any comments beyond the scope of the questionnaire will be welcome.

Certain questions are intended specifically for public authorities or certain stakeholders and respondents are, thus, not required to address every question. If you are not concerned by a particular question, please reply "not applicable".

The deadline for the replies is **12 September 2012**. Replies should be sent to the European Commission, DG COMP, State aid registry, 1049 Brussels, "**HT.3365**", preferably via e-mail to Stateaidgreffe@ec.europa.eu.

The Commission services plan to make the replies to this questionnaire accessible on its website <http://ec.europa.eu/competition/consultations/open.html>. Therefore, if respondents do not wish their identity or parts of their responses to be divulged, this should be clearly indicated and a non-confidential version should be submitted at the same time. In the absence of any indication of confidential elements, DG COMP will assume that the response contains none and that it can be published in its entirety.

QUESTIONNAIRE

ABOUT YOU

Specific privacy statement: Received contributions, together with the identity of the contributor, will be published on the Internet, unless the contributor objects to publication of the personal data on the grounds that such publication would harm his or her legitimate interests. In this case the contribution may be published in anonymous form.

For rules on data protection on the EUROPA website, please see:
http://ec.europa.eu/geninfo/legal_notices_en.htm#personaldata

01. Do you object to the disclosure of your identity?

Yes ☐ No ☒

02. Does any of the exceptions foreseen in Article 4 of Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents⁵ apply to your response? If so, please indicate clearly which parts should not be divulged, justify the need for such confidential treatment and provide also a non-confidential version of your response for publication on the Commission website.

Please provide your contact details below.

<i>Name</i>	Olli Hyvärinen, Eeva Vahtera, Tarja Sinivuori-Boldt, Inkalotta Nuotio
<i>Organisation</i>	Ministry of Employment and the Economy
<i>Primary operating sector</i>	
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<i>E-mail address:</i>	valtioneuvosto@tem.fi , olli.hyvarinen@tem.fi , eeva.vahtera@tem.fi , tarja.sinivuori-boldt@tem.fi , inkalotta.nuotio@tem.fi

NOTE: The sections on the GBER common provisions and specific provisions (sections D and E) follow the structure of the GBER itself. You are requested to follow the order of the questions, even though you are not required to reply to all questions. You can also submit additional information that you consider relevant and which does not fit any specific question.

⁵ OJ L 145, 31 May 2001, p. 43.

As the reform of the GBER forms a key part of the overall modernisation by the Commission of the system of state aid control (SAM), the Finnish authorities wish to set out some general viewpoints about the review before going on to respond to the questionnaire.

Finland's view concerning the reform of the GBER in the context of the modernisation of EU state aid control.

Finland submits that the analysis presented by the Commission in the Communication "EU State Aid Modernisation (SAM)" of 8 May 2012 on the modernisation of EU state aid is a step in the right direction. First of all, there is a need to simplify and reform the provisions on state aid so that it is targeted according to the good objectives of EU2020. Furthermore, the objectives of streamlining state aid procedures and focusing control on the cases of state aid which have the most significance for the internal markets are worthy of support.

The modernisation of the GBER has important links to all of the objectives announced in the Commission's Communication on modernisation. Finland believes that the aid eligibility criteria laid down in state aid regulations – including the GBER – should be harmonised and the criteria should be as clear as possible throughout. This is an important point because, apart from central government institutions, local authorities also apply the EU state aid regulations. It is particularly important to ensure proportionality of the aid criteria in the GBER, since the aim of the Regulation is to speed up and simplify the award of "good" state aid without the need for the Commission's approval.

The GBER reform is particularly significant in terms of increasing the effectiveness of state aid control. In this regard Finland supports the review of the Council's Enabling Regulation (994/1998), to allow the Commission in the future to grant block exemptions in new areas where at the moment this is not possible. Finland is of the opinion that in the future the GBER could cover, for example, certain aid in the spheres of culture, traffic and broadband. Furthermore, the thresholds currently applying to individual declarations under the GBER can be raised in the case of activities carrying the lowest risk of distortion of competition.

Finland points out, however, that the widening of the scope of block exemptions will not exclusively lead to success in achieving the objectives of the modernisation scheme (focusing aid control on the forms of aid with maximum distortive impact on competition), if we do not simultaneously safeguard maximum flexibility in the requirements set for aid eligibility: if, almost without fail, exempted aid has to be notified to the Commission because of the tightness of the GBER criteria, the added value of the exemption is of little merit. The present GBER incorporates certain delimiting criteria (for example, the requirement to establish an aid scheme), which have restricted the applicability of the regulation. Finland is of the view that, in this respect, more flexibility should be introduced to the GBER (please see answer to question 17).

