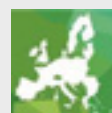


Special Report

More efforts needed to raise awareness of and enforce compliance with State aid rules in cohesion policy



EUROPEAN
COURT
OF AUDITORS

EUROPEAN COURT OF AUDITORS
12, rue Alcide De Gasperi
1615 Luxembourg
LUXEMBOURG

Tel. +352 4398-1

Enquiries: eca.europa.eu/en/Pages/ContactForm.aspx

Website: eca.europa.eu

Twitter: @EUAuditorsECA

More information on the European Union is available on the internet (<http://europa.eu>).

Luxembourg: Publications Office of the European Union, 2016

Print	ISBN 978-92-872-5893-9	ISSN 1831-0834	doi:10.2865/42539	QJ-AB-16-024-EN-C
PDF	ISBN 978-92-872-5879-3	ISSN 1977-5679	doi:10.2865/67955	QJ-AB-16-024-EN-N
EPUB	ISBN 978-92-872-5887-8	ISSN 1977-5679	doi:10.2865/911996	QJ-AB-16-024-EN-E

© European Union, 2016

Reproduction is authorised provided the source is acknowledged.

Special Report**More efforts needed to
raise awareness of and
enforce compliance with
State aid rules in cohesion
policy**

(pursuant to Article 287(4), second subparagraph, TFEU)

The ECA's special reports set out the results of its performance and compliance audits of specific budgetary areas or management topics. The ECA selects and designs these audit tasks to be of maximum impact by considering the risks to performance or compliance, the level of income or spending involved, forthcoming developments and political and public interest.

This performance audit was produced by Audit Chamber II — headed by ECA Member Henri Grethen — which specialises in investment for cohesion, growth and inclusion spending areas. The audit was led by the Reporting Member Oskar Herics, supported by Margit Spindelegger, Head of private office; Niels Brokopp, Principal Manager; Gert Rammeloo and Angelika Zych, Heads of Task; Ildiko Preiss, Attaché; Dana Moraru, Maria Ploumaki and Laura Zanarini, Auditors.



From left to right: A. Zych, I. Preiss, G. Rammeloo, N. Brokopp, M. Spindelegger, O. Herics.

Paragraph

Abbreviations

Glossary

I-VIII Executive summary

1-24 Introduction

3-8 What is State aid and what is its financial importance in the EU?

9-21 Procedures for granting State aid

9-10 Member States must notify State aid to the Commission

11-14 Exemptions to notification

15-21 Main actors involved in managing operational programmes in cohesion policy

22-24 Audits of the European Court of Auditors and Member States' supreme audit institutions on State aid

25-31 Audit scope and approach

32-113 Observations

32-82 Lack of comprehensive analysis by the Commission of State aid errors and insufficient Member State focus on State aid

33-44 Significant number of State aid errors in the European Regional Development Fund, the Cohesion Fund and, to a much lesser extent, in the European Social Fund

45-71 Commission's monitoring weakened by a lack of a comprehensive analysis and insufficient internal coordination

72-82 Insufficient focus of Member States' audit authorities on compliance with State aid rules

- 83-113 **Commission has taken action to simplify applicable State aid legislation and to promote administrative capacity of Member States**
- 84-99 **Expanded General Block Exemption Regulation leads to a shift of responsibility from the Commission to Member States**
- 100-107 **Newly introduced ex ante conditionalities and major project procedure may improve compliance with State aid rules in cohesion policy**
- 108-113 **A State aid common action plan set up by the Commission aims to strengthen the administrative capacity of Member States and requires continuous attention**

114-130 **Conclusions and recommendations**

- Annex I — Spending on State aid by Member State, 2010-2014, million euro**
- Annex II — Results of the monitoring exercises carried out by the Directorate-General for Competition, 2006-2014**
- Annex III — Major projects adopted by the Directorate-General for Regional and Urban Policy for the 2007-2013 programme period**
- Annex IV — Legal framework in the area of State aid**

