PANDORA'S BOX AND THE DELPHIC ORACLE: EU COHESION POLICY AND STATE AID COMPLIANCE

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PREFACE

The research for this paper was undertaken in preparation for the 26th IQ-Net meeting held in Steiermark, Austria, on 3-5 June 2009. The paper was written by Fiona Wishlade and Rona Michie.

This paper is the product of desk research and fieldwork visits during Spring 2009. The fieldwork involved interviews with all of the partners in the IQ-Net consortium, as well as with State aid specialists outside the Managing Authorities at both national and regional level. In addition, interviews were conducted with European Commission staff in DG Competition and DG Regio. Given the nature of the topic under discussion, an explicit commitment was given at interview that confidentiality would be respected and sensitive material or comments would not be attributed to particular respondents or institutions. The field research team comprised:

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Austria
- State Government of Niederösterreich, Economic and Tourism Department
- State Government of Steiermark, Economic Policy Department

Belgium
- Agency for the Economy of Vlaanderen, Europe Economy

Czech Republic
- Ministry for Regional Development

Denmark

- Danish Enterprise and Construction Authority

Finland

- Alliance of Länsi-Suomi
- Ministry of Employment and the Economy

France

- Délégation interministérielle à l'aménagement et à la compétitivité des territoires (DIACT)

Germany

- Nordrhein-Westfalen, Ministry of Economy, SMEs and Energy, EU Affairs Unit
- Sachsen-Anhalt, Ministry of Finance

Greece

- CSF Management Organisation Unit, Ministry of Economy and Finance

Italy

- Lombardia Region, Presidency, Central Directorate for Integrated Programming
- Ministry of Economic Development
- Institute for Industrial Promotion (IPI)

Poland

- Śląskie Voivodeship (Marshal's Office)

Portugal

- Financial Institute for Regional Development (IFDR)

Spain

- País Vasco, Provincial Council of Bizkaia, Department of Economy and Finance

Slovenia

- Government Office for Local Self-Government and Regional Policy, EU Cohesion Policy Department

Sweden

- Tillväxtverket, Swedish Agency for Economic and Regional Growth

United Kingdom

- Department of Communities and Local Government
- ONE NorthEast
- Scottish Government
- Welsh European Funding Office

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It should be noted that the content and conclusions of this paper do not necessarily represent the views of individual members of the IQ-Net Consortium.

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EXECUTIVE SUMMARY

This paper explores the issues surrounding the conceptual and practical difficulties involved in reconciling EU Cohesion and competition policies; specifically, how State aid compliance issues coincide or otherwise with the requirements of the Structural Funds Regulations. It examines which issues are most relevant to Structural Funds Managing Authorities, and how they are addressing compliance. It focuses on three core aspects: (i) the definition of State aids (ii) interpretation of the exceptions to the general prohibition on State aid; and (iii) the mechanisms operated at EU and domestic levels to ensure compliance.

The paper draws on a mix of desk research and interviews with staff working on the implementation of Structural Funds programmes and in State aid compliance. The desk-based research focused on EU legislation and guidelines, case law and Commission decisions as well as documentation available at the national level. The interviews were undertaken in fifteen Member States with a range of Managing Authorities, Intermediate Bodies, Certifying Authorities, programme secretariats, national coordination bodies and State aid compliance units and individual State aid specialists. In addition, interviews were carried out with DG Regio and DG Comp. Although not selected as a representative sample, the range of national and regional authorities interviewed for this research reflects experiences from most parts of the EU and encompasses programmes accounting for a sizeable share of total Structural Funds expenditure in 2007-13.

Definitional issues associated with State aid

In principle, the granting of State aid is prohibited, subject to certain exceptions and any plans to offer aid must first be notified to the Commission. The EU Treaty does not, however, define precisely what a State aid actually is. The challenge for domestic authorities is to decide which measures require notification. Failure to notify a measure which is subsequently found to involve aid may result in the repayment of aid granted.

Although a clear and consistent definition of what constitutes a State aid has yet to emerge, the terms of the Treaty provide a starting point (the main provisions on State aid control are set out under Articles 87 to 89). Building on these, a working definition has emerged from extensive case law and decision practice. The Treaty provisions are based round five cumulative criteria which must be met for a measure to involve aid; these criteria are explored in the paper. Key definitional issues which are crucial for the identification of State aid and which have been identified as problematic among IQ-Net partners include: the concept of 'advantage', the interpretation of 'State resources', the definition of 'undertakings' and 'economic activity' and the lack of tangible criteria for assessing whether a given measure could affect trade between Member States.

Irritation was expressed over the 'reach' of competition policy in areas considered to have no significant competition impact, the resource implications of considering whether State aid was involved and the uncertainty arising in borderline cases. The practical consequences of this evolving definition of State aid and its lack of 'sharp edges' for Structural Fund Managing Authorities are found in the problems they have experienced co-financing particular project types through the Structural Funds. The most problematic project types include: infrastructure projects; urban regeneration; projects with social objectives; and cross-sectoral projects.

With a view to focusing its resources on the most distortive cases of aid, the Commission has determined that so-called *de minimis* aid can be said to fall outside the scope of the prohibition. The *de minimis* facility has come to be widely used in many Member States, and is commonly viewed as a relatively straightforward way to ensure compliance. However, it is widely acknowledged that its use may be less straightforward than it might appear, particularly in relation to the required monitoring of the level of aids received by beneficiaries from all State sources. IQ-Net partner programmes take different approaches to monitoring the use of *de minimis*, some of these are described in the paper.

The scope of admissible aid

In spite of the general ban on State aid control, State aid discipline is characterised by a large body of hard and soft law setting out exceptions to the prohibition, enabling aid measures to be used in a range of policy areas relevant to Structural Fund programmes, such as regional development, research, development and innovation aid and SME support:

- For some of the IQ-Net partner countries/regions the *Regional Aid* Guidelines provide considerable flexibility, while elsewhere, coverage is much more fragmented and in many regions is significantly lower than in the previous planning period.

- *SME aid* is widely used under the Structural Funds programmes, with few compliance or compatibility issues among the IQ-Net partners.

- State aid rules for *R&D&I* were cited as being more problematic, with limitations arising from the large role played by the State in research activity, constraints on the commercialisation of the R&D activities of universities, problems with the funding of clusters and difficulties with the interpretation of the different phases of the R&D process. More generally, there was a perception that the State aid rules made the 'Lisbon objectives' more difficult to address, notably because of the emphasis on funding research *projects* rather than research *infrastructure*. In addition, the rules are perceived to be complex to administer, and the levels of aid which can be offered and scope of eligible expenditure is widely considered to be too low to be attractive.

- In the context of *financial engineering* measures, there was a widespread degree of exasperation among the IQ-Net partners. While on the one hand DG Regio has actively promoted the use of more innovative instruments, the requisite degree of

coordination with respect to ensuring the compliance of measures such as JESSICA and JEREMIE has not been in evidence.

The final part of this section of the paper discusses the temporary framework for State aid measures adopted by the Commission in December 2008 to support access to finance in the financial and economic crisis. The temporary framework comprises both new instruments and the (temporary) modification of existing instruments. Since the introduction of the Framework a large number of measures has been approved by the Commission, but it remains to be seen precisely what impact this new facility will have on the Structural Funds programmes.

Institutional and procedural arrangements for ensuring compliance with the State aid rules

There is considerable evidence that State aid issues are being taken more seriously in the current planning period that previously and that there is greater awareness of, and expertise in, the rules than before. This trend is partly a result of the change in the Structural Funds regulations which makes compliance with the State aid rules the responsibility of the Managing Authority (although the formal position under the Treaty remains unchanged). In parallel, there has been a seismic shift in approach to compliance at the European level with scrutiny of individual measures by the Commission increasingly replaced with a 'self certification' approach.

There is a range of actors with a vested interest in State aid compliance – the European Commission, national governments (as formal addressees of decisions), Managing Authorities and beneficiaries (who may have to reimburse aid). Beyond this, there is a large number of intermediaries involved in actually or potentially providing aid co-financed by the Structural Funds, whose policy is shaped by the State aid rules and whose policy objectives may be frustrated by them. Last, but by no means least, in many jurisdictions, there are specialised State aid units, fulfilling an important guidance, advisory and training role, although rarely a statutory function.

The General Block Exemption Regulation (GBER) which entered into force on in 2008 obviates the need for prior notification and approval of aid schemes in areas where the Commission has defined the circumstances in which it will find aid to be compatible with the common market. The principal rationale for this approach is to reduce the administrative burden on the Commission which, in the past, had committed considerable resources to 'rubber stamping' aid schemes that were in line with the guidelines. In those IQ-Net partner programmes which do make use of the GBER, there is positive response to the flexibility and 'room for manoeuvre' offered. Others, however, viewed the GBER as simply a compilation of existing rules providing no real benefit and still requiring considerable interpretation.

There may be circumstances in which aid requires notification. Notification to the Commission is often preceded by informal contact with a view to ascertaining the main issues likely to arise before the formal process begins; this *may* help to shorten the decision-making process. IQ-Net partner show very different attitudes to the notification

process: for some IQ-Net partners, it is the 'last resort' after *de minimis*, GBER and existing schemes have been explored; for others, it is seen as the safest way for aid schemes in doubt. Programmes which have gone down the route of making many formal notifications of aid schemes to the Commission, however, reported a significant resultant administrative burden.

In April 2009 the Commission adopted a so-called "Simplification Package" aimed at improving the transparency, effectiveness and predictability of State aid procedures; in particular, the package partly formalises the prenotification stage for certain types of aid. The key elements of this package are described in the paper, but its practical implications remains to be seen.

The final part of this section describes Managing Authorities' structures and processes to ensure compliance with State aid rules, including the role played by national competition authorities, the availability of State aid expertise within programmes, and the training and capacity building activities that are taking place within IQ-Net partner regions.

Conclusions

A number of key trends and tensions emerge from the paper:

- State aid principles drafted over half a century ago are often difficult to apply today.
- In practice, the definition of State aid has become increasingly conflated with issues of compatibility.
- There is greater awareness of State aid compliance issues in the current planning period than in the past.
- Compliance with the State aid rules is a major source of anxiety for many domestic policymakers.
- There are significant asymmetries of risk in the compliance process.
- The technical demands of compliance are considerable.
- The constraints imposed by State aid compliance may frustrate the achievement of the objectives of Cohesion policy.
- State aid compliance under the Structural Funds may be greater than under purely domestic policies.

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1. INTRODUCTION

The relationship between EU Competition policy and EU Cohesion policy is at best one of ambiguity and at worst one of direct conflict. While EU Cohesion policy explicitly intervenes to alter economic outcomes, EU Competition policy aims to ensure that State intervention does not interfere with the smooth functioning of the internal market or distort competition to an extent contrary to the common interest.

EU Competition policy predates EU Cohesion policy by several decades. EU Cohesion policy in its current form dates back to the end of the 1980s, which saw the radical restructuring and upgrading of a policy that had until then largely been an adjunct to national regional policies. By contrast, EU Competition policy was enshrined in the Treaty from the outset. It is clear that, back in the 1950s, the authors of the Treaty perceived the risks to the common market that lay in allowing Member States unfettered use of subsidies. Moreover, although the original provisions have been subject to extensive interpretation, the fundamental principle has remained unchanged since the outset: State aid which distorts or threatens to distort competition in the EU is prohibited, subject to certain exceptions.

Given this background, EU-sponsored intervention in the form of the Structural Funds arguably sits uneasily with the precepts of State aid control. Indeed, the scope for conflict was clearly recognised in the 1988 Structural Funds reforms under which the Regulation specified that the Funds should, among other things, comply with competition policy.[1] Notwithstanding this early and explicit requirement, there remain significant conceptual and practical difficulties in reconciling EU Cohesion and Competition policies. In the late 1980s, these were thrown into sharp relief by the high-profile dispute between the Commissioners for Regional and Competition policies over the lack of coincidence between the national and Structural Fund assisted area maps. Of course, such difficulties are by no means restricted to transactions involving the Structural Funds, although the scope for conflict between two spheres of EU policy certainly adds poignancy. However, the Structural Funds Regulations impose specific requirements on the Member States which make State aid compliance issues of particular relevance to Structural Fund Managing Authorities.

The aim of this paper is to explore those issues and examine how they have been addressed in practice. It draws on a mix of desk research and interviews with staff working on the implementation of Structural Funds programmes and in State aid compliance. The desk-based research focused on EU legislation and guidelines, case law and Commission decisions as well as documentation available at the national level. The interviews were undertaken in

[1] Council Regulation (EEC) No 2052/88 of June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operation of the European Investment Bank and the other existing financial instruments, OJEC No. L 185/9 of 15 July 1988.

fifteen Member States with a range of Managing Authorities, Intermediate Bodies, Certifying Authorities, programme secretariats, national coordination bodies and State aid compliance unit and individual State aid specialists. In addition, interviews were carried out in DG Regio and DG Comp. Although not selected as a representative sample, the range of national and regional authorities interviewed for this research reflects experiences from most parts of the EU and encompasses programmes accounting for a sizeable share of total Structural Funds expenditure in 2007-13.

The structure of this report is driven by the architecture of the regulatory framework for State aid, and draws on specific issues of concern to IQ-Net partner countries/regions.

- Section 2 examines definitional issues associated with State aid. This is a crucial matter since, in principle, State aid is prohibited, subject to certain exceptions and any plans to offer aid must first be notified to the Commission. The Treaty does not, however, define precisely what a State aid actually is. The challenge for domestic authorities is to decide which measures require notification.

- Section 3 reviews the scope of admissible aid. In spite of the general ban on State aid control, State aid discipline is characterised by a large body of hard and soft law setting out exceptions to the prohibition enabling aid measures to be used in policy areas such as regional development, research, development and innovation aid and SME support. This section focuses on the exceptions of most relevance to Structural Fund programmes, highlighting particular issues or difficulties experienced in implementation.

- Section 4 is primarily concerned with the institutional and procedural arrangements for ensuring compliance with the State aid rules. It begins with an outline of the EU framework, but focuses on the structures and mechanisms operated both formally and informally within the Member States and especially within the Managing Authorities.

- Section 5 concludes by highlighting some key areas of difficulty where tensions remain unresolved.

2. DEFINING STATE AID

The notion of what constitutes a State aid is clearly fundamental to being able discipline it, but the EC Treaty presents domestic policymakers with a conundrum insofar as it contains no precise definition of what is subject to control. It has been argued that this was probably deliberate[2] – if Member States knew the exact scope of the notion of aid, they could easily devise measures which would not satisfy all of the requirements, and the absence of an exact definition allows the Commission and the Courts to interpret the notion in a wide and flexible way. It is plausible to believe that such a view prevailed at the time, but it is also questionable whether the authors of the Treaty envisaged the extensive scope

[2] Schina, D. (1987) *State Aids under the EEC Treaty Article 92 to 92*, ESC Publishing, Oxford.

of the definition which has emerged. Nevertheless, the definitional issue is crucial since it determines whether or not a given measure requires to be notified to the Commission. As a result, domestic policymakers must make some *a priori* assessment of whether a measure involves aid in order to decide if it needs to be notified. Moreover, failure to notify a measure which is subsequently found to involve aid may result in the repayment of aid granted.

A clear and consistent definition of what constitutes a State aid has yet to emerge from Commission and Court decision-making. Nevertheless, the terms of the Treaty provide a starting point which, through extensive case law and decision practice, has resulted in a working definition. The first part of this section explores the various dimensions of the definition of State aid before examining the practical consequences of the current state of play for Structural Fund Managing Authorities (see 2.1). The wide scope of the definition of State aid has had considerable resource implications for the Commission, not least since the Court has held that there is no level below which aid can be said not to have any effect – simply that, the smaller the amount of aid, the less its negative effects are likely to be: "Where the benefit is limited, competition is distorted to a lesser extent, but it is still distorted."[3] Nevertheless, with a view to focusing its resources on the most distortive cases of aid, the Commission has determined that so-called *de minimis* aid can be said to fall outside the scope of the prohibition. The second part of this section sets out the main criteria for *de minimis* aid, considers the implications of the rules and outlines IQ-Net partner approaches to their implementation (see 2.2).

2.1 What is a State aid?

The main provisions on State aid control are set out in the EC Treaty under Articles 87 to 89. Article 87(1) establishes a basic, though not unqualified, prohibition of State aid:

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

This provision gives rise to five criteria which are summarised in Box 1. These criteria are cumulative – all must be met for a measure to involve aid – and each has given rise to a vast body of case law and legal literature.[4] An in-depth discussion of each of these is well beyond the scope this short paper, but some exploration of these elements is clearly in order as a backdrop to the compliance of the Structural Funds with the State aid rules.

[3] T-214/95 *Vlaamse Gewest v European Commission* [1998] ECR-II 71, para 46.
[4] Recent examples include Nicolaides, P., Kekelekis, M. and Kleis, M. (2008) *State Aid Policy in the European Community,* Kluwer Law International, The Netherlands, and Bacon, K. (2009) *European Community Law of State Aid,* Oxford University Press, Oxford.

Box 1: Criteria for measures to involve State aid

- The measure must confer a *benefit or advantage* on the recipient which it would not otherwise have received;
- it must be granted by the *State* / through *State resources;*
- it must favour *certain undertakings* or the production of *certain goods;*
- it must *distort or threaten to distort competition;*
- it must *affect trade* between the Member States.

The sections that follow discuss each of these criteria in turn before considering their practical implications across a range of projects types identified in discussion with the IQ-Net partner countries/regions.

2.1.1 Benefit or advantage

In order to be caught by Article 87(1), a measure must provide a benefit or advantage which the recipient would not have received under normal market conditions. In the case of 'classic' forms of aid – such as grants or loans at below market rates – the benefit is easy to identify. However, complex issues may arise in the case of other forms of intervention, such as capital injections or equity participation by the public sector, the provision or sale of assets or services by public authorities or the procurement of public services. A number of principles have been developed over time to deal with such transactions, but the notion of a benefit or advantage cannot yet be considered to have been defined conclusively. As a result a detailed, case-by-case examination may be required to determine whether a benefit exists.

The so-called *private investor principle*[5] has become an important criterion in assessing whether particular transactions – notably, but not exclusively, loans, guarantees and capital injections - involve State aid; according to this, if a public authority acts in the same way as a private investor would conceivably have done in the same circumstances, then no benefit is conferred. This can include the possibility of accepting short-term losses if this consistent with longer-term gains, but would exclude wider policy considerations such as regional development or job maintenance, for example.

The Commission has also issued guidance on land sales[6] by public authorities which sets out the procedures for ensuring that a normal market price is paid, and no aid is therefore involved. Essentially, such sales must either be the subject of an open and unconditional bidding process or follow an independent valuation of the assets in order for there not to be a benefit to the purchaser.

A further issue which has given rise to a growing body of case law concerns whether there is an 'advantage' inherent in the compensation paid by public authorities for the execution of

[5] This has been elaborated through a series of cases dating back to the 1980s – see Bacon *op cit*, pp 41-50 for a detailed consideration of the relevant case law.
[6] *Commission communication concerning aid elements in land sales by public authorities*, OJEC No C 209/3 of 10 July 1997.

services of general economic interest (SGEI).[7] The precise contours of the 'advantage' continue to evolve, but in a landmark decision (the *Altmark* case),[8] the Court concluded that compensation for the fulfilment of public service obligations does not constitute an advantage provided that the following four conditions are met:

- the public service obligations are clearly defined;
- the compensation is calculated in an objective and transparent manner;
- the compensation does not exceed the cost of discharging the relevant public service obligations, plus a reasonable profit;
- the level of compensation is based on an analysis of the costs which a typical, well-run undertaking would have incurred, unless the undertaking is chosen following a public procurement procedure.

The key questions to address in considering whether there is an advantage to the recipient are highlighted in Box 2.

Box 2: Checklist: is there an advantage to the recipient?

- Does the measure reduce the costs that the recipient would normally have to bear? If *no*, there is no advantage.
- Where the public authority provides or sells assets or services, does this take place on an open and competitive basis? If *yes,* there is no advantage.
- Where the public authority invests, lends or guarantees funds, does it do so on the same basis as a private investor would? If *yes,* there is no advantage.
- Where the public authority compensates an undertaking for carrying out public service obligations, does this compensation meet the *Altmark* criteria? If *yes,* there is no advantage.

2.1.2 State and State resources

Article 87(1) is concerned with the actions of the State and State resources. However, somewhat contrary to the precise wording of the Treaty, it is now clear that State and State resources are cumulative requirements, not alternatives.[9] This means that the measure must be the action of the State *and* involve a transfer of funds. For example, a regulatory measure which reduces the costs to an undertaking but which does not involve a cost to the State is not State aid.