It is also in Finland's interest to ensure that expanding the group of exempted forms of aid does not compromise the standards of EU state aid control. The data supplied by the Commission in conjunction with the modernisation scheme concerning the monitoring of aid under the GBER indicate that Member States find it very difficult to comply with the eligibility criteria of the GBER (50% of all audited cases have failed to comply with the criteria). For this reason, expanding the scope of the regulation should not be the main goal per se, unless simultaneous efforts are made to ensure that increasingly effective state aid control is used to secure equal operating conditions, with the help of the Member States. In its Report 15/2011, the European Court of Auditors has stated that the effectiveness of the

ex post control of aid granted under the GBER should be improved. One option worthy of consideration is to transfer the responsibility for monitoring aid to the Member States, as the Commission has provisionally proposed. However, any monitoring system should be in proportion to the main goal of the GBER. Finland will submit more detailed views on issues relating to control when the Commission's concrete proposal becomes available.

SECTION A: GENERAL GBER POLICY QUESTIONS

A.1. The GBER in context of the Enabling Regulation and the Guidelines

Questions aiming at all respondents:

1. What are the main difficulties you have encountered in applying individual aid measures on the basis of a scheme which is block exempted?

General comments on the General Block Exemption Regulation

Overall, the provisions of the GBER have been found to be appropriate and fairly simple to apply in Finland. Problems of interpretation have caused situations where the aid eligibility criteria under the GBER on the one hand and under the state aid guidelines on the other hand differ. For example, core concepts in the state aid provisions, such as “incentive effect” and *[Translator's comment: There seems to be something missing here in the source text]* currently differ in the various state aid provisions, and this poses problems. Similarly, the requirement of the permanence of assets, for example, which is set out in Article 12 of the GBER, varies among the various state aid provisions (GBER: three years; Council Regulation (1698/2005) on rural development: five years).

Finland supports the objective outlined in the Commission's Communication “EU State Aid Modernisation (SAM)” of 8 May 2012, which concerns the harmonisation of provisions regarding the assessment of eligibility for state aid. The harmonisation should also cover state aid provisions in the agricultural sector (incl. Regulation 1857/2006 (block exemption regulation for agriculture) and Regulation 1698/2005 (rural development)). Specifically, it is appropriate to keep the provisions included in the GBER as simple and unambiguous as possible in the future too, since the intrinsic purpose of the Regulation is to secure the speedy processing of aid that is manifestly suitable for the internal markets.

In some respects, the eligibility requirements set out in the current GBER have been perceived as excessively restrictive in Finland. Finland considers, for example, that the requirement of an aid scheme⁶, which is currently set as a condition for applying the GBER, should be relaxed to allow small, ad hoc aid measures to be included within its scope in the future. In Finland, ad hoc aid is typically granted for local projects, implemented by municipalities. The significance of such projects to the internal markets is negligible.

Finland is also in favour of giving more consideration to the special features of fiscal support when the GBER is modernised. Because the GBER is essentially designed to apply to projects, it is ill-suited to aid which is granted in the form of fiscal support. Because

⁶ For example, aid granted for environmental protection and regional aid are both subject to the establishment of an aid scheme. In compliance with the requirement for transparency laid down in Article 5 of the GBER, aid granted in the form of a guarantee should also be part of an aid scheme.

there is no project-specific evaluation and no concept of project in fiscal terms, the maximum amount of aid and the monitoring of cumulation, which are examples of requirements of the GBER, are difficult to implement. Furthermore, tax incentives always have to be adapted to the rest of the fiscal system (e.g. to the concepts of taxpayer and tax year). Consequently, the design of tax incentives differs considerably from the design and implementation of incentive schemes for direct aid. In this respect, the Commission could provide guidelines for the Member States on how the special features of fiscal systems could be given more consideration in the design of state aid programmes.

Comments on specific categories of aid with reference to the GBER and proposals for amending the Regulation

The Finnish authorities consider that there is a need to review the GBER, particularly with regard to two aid categories: the criteria applying to aid for consultancy services in favour of SMEs and to aid in favour of disabled workers in the form of wage subsidies.

Finland is of the view that the Articles of the GBER pertaining to **training and consultancy aid (Articles 38–39, and 26)** do not take sufficient account of situations which involve the training of self-employed people or the owners of small micro-enterprises. Under the Articles of the GBER that relate to training aid, only the employees of an undertaking are entitled to aid. Self-employed people and owners of undertakings may exploit the Article of the GBER on consultancy aid, under certain conditions. Experience gained in Finland indicates that in practice the 50% aid ceiling for consultancy services is too low, particularly in the case of micro-enterprises, which often require expert assistance to support development projects. Finland proposes raising the aid level for micro-enterprises to 70% - 80% of eligible costs.

At this initial stage, Finland takes the view that it would be appropriate to introduce more flexibility to the current provisions of the GBER (Articles 40-41) on **granting aid for disadvantaged and disabled workers in the form of wage subsidies**. In Finland, non-profit associations and foundations, which from the viewpoint of EU law are engaged in both commercial and non-commercial activities, have been very significant employers of the most disadvantaged job-seekers in the whole employment market, i.e. those who are socially unfit for work. These players produce services merely to provide a tool for the generation of services which promote employment. There are not very many of these players in Finland, but their activities are very important for boosting employment of the disadvantaged in the job market. Improving employability and work skills always requires the opportunity to gain work experience in “real jobs”.