Reply of the Commission

ACR: Annual control report

CF: Cohesion Fund

COCOF: Coordination Committee of the Funds

DG: Directorate-General

DG COMP: Directorate-General for Competition

DG EMPL: Directorate-General for Employment, Social Affairs and Inclusion

DG REGIO: Directorate-General for Regional and Urban Policy

ECN-ET: European Competition Network – Electronic Transmission

ERDF: European Regional Development Fund

ESF: European Social Fund

ESIF: European Structural and Investment Funds

GBER: General Block Exemption Regulation

GDP: Gross domestic product

ICT: Information and communications technology

IMS: Irregularity management system

IT: Information technology

JASPERS: Joint assistance to support projects in European regions

MAPAR: Management of audit processes, activities and resources

R&D: Research and development

R&D&I: Research, development and innovation

SMEs: Small and medium-sized enterprises

TFEU: Treaty on the Functioning of the European Union

Annual control reports (ACRs) are yearly reports submitted by the audit authorities which set out the findings of all the audits they carried out for a certain or several operational programme(s). ACRs are the main document by which the audit authorities provide assurance on the management and control systems of the operational programme(s) concerned as well as on the legality and regularity of the projects co-financed.

An **audit authority** provides assurance to the Commission regarding the effective functioning of the management systems and internal controls for an operational programme (and, as a consequence, the legality and regularity of the expenditure certified). Audit authorities are generally departments within state chancelleries, at ministries of finance (or internal control bodies under ministry authority), at other ministries or within supreme audit institutions. They must be functionally independent from the bodies managing the funds. An audit authority reports the findings of its systems audits and audits of operations to the managing and certifying authorities for the operational programme concerned. Reports on systems audits and the annual control report are also submitted to the Commission. If the audit authority considers that the managing authority has not taken appropriate corrective action, it must draw the Commission's attention to the matter.

Certifying authorities carry out first-level checks on the expenditure declared by managing authorities and certify that this expenditure is legal and regular. They are generally part of the ministry of finance or internal control bodies under ministry authority.

The **Cohesion Fund** aims to improve economic and social cohesion within the European Union by financing environment and transport projects in Member States whose per capita GNP is less than 90 % of the EU average.

Cohesion policy is one of the biggest policy areas on which the EU budget is spent. It aims to reduce development disparities between different regions, restructure declining industrial areas and diversify rural areas and to encourage cross-border, transnational and interregional cooperation. It is funded from the European Regional Development Fund, the European Social Fund and the Cohesion Fund.

The **Compatibility assessment** is about balancing the negative effects on trade and competition in the internal market from an aid measure with its positive effects in terms of contributing to the achievement of well-defined objectives of common interest. Balancing these effects takes into account the impact of the aid on the social welfare of the EU. The compatibility assessment is the exclusive competence of the Commission.

The **Coordination Committee of the Funds (COCOF)** is the Committee of Member States representatives set up under Article 103 of Regulation (EC) No 1083/2006 to provide advice to the Commission. On the implementation of the ERDF, ESF and CF. COCOF guidance notes serve as recommendations with practical examples and information, without being legally binding or limitative.

The **European Regional Development fund** aims to reinforce economic and social cohesion within the European Union by redressing the main regional imbalances through financial support for the creation of infrastructure and productive job-creating investment, mainly for businesses.

The **European Social Fund** aims to strengthen economic and social cohesion within the European Union by improving employment and job opportunities, mainly through training measures, encouraging a higher level of employment and the creation of more and better jobs.

Glossary

The **European Structural and Investment Funds (ESIF or ESI Funds)** cover five separate funds that aim to reduce regional imbalances across the Union, with policy frameworks set for the seven-year MFF budgetary period. The funds include: European Regional Development Fund (ERDF); European Social Fund (ESF); Cohesion Fund (CF); European Agricultural Fund for Rural Development (EAFRD); and the European Maritime and Fisheries Fund (EMFF).

The **Expert group on European Structural and Investment Funds (EGESIF)** was created in the Commission with the aim of providing advice to the Commission on issues in relation with the implementation of programmes adopted and implemented in accordance with the European Structural and Investment Funds Regulations. It is one of the two groups replacing the Coordination Committee of the Funds (the second one being COESIF – the Coordination Committee for European Structural and Investment Funds).