[7] SGEI are not defined in EU law but generally concern services that either the market does not provide or not to the extent and or quality desired by the public authorities, and which are in the general interest – examples include public transport, postal services, public service broadcasting and utilities.
[8] C-280/00 *Altmark Trans GmbH, Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH,* ECR I-7747.
[9] C-397/98 *PreussenElektra AG v Schleswag AG* [2001] I-2099.

'State' is broadly defined and includes subnational authorities and agencies acting on behalf of public authorities. It may also include the actions of private undertakings in which the State has a holding, if those actions can be attributed to the State.

'State resources' clearly include central government and subnational authority budgets derived from taxation; they also include funds from compulsory levies over which the public authorities have control, revenues foregone and resources such as lottery funding where the public authorities have scope to control their distribution. The treatment of *Community* resources – and the Structural Funds specifically – has been a vexed question for some. Formally, Community resources are *not* State resources;[10] however, the legal services of the Commission have confirmed that once the Structural Funds come under the control of the Member States, they become State resources and the decisions on how they are expended are attributable to the State.[11] From a rational perspective it could, arguably, hardly be otherwise.[12] The differential treatment of Structural Funds and 'national' resources in the context of funding State aid would lead to divergent aid intensities depending on the origin of the monies concerned. Nevertheless, historically, at least, there is considerable evidence of decidedly uneven interpretations of the status of Structural Funds as State aid among the Managing Authorities.

The main issues to consider in determining whether a measure is provided by the State and through State resources are summarised in Box 3.

Box 3: Checklist: is the measure provided by the State and through State resources?

- Is there a cost to the public purse, including the Structural Funds, whether in budgetary terms or revenue foregone? If *yes*, there are State resources involved.
- Can the action be attributed to national or subnational government, agents acting on their behalf or bodies in which the State has a controlling interest? If *yes,* the action is attributable to the State.
- Are both the above conditions met? If *yes,* the measure is provided by the State and through State resources.

2.1.3 Favouring certain undertakings or the production of certain goods

The notion of 'undertaking' is neutral as to ownership or legal status. The term is not defined in EU law, but it is established that it may be public or private, voluntary, charitable or not-for-profit, involve a group of organisations or a public-private partnership

[10] This stems from a case concerning tariff quotas where the Court held that "The financial advantage which traders derive from receiving a share in a Community tariff quota is not granted through State resources because the levy which is waived is part of Community resources… it may not be regarded as State aid or aid granted through State resources"; Cases 213-215/81 *Norddeutsches Vieh- und Fleischkontor Herbert Will and others v Bundesanstalt für landwirschaftliche Marktordnung* [1982] ECR 3582.

[11] Moreover, this extends to resources under the EEA/Norwegian Financial Mechanism; see Commission Decision N 220/2008 - *Latvia: EEA/Norwegian Financial Mechanism priority "Conservation of European cultural heritage" - SIA BC GROUP individual project "Second Life: Restoration of Wooden Cultural Heritage at Kalnciema/Melnsila quarter in Riga"*, 2 October 2008.

[12] But for an alternative view see Nicolaides, P. (2005) 'Puzzles of State Aid: Structural Funds, Cumulation and *De minimis,' European State Aid Quarterly,* 3, pp433-440.

or indeed a self-employed individual; the key is not the *status* of the organisation, but rather that it must be engaged in an *economic activity* in order for Article 87(1) to apply. Economic activity is broadly defined as 'any activity consisting in offering goods or services on a given market'.[13] Some activities are 'non-economic' owing to the exclusive competence of the State – the issuing of passports is an example. Similarly, the social nature of the activity may render it non-economic – the provision of national health, social security or education systems are regarded as non-economic activities. On the other hand, the status of an activity as economic or not also depends on the terms on which the goods or services are supplied – healthcare and pensions are obvious examples. Even if an entity provides services totally free-of-charge to users or customers and is financed entirely by the State, it can still be an undertaking – museums and libraries, for example, cannot be excluded from the scope of 'undertaking' on this basis. On the other hand, where such beneficiaries do not qualify as undertakings (because of the nature of the activity), then the financing involved is a transfer of funds within the State, which does not constitute State aid.[14]

The notions of 'undertaking' and, related, 'economic activity' emerged as particularly problematic from discussions with the IQ-Net partners, but there is also evidence of a shift in perceptions between the previous and current programme periods. For some, 'undertaking' has, historically, been viewed as synonymous with 'private firm', with the result that unless a private enterprise was involved in a given project or scheme, consideration was not really given as to whether a measure might involve State aid. There is evidence that this perception still persists in some quarters – particularly at the sub-regional level. However, in general there is a recognition that 'undertaking' relates not to the legal status or form of the organisation, but rather to whether it is involved in an economic activity.

The widening of the concept of 'undertaking' places more emphasis on the definition of 'economic activity'. This was widely viewed as a difficult issue among the IQ-Net partners since it has the scope to include aspects of social and public services, as well as charitable and voluntary activities; even if an entity provides its services totally free of charge and is entirely financed by the State, it can still be regarded as undertaking in respect of those activities that are regarded as economic. Although in practice State aid could often be ruled out, many IQ-Net partners expressed the view that State aid issues should not enter into the analysis of such projects at all and that the potential 'reach' of competition policy in this respect was too extensive. Moreover, there was a degree of irritation at the resource implications of considering whether State aid was involved in what were perceived, from a 'common sense' point of view, to be instances with no significant competition implications. In addition, there were often concerns at the uncertainty arising in borderline cases where

[13] C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze* [2006] ECR I-289, para 108.

[14] It follows that an entity can be regarded as an undertaking for some of its activities and not for others. For example, a museum organising a exhibition on a commercial basis would be regarded as an undertaking, but in its involvement in the provision of educational activities for primary school children would not.

policymakers decided to rely on their own judgement – that a measure did not constitute aid - rather than notify for certainty.

In order for a measure to involve State aid, it must be *selective*. Aid is selective if it applies to a particular type of activity, a sector of the economy, a particular geographical area or to firms with the same characteristics. In this way, a line is drawn between measures of general economic policy – such as the rate of corporation tax or bank base rates – and measures which directly or indirectly assist a particular class of undertaking. The selectivity test has spawned a large of body of case law and is arguably the most difficult of the tests to apply. However, in practice, it presents fewer problems in the context of the Structural Funds. This is because, in most cases, funding will concern either specific projects or measures that are restricted to the programme area concerned; in other words, the nature of the intervention is by definition selective. Box 4 identifies the main factors which determine whether a measure fulfils the selectivity criterion.

Box 4: Checklist: does the measure favour certain undertakings or the production of certain goods?

- Does the measure benefit an economic activity – i.e. an activity in which there is a market for the goods or services concerned? If *yes,* the beneficiary is an undertaking, irrespective of its legal status.
- Does the measure discriminate between undertakings on the basis of their size, location, activity or other characteristics? If *yes,* the measure is selective.
- Do decisions about eligibility involve administrative or policymaker discretion? I*f* **yes,** the measure is selective.

2.1.4 Distorts or threatens to distort competition

The requirement that a measure must distort or threaten to distort competition in order to be caught by Article 87(1) is not a seriously limiting factor in the definition of a State aid. Indeed, it could be argued that, if the measure fulfils the selectivity criterion, then it is also likely to have the capacity to improve the competitive position of a given undertaking, and therefore to distort competition. In short, there is a virtual presumption of an impact on competition; while the Court has held that an impact on competition cannot simply be assumed by the Commission without any consideration of the likely effects of a measure,[15] the level of proof required is low; the Commission is:

> "not required to carry out an economic analysis of the actual situation on the relevant market, of the market share of the undertakings in receipt of the aid, of the position of competing undertakings and of trade flows of the services in question between Member States."[16]

[15] T-34/02 *Le Levant 001 and others v Commission* [2006] ECR II-267.
[16] T-55/99 *Confederación Española de Transporte de Mercancías (CETM) v European Commission* [2000] ECR II-3207, para 102.

As a result, domestic policymakers would be ill-advised to conclude that a measure did not constitute State aid simply on the basis that it did not, or did not have the potential to, distort competition.

This characteristic has contributed to the broad nature of the definition of State aid and made it difficult to eliminate from the scope of the general prohibition measures that would widely be viewed as innocuous from a competition perspective. This in turn had resource implications for the Commission, whose response was to introduce a *de minimis* rule – i.e. a level of aid below which Article 87(1) could be said not to apply. This is discussed in more detail in section 2.2 below.

2.1.5 Affects trade between Member States

The impact of a measure on trade between Member States is closely linked to its capacity to distort competition – a measure which affects trade will certainly be viewed as distorting competition, although the converse is not necessarily true. As a result, only measures that support activities in which the trade is purely local are likely to fall outside the definition of State aid – such as a single business engaged in local services (e.g. hairdressing) or household trades (e.g. painting and decorating).

In practice, most goods and services are traded between Member States, and this criterion applies whether or not the recipient itself is actually involved in intra-EU trade. Moreover, the Commission and Court have been reluctant clearly to define the circumstances in which trade is *not* affected. In consequence, such examples are relatively few and far between. They include a German swimming pool used by local residents,[17] a small museum in Alsace[18] and the restoration of Brighton Pier (in the United Kingdom).[19] By contrast, the Court *did* find an impact on trade in respect of tax credits paid to Austrian dentists on the basis that "it is not inconceivable that… …medical practitioners specialising in dentistry… …might be in competition with their colleagues established in another EU Member State."[20] In short, the very small number of cases in which there has been a finding of 'no effect' on trade, coupled with the absence of any quantitative test – there is no threshold below which trade can be said not to be affected - means that an effect on trade can usually be presumed. As will be seen, the Commission has attempted to sharpen this criterion in the so-called 'simplification package' (see 4.1.3 below), but it is as yet unclear what practical difference the cited precedents will make.

Several IQ-Net partners expressed frustration at the lack of tangible criteria for assessing whether a given measure could affect trade between Member States. Some observed that a finding of State aid could hinge on small differences between projects – including proximity to national borders - which in turn could make the difference between a project being viable (because Structural Funds cofinancing rates could be used) or abandoned (because the prevailing State aid rate applied). Moreover, the decisions published by the Commission

[17] Commission Decision N 258/00 - *Germany: Freizeitbad Dorsten*, 12 January 2001.
[18] Commission Decision NN136/A/02 - *France: Mesures concernant l'Ecomusée d'Alsace*, 21 January 2003.
[19] Commission Decision N560/01 and NN17/02 - *United Kingdom: Brighton west Pier*, 9 April 2002.
[20] C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck*, [2005] ECR-I 1627, para 35.

in the form of letters to the Member State concerned were often insufficiently precise to be used as precedents.

A recent example concerns aid for culture in Hungary.[21] The Commission makes clear just how broad the concepts of 'undertakings' and 'economic activity' can be, noting that cultural centres could qualify as undertakings even if they are directly managed by the municipality and their operation is not contracted out, that libraries may be classed as undertakings since they compete with bookshops and that museums in general should be viewed as undertakings. The Commission acknowledges that many of the activities concerned are of a purely local nature – for example, it notes that the upgrading of a community centre in a small village is unlikely to affect intra-community trade. However, in its decision, the Commission does not distinguish between those parts of the measure that affect trade between Member States and those that do not. This might be regarded as a missed opportunity to provide guidance for domestic policymakers since the "objectives [of the measure in question] are very narrowly and precisely defined in the form of a quasi-exhaustive list of eligible projects". Instead, the Commission concludes that "certain parts of the scheme do not qualify as aid within the meaning of Article 87 of the EC Treaty, while the parts that do qualify as aid in the same sense are compatible under Article 87 3) d) of the Treaty." This was clearly a positive outcome for the Hungarian scheme as a whole, but since the decision effectively blurred the boundaries between the definition of State aid under Article 87(1) and the compatibility of aid with the Treaty under Article 87(3), it provides scant guidance to other policymakers as to which measures require approval.

2.1.6 Some practical consequences of definitional problems

The evolving definition of State aid and its lack of 'sharp edges' have practical consequences for particular project types which are frequently cofinanced through the Structural Funds. *Infrastructure* projects were cited by a number of IQ-Net respondents as presenting particular difficulties in State aid assessment. Examples include small-scale tourist infrastructure, where the effect on trade is difficult to gauge in a way that definitively rules out the possibility of State aid. Also perceived as problematic is the lack of a working definition of the difference between general and specific infrastructure; one region cited difficult issues arising from the operation of a conference centre owned by a local authority and another called for a more precise definition of 'firm-specific infrastructure'. Investments such as incubator units for firms continue to cause problems in domestic policymaker assessments of whether State aid is involved and, if so, how compliance can be achieved. A key difficulty here is in determining the different level(s) of potential aid beneficiary – e.g. the operator of the incubator and/or its tenants – especially if complex public private partnership arrangements also pertain.

Some partners take a very cautious line on definitional issues relating to infrastructure, notifying cases which they perceive *ought* to fall outside the scope of State aid; the resulting scrutiny, however, fuels a degree of resentment at the reach of Commission intervention in this sphere. Others take a more pragmatic approach, preferring to develop

[21] Commission Decision N293/2008 – *Hungary*: *Aid for multifunctional community cultural centres, museums, public libraries*, 26 November 2008.

and document a robust defence as to why a particular project does *not* involve State aid (in the event of a challenge) rather than involve the Commission at all. A 'third way', which is considerably more risky, but nevertheless in evidence, is a passive assumption that no State aid issues arise.

Partly related to the issue of State aid and infrastructure, several IQ-Net partners mentioned difficulties with *urban regeneration* projects. Urban regeneration is not explicitly provided for by the Commission under the exceptions to the general ban.[22] Instead, there is a 'Staff working document'[23] which argues that "a formal regeneration framework based upon limited experience can quickly turn out to restrict choices and options." It opts instead to set out aspects of the State aid rules of relevance to urban regeneration with respect to definitional issues, the role of services of general economic interest and the scope for urban regeneration measures to be handled under the derogations related to other policy areas, such as training, culture and heritage, SMEs and regional aid;[24] it also lists a number of regeneration schemes which it has approved. As with other definitional aspects, however, the guidance is insufficiently precise for domestic policymakers to conclude with certainty that no State aid issues arise.

The United Kingdom government has argued for a more formal and predictable framework for dealing with land and property market failures.[25] This position is partly the legacy of the Commission's 1999 decision on the United Kingdom's English Partnerships PIP scheme,[26] the loss of which was widely viewed as a "disaster" at the time since the replacement schemes which the Commission would allow were viewed as inadequate.[27] In this context, the United Kingdom authorities identified a number of projects perceived to be 'put at risk' by the State aid rules. These include projects in pockets of deprivation or derelict land outside the assisted areas map (which means that regional aid ceilings do not apply) or projects comprising multiple elements – e.g. land remediation, historic buildings, new build and development - where the lack of clarity in the rules and the complexity in applying different rules to different elements of the project makes administration costly and complicated. More generally, the fact that 'direct development' by public authorities falls outside the State aid rules even where it arguably impinges on private sector markets, but that support payments for private sector led regeneration falls within them is arguably anomalous given the higher public cost of the former and the principle of equal treatment of public and private undertakings enshrined in the Treaty. This position was reiterated in a recent United Kingdom response to a Commission consultation where it was claimed that: "In areas like this the Commission "winks at" non-notification from most Member States on

[22] Exceptions to the prohibition are discussed in Section 3, below.
[23] *State aid control and regeneration of deprived urban areas - Vademecum*, undated document, available at: http://ec.europa.eu/competition/state_aid/studies_reports/vademecum.pdf
[24] Many of these have been revised since the *Vademecum* was published.
[25] *State aid support for land and property development in sustainable communities- UK proposals for reform*, URN 06/1661 available at: www.berr.gov.uk/files/file32867.pdf
[26] Commission Decision of 22 December 1999 on aid scheme C39/99 - *United Kingdom: English Partnerships (EP) under the Partnership Investment Programme (PIP)*, OJEC No L 145/27 of 20 June 2000.
[27] House of Commons, Transport, Local Government and the Regions Committee (2002) 'The Need for a New European Regeneration Framework' *Twelfth Report of Session 2001-2*, HC 483-I.

a massive scale despite the strong possibility that many such grants would be found to be State aid if the cases ever came to Court."[28]

In several IQ-Net partner countries/regions, projects with *social objectives* have also become ensnared by State aid considerations. This appears to have become more commonplace with the growing appreciation of the breadth of 'undertaking'. Examples cited include support for youth centres and elderly day care centres, charitable organisations selling second-hand goods and employing disabled people. The social objectives of these projects are clear; however, the extensive reach of the State aid definition has meant that active consideration has had to be given to whether or not aid is involved and, if so, whether it can be accommodated within either the GBER or *de minimis* provisions.

Cutting across these issues, is the matter of what might be termed *cross-sectoral projects* – those which comprise economic and non-economic elements. These typically arise in the context of projects with social objectives, as mentioned above, and cultural projects. Examples include museums that include a commercial element such as accommodation, retail or catering outlets or community facilities that are intended to serve local people, but include services for businesses. Projects of this type are not only more complicated to scrutinise for State aid purposes, but if State aid is present for one element but not another (for instance, because a local community facility can be deemed not to have any impact on trade) then support is considerably more complicated to administer: different intervention rates may apply to different parts of the project and different sets of accounts might need to be kept to verify that there is no cross-subsidisation.

2.2 *De minimis* support

Distinct from the Treaty provisions themselves in terms of aid definition and derogation from the general ban on State aid, the Commission has defined a level of aid below which Article 87(1) can be said not to apply – so-called *de minimis* aid. This arguably sits rather uneasily with the view of the Court of Justice,[29] which historically has taken the view that even very small amounts of aid can have an impact on competition, but was driven by the need to reduce the administrative burden on the Commission and to focus resources on larger cases of aid.

The *de minimis* principle has been enshrined in a Commission Regulation.[30] This applies to aid to all sectors except agriculture and fisheries,[31] coal, aid for the acquisition of vehicles by road transport undertakings, aid for export and aid for firms in difficulty. The essence of the *de minimis* rule is that aid of up to €200,000 per undertaking[32] in any three-year period

[28] BERR (2008) *State Aid – UK Response to Procedural Questionnaire*, URN 08/628, January 2008.
[29] See Bacon, K. (2009) *European Community Law of State Aid,* Oxford University Press, Oxford at para 2.146.
[30] 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 OJEU 379/5 of 28 December 2006.
[31] Separate *de minimis* rules apply to these sectors.
[32] The ceiling is €100,000 in the transport sector; some activities are excluded altogether, notably agriculture and fisheries, export aid, rescue and restructuring aid and the acquisition of road freight transport vehicles.

can be considered to fall outside Article 87(1), provided that the criteria of the Regulation are met.

Of particular importance, aid must be *transparent*. This means that it must be possible to calculate *ex ante* the gross grant-equivalent of aid without needing to undertake a risk assessment: loans may be regarded as transparent if the grant-equivalent is calculated on the basis of prevailing market interest rates; capital injections and risk capital measures are not considered transparent unless the capital provided is less than the *de minimis* ceiling. Aid provided under a guarantee scheme may be considered transparent if the underlying loan does not exceed €1.5 million per undertaking. Also important, *de minimis* aid cannot be cumulated with other State aid in respect of the same eligible costs. Nevertheless, the absence of restrictions on how *de minimis* aid is spent makes it a very flexible instrument.

It is, however, important to note that in principle the facility carries with it quite stringent monitoring requirements. In particular: recipients must be explicitly informed that aid is being offered on the basis of the *de minimis* Regulation; Member States must obtain a declaration from recipients about any other *de minimis* aid received during the current and two previous fiscal years; and they must record all the information necessary to show that the Regulation has been complied with – these records must be maintained for 10 years.

The Regulation makes reference to the establishment of a central register of *de minimis* aid containing complete information on all *de minimis* aid granted by any authority within the Member State, but there is no obligation to set up such a system. Nevertheless, in the absence of register of this type, it is difficult to imagine that compliance with the *de minimis* rule can be assured. In this situation, compliance depends essentially on the declaration by the undertaking about the amount of *de minimis* aid received in the relevant period.

The notion of 'undertaking' is not defined in the Regulation, and it is unclear what information is provided to beneficiaries by awarding bodies about the nature of the declaration – i.e. on whose behalf it is made. However, in the Dutch service stations case, the Commission took the view that:[33]

> "the *de minimis* rule could only apply if each service station could be seen as a separate enterprise. A service station cannot be regarded as a separate enterprise if one owner possesses several service stations, which may be the case with company-owned/company operated service stations (Co/Co) or where the freedom of 'independent' operators is circumscribed to such an extent by exclusive purchasing and rental agreements that they are controlled de facto by the large oil companies, as in the case of company-owned/dealer operated service stations."

The implication of this decision is that in order to be certain of complying with the Regulation, Member States need to have a complete overview of all the beneficiaries of aid

[33] Commission Decision of 20 July 1999 on the state aid implemented by the Netherlands for 633 Dutch service stations located near the German border, OJEC No L 280/87 of 30 October 1999.

purporting to be *de minimis*, including ownership and other ties (such exclusive contracts) in order to establish that there is no cumulation in excess of the ceiling. An approach to addressing the cumulation problem has been put forward in the legal literature,[34] but there is little evidence that the model guidelines proposed are reflected in current practice.