We thus propose that the Commission consider extending the scope of the Articles of the GBER which apply to wage subsidies. The aim should be to help people who, immediately prior to starting in wage-subsidised employment, have been unemployed job-seekers for a period of two years, to find employment in non-profit corporations for a minimum of 24 months – and in exceptional circumstances for a longer period. The maximum aid level would be 75% of eligible costs. In practice, this would mean that when granting wage subsidies a precisely defined group of the long-term unemployed could be equated with disabled workers.

Detailed comments on the application of the GBER

The comments below comprise a more detailed listing of the problems that the Finnish authorities have noted in connection with the application of the GBER. Finland is of the opinion that the Commission should either make the regulation less ambiguous in this respect or draft more detailed instructions for the Member States concerning the application of the provisions.

- Individual notification thresholds (Article 6(1)(e)): the provisions leave it open to interpretation whether situations where one undertaking has several different projects which exceed the threshold are subject to the individual notification obligation.
- Definition of “undertaking in difficulty” (Article 1(7)): the definition of “undertaking in difficulty” which is given in the GBER differs from that given in the guidelines for rescue and structural reform aid. The Commission should consider harmonising the definitions concerned.
- Aid cumulation (Article 7) – the current Article 7(3) lays down that aid granted by the GBER shall not be cumulated with “Community funding” in relation to the same eligible costs. The wording leaves it open to interpretation whether the cumulation assessment should be limited exclusively to EU-funded projects or also to aid schemes notified to the Commission, which include national co-funding.
- Training aid (Articles 38–39): in practice it has been difficult to draw the line between general training and specialised training on the one hand and training and consultancy services (Article 26) on the other; the Commission should specify the definitions more precisely in this respect. The definition of “consultancy services” is particularly superficial in the current provisions.
- Training aid (Articles 38–39): at present the wording of the Article indicates that only employees are entitled to training aid. The fact that self-employed people and owners of SMEs are, in practice, left outside the scope of the Regulation entirely is a problem. The opportunities for these groups to seek aid should be clarified in connection with the modernisation of the GBER. For example, at present it is unclear to what extent aid under the provisions of Article 26 of the Regulation can be applied to support the training of self-employed people.

A.2. The GBER's impact on state aid policy

Questions aiming at public authorities:

2. Can you provide examples how the design of support measures (schemes) has been influenced by the GBER as compared to similar measures introduced under previous rules (for example, with regard to thresholds of measures, assessment of incentive effect)?

Moving from several sector-specific block exemptions to a single general block exemption regulation on 29 August 2008 has simplified and clarified the design of state aid measures. The GBER has also contributed to greater awareness of state aid measures. Finland supports the Commission in its endeavour to streamline and harmonise state aid regulation, also with regard to the current modernisation of the state aid system.

3. Has the entry into force of the GBER brought about a necessity to modify the scrutiny of aid applications?

Yes ☐ No ☐

The replies received from the Finnish authorities did not include any comments regarding this question.

If yes, can you quantify and substantiate the modifications?

Questions aiming at all respondents:

4. Based on your experience with designing aid measures, do you consider that the measures allowed under the current GBER better target market failures and / or equity objectives than previous block exemption rules?

Yes ☐ No ☐

The replies received from the Finnish authorities did not include any comments regarding this question.

If yes, please substantiate and give concrete examples.

5. Please describe what you consider from your perspective as the main positive economic effects of support granted for companies under the current GBER.

Finland is of the view that aid granted under the GBER encourages the development and modernisation of business operations. The aid can be exploited to promote both the modernisation of material production tools and the development of undertakings' business know-how, products and production as well as internationalisation.

A.3. Negative effects of block exempted state aid

Questions aiming at all respondents:

6. What are the main potential negative effects of block exempted State aid in context of distortions of competition and effects on trade? Please substantiate and give concrete examples.

Assessing the distortion of competition is difficult, partly because the aid categories under the GBER are not sufficiently transparent (for instance, to the competitors of the beneficiary undertakings). It is difficult to deduce, for example, from publicly available information whether aid which has a distorting effect on competition is consistent with the GBER. Finland considers that the Commission should consider improving the transparency of aid under the GBER, for instance by means of technical solutions, so as to make it easier for the various parties (Member States and the competitors of state aid beneficiaries) to find further information on these forms of aid (see reply to question 35).

7. Do you consider that the application of the GBER or some of its provisions have led, in practice, to affected trading conditions to an extent which is contrary to the common interest ?

For the purposes of your reply, please consider in particular the following circumstances: market proximity of the supported activity; amount of aid; size of the beneficiary; market power of the beneficiary; level of positive externalities; definition of the relevant geographic

and product market; competitive structure of the market concerned (number of competitors; barriers to entry; existence of market power). Please substantiate your view with concrete examples and data.

The replies received from the Finnish authorities did not include any comments regarding this question.

8. Which of the block exempted aid categories would you consider to have a high risk of affecting trading conditions to an extent contrary to the common interest? In view of your experience in block-exempted aid schemes, do you consider that large, in terms of overall budget, state aid schemes do generally have a higher potential for distortion? Please substantiate and give concrete examples.

Large amounts of aid have the greatest risk of causing distortions in competition, and for this reason it is justified to retain it within the scope of the Commission's advance notification requirement. Similarly, start-up investment aid, in particular for sectors where there is structural over-capacity, may contribute substantially to the distortion of competition between the Member States. It is Finland's opinion that these aid categories should also be kept within the Commission's advance control system.

9. Do you consider that the safeguards in place in the GBER offer sufficient guarantees in order to avoid that trading conditions are affected to an extent contrary to the common interest?

Finland has noted that the outcomes of monitoring by the Commission under Article 10 of the GBER show that the current control system does not function properly. The European Court of Auditors has also pointed out this fact in its Report (15/2011) "Do the Commission's Procedures Ensure Effective Management of State Aid Control?" In this respect, there are grounds to consider improving the effectiveness of ex post control of aid granted under the GBER. In order to safeguard the effectiveness of State aid control, ex officio inspections by the Commission should also be increased, both for aid schemes under the GBER and for aid programmes that are normally notified to the Commission.

SECTION B: THE USE OF THE GBER

B.1. Rationale and assessment of policies under GBER

Questions aiming at public authorities:

10. To what extent has the GBER been used for sectoral measures? In which sectors did you mainly apply measures covered by the GBER?

In Finland aid schemes under the GBER are mainly horizontal in nature (aid beneficiaries are not selected from specific sectors).

11. Do EU programmes for funding influence your Member State's strategy for block exempted aid?

Yes ☐ No ☐

Finland does not apply a coordinated strategy to the exploitation of the GBER. The guidelines issued by the Finnish authorities concerning EU state aid regulation consistently highlight the

opportunities for exploiting the GBER, but in practice the GBER's usefulness is currently restricted by several factors (for more detail see question 18).

EU funding programmes have only a limited impact with regard to the use of the GBER.

If so, could you specify which programmes and in which way?

Questions aiming at all respondents

12. How important is the level of private co-funding for block exempted aid measures in your Member State? Does private participation often exceed minimum intensities specified in the GBER? What changes in the level of private funding have you noted over recent years?

B.2. Statistical data

Questions aiming at public authorities:

13. Can you provide a comparative estimate of the magnitude of the total amount of aid spent under the GBER for 2010 in relation to the total amount of aid spent under *de minimis* rules (excluding aid measures between 200,000 and 500,000 € which temporarily were considered to constitute compatible aid under the Temporary Framework ⁷)?

It is estimated that in 2010 the Finnish central government authorities granted approximately EUR 260 million in *de minimis* aid. The figure is an unofficial estimate and it does not include aid granted by Finnish municipalities. An estimated EUR 115 million was granted under the GBER.

14. Could you indicate the aggregate amount of block exempted aid under the GBER (in million EUR) granted by your authorities (local/regional/Member State) between 29 August 2008 and 31 December 2011, on a yearly basis. Please indicate the breakdown of this aggregate block exempted aid for approved aid scheme or for individual aid. Please provide, if possible, a breakdown of aggregate block exempted aid granted to large undertakings and to SMEs.

See Annex 1.

15. Please indicate which aid forms were most used for block exemptions: grants, interest rate subsidies, loans, repayable advances, guarantee schemes, fiscal measures, other and provide policy reasons for the preferences.

The preferred form of aid in aid schemes under the GBER is the direct grant (which accounted for 93% of public aid granted under the GBER in 2011). A smaller proportion of aid was granted in the form of interest-rate subsidies and tax relief. From 2012, the GBER will also be exploited in order to grant aid in the form of reductions in environmental tax.

The small proportion of aid granted as interest-rate subsidies is likely to be due partly to the low level of interest rates. The minimal use of fiscal measures may be due to the fact that at present the GBER does not lend itself to the granting of aid in the form of fiscal support (see answer to question 1).

⁷ The *de minimis* threshold amounts to 200,000 € per undertaking over three years. See Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid

16. Please provide a ranking of aid categories (aid objectives, e.g. Art 13.1, 14, 15 etc. of the GBER) most used within your Member State or region (please quantify the number of measures and aggregate aid amounts) and provide policy reasons for the preferences.

See Annex.

17. Do particular factors prevent your authorities from granting a larger proportion of aid through block exempted measures?

Yes ☐ X No ☐

If so, please specify and give concrete examples.