Of crucial importance from a strictly legal perspective, aid is only considered *de minimis* if *all* the conditions of the Regulation are met; it is not sufficient that the amount of aid is transparent and below the ceiling – it is also necessary to comply with the monitoring requirements. Failure to do this means that the general prohibition in Article 87(1) and the notification requirement will apply; in other words, aid which is below the threshold, but does not meet all the criteria of the Regulation would, in principle, be treated as unnotified aid by the Commission.

Nevertheless, reflecting the apparent flexibility of the mechanism, the *de minimis* facility has come to be widely used in many Member States, not least since *de minimis* aid can be employed to avoid a detailed consideration of whether a measure actually involves State aid at all. Indeed, many IQ-Net partners reported that they were encouraged to resort to the *de minimis* facility by the Commission for this very reason. Its use has been described variously as a 'safe harbour' and a 'get out of jail free card'. The *de minimis* categorisation is commonly viewed as a relatively straightforward way to ensure compliance – or, at least, the appearance of compliance. However, it is widely acknowledged that this may just be a veneer – that is to say, its use may in reality conceal a multitude of problems, particularly relating to the requirement to monitor the level of aids (from all State sources) being received by beneficiary firms over a three-year period.

IQ-Net partner programmes take different approaches to monitoring the use of *de minimis*. The beneficiaries' responsibilities are generally met by requiring the submission of some form of '*de minimis* declaration', either providing information on any other *de minimis* aid already received, or declaring that they remain within the allowed threshold. The conditions surrounding *de minimis* are generally described to the applicant on several occasions e.g. in the commitment letter. However, few IQ-Net partners have formal arrangements in place to monitor applicants' *de minimis* declarations closely, and they must rely on applicant honesty and understanding of the rules and conditions. Almost all recognise that it is impossible to check all other possible sources of funding which a beneficiary may have received. This uncertainty can be seen as a source of risk. For example, in Sachsen-Anhalt, *de minimis* projects are often selected for on-the-spot project checking visits because they are categorised as being of potentially higher risk, and, in fact, the MA advises against using *de minimis* due to the additional administrative burden and risk associated with it. In the United Kingdom, Regional Development Agencies and other awarding bodies are counselled to use *de minimis* only "as a last option where it is not possible to provide cover for the funding under a block exemption scheme or an approved aid scheme";[35] this partly reflects the administrative difficulties associated with *de*

[34] Nicolaides, P. Kleis, M. and Kekelekis, M. (2008) 'Cumulation of de minimis aid to enterprises that form a single economic unit', *European State Aid Law Quarterly*, 1, pp48-54.
[35] OFFPAT (2007) *Desk Instructions on Administrative Procedures when using de minimis Regulation*, available at: http://www.offpat.info/publications.aspx

minimis, but also the perception that the threshold could become exhausted quite quickly. On the other hand, in Greece, audits carried out during the 2000-06 period revealed very few cases of aid exceeding *de minimis* limits.

The use of formal monitoring procedures for overseeing the use of *de minimis* varies widely. A number have developed databases which attempt to capture the aid granted to individual beneficiaries to help monitor *de minimis* levels (for example, the SHRIMP (System for Collection, Reporting and Monitoring Aid) database in Poland and the BDA (*Banca Dati Anagrafica*) in Italy)[36], while others either have concrete plans (e.g. the Czech Republic envisages a national database for all public support, including de minimis, to be operational from 2010) or are discussing this as a potential development. However, even where information systems are used to monitor Structural Funds aid, few Structural Funds management information systems have cross-over with national aid systems, meaning that a full picture of aid cumulated cannot be obtained. Some IQ-Net partners have concluded that *de minimis* support is too marginal for the purpose of setting up a separate database, or that it would be too costly to develop.

Two interesting examples of databases which have been developed to capture *de minimis* levels can be found in Slovenia and Portugal, operating at Member State level. To monitor *de minimis* aid in Slovenia, the Slovenian State Aid Monitoring Department maintains a database allowing grantors to check whether potential recipients have already reached the ceiling. To allow the data on previously granted *de minimis* aids to be checked, the identification number of the recipient is entered resulting in a detailed overview of the aid according to individual recipient over the previous three-year period (see Figure 1 below). The database is considered by the SAMD to be a very good support tool, which has worked well since its introduction in 2001.

[36] It should be noted, however, that the database is not as effective as was initially foreseen. The BDA was included in each NOP from 1989 (1989-93, 1994-99 and 2000-06) but the design of the database was too ambitious – i.e. the goal was to check all investments at single invoice level, to generate a national overview of all aids given out with public resources from national and sub-national authorities. There is now an attempt to simplify the BDA and concentrate it on *de minimis*. An interesting development is the linkage with the databases of the chambers of commerce (which manage the register of enterprises), so that all the information on a firm can be automatically obtained by inserting its VAT number. There should also be a link to the Ministry of Finance's CUP – *Codice Unico di Progetto* (a unique project code given to each project).

Figure 1: Slovenian State Aid Monitoring Department de minimis database

Detailed overview of the aids according to individual potential recipient in the previous 3-year period:

REPORT ON GRANTED DE MINIMIS AID, BY RECIPIENT
(in EUR, from 1.1.2005 till today)

Registr. number of recipient	Transaction	Notification number	Net Amount
123456855 ENTERPRISE 1			
	31.05.2005	0002-5715334-2002	5.424,87
	04.11.2005	0002-5715334-2002	24.411,92
	30.10.2006	M001-5715334-2005	5.216,16
	Total:		35.052,95
354666566 ENTERPRISE 2			
	18.4.2005	0002-5715334-2002	14.606,47
	17.10.2005	0002-5715334-2002	14.606,47
	04.11.2005	0002-5715334-2002	4.867,78
	20.06.2006	M001-5715334-2005	3.477,09
	01.09.2006	M001-5715334-2005	10.431,27
	10.11.2006	M001-5715334-2005	3.478,13
	Total:		51.467,71
564656455 ENTERPRISE 3			
	04.11.2005	0002-5715334-2002	4.437,72

Overview of all granted de minimis aids by recipient in the previous 3- year period:

REPORT ON DE MINIMIS AID BY RECIPIENT
by net amount in EUR, last three years

Registr. number	Recipient	2005	2006	2007	Last 3 years
8573732596	Enterprise 1	45.694,30	42.570,72	25.037,60	**113.302,62**
8573732597	Enterprise 2		99.671,95	1.251,88	**100.923,83**
8573732598	Enterprise 3	86.125,17	13.817,77		**99.942,94**
8573732599	Enterprise 4	99.998,81			**99.998,81**
8573732600	Enterprise 5		99.916,28		**99.916,28**
8573732601	Enterprise 6		99.916,28		**99.916,28**
8573732602	Enterprise 7		99.916,28		**99.916,28**
8573732603	Enterprise 8		99.916,28		**99.916,28**
8573732604	Enterprise 9		99.916,28		**99.916,28**
8573732605	Enterprise 10		99.916,28		**99.916,28**
8573732606	Enterprise 11	99873,74			**99.873,74**
8573732606	Enterprise 12		99861,85		**99.861,85**
8573732606	Enterprise 13	99824,84			**99.824,84**
8573732606	Enterprise 14		99732,93		**99.732,93**
8573732606	Enterprise 15		99732,93		**99.732,93**

Source: Slovenian State Aid Monitoring Department presentation (2008)

In Portugal, support is only granted to projects falling within the *de minimis* rules when they have been checked through the national *de minimis* database, which was set up in 2002. It was subsequently adapted in 2006 to conform to the new regulatory requirements, and then again in 2009 following the changes to the award limits in the context of the Commission's crisis measures. The IFDR is responsible for managing the database, which functions in a fully computerised form.

The database functions in two stages. First of all, the body responsible for awarding the aid has to fill in a form covering a series of information fields: company name, tax number, validation of control of exceptions (e.g. if the company is in financial difficulty), code of economic activity, the amount of aid and the date of the award decision. This information is transmitted via the internet to the database. The database produces a first report to detect errors or inconsistencies in the entries. The second stage involves a verification check on whether the award complies with the eligible thresholds (in terms of the volume and cumulation of aid). Within 3-5 days, an electronic report is automatically produced and sent to the body that is responsible for awarding the aid, verifying whether the aid can be granted. A manual has been prepared to support the aid awarding bodies in inputting data to the system.

The Portuguese system is considered to have three key strengths. First it automates the *de minimis* rules into the decision-making process. Second, it provides for greater legal certainty in awarding support. Lastly, is provides a speedy and reliable mechanism for identifying the *de minimis* support granted to a recipient.

3. THE SCOPE OF ADMISSIBLE AID

There is a presumption under Article 87(1) that measures fulfilling the criteria (benefit, State and State resources, selectivity, distortion of competition and impact on intra-EU trade) are prohibited. The wide interpretation of these criteria means that the reach of State aid control into economic development activities is extensive. However, the basic prohibition of State aids is tempered by a number of derogations which define the circumstances in which State aid is, or may be, compatible with the Treaty. This section focuses on the circumstances in which State may be admissible.[37] It begins by outlining the Treaty provisions derogating from the basic prohibition (see 3.1) and goes on to discuss the substance of derogation in a number of keys areas of relevance to the operation of the Structural Funds (see 3.2).

3.1 Treaty provisions

Article 87(1) gives the initial impression of a draconian approach to subsidies because the prohibition is apparently cast so wide. However, Articles 87(2) and (3) set out a number of exceptions to the general ban. Article 87(2) is of relatively limited application (and offers little discretion to the Commission), but Article 87(3) has been extensively interpreted by the Commission to provide a basis for finding measures targeting a wide range of policy objectives compatible.

3.1.1 Mandatory exceptions to the general ban

Article 87(2) provides that the following *shall* be compatible with the common 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 affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.*

Measures that address these objectives must be notified to the European Commission in advance of implementation, but the Commission does not have the discretion to decide whether or not to authorise them, rather it must determine whether the conditions set out above are met. Article 87(2) is not of major importance for Structural Funds programmes since the types of measure for which it provides are unlikely to fall within the scope of EU Cohesion policy. Nevertheless, it is worth noting in passing that this provision has been used, for example, to authorise passenger travel grants for internal flights in Guyane (Article 87(2)(a))[38] and reconstruction loans following flooding in Hungary (Article

[37] The focus of this is on the general Treaty provisions in relation to State aid, rather than the specific sectoral provisions eg in relation to transport and agriculture.

[38] Commission Decision N 912/2006 – *France : Régime d'aides à caractère social sur certaines liaisons aériennes intérieures en Guyane*, 19 March 2007.

87(2)(b)).[39] On the other hand, following German reunification, Article 87(2)(c) has fallen into disuse.

3.1.2 Discretionary exceptions to the general ban

Under Article 87(3), the following *may* be considered to be compatible with the common market:

> *(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;*
>
> *(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 Community 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 acting by a qualified majority on a proposal from the Commission.*

These provisions have been extensively interpreted by the European Commission, giving rise to a large body of guidelines, communications and regulations specifying policy across a range of areas.

Article 87(3)(a) provides the legal basis for State aid to the most disadvantaged regions of the Community. These so-called *'a' regions* are defined on the same basis as the Convergence regions under EU Cohesion policy – i.e. GDP (PPS) per head of less 75 percent of the EU average – and for the same period (2007-2013). Regional aid is discussed in more detail below (see 3.2.1).

Article 87(3)(b) enables two types of support to be authorized: aid for projects of common European interest – such as aid for the Channel tunnel rail link;[40] and aid to remedy a serious disturbance in the economy of a Member State. Until 2008, this latter provision was scarcely used; however, the global financial crisis has resulted in a raft of measures being approved on the basis of Article 87(3)(b). It was used as the basis for authorising support for individual financial institutions (the Commission's 'standard' approach to rescue and restructuring aid proving inadequate in the circumstances). In addition, and potentially more relevant in the present context, Article 87(3)(b) is the basis for the temporary framework which enables the Commission to authorise aid for the 'real' economy (see 3.2.5 below).

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[39] Commission Decision N463a/2006 - *Hungary: Reconstruction loan to make good the damage caused by the flood 2006*, 11 December 2006.
[40] Commission Decision N 706/2001 – *United Kingdom: The Channel Tunnel Rail Link*, 24 April 2002.

Article 87(3)(c) underpins the widest range of exceptions and is the legal basis of most relevance for State aid under the Structural Fund programmes. The general principle of this provision is that aid may be allowed for the development of certain activities and regions, but it should be limited in order to ensure that the common interest requirement is met. Under Article 87(3)(c), the Commission has developed a basis for authorising aid for a number of objectives, including regional development, support for small and medium-sized enterprises (SMEs), R&D, innovation and environmental protection. The terms on which such aid may be offered are set out in various guidelines and communications and, importantly, the General Block Exemption Regulation discussed further below (see 4.1.1).

Article 87(3)(d) was added to the EC Treaty by the Maastricht Treaty in 1993. It has been used as the basis for authorising aid to the film industry,[41] as well as schemes for theatre and dance activities,[42] and museums.[43] In some cases, it is clearly debatable whether indeed the support involves aid at all, but the Commission is characteristically ambivalent about ruling out such possibilities, preferring to 'raise no objections' to the measures concerned by authorising them under Article 87(3)(d). However, the resource intensity of case-by-case scrutiny has led some to call for a block exemption regulation in this area.[44] For the time being, however, there are no *general* guidelines on how the Commission will address aid to culture and national heritage, although specific communications do apply to the film industry[45] and public service broadcasting.[46]

For completeness, it can be noted that the use of Article 87(3)(e) – authorisation of state aid by the Council - is extremely rare and unlikely to arise in the day-to-day operations of the Structural Funds.

3.2 Admissible aid – some key policy areas

The interpretation of the derogations from the general ban on State aid has given rise to a vast body of soft, and, increasingly, hard law. In their current form, these rules run to over 500 pages,[47] without including matters of interpretation that necessarily arise from individual decisions. Many of these rules have been significantly recast in the wake of the

[41] Commission Decision N 760/2007 – *France : Modification du dispositif du crédit d'impôt en faveur de la production Phonographique*, 16 July 2008.
[42] Commission Decision N 368/2008- *Spain: Aid for theatre, dance, music and audiovisual activities in the Basque country*, 22 August 2008.
[43] Commission Decision N 293/2008 – *Hungary: Aid for multifunctional community cultural centres, museums, public Libraries,* 26 November 2008.
[44] Sinnaeve, A. (2008) 'Does Aid for Theatres Affect Trade between Member States?' *European State Aid Law Quarterly*, 1, pp7-11.
[45] *Communication from the Commission concerning the State aid assessment criteria of the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works (Cinema Communication) of 26 September 200*1, OJEU No C 31/1 of 7 February 2009.
[46] *Communication from the Commission on the application of State aid rules to public service broadcasting*, OJEC No C320/5 of 15 November 2001.
[47] See European Commission (2008) *EU Competition Law – Rules Applicable to State Aid, situation at 1 November 2008*, available at:
http://ec.europa.eu/competition/state_aid/legislation/compilation/index_en.html

State aid action plan (SAAP),[48] which was itself set in the context of the Lisbon strategy for growth and jobs. In essence, the rules aim to embody the balancing of the positive effects of State aid (in terms of contributing to the achievement of objectives of common interest) against its negative impacts (distortion of competition and trade); in principle, for State aid to be compatible, it must be necessary and proportionate.

The substantive rules relating to the assessment and compatibility of State aid cover a wide range of areas, from those that are generally viewed positively (such as support for SMEs) to those where considerable caution is exercised (support for rescue and restructuring). In between, the Commission's treatment of investment and employment aid to large firms is more nuanced and driven by its perception of regional problems – in prosperous regions such aid will be disallowed, but in disadvantaged regions quite high levels of aid may be authorised.

The aim of the remainder of this section is to provide a brief overview of the main substantive rules of relevance to Structural Funds programmes, focusing on those highlighted by the IQ-Net partners as presenting particular issues or difficulties. The emphasis here is on the content of the rules, rather than the form – i.e. guidelines and General Block Exemption Regulation (GBER), which is discussed in Section 4 below.

3.2.1 Regional aid

Regional aid was the first policy area in which the Commission formalised its position, with some key principles set out as far back as the 1970s. Over time, the approach has become more comprehensive and predictable, and the timescale of the regional aid rules has been explicitly aligned with the planning period for the Structural Funds.

Regional aid is designed to promote the economic development of areas defined on the basis of Article 87(3)(a) and (c) ('a' regions and 'c' areas). This effectively restricts the use of investment aid to large firms to those located in designated areas; it also determines the areas in which SMEs may benefit from higher rates of award.

Under the current guidelines,[49] the regional aid maps were defined for the period 2007-2013, with limited scope for review. Eligible areas cover just under half of the EU population: 'a' regions were defined on the basis of EU-wide criteria (essentially GDP per head) while 'c' areas were selected by the Member States.

The guidelines envisage the following types of support:

- Investment aid
- Aid for employment linked to initial investment
- Aid for newly created small enterprises

[48] European Commission (2005) *State Aid Action Plan – Less and better targeted state aid: a roadmap for state aid reform*, COM(2005)107 final, Brussels, 7 June 2005.
[49] *Guidelines on Regional Aid for 2007-2013*, OJEU No C54/13 of 4 March 2006.

- Operating aid (exceptionally – mainly in outermost or sparsely-populated regions).

In practice, the Regional Block Exemption Regulation[50] and the GBER[51] which superseded it mean that most regional aid schemes can be implemented without prior notification to the Commission – the principal exception concerns operating aid, which must always be notified.[52]

Maximum rates of award under the Guidelines are calibrated by firm size and the severity of the regional problem. The main provisions for maximum rates are set out in Figure 2.[53]

Figure 2: Award maxima under the Regional Aid Guidelines

	Large firms	Medium-firms	Small firms
'a' regions GDP per head <45% EU25 average	50%	60%	70%
'a' regions GDP per head <60% EU25 average	40%	50%	60%
'a' regions GDP per head <75% EU25 average	30%	40%	50%
'c' areas (general case)	15%	25%	35%

In general, eligible investment is limited to new assets (except SMEs), the retention of the investment in the assisted area for at least five years (three years for SMEs) and a financial contribution of 25 percent from the beneficiary. Where support is for employment linked to initial investment, the same aid rate applies to the additional wage costs related to the new jobs.

For some of the IQ-Net partner countries/regions the Regional Aid Guidelines provide considerable flexibility. In Poland and Slovenia, for example, the entire country is covered by 'a' region status, as is most of the Czech Republic and Greece. This means that throughout all or most of these territories, investment aid can be offered to large firms as well as SMEs and at relatively high levels of aid intensity.

Elsewhere, coverage is much more fragmented and, importantly, in many regions is significantly lower than in the previous planning period. This has several side effects. Some IQ-Net partners pointed to the complexities of having different rates of award within the region, depending on the prevailing assisted area status. Others noted that regional aid areas do not necessarily coincide with urban regeneration areas, limiting the scope for intervention to support such projects where there is no overlap. A further point is that the loss of assisted area status has not only meant that SMEs must be assisted at a lower rate than before, but also that large firms can only be assisted under horizontal regimes, such as

[50] Commission Regulation (EC) no 1628/2006 on the application of Article 87 and 88 of the Treaty to national regional investment aid, OJEU No L302/29 of 1 November 2006.
[51] Commission Regulation (EC) No 800/2008 of 6 august 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty (General block exemption Regulation), OJEU No L 214/3 of 9 August 2008.
[52] Certain large cases also require individual clearance.
[53] In reality, the matrix is much more detailed and includes transitional arrangements for some regions and special provisions for others such as outermost and border regions.

R&D&I. Clearly these have a much narrower focus (as well as modest rates of award) resulting in more limited possibilities for intervention. A more general observation was the lack of flexibility in area designation in the context of the recession. France sought, unsuccessfully, an extension of the assisted areas map in the context of the current economic crisis and the closures taking place in non-assisted and several IQ-Net partners bemoaned the largesse of the Commission towards the financial services sector when set against its strict approach to regional aid.

3.2.2 SME aid

The approach to State aid for SMEs under Competition policy is generally positive, reflecting the 'political will' of the Commission to recognise the central role of SMEs in the EU economy.[54] The definition of an SME is set out in the Annex to the GBER and is essentially as follows:

A *medium-sized* enterprise is one that has:

- fewer than 250 employees and
- either an annual turnover not exceeding €50 million and/or a balance sheet total not exceeding €43 million.

A *small* enterprise is one that has:

- fewer than 50 employees and
- either an annual turnover and/or balance sheet total not exceeding €10 million.

These criteria must be applied to the enterprise as a whole, including subsidiaries in other countries. The Regulation also provides definitions of autonomous, linked and partner enterprises with a view to assessing the real economic position of the organisation concerned.