In the experience of the Finnish authorities, when examining the relationship of an aid measure to EU state aid regulation, a typical situation faced in the selection is between the exploitation of the GBER on the one hand, and the submission of a state aid notification to the Commission, on the basis of a horizontal framework or guidelines, on the other. In this respect, the following factors particularly restrict the exploitation of the GBER:

- The establishment of an aid scheme is a pre-requisite for exploiting the GBER. Finland has found it problematical that aid granted on an ad hoc basis is excluded almost categorically from the scope of the GBER. In Finland, we have examples of cases where the amount of aid granted for a local project, which only just exceeds the *de minimis* threshold, is notified to the Commission for the sole reason that the GBER requires the establishment of an aid scheme.

Because ad hoc aid can also have a considerably distortive effect on competition, it is appropriate that any relatively large amounts of ad hoc aid continue to be subject to the advance notification obligation. It is Finland's view, however, that consideration should be given to adding flexibility to the Regulation by releasing ad hoc aid from the advance notification obligation under certain conditions. For example, separate thresholds could be set for ad hoc aid which are lower than those governing aid schemes. If the ad hoc aid were to exceed the said threshold, a state aid notification would have to be submitted to the Commission.

Finland would like to point out that extending the scope of the GBER to cover ad hoc aid to a larger extent than before would also support the objective of focusing the enforcement of state aid control on cases with the maximum effect on the internal markets, which is one of the purposes of the EU state aid modernisation process which the Commission has launched. In practice, the problem of restriction of the scope in Finland has particularly involved local aid granted by the municipalities, and the relevance of such aid to the internal market is minimal.

- Aid levels which are lower than those set for framework/guidelines, and restrictive eligibility criteria: certain aid categories under the GBER apply lower aid levels than the equivalent horizontal guidelines/framework. In Finland's opinion, raising the level of aid for GBER aid categories to the same levels as in the guidelines/framework should be considered in situations where the Commission has plenty of practical experience concerning settlement, and where it is easy to determine the criteria for the aid permitted.

B.3. The GBER and the crisis

Questions aiming at all respondents:

18. To what extent has the economic and financial crisis had an impact on the granting of block exempted state aid in your Member State?

If applicable, can you describe such impact and indicate if, and how, your authorities have adapted their State aid granting policy in response?

19. Do you consider that the GBER is a useful instrument to ensure funding for SMEs? If so, which aid measures are most useful?

Finland considers the GBER to be a useful instrument, because it comprises a wide variety of different aid measures. This facilitates programme management and accelerates the implementation process.

SECTION C: EFFECTIVENESS AND EVALUATION OF BLOCK EXEMPTED AID

Questions aiming at public authorities:

20. How do you evaluate the effectiveness of block exempted aid granted in your Member State in relation to the objectives pursued by the measures in question? Do you carry out evaluation analysis of individual measures and/or programmes? Please substantiate your answer.

It is provided under Finnish laws that the effectiveness and functioning of the business aid programmes are to be evaluated on a regular basis. However, the studies have not specified the effectiveness of the aid forms from the point of view of EU state aid regulation in such a way that aid granted under the GBER is analysed separately.⁸

At the general level, the Finnish authorities have noted that the effectiveness and suitability of interest-rate subsidies have proved to be somewhat questionable, particularly in the case of smaller financing projects. Particularly in the current situation, where interest rates are at a low level, the actual impact of the aid has been very small. Thus, the incentive effect of interest-rate subsidies is mainly only seen in financing projects involving larger loans.

Questions aiming at all respondents:

21. Please make available any relevant studies or reports that describe the effectiveness of block exempted aid in your country.

Structural Fund programmes are the subject of regular evaluation applying different weightings. The latest interim reports (including an English summary) can be found on the following websites:

http://www.rakennerahastot.fi/rakennerahastot/tiedostot/arviointiraportit_2012/eakr_arviointiraportti2012.pdf

http://www.rakennerahastot.fi/rakennerahastot/tiedostot/arviointiraportit_2012/esr_arviointiraportti2012.pdf

22. According to your experience, which are the most appropriate types of State aid instruments to be block exempted (e.g. grants, interest rate subsidies, loans, repayable advances, guarantee schemes, fiscal measures)? Please substantiate your answer.

⁸ Examples of effectiveness studies

http://www.maaseutu.fi/attachments/maaseutu/maaseudunkehittamisojhelmat/66q3ghtNO/Maaseudun_yritysrahoitus_Ramboll_2012.pdf

It is fundamentally inappropriate to draw lines between the different aid instruments with regard to the application of the GBER. There is more justification in excluding from the scope of the Regulation the aid categories which have the greatest distortive effect on competition due to the nature of the measure, the amount of the aid or the specific characteristics of a certain sector. However, substantial fiscal aid schemes, for example, should essentially be covered by the obligation of advance notification to the Commission.

SECTION D: THE GBER – COMMON PROVISIONS

D.1. Scope of block exempted aid (Article 1)

Questions aiming at all respondents:

23. Based on your experience with designing aid measures, do you consider the current scope of measures covered by the GBER to have been appropriately framed?

Yes ☐ **X** No ☐

Finland is in favour of including certain new aid categories within the scope of the Enabling Regulation (948/1998), in order to allow the Commission, in cases of block exemption, to consider these aid categories as appropriate for the internal market without advance notification. For example, aid incorporated into broadband projects, traffic projects (e.g. regional airports) and cultural aid could be considered such aid categories. There has also been much discussion in Finland on the boundaries between various financial/non-financial activities in various sport-related areas, and on the criteria applying to state aid, in particular the requirements for fulfilment of the criterion concerning the impact on trade. As the Commission gains more practical experience of settlement, the state aid nature of measures linked to sport should also be evaluated from the point of view of the GBER.

As the scope of the GBER is extended, care should be taken to ensure that the new aid categories are eligible. Aid with the most distortive effect on competition should be kept within the bounds of the obligation of advance notification to the Commission in the future too. For more details, please see the reply to question 31.

If not, please explain what difficulties you have encountered.

D.2. Definitions (Article 2)

Questions aiming at all respondents:

24. Based on your experience with the application of the GBER, are there any definitions (of e.g. ad hoc aid, tangible assets) in need of further clarifications or change? Please describe any particular difficulties you have encountered in applying specific definitions.

As described in more detail above in answer to question 1, the current cumulation provision is somewhat open to interpretation. There would be grounds for the Commission to prepare instructions concerning the GBER, describing the most commonly encountered problems of interpretation in the Member States concerning the eligibility criteria, including aid cumulation.

D.3. Transparency of aid (Article 5)

25. Is the current distinction between transparent and non-transparent aid adequate?

Yes ☐ No ☐ **X**

Please describe any difficulties you have encountered.

In respect of aid granted in the form of guarantees, only aid comprised in guarantee schemes is considered transparent under Article 5 of the GBER. From the point of view of the Finnish authorities, aid comprised in individual guarantees should also be considered transparent if the aid element is calculated, for example, on the basis of the safe harbour premiums laid down in the Commission's Guarantee Notice.

26. In particular, do you consider that Articles 5(1)(d) and 25 address well the specificity of fiscal measures?

Yes ☐ X No ☐

The current GBER describes unambiguously the eligibility criteria for granting aid in the form of a reduction in the environmental tax under Article 25 of the Regulation. However, in its present guise, the GBER is not applicable to national environmental taxes which are not covered by the Energy Taxation Directive 2003/96/EC. When modernising the Regulation, it should be considered whether it would be appropriate in the future, based on criteria complying with the current guidelines applying to environmental aid (2008/C82/01), to deem some national fiscal subsidies acceptable for the internal markets without submitting a notification to the Commission.

Please explain and describe the main difficulties you have encountered.

D.4. Cumulation (Article 7)

Questions aiming at all respondents:

27. Based on your experience with designing aid measures, are the provisions on cumulation appropriately designed?

Yes ☐ No ☐ X

What are the difficulties you have encountered?

As has been described in more detail above in the reply to question 1, the current cumulation provision is somewhat open to interpretation.

D.5. Incentive effect (Article 8)

Questions aiming at public authorities:

28. How do the authorities in your country verify the existence of the incentive effect for SMEs?

National regulations on business subsidies lay down an obligation to review the effectiveness of the proposed aid in the case of each aid decision, and the outcome of the review is entered in the database. Statutory studies of the effectiveness and functioning of aid schemes are also conducted by the authorities ex post facto.

With regard to the implementation of aid incentives, conflicts of interpretation have arisen in situations where additional support is sought for beneficiary projects, for example due to the expansion of a project. The issue is clearly one of expansion of the project or of some other need for change that has arisen during the running of the project, and in respect of which there would also be grounds for applying for aid. This is not a simple case of over-spending,

but rather a justified need for applying for new aid funding, for the sake of the beneficiary as well as to ensure the completion of the project. The aid is therefore required for the purpose of funding changes that have become necessary over the course of a, generally, longer term project.

29. How do the authorities in your country verify the existence of the incentive effect for large undertakings? Do you typically make enquiries into the counterfactual (i.e. check what the firm concerned would do in the absence of aid)? Please provide examples.

Please see answer to question 28.

30. Do you measure the effect of additional public spending in leveraging private expenditure? If so, how do you do that and what are the results?

The replies received from the Finnish authorities did not include any comments regarding this question.

31. Based on your experience in designing aid measures, do you consider that Article 8(4) addresses well the specificity of fiscal measures? Please describe any difficulties you have encountered.

Yes ☐ No ☐

The replies received from the Finnish authorities did not include any comments regarding this question.

Please explain.