There are a number of SME-specific aid categories identified in the GBER as compatible with the Treaty. These are:

- investment and employment aid – permissible in all regions, with higher rates applicable in designated 'a' regions and 'c' areas[55]
- aid for newly-created small enterprises established by female entrepreneurs[56]
- aid for early adoption of future Community environmental standards[57]

[54] European Commission (2008) *Communication from the Commission to the Council, the European Parliament, the European Economic and social Committee and the Committee of the Regions: "Think Small First", A "Small Business Act" for Europe*, COM(2008)394 final, 25 June 2008.
[55] GBER, Articles 13 and 15.
[56] GBER, article 16.
[57] GBER, Article 20.

- aid for consultancy[58]
- aid for participation in trade fairs[59]
- aid in the form of risk capital[60]
- aid for obtaining and validating patents and other IP rights[61]
- aid to young innovative enterprises[62]
- aid for innovation advisory and support services.[63]

Eligible expenditure varies by category of aid, as do maximum rates of award, which are set out in Figure 3.

Figure 3: Maximum rates of award for SME aid

Investment and employment aid (higher rates apply to processing and marketing of agricultural products and in regional aid areas)	• Small firms • Medium firms	20% 10%
Female entrepreneurship		15%
Early adaptation to future Community standards	• Small firms • Medium firms	15% 10%
Risk capital		Maximum investment €1.5 mill per target undertaking
Consultancy services and participation in trade fairs		50%
Intellectual property rights	• Fundamental research • Industrial research • Experimental development	100% 50% 25%
Innovation advisory and support services		Generally 75%

In general, SME aid is widely used under the Structural Funds programmes – especially investment and employment aid which, in some countries (e.g. France), have been incorporated into umbrella schemes enabling all tiers of government to offer aid. It remains to be seen what advantage will be taken of the newer forms of aid enumerated under the GBER. Nevertheless, it appears that SME aid is being operated with few compliance or compatibility issues among the IQ-Net partners, although attention was drawn to the complexities of applying the concept of linked enterprises and the resource implications of

[58] GBER, Article 26.
[59] GBER, Article 27.
[60] GBER, Article 29.
[61] GBER, Article 33.
[62] GBER, Article 35
[63] GBER, Article 36.

applying the size criteria, an aspect which has also received some attention in the legal literature.[64]

3.2.3 Research, development and innovation (R&D&I)

In principle, research, development and innovation (R&D&I) is also a policy area in which the Commission perceives there to be clear benefits from public intervention. Indeed, the 2002 Barcelona European Council agreed that R&D spending should be increased, with a target of 3 percent of GDP by 2010 and two-thirds of new investment to come from the private sector. This positive attitude to supporting R&D is reflected in the framework on State aid for R&D and innovation[65], which identified a range of aid measures as potentially compatible with the Treaty, notably aid for:

- R&D projects
- technical feasibility studies
- young innovative firms
- process and organisational innovation in SMEs
- loan of highly qualified personnel
- innovation clusters.

Schemes supporting most of these[66] may be reported under the GBER, subject to certain size limits, beyond which they are subject to assessment under the R&D&I Framework.

The level of support for R&D projects varies according to the stage of the research with up to 100 percent of fundamental research costs being eligible, but support for experimental development generally being limited to 25 percent of eligible costs for large firms, rising to 45 percent for small firms.

The different phases of the research process with respect to research projects, in particular, are defined as follows:

- *fundamental research* means experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundation of phenomena and observable facts, without any direct practical application or use in view;
- *industrial research* means planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for brining about a significant improvement of the same;

[64] See Kekelekis, M. (2008) 'The big enterprise of defining SMEs in State aid cases,' *European State Aid Law Quarterly*, 2008(1) pp 12-27.
[65] *Community framework for State aid for research and development and innovation*, OJEC No C323/1 of 30 December 2006.
[66] Schemes for process and organisational innovation and innovation clusters are excluded.

- *experimental development* means the acquisition, combination, shaping and use of existing scientific, technological, business and other relevant knowledge and skills to produce plans and arrangements for new or improved products, processes and services.

Notwithstanding the apparently positive attitude to State aid for R&D&I under the framework, the State aid rules were cited by several IQ-Net partners as a major constraint in supporting R&D under the Structural Funds programmes. At the same time, as noted earlier, the reliance on R&D&I type support has grown in many regions with the decline in the availability of investment aid, following the redrawing (and shrinkage) of the assisted area maps. In some countries, the limitations imposed by the State aid rules appear to arise at least in part from the large role played by the State in research activity; this can reduce the 'room for manoeuvre' in, for example, the promotion of collaborative projects. Elsewhere, the State aid rules were viewed as a constraint on the commercialisation of the R&D activities of universities. This issue has been addressed explicitly in the United Kingdom with a guidance note for universities and research organisations aimed at setting out the circumstances in which such bodies are not operating as undertakings (and therefore support is provided on a 'no aid' basis), how such organisations can avoid giving aid to third parties and, where there is aid, on what basis it can be rendered compliant with the State aid rules.[67]

A number of IQ-Net partners mentioned that funding clusters was a particular problem and were critical of the lack of coordination between DG Regio and DG Comp on this subject. In practice, there appear to have been few instances of funding for clusters notified.[68] Another difficulty cited by the IQ-Net partners was the interpretation of the different phases of the R&D process and knowing to which phase a given project should be allocated (and the funding of projects which cut across the phases defined).

More generally, there was a perception that the State aid rules made the 'Lisbon objectives' more difficult to address, notably because of the emphasis on funding research *projects* rather than research *infrastructure*. Clearly there is scope to fund research infrastructure outside of the scope of the State aid rules. For example, in considering support for the Fraunhofer Centre for Silicone Photovoltaics (which the German authorities had notified for legal certainty) the Commission concluded that no State aid was involved.[69] In part, this was because its activities were largely non-economic as defined in the guidelines (namely education, the conduct of independent R&D for more knowledge and the dissemination of research results); in addition, with regard to economic activities (such as carrying out research on behalf of undertakings), the costing of those activities was subject to guidelines the purpose of which was to avoid any advantage of public sector contracting bodies over private ones and the spill-over of funding from non-economic to economic activities. Moreover, separate accounts were to be maintained for economic activities.

[67] BERR (2008) *Universities and Research Organisations on the EC State Aid Framework for R&D&I - Guidance Note*, URN 08/1501 December 2008.
[68] Commission Decision N331/2007 – *Germany (Thuringia): Guideline for the promotion of innovative technology oriented collaboration projects, networks and clusters*, 28 January 2008.
[69] Commission Decision N365/2007 – *Germany (Sachsen-Anhalt): Establishment of Fraunhofer Centre for Silicon Photovoltaics*, 26 November 2008.

A number of IQ-Net partners commented on the complexities involved in constructing such arrangements and assembling aid packages that were State aid compliant. They argued that projects could be compromised or even abandoned either because of those difficulties, or because the aid intensities were too low (or eligible expenditure too narrowly defined) for projects to be sustainable.

At a more conceptual level, but with practical implications, the R&D&I State aid framework has been criticised in work undertaken for the French Ministry for Industry which concluded that the market failure doctrine is a "very inadequate" framework within which to judge the case for State aid for R&D.[70] A related study[71] made a number of recommendations, including that: the rules for schemes subject to the standard assessment procedure should be made simpler; the rate of award for clusters should be raised; the definition of process and organisational innovation in services should be widened; and the size limit on firms eligible for the SME bonus should be increased.

3.2.4 Risk capital

Since 2001, the Commission has operated guidelines that set out the circumstances in which support for risk capital measures involves State aid and the conditions under which it might be deemed compatible with the Treaty; the current guidelines[72] date back to 2006, and some support mechanisms are be covered by the GBER.[73]

Under the GBER, risk capital measures in the form of participation in a private equity investment fund are compatible with the Treaty if the following conditions are met:

- the tranches of investment made by the fund in any target SME do not exceed €1.5 million in any 12 month period;
- at least 70 percent of the fund is invested in SMEs in the form of equity or quasi equity;
- for SMEs in assisted areas and small firms, risk capital is restricted to providing seed capital, start-up and/or expansion capital. For medium-firms in non-assisted areas expansion capital is excluded;
- at least 50 percent of the financing of the fund is provided by private investors (except where the fund exclusively targets SMEs in assisted areas, in which case the threshold is 30 percent);

[70] Metcalfe, S (2008) *The Perpetual Dance: Competition, Innovation and the Community Framework for State Aid for R&D&I,* étude réalisée sous la supervision de Technopolis Group France à la demande de la Direction générale des Entreprises du ministère de l'Economie, de l'Industrie et de l'Emploi, June 2008.
[71] Technopolis (2008) *Impact of the Community Framework for State Aid for Research and Development and Innovation on European Union Competitiveness*, Summary of study undertaken at the request of the Directorate General of Enterprises, Ministry of Economic Affairs, Industry and Employment, June 2008.
[72] *Community guidelines on State aid to promote risk capital investment in small and medium-sized enterprises*, OJEU No C 194/2 of 18 August 2006.
[73] Note also that the temporary framework for the economic crisis provides for a relaxation of some of these conditions until end 2010 – see 3.2.5 below.

- the risk capital measure must be profit driven (there must be a business plan for each investment and a clear and realistic exit strategy);

- the investment fund must be managed on a commercial basis.

Where measures do not comply with the GBER, they may nevertheless be approved after scrutiny under the Risk Capital Guidelines. For these purposes, the Commission will consider whether State aid is present at each of the following tiers:

- *the investor:* the Commission will consider the investment to be effected *pari passu* between public and private investors, and thus not to constitute State aid, where its terms would be acceptable to a normal economic operator in a market economy without State intervention. This is assumed to be the case only if public and private investors share exactly the same upside and downside risks and rewards and hold the same level of subordination, and normally where at least 50 percent of the funding of the measure is provided by private investors, which are independent from the companies in which they invest.

- *the investment fund, vehicle or manager:* in general, this tier is considered to be the intermediary vehicle for the transfer of investment to the SME, rather than a beneficiary. However, aid may be involved if, for example, the remuneration of the management company is out of line with current market trends.

- *the enterprises in which investment is made:* if aid is present at the level of the investor or the fund, there is normally a presumption that it is also at least partially passed on to the target enterprise, unless the investment complies with the market investor principle.

Some risk capital measures involving State aid will be subject to a standard assessment under the Guidelines – these will be handled under the simplified procedure under the new procedural package (see discussion in 4.1.3 below). Others will be subject to a more detailed balancing test in which the Commission seeks to set the positive effects of aid (expressed in terms of the presence of a market failure, the appropriateness of the instrument, the incentive effect and necessity of aid and proportionality) against its negative effects (crowding out and other distortions of competition).

Overall, the Guidelines and the GBER combined set out a complex series of criteria for determining first, whether State aid is present and second, if so, whether it (i) can be reported under the GBER, or (ii) is subject to a simplified assessment, or (iii) is subject to more detailed scrutiny. Clearly, there is scope is to operate risk capital measures in ways that fall outside the State aid rules completely, and this line is followed is some IQ-Net partner countries/regions. In others, however, the very nature of participation funds and the share of public funds within them make it impossible to demonstrate that operations are effected on a *pari passu* basis. In any event, the very purpose of such funds is to bridge what is perceived to be a gap in private sector provision and there would seem to be no public policy benefit in simply replicating what is delivered by the market.

Many IQ-Net partners expressed concern at the complexity of the requirements under the risk capital guidelines. This applies to both purely domestic arrangements and to those involving EU financial engineering instruments such as JEREMIE and JESSICA. Indeed, one IQ-Net partner cited the relationship between JEREMIE and the State aid rules as being symptomatic of a 'serious dysfunction' in the Commission, while another noted that coordination between DG Regio and DG Comp had been particularly poor with respect to financial engineering. To date, two JEREMIE-based measures have been approved under the State aid rules – in Hungary and Wales (United Kingdom).[74] The implementation of JESSICA is still under discussion in many regions / countries, with consideration being given, for example, to using the participation the EIB in order to avoid procurement and State aid issues. It is worth noting in passing that some IQ-Net partners criticised the privileged role of the EIB in this context.

More generally, there is, at best, a discontinuity between DG Regio's exhortations to Member States to make greater use of financial engineering instruments and DG Comp's capacity to scrutinise and approve them swiftly. On the other hand, there is also considerable evidence that, in spite of COCOF guidance,[75] difficulties in implementing financial engineering instruments go well beyond State aid issues and that many managing authorities lack the technical capacity to establish the relevant mechanisms within the current legal framework.[76]

3.2.5 Temporary measures in response to the economic crisis

In December 2008, the Commission adopted a temporary framework for State aid measures to support access to finance in the financial and economic crisis. [77] The measures are based on Article 87(3)(b), which enables the Commission to authorise measures to "remedy a serious disturbance in the economy of a Member State." Reflecting this, some subnational governments (such as Scotland and Vlaanderen) had proposals for such measures turned down on the basis that the conditions in the 'economy of the *Member State*' constituted the underlying justification for any authorisation – although clearly there are also administrative benefits to the Commission in terms of the potential number of notifications.

The framework has two main objectives: (i) to allow measures that unblock bank lending to firms and thereby guarantee continuity in access to finance; and (ii) to facilitate aid schemes that encourage continued investment, especially in sustainable growth. Proposed measures must be notified and approved by the Commission prior to implementation, but

[74] Commission Decision N355/2008 – *Hungary*: *Hungarian JEREMIE risk capital measure*, 10 December 2008; and Commission Decision N700/2007 – *United Kingdom, Wales: Finance Wales JEREMIE Fund*, 14 November 2008.
[75] *Note of the Commission Services on financial Engineering in the 2007-13 programming period*, DOC COCOF/07/0018/01-EN final of 16 July 2007; and, Guidance Note on Financial Engineering, COCOF 08/0002/03-EN of 22 December 2008.
[76] Matusiak, A. (2009) *European Network on Financial Instruments,* Marshal Office of the Wielkopolska Region.
[77] The consolidated version including the February 2009 amendments is Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis, OJEU No C 83/1 of 7 April 2009.

thereafter individual aid within the terms of the approved scheme can be offered immediately and without further notification.

Under the framework, a number of conditions apply:

- all measures apply only to firms which were not in difficulty on 1 July 2008; they may apply to firms which entered into difficulties thereafter as a consequence of the economic and financial crisis;
- all measures are applicable to 31 December 2010;
- approved temporary measures may not be cumulated with *de minimis* aid in respect of the same eligible expenditure;
- approved temporary measures may be cumulated with other compatible aid or with other forms of Community financing, provided that the maximum aid intensities in the relevant guidelines or GBER are respected.

The temporary framework comprises both new instruments and the (temporary) modification of existing instruments. The key forms of aid which can be authorised under the framework are as follows.

- *A lump sum of up to €500,000 per undertaking*. In calculating this sum, account must be taken of any aid paid under the *de minimis* Regulation.
- *State guarantees for loans at a reduced premium*. The reduction is up to 25 percent for SMEs and 15% for large firms on the annual premium calculated in accordance with the 'safe harbour' provisions annexed to the Framework or a methodology already accepted by the Commission.[78] The loan must not exceed the wage bill of the firm, and the guarantee may not exceed 90 percent of the loan.
- *Subsidised interest rates*. The rate which the Commission will accept is linked to the central bank overnight rate, the interbank rate and a risk premium related to the credit worthiness of the firm. More generous terms may be authorised for the production of 'green products'

In addition to these essentially new measures, the Framework also provides for a temporary derogation from the risk capital guidelines (see 3.2.4 above) in respect of the size of investment per target enterprise (raised from €1.5 million to €2.5 million) and the proportion of private participation (lowered from 50 percent to 30 percent).

Since the introduction of the Framework a large number of measures has been approved by the Commission. These are summarised in Figure 4.

[78] Notably in the context of the GBER, where approval of calculation methodologies may render otherwise 'intransparent' aid transparent.

Figure 4: Measures approved under the Temporary Framework for the 'real' economy

	Type of measure / Beneficiary	Date of adoption
Austria	N47/a/2009 - Temporary scheme (aid up to € 500 000)	20 March 2009
Austria	N47/d/2009 - Temporary scheme (risk capital)	25 March 2009
Belgium	N117/2009 - Temporary scheme (subsidised guarantees)	20 March 2009
Czech Rep	N236/2009 - Temporary scheme (aid up to € 500 000)	7 May 2009
Czech Rep	N237/2009 – Temporary scheme (subsidised interest rates)	6 May 2009
Denmark	N198/2009 – Temporary scheme (export credit insurance)	6 May 2009
France	N7/2009 - Temporary scheme (aid up to € 500 000)	19 January 2009
France	N15/2009 - Temporary scheme (reduced interest rates)	4 February 2009
France	N11/2009 - Temporary scheme (reduced interest rates – to producers of green products)	3 February 2009
France	N23/2009 - Temporary scheme (subsidised guarantees)	27 February 2009
France	N119/2009 - Modification of French risk capital scheme	16 March 2009
Germany	N661/2008 – KfW run special program 2009 (interest subsidies)	30 December 2008
Germany	N668/2008 – Temporary scheme (limited amount of compatible aid)	30 December 2008
Germany	N39/2009 – Temporary adaptation of risk-capital schemes	3 February 2009
Germany	N27/2009 - Temporary scheme (guarantees)	27 February 2009
Germany	N38/2009 - Temporary scheme (reduced interest rates)	19 February 2009
Hungary	N203/2009 - Temporary scheme (guarantees)	27 April 2009
Hungary	N114/2009 - Temporary scheme (guarantees)	10 March 2009
Hungary	N77/2009 - Temporary scheme (aid up to € 500 000)	24 February 2009
Hungary	N78/2009 – Temporary scheme (subsidised interest rates)	24 February 2009
Ireland	N186/2009 – Temporary scheme (aid up to € 500 000)	15 April 2009
Latvia	N124/2009 – Temporary scheme (aid up to € 500 000)	19 March 2009
Latvia	N139/2009 - Temporary scheme (subsidised guarantees)	23 April 2009
Luxembourg	N99/2009 – Temporary scheme (aid up to € 500 000)	26 February 2009
Luxembourg	N128/2009 – Temporary scheme (guarantees)	11 March 2009
Luxembourg	N50/2009 – Temporary scheme (export-credit insurance)	20 April 2009
Netherlands	N156/2009 – Temporary scheme (aid up to €500000)	1 April 2009
Portugal	N13/2009 – Temporary scheme (aid up to €500,000)	19 January 2009
Slovakia	N222/2009 - Temporary scheme (aid up to €500,000)	30 April 2009
Spain	N140/2009 – Temporary scheme (aid for green cars)	29 March 2009
UK	N43/2009 – Temporary scheme (aid up to €500,000)	4 February 2009
UK	N71/2009 – Temporary scheme (guarantees)	27 February 2009
UK	N72/2009 – Temporary scheme (to businesses producing green products)	27 February 2009
UK	N257/2009 – Temporary scheme (subsidised interest rates)	15 May 2009

Source: DG Comp website, http://ec.europa.eu/competition/state_aid/what_is_new/news.html

It remains to be seen precisely what impact this new facility will have on the Structural Funds programmes. At first sight, however, it would appear that its effects are likely to be limited. This is partly because of the way in which intervention is programmed to take place over a relatively long period, rather than responding to cyclical change in the economy; Managing Authorities may not wish to, or may not be in a position to, adapt programmes to accommodate a facility that lasts only until the end of 2010. The reactions of the IQ-Net Managing Authorities to the package were mixed, but on balance not especially positive. Several pointed to the complexity of the measures approved – one

regional authority noting that it had engaged a firm of lawyers to assist with the interpretation of the provisions relating to soft loans and guarantees. Another respondent observed that the equity and soft loan funding, in particular, would be of limited value to SMEs since, in addition to the complexity of the measures, the advantageous rates of intervention were only temporary, and small firms would find it hard to deal with a sudden reduction in equity funding. On the other hand, what has been widely characterised as an extension of the *de minimis* facility to €500,000, has been viewed more positively as increasing flexibility. It is important to note, however, that this is a misinterpretation of the new measure (it does not fall outside Article 87(1)) and that longer term the monitoring requirements associated with cumulation of temporary measures with *de minimis* support may prove cumbersome to manage.

4. MANAGING COMPLIANCE

The compliance of the Structural Funds with the State aid rules is driven by two separate, but interrelated strands of obligation imposed on domestic authorities: those relating to the implementation of the Structural Funds Regulation and those flowing from the requirements of the Treaty in respect of Competition policy.