Questions aiming at all respondents:

32. In your experience with the application of the formal requirements set out in Article 8, including the distinction between SMEs and large undertakings, have these requirements adequately ensured that the aid is necessary to carry out the project in a given location or to carry out a project of given size /scope /total amount spent/ speed?

Yes ☐ ☒ No ☐

If not, please explain why. Please describe the main difficulties you have encountered.

33. In particular, have you encountered difficulties in applying Article 8(4) in relation to fiscal measures?

Yes ☐ No ☒

Please describe any difficulties you have encountered.

D.6. Formal requirements (Articles 9 - 11)

34. Have you encountered difficulties in applying the provisions on transparency, monitoring and annual reporting? Please explain.

Yes ☐ No ☒

35. In particular, is the obligation of the Member State to publish on the internet the full text of the aid scheme sufficient (Article 9(2))?

Yes ☐ No ☒

Finland considers that it would be justifiable to improve the requirements of transparency set out in the GBER. At present, due to the insufficient transparency of the aid, it is difficult to evaluate the aid granted under the GBER, for example, in terms of distortion of competition.

Finland's understanding is that it would be possible to improve the situation through simple technical solutions. For example, the Commission could consider linking the GBER notifications directly to the search register maintained by DG Competition, to do away with the need to search for the individual aid scheme in the OJ by opening numerous files. The Commission's aid register functions well, and it would be desirable to be able to search as easily for GBER aid schemes in the register as it is in the case of notified schemes.

With a view to increasing transparency, all the fields of the additional information form should also be translated into every official EU language. At present, some of the data in the additional information form (aid measure heading, and name of the granting authority) are given only in the national language.

D.7. Specific conditions applicable to investment aid (Article 12)

36. Have you encountered difficulties in applying the conditions applicable to investment aid?

Yes ☐ No ☒

Please describe the main difficulties you have encountered.

SECTION E: GBER – SPECIFIC PROVISIONS

Please note that the types of aid which are covered by the current GBER but not mentioned in the present section (i.e. regional, environmental and R&D&I aid, risk capital) are subject to a separate questionnaire and review. The questionnaires for regional aid and aid R&D&I have already been published⁹.

Questions aiming at all respondents:

E.1. SME investment and employment aid (Article 15)

37. Have you encountered difficulties in applying Article 15(2) concerning aid intensity?

Yes ☐ No ☒

If you have encountered difficulties with the application of this provision, please explain.

38. Have you encountered difficulties in applying Article 15(3) and (4) concerning the eligible costs?

⁹ <http://ec.europa.eu/competition/consultations/open.html>

Yes ☐ No ☒

If you have encountered difficulties with these provisions, please explain.

E.2. Aid for small enterprises newly created by female entrepreneurs (Article 16)

Questions aiming at public authorities:

39. Have you granted any aid under this provision?

Yes ☐ No ☒

If yes, please provide examples.

40. Have you encountered difficulties in applying this condition?

Yes ☐ No ☒

Aid has not been granted in Finland pursuant to this Article.

If yes, please provide examples.

Questions aiming at all respondents:

41. Have you encountered difficulties in applying Article 16(3) on aid amounts?

Aid has not been granted in Finland pursuant to this Article.

If you have encountered difficulties with this provision, please explain.

42. Have you encountered difficulties in applying Article 16(4) on aid intensity?

Aid has not been granted in Finland pursuant to this Article.

If you have encountered difficulties with this provision, please explain.

43. Have you encountered difficulties in applying Article 16(5) concerning the eligible costs?

Aid has not been granted in Finland pursuant to this Article.

If you have encountered difficulties with this provision, please explain.

Questions aiming at all respondents:

E.3. Aid for consultancy in favour of SMEs and SME participation in fairs (Articles 26-27)

44. Have you encountered difficulties in applying Articles 26(2) and 27(2) on aid intensities?

Yes ☒ No ☐

In the experience of the Finnish authorities, the maximum aid levels applying to aid for consultancy services in favour of SMEs are too low, particularly with regard to micro-enterprises. In Finland's view, raising the level to 70% - 80% would boost considerably the development of business opportunities for micro-enterprises. Raising the level of aid would be particularly justified for the self-employed, who cannot obtain aid under the current GBER Articles applying to training aid (which is only for employees).

If you have encountered difficulties with these provisions, please explain.

45. Have you encountered difficulties in applying Articles 26(3) and 27(3) concerning the eligible costs?

Yes ☐ No ☒

If you have encountered difficulties with these provisions, please explain.

E.4. Training Aid (Articles 38-39)

46. What is your experience with the application of Article 38 GBER and in particular its definitions? Please explain any difficulties you have encountered.

As has been pointed out above in the answer to question 1, boundary problems have been encountered in terms of, among other things, 1) whether services fall under general or specialised training; and 2) whether it is training or consultancy that is involved (Articles 26-27 of the GBER). The Commission should provide more specific definitions in this respect in the new GBER. The total exclusion of the self-employed and of owners of SMEs from the scope of the current GBER's Articles pertaining to training aid has also been found to be problematic.