The Structural Funds Regulation imposes a general duty on the Commission and the Member States to ensure that assistance from the Funds is consistent with the activities, policies and priorities of the Community.[79] This obligation is cascaded down into explicit commitments in the National Strategic Reference Frameworks and Operational Programmes to comply with EU State aid rules. Moreover, from a procedural perspective, the implementing Regulation requires Member States to indicate the guidance provided on State aid issues and the checks in place to ensure compliance at the level of each Managing Authority (in their descriptions of the management and control systems).[80]

These provisions are additional to the more general obligation on Member States regarding respect for competition policy. Moreover, although the Managing Authorities have a particular role in the context of the Structural Funds, ultimate responsibility rests with the Member State, which is the addressee of any formal communication from the Commission, including the initiation of investigative proceedings and their outcome. Failure to comply with the State aid rules – or at least being caught failing to so – may be a source of acute political embarrassment, but there are also consequences for the beneficiary of illegal and incompatible aid since such aid may have to be repaid, with interest.

This architecture means that there is a range of actors with a vested interest in State aid compliance – the European Commission (DG Comp, in particular, but also DG Regio and, in some cases DG Tren), national governments (as formal addressees of decisions), Managing Authorities (with formal responsibility under the Structural Funds Regulation) and

[79] Article 9, Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No. 1260/1999, OJEU No L 210/25 of 31 July 2006.
[80] Article 21 and related Annex XII of Commission Regulation (EC) No 1828/2006 of 8 December, OJEU No L 371/1 of 27 December 2006.

beneficiaries (who may have to reimburse aid). Beyond this, there is a large number of intermediaries involved in actually or potentially providing aid co-financed by the Structural Funds, whose policy is shaped by the State aid rules and whose policy objectives may be frustrated by them. Last, but by no means least, in many jurisdictions, there are specialised State aid units, fulfilling an important guidance, advisory and training role, although rarely a statutory function.

Against this background, this section begins by setting out the key features of the EU framework for ensuring compliance with the State aid rules (see 4.1), before going to review the domestic arrangements for compliance in the IQ-Net partner jurisdictions (see 4.2).

4.1 The EU Framework

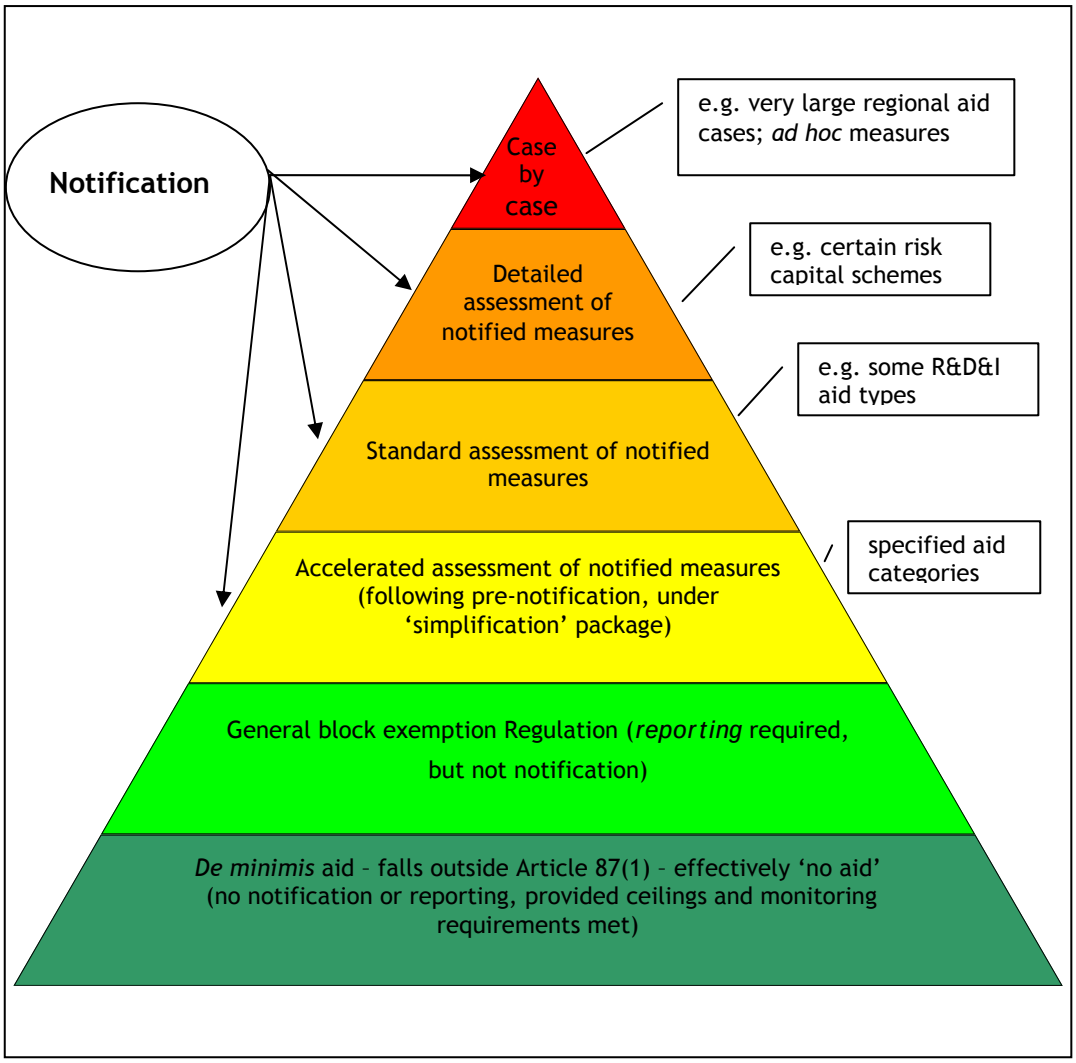
In principle (under the Treaty), any plans to offer aid must be notified to the Commission in advance and approved prior to implementation by the awarding authority. In other words, both the decision about *whether a measure involves State aid* and, if so, *whether it is compatible with the Treaty* formally rest with the Commission. Of course, the decision about whether a measure requires notification at all lies essentially with the domestic authorities, requiring, in principle, an appraisal of State aid issues prior to implementation.[81] As Section 2 above has shown, however, the definition of a State aid remains blurred at the edges, in many instances presenting domestic authorities with the conundrum that in order to be certain about whether notification is necessary, it is necessary to notify.

In practice, it would clearly be unworkable for the Commission to scrutinise every potential instance of State aid before clearing it as 'no aid', authorising or prohibiting it. Instead, historically, the vast majority of awards have been made under *schemes* which the Commission has approved; this generally obviates the need for scrutiny of individual awards to firms.[82]

More recently, State aid policy has undergone a procedural revolution. The overarching thrust of this has been for the Commission to focus its resources on those areas deemed to pose the greatest threat to competition. As a result, a hierarchy of scrutiny has emerged, with *de minimis* aid falling outside Article 87(1) and aid compliant with the GBER no longer requiring notification. Among measures that *do* require notification, there is also a hierarchy, with the new simplification package providing for accelerated procedures and several of the guidelines (which provide the basis for Commission decision-making for aid that fall outside the GBER) distinguishing between standard and in-depth assessment for aid schemes. At the 'top' of the scrutiny hierarchy are individual cases which, for a variety of reasons, merit case-by-case assessment, even if the aid proposed is offered under an authorised scheme. This hierarchy is summarised in Figure 5.

[81] The Commission may, of course, uncover unnotified aid (for example through press reports) or be alerted to unnotified aid by competitors.
[82] Although, as will be seen, the regional aid and R&D&I guidelines provide for significant individual awards to be examined and approved on a case-by-case basis.

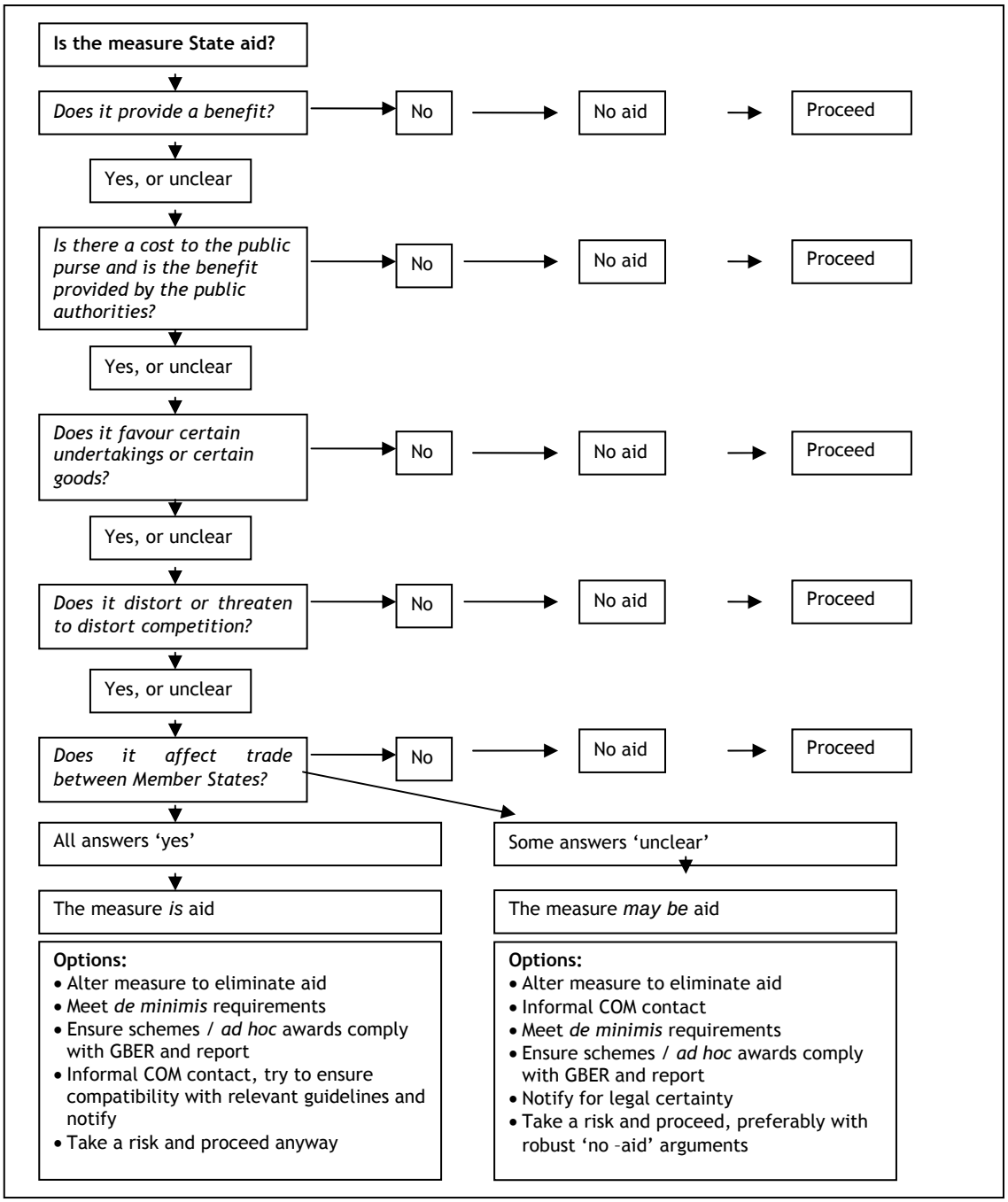
Figure 5: A hierarchy of scrutiny – a risk-based approach to State aid assessment



Source: EPRC research.

In broad terms, from a compliance perspective, three categories of measure can be distinguished:(i) *de minimis* support; (ii) measures which fit within the GBER; and (iii) measures which require notification. This classification gives rise to important issues to be addressed at the domestic level, since each of the three groups carries different risks and responsibilities. Indeed, the lower the level of scrutiny by the Commission, the higher the administrative burden at the national and subnational levels in terms of ensuring compliance. On the other hand, the closer the scrutiny required by the Commission, the longer the delays involved in implementation. The decision-making process required of domestic authorities is summarised in Figure 6.

Figure 6: Determining the presence of State aid and next steps



Source: EPRC research.

There are three possible outcomes from the analysis of a given measure in the context of State aid compliance. The first is a clear finding that no aid is involved (i.e. that at least one of the defining criteria is not met), in which case the measure can proceed without further ado. A second outcome is that the measure involves State aid; the third is that it *may* involve State aid. In practice, the options for domestic authorities are relatively similar in both these situations.

A first option in both cases is to eliminate the possibility of State aid from the measure. In some instances, this might be achieved relatively easily. For example, the precise terms of a risk capital scheme could be adjusted to take it outside the scope of Article 87(1) by, for

example, ensuring that the activities of the State were conducted according to the private investor principle. In other cases it will clearly be more difficult.

Where the presence of aid is unclear, domestic authorities may seek to clarify the position through informal contact with the Commission. A key difficulty here is that such contact does not produce a binding decision, but it does alert the Commission to the plans of the authority concerned.

In the case of both clear and possible aid, a further option may be to provide support under the *de minimis* Regulation. This may be an attractive option where the measure does not readily fit within the GBER and the amount of aid is sufficiently modest. On the other hand, this paper has drawn attention to the onerous monitoring requirements of the Regulation. Moreover, and especially in cases where it is unclear whether aid is present at all, there may be strong arguments against exhausting the *de minimis* ceiling.

An alternative approach would be to ensure that the measure fits within the GBER and report it. While this is likely to be a preferred option, where possible, if aid *is* involved, it is less attractive if the presence of aid is unclear, since intervention may be compromised by being shoehorned into constraints that are not in fact required.

Where none of these options is suitable, the only viable route may be to notify. The advantage of formal notification of proposed measures to the Commission is that it produces a binding decision as to their compatibility with the Treaty. However, the associated delays and uncertainty make this an option of last resort for many domestic authorities.

Last, policymakers may simply take a risk and opt to proceed without notification. This is arguably rather more risky where the presence of aid is self-evident, but historically has been relatively common in the context of rescue and restructuring aid where swift action is often paramount and awaiting a Commission decision would undermine the utility of government action. However, in less clear-cut instances, there is a case for developing and documenting robust arguments as to why a given measure does not involve aid. This informed, risk-based approach appears to be passively encouraged by the Commission (since it tends to eliminate cases at the margins in which the Commission is not anyway greatly interested), but it involves a gamble on the part of domestic authorities that the decision will not be challenged and, if it is, that the Commission will share the same view of the measure.

In summary, the main issues for domestic authorities to address are: whether aid can be rendered *de minimis*; whether to adapt a measure as appropriate and report it under the GBER; and whether to notify. *De minimis* aid has already been discussed in some detail earlier (see 2.2). The remainder of the discussion on the EU framework for compliance deals with the GBER (see 4.1.1) and notification (see 4.1.2). It also includes a brief overview of the Commission's 'simplification package' introduced at the end of April 2009 (see 4.1.3).

4.1.1 General Block Exemption Regulation

As part of the rationalisation and simplification of the State aid rules, the Commission adopted a General Block Exemption Regulation (GBER) in July 2008;[83] the GBER entered into force on 29 August 2008. This represented the latest stage of a process begun under the 1998 Enabling Regulation[84] which envisaged the possibility of block exemptions in a number of policy areas, namely aid for SMEs, R&D, training, environmental protection and regional aid. In practice, block exemption regulations were only adopted for SME and training aid (in 2001) employment aid (in 2002) and regional aid (in 2006).

The main purpose of the block exemption approach is to obviate the need for prior notification and approval of aid schemes in areas where the Commission has defined the circumstances in which it will find aid to be compatible with the common market. In other words, provided that a given measure meets the conditions set out in the Regulation, there is a *presumption* that the measure is compatible with the Treaty.

The principal rationale for this approach is to reduce the administrative burden on the Commission which, in the past, had committed considerable resources to 'rubber stamping' aid schemes that national administrators had already taken care to ensure were in line with the Commission's published guidelines. There is a considerable incentive for administrators to design measures that comply with the GBER, since measures that do not meet the precise criteria have to be notified; a potentially lengthy process with an uncertain outcome. Importantly, however, the GBER applies only to transparent aid with incentive effect.

In the context of the Regulation, *transparency* means regional investment aid schemes under which it is possible to calculate *ex ante* the gross grant equivalent (GGE) as a percentage of eligible expenditure. Such schemes include grants, interest rate subsidies and capped fiscal measures. Schemes which comprise a guarantee element may be considered transparent if the Commission has accepted the methodology used to calculate the intensity of the guarantee. Several countries (including France and Germany) have notified methodologies for calculating the grant-equivalent of measures.[85] These methodologies have been endorsed by the Commission, which effectively renders aid calculated according to these methods transparent.[86] This enables the Member State concerned to report schemes under the GBER that use the methodology to calculate aid values and increases the scope of the GBER to include measures – notably guarantee schemes - that would otherwise lack the transparency for exemption.

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[83] RAPID Press Release (2008) *State aid: Commission adopts Regulation automatically approving aid for jobs and growth*, IP/1110/08 of 7 July; Commission Regulation (EC) No 800/2008 of 6 august 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty (General block exemption Regulation), OJEU No L 214/3 of 9 August 2008: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:214:0003:0047:EN:PDF

[84] Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 (now 87 and 88 respectively) of the Treaty establishing the European Community to certain categories of horizontal State aid, OJEU No L 142/1 of 14 May 1998.

[85] Commission Decision N 677a/2007 – *France: Method to calculate the aid element in public loans,* 16 July 2008; and Commission Decision N 197/2007 – *Germany: Method to calculate the aid element in guarantees,* 25 September 2007.

[86] GBER, Article 5(1).

Repayable advances are transparent if the total advance does not exceed the aid ceiling expressed as a percentage of eligible expenditure. The following are not considered transparent:[87] aid comprised in capital injections (without prejudice to the specific provisions on risk capital); and aid comprised in risk capital measures (except for risk capital aid schemes for SMEs that comply with the BER).

Regarding *incentive effect*, the GBER only exempts schemes from notification if, prior to work on the project starting, the beneficiary has submitted an application for aid. In the case of SMEs, fulfilment of this condition is sufficient to show incentive effect.[88] In the case of large firms, Member States must in addition, and prior to granting aid, verify that the documentation provided by the beneficiary establishes the incentive effect of aid on the basis of one or more of the following criteria:

- a material increase in the size of the project/activity due to the aid;
- a material increase in the scope of the project/activity due to the aid;
- a material increase in the total amount spent by the beneficiary on the project/activity due to the aid;
- a material increase in the speed of completion of the project/activity due to the aid; and/or
- that the project would not have been carried out as such in the assisted region concerned in the absence of aid.[89]

These requirements do not apply to fiscal measures granted automatically without any discretion on the part of the awarding authorities and where the measure has been adopted prior to project start.[90]

Ad hoc aid which is used to supplement aid granted on the basis of transparent regional aid schemes, and which does not exceed 50 percent of the total aid, is also exempt from notification provided that the *ad hoc* aid fulfils all the criteria of the Regulation.[91] This provision would enable, for example, a local authority to complement national level incentives (subject to the prevailing regional aid ceiling); however, it does not allow for the use of *ad hoc* aid independently, which must be notified and assessed on the basis of the Regional aid guidelines.

The GBER sets out the conditions, eligible expenditure and aid intensities for aid in the following policy areas:

- Regional investment and employment aid

[87] GBER, Article 5(2).
[88] GBER, Article 8(2).
[89] GBER, Article 8(3).
[90] GBER, Article 8(4).
[91] GBER, Article 2(5).

- SME investment and employment aid
- Aid for female entrepreneurship
- Aid for environmental protection
- Aid for consultancy for SMEs and SME participation in trade fairs
- Aid in the form of risk capital
- Aid for research & development and innovation
- Training aid
- Aid for disadvantaged and disabled workers

The GBER requires reference to be made to the GBER in the granting legislation and also specifies criteria with respect to maintaining records which must be kept for 10 years. It also provides for the Commission to monitor implementation. There must be direct access to the implementing legislation from a web link in the reporting document in order to ensure that third parties have the opportunity to assess the compatibility of the measure with the GBER (as well as the Commission).

In those IQ-Net partner programmes which do make use of the GBER (and some do not, for example, País Vasco and Vlaanderen), there is positive response to the flexibility and 'room for manoeuvre' offered. This is considered to be very valuable, alongside the introduction of a certain amount of simplification and the potential for accelerated procedures. However, the feedback is not all positive – some viewed the GBER as simply a compilation of existing rules providing no real benefit and still requiring considerable interpretation. The GBER's 'newness' means that it is still regarded with a certain amount of scepticism. On the other hand, several IQ-Net partners suspected that they may not be optimising their use of GBER, and were interested in exploring the potential for greater use.

In Denmark, the GBER (known as the 'super group exemption') is being used, and it was originally thought that some 'standard models' of project would emerge which could then be used in similar projects in the future. In practice, this has proved to be difficult due to the variation and complexity of the projects submitted which often straddle several categories in the 'super group exemption'. A major task has been to make regional project administrators aware of the need to distinguish between activities within a particular project, and, by implication, make applicants describe the proposed activities in sufficient detail so the appropriate rules on eligible expenditure and aid intensities can be applied.

In Italy, a so-called 'omnibus' scheme is in operation instead of using the GBER, over which it is considered to have some advantages. The omnibus scheme was notified to and approved by the Commission, rather than being reported on the basis of the GBER. Importantly, the omnibus scheme has a wider scope – it includes, for example, organisational innovation and process innovation for certain services and aid to the 'innovation poles', which are not included in the GBER. Moreover, the omnibus scheme

combines a high degree of flexibility with legal certainty; even though the GBER was passed after its adoption, the regional authorities perceive a national notified aid scheme to offer greater security than the use of the GBER.

Concerns at the lack of security in using the GBER at the subnational level are not, however, universal. In France, national framework legislation has been introduced using the GBER as a template to enable any tier of national or subnational authority with the relevant competence to offer aid, provided that it is compliant with the GBER.[92] This will be complemented by software which is being developed to make use of the calculation methodologies approved by the Commission so that subnational authorities can make use of a wider range of policy instruments under the GBER.

4.1.2 Notification

As already mentioned, the scope of the GBER is wide and administrators will have a vested interest in trying to fit schemes within it terms. However, there may be circumstances in which aid requires notification. These include:

- schemes which do not meet the precise criteria of the GBER (e.g. with respect to transparency) or which are explicitly excluded from the scope of the GBER (e.g. regional operating aid);
- individual awards where the amount of aid / aided investment exceeds the limit in the GBER and is subject to individual scrutiny (e.g. large investment projects as defined in the regional aid guidelines);
- *ad hoc* aid except that complementing aid allowed under the GBER – i.e. aid not offered under an explicit scheme;
- individual cases where the status of a measure as aid is unclear and the domestic authority seeks legal certainty that the measure is not aid (or a decision that it is compatible).

It is also worth noting that the GBER is only really of value to those Managing Authorities for which aid schemes are a major part of the programme, in which case implementation may be straightforward. In many regions this is not so. In Vlaanderen, for example, the Structural Funds are not used to finance schemes *per se*¸ potentially giving rise to a more complex range of issues.

Notified aids are assessed against the relevant guidelines – eg regional aid, environmental aid etc. In the absence of a relevant guideline – for instance in the case of culture or heritage projects - the aid would be assessed directly against Article 87(3). The approval process can be particularly lengthy where there is no obvious precedent for the measure concerned and the policy objectives which it seeks to address are not explicitly provided

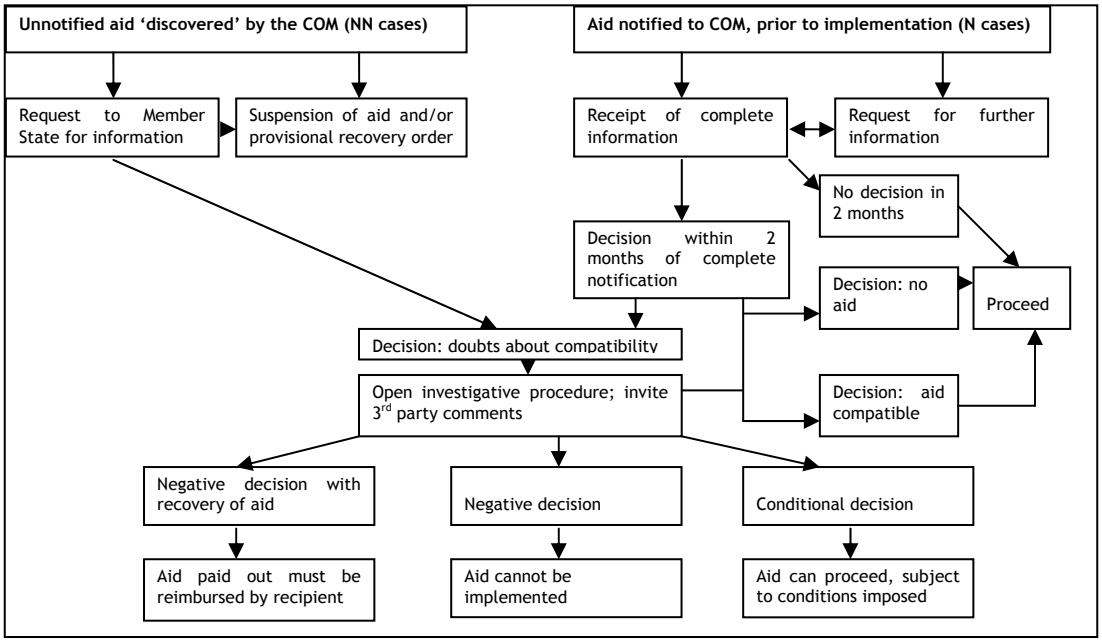
[92]For details see: http://www.diact.gouv.fr/fr_1/amenagement_du_territoire_44/aides_aux_entreprises_626/reglementation_europeenne_718/n_ont_1474.html

for in any existing guidelines. An example of this is the Scottish Credit Union case,[93] which took almost two years to approve even though the principles of the scheme would appear to be entirely with the Community objectives of economic and social cohesion (indeed it was to be co-financed under the Structural Funds) and the maximum annual spend envisaged was relatively modest at some £5 million (c.€ 6 million).

Within some of the State aid guidelines, there is provision for a standard and a more detailed assessment of the measures involved (for example, in the guidelines for R&D&I and risk capital). Domestic policymakers faced with the prospect of notifying a measure have a vested interest in ensuring that, as far as practicable, the notified measure follows the contours of the guidelines and, where relevant, of schemes already approved under those guidelines. In short, where possible, the aim should be to notify a compatible regime; failure to do so is likely to result in a lengthy decision-making process.

Notification to the Commission is often preceded by informal contact with a view to ascertaining the main issues likely to arise before the formal process begins; informal contact *may* help to shorten the decision-making process. Some domestic authorities explicitly use this informal phase to hone a compatible aid notification; moreover, as will be seen, this process is effectively being formalised under the simplification package described below.

Figure 7: Summary of Commission Decision-Making for Notified and Unnotified Aid



Note: This diagram contains the main elements only.
Source: EPRC research.

The main steps involved following any informal contact with the Commission are summarised in Figure 7. As noted, formal notification has the advantage of producing a

[93] Commission Decision N 244/2003 – *United Kingdom: Credit Union Provision of Access to Basic Financial Services – Scotland,* 6 April 2005.

clear decision about: (i) whether the measure constitutes State aid within the meaning of Article 87(1); and (ii) if so, whether it can qualify for one of the exemptions from the general ban on State aid. The main disadvantage of this option is the length of time taken to reach a decision. The deadline for an initial decision is two months from the receipt of a completed notification. However, the Commission can easily 'restart the clock' by requesting further information just before the deadline expires. Several IQ-Net partners criticised this practice, claiming that on occasion the matters raised were pure formalities and that it was sometimes done to cover staff turnover. Importantly, if the Commission has doubts as to the compatibility of the measure, it must open the investigative procedure, a lengthy process involving comments from third parties which is unlikely to yield a decision in much under two years.

Faced with this prospect, and political pressures for speedy implementation, domestic authorities may be inclined to proceed anyway, in spite of the possibility that the measure may involve State aid. This too carries risks. Aside from political embarrassment and the ultimate frustration of policy objectives, it is ultimately the recipient of the aid which pays the penalty for unnotified aid which results in a negative decision. In such circumstances, the beneficiary may have to reimburse aid already received, with interest, even if this would place the undertaking in financial difficulties.

Domestic authorities may be wary of notification in borderline cases for other reasons. The liberalisation agenda of recent years has contributed to a broadening of the State aid concept as a wider range of activities have become subject to competition and the role of the public sector in the economy has come under increasing scrutiny. Domestic authorities may be reluctant to contribute to new precedents, not least since the resulting 'Pandora's box' effect may have direct implications for established practices across a range of areas. As one State aid specialist put it during the IQ-Net fieldwork research: "we have enough to do without turning over any stones". On the other hand, it is worth noting that an increasingly important source of policy precedents derives from complaints brought by third parties, so that a conspiracy of inaction may ultimately be little defence against a further widening of the definition.

The approaches taken to notification among the IQ-Net partner programmes are split evenly between: those who had not yet made any notifications at all to the Commission at the time of the fieldwork (and were not intending to make use of this channel in future); and those who had made numerous notifications or were indeed notifying most of the aid granted under their programmes (with only a few regions just having notified one or two schemes). This split reflects very different attitudes to the notification process: for some IQ-Net partners, it is the 'last resort' after *de minimis*, GBER and existing schemes have been explored; for others, it is seen as the safest way for aid schemes in doubt. Programmes which have gone down the route of making many formal notifications of aid schemes to the Commission, however, reported a significant resultant administrative burden.

Notification is usually made by a central, national or federal body where this exists; their role may simply be to transmit the information drafted by the MA to the Commission. In some cases, the national State aid body may make a significant input into the design of a

measure with a view to trying to ensure compatibility prior to notification and avoid a lengthy decision-making process.

4.1.3 Simplification package

It is worth noting here that in April 2009 the Commission adopted a so-called "Simplification Package" aimed at improving the transparency, effectiveness and predictability of State aid procedures. This comprises two elements: a Notice on simplified procedures for treatment of certain types of aid; and a Best Practices Code on the conduct of State aid control proceedings.[94]

The Notice on simplified procedures identifies the circumstances in which the Commission will take a 'short-form' decision of 'no aid' or 'no objections', the aim being to reach such a decision within 20 working days of notification. Notification must, however, be preceded by 'pre-notification' contact, the aim of which is to ensure that any points of information are dealt with, enabling the Commission to reach a *prima facie* decision that it would be in a position to approve the measure once formally notified, without further information requests. Three categories of aid are, in principle, eligible for the simplified procedure.

Category 1 measures are those that fall within the 'standard assessment' section of existing frameworks or guidelines, but which are not covered by the GBER. These include:

- risk capital measures, other than private equity investment funding, meeting all the requirements of Section 4 of the Risk Capital Guidelines;[95]
- some environmental investment aid meeting the conditions of Section 3 of the Environmental Aid Guidelines;[96]
- specified types of aid under the R&D Guidelines,[97] namely: aid for young innovative enterprises; aid for innovation clusters; and aid for process and organisational innovation in services;
- *ad hoc* regional aid which is below the individual notification threshold set out in the Regional Aid Guidelines;[98]
- rescue and restructuring aid which meets specified substantive criteria under the guidelines[99]
- export credits that meet the relevant conditions of the Shipbuilding Framework;[100]

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[94] These were adopted on 29 April 2009 and are not yet published in the OJ, but are available at: <http://ec.europa.eu/competition/state_aid/legislation/rules.html>

[95] *Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises,* OJEU No. C194/2 of 18 August 2006.

[96] *Community guidelines on State aid for environmental protection,* OJEU No. C82/1 of 1 April 2008.

[97] *Community framework for State aid for research and development and innovation,* C323/1 of 30 December 2006.

[98] *Guidelines on national regional aid for 2007-13*, OJEU No. C54/13 of 4 March 2006.

[99] *Community guidelines on State aid for rescue and restructuring firms in difficulty*, OJEU No. C 244/2 of 1 October 2004.

- audiovisual support schemes meeting certain criteria under the Cinema Communication.[101]

Category 2 measures are those corresponding to well-established Commission decision-making practice. These are defined as those whose features correspond to those of aid measures approved in at least three earlier Commission decisions, known as 'precedent decisions'[102]. These include:

- aid for heritage conservation linked to historic, ancients sites or national monuments under Article 87(3)(d) (see 3.1.2 above);
- aid schemes for theatre, dance and music activities;
- aid schemes for the promotion of minority languages;
- aid measures in favour of the publishing industry;
- aid measures in favour of broadband connectivity in rural areas;
- guarantee schemes for shipbuilding finance;
- aid measures fulfilling all the conditions of the GBER but excluded from it because they lack transparency (but the gross grant-equivalent methodology has been approved in precedent decisions) or because they involve *ad hoc* aid;
- measures supporting the development of local infrastructure that do not constitute State aid because the measure in question will not affect intra-Community trade.

In each of these areas, the Notice cites three precedent decisions as a source of guidance. However, it is notable that in no case are the decisions cited available in more than two languages - typically the language of the country concerned by the decision and either English or French.

The last indent of Category 2 arguably sits rather uneasily; if the pre-notification contact had concluded that a measure did not involve aid, it is not evident why it should be notified at all. Moreover, it is not clear that the four precedent decisions mentioned will be of great practical use in sharpening the definition of State aid, not least since two of the decisions are available only in German, another only in Swedish and the fourth in English and Dutch. On substance, the commentary in the Notice notes that in order for a measure to be considered as not having any effect on intra-Community trade, the precedent decisions require a demonstration by the Member State of the following: (i) that the aid does not lead to investments being attracted to the regions concerned; (ii) that the goods/services

[100] *Framework on State aid to shipbuilding*, OJEU No. C 317/11 of 30 December 2003, as amended and extended.
[101] *Commission Communication on certain legal aspects relating to cinematographic and other audiovisual works*, COM (2001) 534 final, Brussels 26 September 2001.
[102] Only decisions carried out in the 10 years preceding pre-notification can be considered precedent decisions.

produced are purely local and/or have a geographically "limited" attraction zone; (iii) that there is no more than a "marginal" effect on consumers from neighbouring Member States; and (iv) that the market share of the beneficiary is "minimal" on any relevant definition and that the beneficiary does not belong to a wider group of undertakings. The lack of quantification associated with impacts being 'limited', 'marginal' or 'minimal' makes it unclear just how much this provision will assist domestic policymakers in practice.

Looking beyond the simplification package *per se*, as mentioned earlier, informal contact with DG Comp is an important element in ensuring compatibility of a pending formal notification. Among the IQ-Net partners, IPI/MISE (Italy) reported that they found these contacts helpful, and plan to increase the use of 'pre-notification' contact further in future. Indeed, this was one of the key commitments made at a meeting in June 2006 between DG Comp and the Italian authorities (European Policies Department, Ministry of Foreign Affairs, Ministry of Economic Development, Ministry of Economy and Finances, and representatives from the regional authorities). Issues discussed included: the strong added value of pre-notification meetings, particularly for schemes where the Commission has not yet defined a clear-cut set of procedures; the value of strengthening the link between pre-notification and notification through the allocation of a single case handler for both procedures, where possible; and the usefulness of enhancing informal contacts, e.g. bilateral meetings or via national contact points within DG Comp; and the potential to exploit more fully multi-lateral meetings by preparing agendas with more time for the presentation and discussion of national cases. The Italian authorities were interested in the potential for extending the State aid notification form to include more non-compulsory fields, to allow the submission of more information on specific cases. This would reduce the need to send annexed documentation and limit clarification requests by DG Comp, which are one of the main reasons reported for the excessive length of appraisal procedures.

The response of many other IQ-Net partners to informal contact with the Commission was, in many cases, considerably less positive. A number had used DG Regio as starting point for advice, but IQ-Net partner assessments of DG Regio's capacity in this field were generally not positive.[103] Some had found the advice to be unreliable or in conflict with that subsequently received from DG Comp, and several were uncomplimentary about the general quality of coordination between the two DGs. Regarding informal contact with DG Comp, several criticised the 'Delphic' nature of the responses - the lack of clear guidance and non-binding nature of the opinions received from DG Comp staff, meaning that they had to bear the risk of implementing measures in borderline cases. The reluctance to indicate clearly that a measure did not involve aid was also a source of frustration, as was the tendency to push domestic authorities toward *de minimis* or the GBER as a way of avoiding having to assess whether a measure involved State aid at all.

The Simplification package is clearly intended to address some of these concerns; it remains to be seen whether it will do so in practice.

[103] Clearly DG Regio has no role under the simplification package, but is often a general point of contact on State aid issues for Managing Authorities.

4.2 Managing compliance: domestic arrangements

4.2.1 Structures for managing compliance

Overall responsibility for ensuring compliance of Structural Funds programmes and projects with the State aid rules is generally taken by the programmes' Managing Authorities (MAs), assisted by Intermediate Bodies where these have delegated MA tasks. The specific arrangements for ensuring compliance with the State aid rules depend on the national and regional administrative frameworks/Structural Funds management and implementation systems which are in operation (see Annex for fiches relating to the main responsible bodies in the IQ-Net partner programmes).

Different emphases are placed on the responsibility of the *beneficiary* to ensure compliance of their application with State aid rules and the responsibility of the MA to check this compliance; and within IQ-Net partner programmes, the focus on who is seen to be most at risk from errors varies – ranging from the beneficiary, who would be financially penalised, to the MA, who would have to recoup the funds and satisfy auditors, or the Member State.

Feedback from fieldwork suggests that awareness of the relevance of State aid rules to the Structural Funds programmes is higher during this programme period than in previous periods. Compliance with State aid rules is further up the agenda for a number of reasons, and is also a greater cause for concern. Greater awareness of the rules coupled with their complexity means that many programmes are operated with considerable uncertainty regarding State aid compliance, largely because there is insufficient expertise and capacity to engage with the issues at the level required by the complexity of the legislation. Programmes are responding to this in a number of ways: by turning to specialist bodies/units with specific State aid expertise (where these exist), by setting up new bodies or processes to develop specialised expertise (e.g. meetings and networks); and by building capacity and expertise through training.

(i) The role of national competition authorities

A general point to note about State aid compliance is that the Commission has no authority over the form of national mechanisms for ensuring compliance; this contrasts with the administration of the Structural Funds where Member States must designate bodies with responsibility for fulfilling a range of functions, such a management, audit, payment and so on.

A consequence of this is that the arrangements within Member States are quite diverse. In some countries there is considerable expertise within different tiers of government. For example, in the United Kingdom, the State aid unit at BERR (the Department for Business, Enterprise and Regulatory Reform) has an overarching role and participates in the Commission multilateral meetings on State aid, but is complemented by specialised bodies in Scotland and Wales (which have also on occasion directly represented United Kingdom interests at multilateral meetings). Elsewhere, responsibility is more diffuse, relying on expertise within particular administrations, and sometimes a single individual.

In the new Member States, the position tends to be more formal. This is essentially a legacy of the pre-accession period during which applicant countries were required to adopt and implement the *acquis communautaire* in the field of State aids, essentially by transposing the body of State aid rules and guidelines into national legislation. Each country was also required to designate a national competition authority, the role of which mirrored that of the European Commission in scrutinising and policing State aid. On accession, the State aid rules became directly applicable in the new Member States and the task of ensuring compliance was transferred from the national competition authorities to the European Commission. Clearly, these national authorities built up considerable expertise in the pre-accession period and although their formal role has changed, they continue to perform important functions with respect to State aid compliance both in internal affairs and in relations with the European Commission.

- In the Czech Republic, the Office for the Protection of Competition is the central authority for coordination, advice, consulting and monitoring on State aid and its tasks, and the rights and duties of aid providers, are enshrined in legislation.[104]

- The position in Poland is broadly similar, with the Office for Competition and Consumer Protection retaining a formal internal and external role in compliance under legislation amended at the time of accession;[105] the performance of this role is particularly complex since some 3,500 authorities are competent to grant aid in Poland.

- In Slovenia, a greater degree of control has been retained by the State Aid Monitoring Department (SAMD), a special department within the Ministry of Finance, which inherited many of its functions from the pre-accession Commission for State Aid Control.[106]

Where they exist, national State aid authorities typically play a coordinating role, and are involved in advice provision and preparation of guidelines, handling formal communications with the Commission, contributing to the legislative process, and monitoring and reporting activities. The national competition authority may concentrate on contributing to EU level discussions and negotiations rather than being involved in day-to-day compliance issues (e.g. as in Portugal). Alternatively, they may play a more active internal role, as in Denmark, where DECA (the Danish Enterprise and Construction Authority) and the regional administrators can obtain advice from an inter-departmental administrative committee of State aid experts associated with the Danish Competition Authority.

Where their role varies markedly is in the provision of opinions. Most do not have a statutory role, and can provide only expert opinions and recommendations to enquirers. The exception among the IQ-Net partner programmes is in Slovenia, where the State Aid Monitoring Department (SAMD) at the Ministry of Finance will provide a binding opinion on

[104] Bednár, J. (2005) 'The State aid control procedure in the Czech Republic', *European State Aid Law Quarterly*, 2. pp 265-7.
[105] Pelka, P. (2004) 'State aid control in Poland,' *European State Aid Law Quarterly*, 3, pp 380-4.
[106] Jagodič-Lekočevič, L. (2004) 'State aid control in Slovenia,' *European State Aid Law Quarterly*, 3, pp 375-9.

State aid under the block exemption and *de minimis* rules, and there is a formal process in case of disagreement between the SAMD and awarding bodies.

It is worth noting that in Italy, the establishment of a single, central national body to act as a contact point for DG Comp was suggested by the Commission to the Italian authorities, apparently on the basis of evidence that, where in place, such structures have resulted in a higher quality of notifications and a significant reduction of the timescale for approval.