47. Have you encountered difficulties in applying Article 39(2) on aid intensities?

Yes ☐ No ☒

If you have encountered difficulties with this provision, please explain.

48. Have you encountered difficulties in applying Article 39(4) concerning the eligible costs?

Yes ☐ No ☒

If you have encountered difficulties with this provision, please explain.

E.5. Aid for disadvantaged and disabled workers (Articles 40-42)

49. Have you encountered difficulties in applying Articles 40(2) and 41(2) on aid intensities?

Yes ☐ No ☒

If you have encountered difficulties with these provisions, please explain.

As has been stated above, Finland does not consider the current state aid provisions on state aid granted in the form of wage subsidies to be entirely sufficient. In Finland, non-profit associations and foundations, which from the viewpoint of EU law are engaged in both commercial and non-commercial activities, have been very significant employers of the most disadvantaged job-seekers in the employment market, i.e. those who are socially unfit for

work. These players produce services merely to provide a tool for the generation of services which promote employment. There are not very many of these players in Finland, but their activities are very important for boosting employment of the disadvantaged in the job market. Improving employability and work skills always requires the opportunity to gain work experience in “real jobs”.

We thus propose that the Commission consider extending the scope of the Articles of the GBER which apply to wage subsidies. The aim should be to help people who, immediately prior to starting in wage-subsidised employment, have been unemployed job-seekers for a period of two years, to find employment in non-profit corporations for a minimum of 24 months – and in exceptional circumstances for a longer period. The maximum aid level would be 75% of eligible costs. In practice, this would mean that when granting wage subsidies a precisely defined group of the long-term unemployed could be equated with disabled workers.

50. Have you encountered difficulties in applying Articles 40(3) and 41(3) concerning eligible costs?

Yes ☐ No ☒

If you have encountered difficulties with these provisions, please explain.

Please see the answer to question 48.

SECTION F: MISCELLANEA

Questions aiming at all respondents:

51. Do you have any other comments on the application of the GBER on issues other than those covered in the previous questions?

52. Please provide copies of any documents or studies which may be relevant for assessing the application of the GBER and contributing to the reflection on its future revision.

Please indicate whether the Commission services may contact you for further details on the information submitted, if required.

Yes ☒ No ☐

THANK YOU FOR RESPONDING TO THIS QUESTIONNAIRE.

Our Ref/Ein Cyf:

Your Ref/Eich Cyf:

Date/Dyddiad:

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LG

HT.3572-SAM-*de minimis* review

18th October 2012

Lowri Gwilym

lowri.gwilym@wlga.gov.uk



European Commission
DG COMP
State Aid Registry
1049 Brussels

Dear Sir / Madam

Response to the Revision of the *de minimis* Regulation Consultation Paper

The WLGA welcomes the opportunity to provide comments as part of the consultation on the revision of the *de minimis* Regulation.

We have provided our response in the form of this letter as we feel that as a representative body of local government we do not have direct experience as a granting authority or as an aid beneficiary thus are not able to comment fully on the number of technical and detailed questions asked in the consultation. Our comments have been informed by the views of local authority officers who have direct experience of the current *de minimis* regulations. We wish to provide the following comments:

- The current *de minimis* regulations were introduced to lessen bureaucracy and promote access to public funding for SMEs and other organisations. However, the €200,000 threshold over a period of 3 years is limiting and is subject to cumulation rules.
- The WLGA would urge a more relaxed approach to cumulation. Efforts to keep track of *de minimis* aid over 3 years and apply the cumulation rules are bureaucratic, time-consuming, often ineffective, and disproportionate to the risk of distortion of competition if the cumulation rules are broken. It is often difficult to account for different forms of aid awarded to the same undertaking due to the fact that the aid may come from different levels of government and through different schemes. Therefore in the interests of simplification and transparency, the burden of cumulation control should either be eliminated completely or substantially reduced (e.g, by operating a one-year cumulation period or applying the *de minimis* limit at a project level).

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- In line with the comment above regarding the limitation of the current threshold, the WLGA supports the raising of the *de minimis* threshold to €500,000 - €600,000 so that relatively modest amounts of aid with no appreciable distortive impact on competition are removed from the scope of state aid rules and the European Commission can focus its resources on the most distortive aid. A lower threshold could be acceptable if the burden of cumulation control was much reduced or even eliminated.
- Local government would welcome more frequent revisions of the threshold.

We sincerely hope that our messages and comments will be taken on board as the proposals for *de minimis* regulations are further developed and refined.

We look forward to working with all key partners, including the European Commission, UK Government and Welsh Government, in shaping these proposals to enable the continuation of vital aid to businesses to safeguard and create sustainable jobs and growth to assist economic recovery.

Yours Sincerely



Lowri Gwilym
Team Manager – Europe and Regeneration
Rheolwr Tîm – Ewrop ac Adfywio