(ii) State aid expertise within programmes

There is wide variation in the level of resources and expertise available to the MAs (and within them) to help them make decisions on State aid issues, and to check compliance. Many IQ-Net partners have specialist State aid units working alongside the MAs and Intermediary Bodies (see Annex). In Greece, for example, when examining the compliance of specific aid schemes, the MAs can ask for the opinion of the State Aid Unit (MOKE) within the Centre of International and European Economic Law (CIEEL). The Unit was set up in 2002 to provide specialised consulting services in the State aid sector. CIEEL operates as a private legal entity (and also designated as a European Documentation Centre) with operational and financial autonomy, under the supervision of the Minister of Economy and Finance. In Sachsen-Anhalt, funding from the Structural Funds is allocated only either once a notification process has been undertaken or once the central *Land* State aid unit has been consulted as to a projects' conformity with State aid rules.

Other IQ-Net partners rely on State aid specialists or legal experts within the MA itself, either within or outside the MA function. In Finland, for example, there is a State Aid unit within the MA (the Ministry of Employment and the Economy). In Germany, each *Land* Ministry has its own State aid expert unit which provides advice to the Intermediate and implementing bodies, if they have any queries relating to State aid rules. In Nordrhein-Westfalen, expertise is also available from the NRW Bank, which undertakes various technical checks on behalf of the MA, checks project applications in order to assess their State aid status from the programme's perspective (as well as to assess various other Structural Funds related issues), and gives its opinion to the Intermediate Body.

State aid expertise may lie within the organisation that carries out the MA role, but outside the MA function. For example, in Vlaanderen, there is no official State aid unit, but the Europe Economy Directorate mainly makes use of State aid expertise within the Agency's Economic Support Directorate. Similarly, while the Ministry of Enterprise, Energy and Communications in Sweden has a State aid unit, expertise at the MA, Tillväxtverket (formerly known as Nutek), is mostly outside Tillväxtverket's MA function. Nevertheless, frequent cooperation takes place between the MA and Tillväxtverket's State aid expert.

At Tillväxtverket's programme support office (which provides support for the eight regional programme offices), State aid knowledge is mostly dependent on legal advisors. Within the MA's regional offices, expertise is based on staff experience gained over the years. This is common to many IQ-Net partner programmes, where the role of State aid expert may have arisen informally, through being involved in several problematic project applications, for

example, and where State aid responsibilities are shared with other tasks (e.g. in Poland and Scotland).

Some programmes are increasingly involving legal services to help with compliance issues, and are seeing potential beneficiaries do likewise. For example, in Śląskie, the regional government is currently looking to appoint experts (ideally from a legal background).

There are problems associated with over-dependence on support from State aid units which are outside the Structural Funds functions of a MA. These units may be very small and lack resources, they may be approached late in the application process, or they may be relied upon in place of the MA engaging fully with the issues. There is evidence that State aid units would like to see that appropriate guidance is available to projects early on in their development process, allowing them to be framed appropriately from the start, reflecting their concern that they may hold up projects which come to their attention too late.

4.2.2 Training and capacity building

Managing Authorities and Intermediate Bodies with State aid compliance responsibilities in the IQ-Net partner regions use a range of methods to increase knowledge and awareness among on State aid rules. This has included capacity-building, tailored workshops and seminars, and lengthier dedicated training sessions. This is in addition to the publication of guidelines, checklists, *vademecum* and manuals aimed at the MAs, IBs and applicants.

In some cases, the intention is to increase the capacity of MA or Intermediate Body staff dealing with State aid issues, thus reducing dependence on the existing specialised State aid units (which are often very small). For example, in Austria, project applicants have been frequently referring directly to the BMWA (*Bundesministerium für Wirtschaft und Arbeit*/Federal Ministry of Economics and Labour) on State aid related issues, increasing the workload at the federal level. As a consequence, the BMWA started to run seminars to increase knowledge on State aid issues; for example, a seminar was run in January 2009 for the Austrian *Regionalmanagements*[107]. In Wales, there is similarly an emphasis on capacity building for WEFO's Project Development Officers, who are responsible for examining individual projects and assessing whether there is potential for State aid. They have recourse to the Welsh Assembly Government's State Aid Unit and legal services when they are unsure or where there are issues on which they need expert advice, but the plan is to build up confidence, with the aim that the State Aid Unit would only be brought in at the 'next level', to provide additional back-up and a second opinion on 'grey areas'.

In Lombardia, it was recognised that not all sectoral or cross-sectoral DGs have the same competences in relation to State aids, a problem potentially exacerbated by the change of focus of the programme (and thus a change in the DGs/offices involved) compared to the previous period. The MA considered that this could become a contentious area, and decided to undertake a capacity building programme. This training programme was carried out with

[107] The Austrian *Regionalmanagements* (regional management offices) were set up in the mid-1990s to stimulate an integrated approach to bottom-up regional development. They provide consultancy services on funding possibilities and serve more generally as intermediary bodies between the different levels of government and funding agencies.

the support of IPI and was tailored to the State aid content of the OP, with the aim of ensuring compliance within the 'very architecture of the programme'; all personnel involved in the implementation of the programme participated (see Box 5).

Box 5: Training on State aids under the Lombardia 2007-13 RCE OP

Day one: overview of EU Treaty norms and main derogations; definitions; concepts of aid scheme and individual aid; notification obligations, procedures and exemption regulations; applicable rules for regional, horizontal and sectoral aids.

Day two: definition of SME; *de minimis* aids; temporary measures for the economic and financial crisis.

Day three: General Block Exemption Regulation.

Day four: guarantees; reference interest rate; grant-equivalent calculations; cofinancing of aid schemes in the Lombardia 2007-13 ROP ERDF.

Day five: analysis of specific themes and schemes eg: omnibus schemes notified by Ministry of Economic Development; Article 87(3)(d); infrastructure investments; SGEI; and broadband investments.

In addition to special training initiatives to build up capacity and expertise, programmes provide opportunities for staff to exchange knowledge and experience, and discuss issues through the use of specialised committees, working groups and networks.

In Greece, a Coordination Committee has been set up in an attempt to overcome the coordination problems faced by the CSF Managing Authority (of the Ministry of Economy and Finance) during the 2000-06 period. A Coordination Committee was introduced for 2007-13, to coordinate the planning and implementation of State aid co-financed actions carried out by different bodies and ministries. The members of the Committee represent all bodies involved in State aid actions under EU co-financed programmes.

In Sweden, State aid expertise among Tillväxtverket's regional offices has developed informally, i.e. based on the staff experience built up over time through dealing with cases. However, from March 2009, representatives from each of the eight regional offices are set to meet regularly to discuss State aid issues with the aim of improving competence. In addition, the case handling officers (who process project applications in the regional programme offices) meet twice a year in Stockholm to discuss specific issues of concern, including State aid. These meetings are also attended by a representative of the Ministry of Enterprise, Energy and Communications and by Tillväxtverket's State aid expert. There has been some discussion of developing State aid competence based on a model with specific State aid groups gathering representatives across the different Ministries/regions. However, until now the approach has relied on the existing structure and regular discussions/meetings.

Even when there is no formal training or capacity building taking place, existing processes may allow an informal or experience-based build up of expertise on State aid issues. For example, although there is currently no specific training with respect to State aid issues in Keski-Suomi, State aid rules are discussed amongst the Intermediate Bodies when they get together for project group meetings. In Nordrhein-Westfalen, a *Land* working group has been set up in relation to State aid, made up of the State aid experts from the different Ministries, plus the NRW Bank. The working group aims to develop a common language and definitions, and joint approaches to specific types of issues and cases. In the United

Kingdom, the OffPAT State Aid Technical Group provides a forum for the discussion of State aid issues (although with a wider coverage than Structural Funds programmes).

4.2.3 Procedures to help ensure compliance within programmes

Most IQ-Net partners agree that ensuring the compatibility of Structural Funds co-funded schemes and projects with State aid rules is a problematic area**.** This is despite the fact that only a few IQ-Net partners had so far experienced State aid issues being highlighted as a problem (in terms of processes or specific projects) during audit. Attitudes to how seriously the issue of compliance is taken range along a spectrum. At one extreme is the approach that advocates doing as much as possible to comply, but "if the rules really do not suit, then flout the rules and take the risk". At the other end of the spectrum, some countries (e.g. Slovenia) have carried out stringent internal checks on State aid compliance processes. However, the potential for ambiguity and multiple interpretations of the rules has led to many programmes taking a cautious approach. MAs are attempting to reduce the risk associated with the treatment of State aids in a number of ways:

- *Ensuring compliance as early in the programme process as possible,* i.e. at the level of the programme. Compliance is considered to be established at OP stage in Portugal, where the intention under the National OP for Competitiveness Factors (the key business support programme in Portugal) is that compatibility between national and community rules is established when designing the programme. Thus, compliance with State aid rules is automatically ensured as long as the projects comply with the incentive scheme regulations. Similarly in País Vasco, at the programme formulation stage, when the operations/projects were selected for inclusion in the Diputación Foral de Bizkaia component of the programme, the Structural Funds team screened the submissions to ensure compliance with all EU rules, including on State aid. In Greece, ROP State aid schemes are centrally designed so that they fall within exemptions.

- *Trying to 'lock-in' compliance at the call for proposals/tenders stage*. In Greece, there is a coordination procedure for calls for proposals which are checked before they are issued for potential State aid problems. A draft of the call is forwarded by the responsible IB to the MA of the OP, and in turn to the National Coordination Authority, for it to express its opinion. In the case of State aid actions where the criterion of their compliance with the State aid rules is included in the call for proposals, the MA examines whether the type of aid falls into the application field of the exemption regulations, or whether a formal notification of the aid to the Commission is needed. 'Upstream' compliance (i.e. not devolved to project applicants, but built up-stream in the tenders) is also sought in Italy at tender stage. In the Lombardia programme, the officials within each sectoral DG involved in implementing the various measures check that projects are in line with the calls for tenders and thus comply with State aid legislation. Sachsen-Anhalt has developed a documentary framework that aims to ensure that EU rules are respected for all the 175 budget lines included in the OP, and insists that all bodies that wish to obtain Structural Fund funding must conform to this framework.

- *Use of formal notification* as the safest way for aid schemes in doubt. The Greek public authorities, for example, have preferred to use the formal notification procedure for individual aid schemes in doubt, in order not to take risks. This is seen to have created a significant administrative burden to the public authorities (as well as to the Commission), and led to significant delays in the implementation of State aid actions (creating serious challenges in terms of the application of n+3/n+2). Similarly, in Finland, most schemes are notified.

- *Notification of umbrella schemes*. In Italy, MISE has notified an omnibus R&D scheme of c. €6 million for the period up to 2013. Each Italian region can decide whether or not to use the omnibus scheme, including for non co-financed measures. The Lombardia programme is using the R&D omnibus scheme, which essentially covers all R&D&I measures under the programme and is the main aid scheme in the programme. This operates within the confines of the national Italian omnibus scheme, adapting it as relevant. The Lowlands and Uplands Scotland programme is also considering introduction of umbrella notifications under several programme priorities, and it is also a possibility in Wales (possibly aligned under the Strategic Frameworks).

- *Tighter controls at project application stage*, through greater liaison with applicants (as in Denmark), strengthened application forms (Scotland) and more consistent use of checklists (in many IQ-Net partner regions, including Vlaanderen, País Vasco, Austria and Nordrhein-Westfalen, where a working group has produced checklists that must be used by the Intermediate Bodies in checking that all formal and legal requirements are met in relation to projects. These checklists relate to: project applications; checks on intermediate statements on the use of funds; checks on final statements on the use of funds).

- *Use of legal services*. In North East England, the Regional Development Agency (RDA), ONE North East, has State aid expertise in its legal team, who have overall responsibility for compliance. The legal team is a resource for the delivery side of the RDA, and they issue guidelines, circulate information etc. A person in the legal team sits on the national, BERR-led State aid working group. In the Střední Čechy ROP, when checking project applications with respect to State aid compliance, if there is any ambiguity, the project proposal is checked with the Regional Council's lawyer; in addition, external evaluators/experts might be engaged to obtain another evaluative opinion.

- *More stringent efforts to protect themselves in the event of future audits, for example by ensuring better record-keeping*. This may include keeping records of the decision-making process that took place i.e. how it was decided that a project or scheme was compliant, ensuring that the process followed is at least free of criticism. Again, this has significant resource implications for programmes, where dedicated State aid resources are very limited.

- *Stricter monitoring and follow-up*. In País Vasco, verifications are undertaken to ensure compliance with State aid rules prior to certification of statements of expenditure; this process includes a questionnaire with a checklist covering whether the service or good

has been provided, whether public procurement or State aid rules are being complied with etc. On-site visits are also made by an independent company. In North East England, Mazars, the consultancy firm appointed to help with monitoring, checks the applicants' systems for monitoring. In Sachsen-Anhalt, *de minimis* projects are often selected for on-the-spot project checking visits because they are categorised as being of potentially higher risk.

- Some programmes may make efforts to *restructure projects* where it is thought that aid issues might arise; others *avoid tricky projects altogether*. In Finland, for example, Tekes uses only domestic funding to fund business incubators, which are considered to be potentially problematic. In the Czech Republic, where a very cautious approach is being taken, a relatively steep decrease in the volume of granted State aid can be observed since the accession of the EU in 2004 in comparison to the previous period.[108]

5. ISSUES AND CONCLUSIONS

The aim of this paper has been to explore the issues surrounding the compliance of EU Cohesion policy with the State aid rules. It has focused on three core aspects: (i) the definition of State aids (ii) interpretation of the exceptions to the general prohibition on State aid; and (iii) the mechanisms operated at EU and domestic levels to ensure compliance. The aim of this final section is to draw out some of the key trends and tensions to emerge from this discussion.

(i) State aid principles drafted over half a century ago are often difficult to apply today.

It is not clear precisely what was intended by the authors of the Treaty in drafting the State aid provisions, save that government intervention should not frustrate the establishment of the common market through the use of essentially protectionist subsidies. The basic text setting out State aid discipline lacks precision, but was anyway drawn up in an altogether different economic and social context. The boundary between the public and private sectors has become increasingly blurred in recent times, with the private sector frequently involved in the delivery of services which had previously been the preserve of the State, and public bodies, such as universities, increasingly involved in commercial activities. Areas such as healthcare provision and infrastructure raise many complex issues, as do support for organisations running cultural, leisure or certain social services and projects undertaken using public private partnerships. Many such activities are the mainstay of Structural Fund programmes, but the State aid rules are ill-suited to their assessment and there is a sense in which both the Commission and the Member States conspire to circle carefully around Pandora's Box, all aware that non-notification may not be consistent with a strict

[108] The absolute volume of granted State aid decreased by about 80 percent in 2004 compared to 2003. In 2007, the absolute volume of State aid granted in the Czech Republic reached € 938 million, corresponding to 37 percent of the absolute volume in 2003. Although these figures include also State aids not granted under the Structural Funds, the numbers show a significant change in the approach to State aid issues in the Czech Republic:
http://ec.europa.eu/competition/state_aid/studies_reports/stat_tables.html#2

interpretation of the rules, but wary of the complexities that may be unleashed by close scrutiny.

(ii) In practice, the definition of State aid has become increasingly conflated with issues of compatibility.

The architecture of Article 87 is clear in setting out a prohibition of State aid (paragraph 1) and outlining the exceptions to this ban provision (paragraph 3). However, a precise definition of what constitutes State aid under Article 87(1) remains elusive; this is a source of frustration and insecurity for many domestic policymakers, some of whom perceive the rules to be increasingly ambiguous.

The Commission's capacity to limit the notion of State aid is constrained by the precedents set in the case law of the Court of Justice. Court rulings have tended to widen the definition, by emphasising that all aid distorts competition, although smaller amounts might distort it less, and taking a broad interpretation of the effects of a measure on intra-EU trade. The effect of this is that the concept of State aid has the potential to include a vast array of interventions, many of which, although theoretically meeting the criteria, would not be considered to be of any real significance in terms of their effects on the internal market; the resource implications of this extensive interpretation are huge.

In response, rather than tighten the definition of State aid (Article 87(1)), Commission action has centred on defining the circumstances in which aid is compatible (Article 87(3)). The last decade or so has been a highly active period in Commission policymaking during which it has increased the scope of compatible aid, while simultaneously limiting the need for notification. As a result, instead of focusing on issues of definition in borderline cases, it actively encourages domestic authorities to make use of the *de minimis* facility or the GBER where the status of measures as State aid is unclear.

Matters of principle aside, there are practical consequences of this since measures which may not involve aid at all (but cannot easily be cleared because of the looseness of the definition) may be subject to the modest expenditure limits (and administrative burden) of the *de minimis* regulation or constrained by the straightjacket of rules designed for quite another purpose.

Against this background, there is arguably a need for a more rigorous analysis of competition impacts and a consideration of whether whole categories of measure – for example, some essentially social measures, could readily be excluded from scrutiny.

(iii) There is greater awareness of State aid compliance issues in the current planning period than in the past.

There is considerable evidence that State aid issues are being taken more seriously in the current planning period than previously and that there is greater awareness of, and expertise in, the rules than before. Historically, there has been a tendency among many at the subnational level to associate State aid with direct support for private firms; there is increasing recognition that involvement in economic activity is the central criterion rather than the legal status of the recipient.

This trend is partly a result of the change in the Structural Funds regulations which makes compliance with the State aid rules the responsibility of the Managing Authority (although the formal position under the Treaty remains unchanged). In parallel, there has been a seismic shift in approach to compliance at the European level with scrutiny of individual measures by the Commission increasingly replaced with a 'self certification' approach. For the domestic authorities, the trade-off in this arrangement is that of speedier implementation against devolution of responsibility for ensuring compatibility and monitoring of implementation – with all the administrative burden which these tasks imply. Of necessity, this requires a greater understanding of the regulatory context.

Alongside this, both the Commission and many bodies within the Member States have conducted intensive training and awareness campaigns designed to inform all relevant authorities of the scope and possibilities for intervention provided for under the rules, as well as the risks of non-compliance. Notwithstanding this, there is still a tendency for some policymakers to assume that the State aids rules concern only incentive schemes for firms and that, provided such support complies with the GBER, no wider issues arise.

(iv) Compliance with the State aid rules is a major source of anxiety for many domestic policymakers.

The heightened awareness of the State aid rules among Managing Authorities has also engendered higher levels of anxiety about compliance; where previously the emphasis was on ensuring that obvious cases of State aid – such as incentives to firms – were compliant, now there is a greater recognition that there is potential for State aid to be present in almost any co-financed project.

State aid authorities in many Member States remain concerned at levels of awareness and compliance within their jurisdictions. Almost all those interviewed could point to actual or past examples which would not bear close examination under the State aid rules. In some cases this was due to deeply embedded administrative and other practices; in others, a deliberate flouting of the rules had been driven by political considerations, with the mandate of politicians often too short to await the uncertain outcome of the notification process. Elsewhere, there was not, or had not been sufficient 'buy in' to ensuring compliance at senior levels in the administration.

(v) There are significant asymmetries of risk in the compliance process.

These asymmetries operate at a number of levels. As described in the paper, the notification requirement is tautological in nature: in order to know whether it is necessary to notify, it is necessary to notify. However, in many respects, the incentive to notify is not great – the process is lengthy and the outcome uncertain; moreover, the chances of non-notification being detected and punished are arguably relatively small. In addition, in this eventuality, the penalty (political embarrassment aside) is largely borne by the recipient of illegal aid, which may have to reimburse it. It is worth stressing here that notification is undertaken by the Member State, and not the potential beneficiary, so that an undertaking which feared that the aid it was to receive might not be compliant would be forced to take this risk or withdraw from the transaction.

Although the ultimate risk is borne by the beneficiary in the sense that reimbursement may be required, many domestic policymakers perceived there to be a disproportionate degree of risk in their responsibility for decisions. Some Managing Authorities were critical of the way in which State aid authorities hedged their advice with caveats and stressed that the ultimate decision was not theirs. Similarly, many criticised the Commission services for the often Delphic nature of the guidance given, and always under the cover of a personal and non-binding opinion. Nevertheless, it is clear that the many thousands of emails generated in this process are carefully preserved to provide 'credible deniability' should blame subsequently be apportioned.

(vi) The technical demands of compliance are considerable.

In a number of areas the technical demands of compliance with the State aid rules are perceived to be excessive, especially for subnational authorities, which rarely have the specialised resources required.

In general, considerable resources are required to keep abreast of changes. The current rules alone run to over 500 pages, but the interpretation of those rules in Commission decisions and Court of Justice rulings extends far beyond this. Moreover, while transparency of Commission decision-making has improved beyond measure in the last decade or so (notably with the publication of its decisions in the form of a letter to the Member State), the Commission does not systematically highlight what it perceives to be landmark decisions nor does it update regulations and guidelines to take account of such decisions or judgments of the Courts.

A further issue concerns the language of decision-making. It is evident that DG Comp experiences some difficulties in dealing with the languages of some of the new Member States. Moreover, decisions addressed to countries are not always in the language of the country concerned, which is the source of some irritation. In addition, even the so-called precedent decisions highlighted in the simplification package are only available in one or two languages, limiting their accessibility for many policymakers.

Last, in specific areas of policy the technical expertise required to interpret and implement the rules is considerable. This is particularly so in areas such as risk capital aid or the development of methods to calculate the aid element in opaque forms of aid. It is also true in areas such as R&D&I aid which has become increasingly important in regions which have lost or reduced assisted areas, and where investment aid used to be the mainstay of support.

(vii) The constraints imposed by State compliance may frustrate the achievement of the objectives of Cohesion policy.

The obligation to comply with the State aid rules does not always sit easily with the objectives of Cohesion policy. Two specific areas of policy stand out in this regard: R&D&I policy and financial engineering.

In spite of the fact that the R&D&I guidelines are cast in terms of the Barcelona Council aim of increasing spending to three percent of GDP by 2010, there is considerable evidence that

IQ-Net partners have difficulty in addressing the 'Lisbon' criteria in their programmes owing to the constraints of the R&D&I rules. Not only are they perceived to be complex to administer (the phases of the research process presenting particular difficulties), but the levels of aid which can be offered are often too low and the scope of eligible expenditure too narrow to be attractive.

In the context of financial engineering measures, there was a widespread degree of exasperation among the IQ-Net partners. While on the one hand DG Regio has actively promoted the use of more innovative instruments, the requisite degree of coordination with respect to ensuring the compliance of measures such as JESSICA and JEREMIE has not been in evidence. One experienced State aid unit official noted that in many years of service, the negotiation of these instruments with DG Comp was the longest he had ever been involved in.

More generally, the State aid rules were often viewed as a source of frustration among Managing Authorities who claimed that it was already difficult enough to find 'good projects' without the limiting field by imposing additional restrictions. Partly related, there is also evidence to suggest that pressures to spend in a timely fashion under n+2/3 may result in projects that raise State aid issues being set aside or rejected because the delays inherent in notification and approval by DG Comp were unpredictable and could result in a loss of Structural Funds receipts.

(viii) State aid compliance under the Structural Funds may be greater than under purely domestic policies.

Although State aid compliance is viewed as fraught with difficulties and an extremely complex area, there is some evidence to suggest that compliance is more likely under cofinanced projects than purely domestic ones. Several examples were given of interventions which domestic authorities had opted not to cofinance because of fears that the instruments in question would not bear close scrutiny from a State aid perspective. In short, the audit process (or the anticipation thereof) built into Cohesion policy administration may result in a higher degree of compliance with the State aid rules than would otherwise be the case.

ANNEX: MAIN ACTORS INVOLVED IN ENSURING STATE AID COMPLIANCE UNDER THE STRUCTURAL FUNDS PROGRAMMES IN IQ-NET PARTNER REGIONS

AUSTRIA

Level	Main actors	Main responsibilities
Federal	Department for Co-ordination of EU-State Aid Rules (*Abteilung für EU-Beihilfenrecht*) at the Federal Ministry of Economics and Labour (*Bundesministerium für Wirtschaft und Arbeit*, BMWA)	Notifies new schemes to COM. Makes recommendations.
Federal	There are four federal Intermediate bodies - *Förderstellen* (FS), such as the ERP Fund and the FFG (Austrian Research Promotion Agency).	See *Land*-level Intermediate Bodies.
Land	SF Managing Authorities	Final responsibility for compliance, but role relatively limited.
Land	Intermediate Bodies - *Förderstellen*. In the IQ-Net partner regions, the main *Länder*-FS are ecoplus and WST3 in Niederösterreich, and SFG in Steiermark	Project applicants complete checklists for the FS, assuring compliance with State aid rules.

BELGIUM: FLANDERS

Level	Main actors	Main responsibilities
Federal	None in relation to the Vlaanderen programme.	None in relation to the Vlaanderen programme
Regional	Programme Monitoring Committee	Final responsibility for State aid issues under Vlaanderen programme
Regional	Europe Economy Directorate of Enterprise Vlaanderen, which acts as MA and programme secretariat	Day-to-day responsibility for state aid issues, drafted State aid checklist
Regional	Enterprise Vlaanderen Economic Support Directorate	State aid expertise available; is consulted on the programme's State aid texts

CZECH REPUBLIC

Level	Main actors	Main responsibilities
National	State Aid Department of the Office for the Protection of Competition (OPC) (*Úřad pro ochranu hospodářské soutěže, ÚOHS*)	Advisory, consultancy and monitoring role to public subsidy providers. Liaise with COM. Monitoring State aids.
National	State aid specialists within the National Coordination Authority of the NSRF (NCA) and the Budget Department both within the Ministry for Regional Development (MRD)	NCA provides guidance (studies, seminars) and communicates with Commission. Budget Dept. deals with registration of State aids, support to ROP MAs.
National	Working Group of NCA (MA delegates)	Disseminates information on State aids (also other topics). Meets monthly.
Nat/Reg	SF Managing Authorities	Have overall responsibility for ensuring compliance. Check projects for compliance. Use of specialised legal experts is common.
Regional	Working Group State Aid and Legislation has been set up by the ROP MAs, consisting of ROP's lawyers and sometimes attended by representatives of the OPC.	Discusses and solves State aid questions (meets monthly).
	Working Group within the OP Enterprise and Innovations, attended by the OPC representatives	Discusses and solves very concrete State aid questions.
	Beneficiary	Responsible for providing true information on application and provides statutory declaration in case of *de minimis* aid.

DENMARK

Level	Main actors	Main responsibilities
National	Danish Enterprise and Construction Authority (DECA)	Responsible for final checking of all applications for compliance with regulations before granting support. Two different units responsible for the eastern and western parts of the country. Provides training and early stage advice on applications. Individual case officers are responsible for checking applications for State aid compliance, but in the current programming period a small number of State aid experts have emerged who serve as back-up for case officers.
National	Structural Fund Programmes Controller Unit	Focuses on compliance with State aid regulations.
Regional	SF Managing Authorities	Responsible for ensuring that the projects they recommend for funding comply with all relevant regulations, including those concerning State aid.
Networks etc.	Inter-departmental administrative committee of State aid experts associated with the Danish Competition Authority	Provides advice.

FINLAND

Level	Main actors	Main responsibilities
National	Ministry of Employment and the Economy (i.e. Managing Authority for ERDF programmes). Normally, such issues within Ministry are dealt by State Aid Unit.	Overall responsibility in terms of regulatory framework for State aid, including provision of guidance for IBs.
Regional	Intermediate Bodies at the regional level (e.g. Regional Councils, T&E centres, Tekes, Finnvera, environmental and road administrations, state provincial office).	Responsible for ensuring compliance with State aid regulations. Provide guidance for projects. Responsible for providing relevant information with respect to State aid in electronic EURA2007 system.
Regional	Beneficiaries	Responsible for providing relevant information with respect to State aid in the electronic EURA2007 system.
Networks etc:	For instance, in Keski-Suomi, State aid rules are discussed amongst the Intermediate Bodies when they get together for project group meetings.	

FRANCE

Level	Body	Main responsibilities
National level	SGAE (secretariat general for European affairs), MICA unit (internal market, consumers, competition, State aid and armaments)	Notifies new schemes to COM. Formal interface with French permanent representation. Circulates new information, advice guidelines etc. to national and subnational bodies
National level	DIACT State aid specialist (other ministries, notably industry, play an important informal and advisory role)	Provides advice, guidance and training, but no statutory controls
Regional level	*Préfet de région* and *Trésorerie payeur général*	Have a general duty to ensure the legality of the actions of the State at the regional level and of local authorities; this implicitly includes State aid rules.
Reg/ subregion level	*Services instructeurs*	Project applicants complete checklists, assuring compliance with State aid rules.

GERMANY: SACHSEN-ANHALT

Level	Main actors	Main responsibilities
Land	The Intermediate Bodies and implementing bodies which implement the different schemes and instruments co-financed by the SF OPs (i.e. units in *Land* Ministries, and public agencies subordinate to these Ministries, plus the *Land* Bank)	Responsible for checking project applications to ensure that they conform to State aid rules and for formally deciding that a project is eligible for EU funding.
Land	The *Land*'s central State aid advisory unit, located in the Ministry for the Economy and Labour.	Answers queries from IBs. Channels draft State aid schemes from different *Land* ministries to the Federal Finance Ministry, which formally notifies them to DG Comp.
Land	OP Managing Authority for the ERDF and ESF OPs located in the *Land* Ministry of Finance	Developed a documentary framework that aims to ensure that EU rules are respected for all the 175 budget lines included in the OP. Checks the information provided by Intermediate Bodies on approved projects.

GERMANY: NORDRHEIN-WESTFALEN

Level	Main actors	Main responsibilities
Land	Intermediate Bodies which responsible for committing funds to projects	Formal responsibility for checking that project applications conform to EU State aid rules.
Land	Each *Land* Ministry has its own State aid expert unit	Provides advice to the Intermediate and implementing bodies, if they have any queries relating to State aid rules.
Land	NRW Bank	Undertakes technical checks on behalf of the MA - checks project applications to assess their State aid status from the programme's perspective (as well as to assess various other SF related issues), and gives its opinion to the Intermediate Body.
Land	A *Land* working group has been set up in relation to State aid, and is made up of the State aid experts from the different Ministries plus the NRW Bank	Ensures a consistent approach to the interpretation of State aid rules across all Ministries.

GREECE

Level	Main actors	Main responsibilities
National	Ministry of Economy and Finance, Directorate general of Economic Policy – Department of European Union	Notifies aid to DG Comp.
National	State Aid Unit (MOKE) within the Centre of International and European Economic Law (CIEEL)	Provides advice to MAs on details of aid schemes.
National	National Coordination Authority (NCA), through the Special Service for Institutional Support and the Special Co-ordination Service, Unit D: Competition and State aids	Responsible for ensuring compliance of the OPs with the Community State aid rules. Sets out general implementing rules and procedures for State aid actions in manual. Gives opinion on calls for proposals.
National	Coordination Committee for State aid co-financed actions	Coordinate the planning and implementation of State aid co-financed actions that are implemented by different bodies and ministries.
Nat/reg	OP and ROP Managing Authorities	Ensure compliance of specific State aid schemes. Supervise IBs.
Nat/reg	Authorized public authorities (Intermediate Bodies)	Ensure compliance of individual private projects. Check applications forms and perform verification checks.

ITALY

Level	Main actors	Main responsibilities
National	Ministry of Economic Development (*Ministero per lo Sviluppo Economic*o – MISE)	Administration of the passwords for the electronic notifications to DG Comp to national and regional authorities Management of the national database to track *de minimis* aid Responsible authority for the notified omnibus scheme for R&D Responsible for the drafting of the annual report on aid schemes which the Ministry of Foreign Affairs sends to DG Comp
National	A dedicated office within the Department for Cohesion Policies of MISE	Deals with the coordination and support of other administrations, especially regional, on State aids and on the compatibility with competition rules more generally
National	IPI	Supports MISE for R&C programme
National	Department for Community Policies	Involved in simplification of notification procedures.
Nat/reg	Sectoral or cross-sectoral DGs/Departments that under each regional or national administration are in charge of the operation of the measures included in the programmes and, as regards State aids, their State aids compliance	A number of officials within each sectoral DG involved in the programme undertake project selection and check that the projects are in line with what required by the calls for tenders.
Regional	Managing Authority – i.e. the DG for Industry, SME and cooperation in Lombardia	'Priority referents' or measure managers within the MA have also the responsibility of ensuring compliance with State aid rules.

POLAND - ŚLĄSKIE

Level	Main actors	Main responsibilities
National	Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumentów* – UOKiK)	Can provide beneficiaries with opinions/advice on potential State aid issues and give its interpretation of particular terms and definitions. Plays key role in State aid notification. Responsible for monitoring State aid. It collects and disseminates information.
National	Ministry of Regional Development (the MA for the Human Capital OP and the key coordinating body for the regional MAs of the ROPs)	Supervisory, guidance
Regional	Within Marshal's Office, State aid responsibilities are shared with other tasks across staff in an ad hoc way in both the Regional Development and the ESF units.	Responsible for ensuring compliance. Check applications for State aid issues.
Regional	Financial department in regional government	Reviews funding flowing though body for State aid.

PORTUGAL

Level	Main actors	Main responsibilities
National	national competition authority	Contributes to legislative process, not involved in ensuring compliance.
National	IFDR - Financial Institute for Regional Development	Provision of advice.
Nat/reg	MAs of national/regional operational programmes. Responsibility can be delegated to an Intermediary Body	Ensures that co-funded operations are compliant with State aid rules.
National	A national commission is responsible for designing and reviewing the governing legislation on incentive schemes, a core aspect of state aid in Portugal	Advises on the compliance of the incentive schemes with national and community rules on State aid.
Nat/reg	Intermediate bodies	At project analysis stage, the intermediary body confirms the compatibility of the aid in terms of the main State aid requirements.
Networks	A technical support network	Promotes compliance with State aid rules.

SLOVENIA

Level	Main actors	Main responsibilities
National	State Aid Monitoring Department (SAMD) at the Ministry of Finance	Overall responsibility for ensuring compliance with the State aid rules. Same procedure for cases with or without SFs contribution. Also: notification of State aid to COM; handles, assesses and provides binding opinion on State aid that entails a block exemption and aid under the *de minimis* rule; monitoring of granted aids (*de minimis*, State aid); control over evidence (notified aids, granted aids, *de minimis* aids); training and advice for State aid grantors. Checks all public tenders for compliance.
National	Government Office for Local Self-Government and Regional Policy (GOSP) – the MA	Checks if tenders prepared are in accordance with the existing State aid schemes.
Nat/regional	Intermediate Bodies and direct budget users (ministries) or its agents (public agencies, public funds)	Preparation of calls for tenders. Must guarantee that calls for tenders are in accordance with the existing State aid rules.
	Project applicants	Sign a funding contract in which they declare that/if they received State aid and how much.

SPAIN – PAÍS VASCO

Level	Main actors	Main responsibilities
National	MA – the ERDF unit within the DG for Community Funds (Ministry of Economy and Finance).	Overall responsibility for ensuring compliance with the State aid rules
Region/province	Cohesion policy teams in the regional governments, and, in the case of the Pais Vasco, provinces (*Diputacion Foral de Bizkaia*), which are designated as intermediary bodies	Share task with MA. Directly responsible for all aspects of management, including compliance with State aid. Check all projects to be funded.
National	National competition commission in Spain	Responsible for general competition policy issues, but does not play a role in the implementation of Cohesion policy.

SWEDEN

Level	Main actors	Main responsibilities
National	State Aid Unit within the Ministry of Enterprise, Energy and Communications	Responsible for ensuring compliance with State Aid rules
National	Managing Authority (i.e. Tillväxtverket)	Provides advice and training to the regions and other bodies with respect to State Aid issues
National	Tillväxtverket – State Aid expert (outside MA function)	Provides advice to MA function of Tillväxtverket
Regional	Case handling officers at the eight regional programme offices of Tillväxtverket	Process application forms using State Aid checklist. There are plans to meet regularly to discuss State Aid issues with the aim of improving competence in this area.
Regional	Beneficiary	Responsible for providing relevant information with respect to State Aid in the application form.

UNITED KINGDOM

Level	Main actors	Main responsibilities
National	Department for Business, Enterprise and Regulatory reform (BERR) State aid unit	Key focal point for state aid issues nationally
Regional	England – RDAs (MAs)	Responsible for ensuring State aid compliance, process and check applications.
Regional	Mazars consultancy firm	Checks applicants systems and provides advice during pre-engagement visit.
Regional	Scotland – Scottish Government, State Aid Unit	Provide advice.
Regional	Scotland – Scottish Government (MA)	Responsible for ensuring State aid compliance.
Regional	Scotland – IABs (ESEP for the Lowlands and Uplands Scotland programmes and HIPP for the Highlands and Islands)	Process and check applications, provide initial guidance.
Regional	Wales – Welsh Assembly Government state aid unit and legal services	Provide advice.
Regional	Wales – WEFO (MA)	Responsible for ensuring State aid compliance. Check projects.
	Applicants	Some larger applicants may consult in-house state aid expertise (e.g. local authorities, enterprise agencies)
Working groups	BERR-led state aid working group, OffPAT State Aid Technical Group	

Improving the Quality of Structural Funds Programme Management through Exchange of Experience

IQ-Net is a network of Convergence and Regional Competitiveness programmes actively exchanging experience on practical programming issues. It involves a programme of research and debate on topical themes relating to Structural Funds programme design, management and delivery, culminating in twice-yearly meetings of members. IQ-Net was established in 1996 and has successfully completed three periods of operation: 1996-99, 1999-2002 and 2002-07. The fourth phase was launched on 1 July 2007 (Phase IV, 2007-10).

IQ-Net Meetings

25 partners' meetings and a special 10th anniversary conference have been held in ten European countries during 12 years of operation of the Network. Meetings are held at approximately six-month intervals and are open to IQ-Net partners and to observers interested in joining the Network. The meetings are designed to facilitate direct exchange of experience on selected issues, through the presentation of briefing papers, plenary discussions, workshop sessions and study visits in the hosting regions.

IQ-Net Website

The IQ-Net Website is the Network's main vehicle of communication for partners and the public (www.eprc.strath.ac.uk/iqnet). The launch of Phase IV has been accompanied by an extensive redesign of the site which comprises two sections:

Partner Intranet Pages available exclusively to IQ-Net members.

Public Pages which provide information on the Network's activities and meetings, allow the download of IQ-Net Reports and Bulletins, and provide a news section on issues relevant to the Network.

The Partners' section of the website provides exclusive services to members of the Network, including access to all materials prepared for the IQ-Net meetings, a list of EU27 links (programmes, institutions, economics and statistics etc.), partners' contact details, a partners' blog and other items of interest.

IQ-Net Reports

The IQ-Net Reports form the basis for the discussions at each IQ-Net meeting. They present applied and practical information in a style accessible to policy-makers, programme executives and administrators. The reports can be downloaded, at no charge, from the IQ-Net website. To date, around 25 thematic papers have been produced on both 'functional issues' (e.g. management arrangements, partnership, information and communication, monitoring systems) and 'thematic issues' (e.g. innovation, enterprise development,

tourism). A similar number of papers have also been produced to review developments in the implementation of the Network's partner programmes.

IQ-Net Thematic Papers

- The Financial Management, Control and Audit of EU Cohesion Policy
- From Environmental Sustainability to Sustainable Development? Making Concepts Tangible in Structural Funds Programmes
- Making sense of European Cohesion Policy: 2007-13 on-going evaluation and monitoring
- Turning ideas into action: the implementation of 2007-13 programmes
- The New Generation of Operational Programmes, 2007-2013
- National Strategic Reference Frameworks and OPs, 2007-2013
- Preparations for the Programme Period 2007-13
- Territorial Cohesion and Structural Funds
- Cohesion Policy Funding for Innovation and the Knowledge Economy
- The Added Value of Structural Funds
- Information, Publicity and Communication
- Mid-term Evaluation of the 2000-06 Programmes
- Mainstreaming Horizontal Themes into Structural Fund Programming
- The Structural Funds: Facilitating the Information Society
- Information into Intelligence: Monitoring for Effective Structural Fund Programming
- At the Starting Block: Review of the New Programmes
- Tourism and Structural Funds
- Preparations for the New Programmes
- The New Regulations and Programming
- Strategic Approaches to Regional Innovation
- Effective Responses to Job Creation
- The Evolution of Programmes and Future Prospects
- Equal Opportunities in Structural Fund Programmes
- The Contribution of Meso-Partnerships to Structural Fund Implementation
- Regional Environmental Integration: Changing Perceptions and Practice
- Structural Fund Synergies: ERDF and ESF
- The Interim Evaluation of Programmes
- Monitoring and Evaluation: Principles and Practice
- Generating Good Projects
- RTD and Innovation in Programmes
- Managing the Structural Funds – Institutionalising Good Practice
- Synthesis of Strategies 1994-96

IQ-Net Bulletin

The IQ-Net Bulletin promotes the dissemination of the Network's activities and results. Thirteen issues have been published to date, over the period from 1996 to 2007. Bulletins are published using a standard format, with each providing summaries of the research undertaken and reports on the discussions which take place at IQ-Net meetings. The Bulletins can be downloaded from the IQ-Net website (public pages). A printed version is also sent out to the IQ-Net mailing list.

Admission to the IQ-Net Network is open to national and regional Structural Funds Managing Authorities and programme secretariats. For further information or to express an interest, contact Professor John Bachtler (john.bachtler@strath.ac.uk) or Laura Polverari (laura.polverari@strath.ac.uk