Financial corrections aim to protect the EU budget from the burden of erroneous or irregular expenditure. For expenditure subject to shared management, recovering payments incorrectly made is primarily the responsibility of Member States. Financial corrections can be made by withdrawing irregular expenditure from Member States' expenditure declarations or through recoveries from beneficiaries. Financial corrections can also be imposed by the Commission.

A **managing authority** is a national, regional or local public authority, or any other public or private body, which has been designated by a Member State to manage an operational programme. Its tasks include selecting projects to be funded, monitoring how projects are implemented and reporting to the Commission on financial aspects and results achieved.

Major projects are projects which are so financially significant that a specific Commission decision is required for the Member State to obtain EU co-financing from the European Regional Development Fund or the Cohesion Fund. They have a total cost exceeding 50 million euro and are generally large-scale infrastructure projects in transport, environment and other sectors such as culture, education, energy or ICT.

An **operational programme** sets out a Member State's priorities and specific objectives and how funding will be used during a given period, generally seven years, to finance projects. These projects must contribute to achieving one or more of a certain number of objectives specified at the level of the operational programme's priority axis. Programmes have to be in place for each of the funds in the area of cohesion policy, i.e. the European Regional Development Fund; European Social Fund or Cohesion Fund. Operational programmes are prepared by Member States and must be approved by the Commission before any payments from the EU budget can be made. They can only be modified during the period covered if both parties agree.

Partnership agreements are agreements entered into between the European Commission and each Member State for the 2014-2020 programming period. They set out the national authorities' plans on how to use funding from the European Structural and Investment Funds and outline each country's strategic goals and investment priorities, linking them to the overall aims of the Europe 2020 strategy for smart, sustainable, and inclusive growth. They also include details of any ex-ante conditionalities and performance management frameworks. They are prepared by the Member State in a dialogue with the Commission and must be adopted by the Commission.

Programme period: The multi-annual framework within which cohesion policy expenditure is planned and implemented.

Services of general economic interest are economic activities that public authorities identify as being of particular importance to citizens, and that would not be supplied (or would be supplied under different conditions) if there were no public intervention. Examples are transport networks, postal services and social services.

Supreme audit institutions are national bodies responsible for auditing government revenue and spending.

An **undertaking** is any entity which engages in an economic activity, regardless of its legal status or the way it is financed.

I

State aid is any aid granted by a Member State which distorts or could distort competition by giving certain enterprises an advantage, in-so-far as it affects trade between Member States. In principle, State aid is prohibited in order to ensure the proper functioning of the internal market. However, aid of a certain size, in certain sectors, geographical areas or in special circumstances, may be compatible with the internal market. During the period 2010 to 2014, Member States have granted an average of 76.6 billion euro of State aid per year, excluding aid to the financial sector, to the railway sector and to public services such as postal services. This corresponds to over 0.5 % of EU Member States' GDP.

II

Cohesion policy is one of the main spending areas in the EU budget. For the 2014-2020 programme period the total budget for the European Regional Development Fund (ERDF), the Cohesion Fund (CF) and the European Social Fund (ESF) amounts to 352 billion euro, up from 347 billion euro in the 2007-2013 programme period. According to Commission estimates, ERDF/CF and ESF spending accounted for more than one-quarter of State aid granted in the EU in the 2007-2013 period.

III

Through this audit, we assessed for the 2007-2013 programme period the level of non-compliance with State aid rules in cohesion policy and the extent to which the Commission was aware of the causes of non-compliance. We also examined whether the actions undertaken by the Commission for the 2014-2020 programme period will strengthen its and the Member States' capacity to prevent, detect and correct infringements of State aid rules.

IV

Over the 2010-2014 period, the Commission and the Court of Auditors detected infringements of State aid rules in a significant number of our audits; State aid errors in ERDF and CF were an important factor contributing to our estimated level of error in cohesion policy. We found that the Commission's own audits and monitoring in the cohesion area resulted in a detection rate which was similar to our own findings. The audit authorities in the Member States, on the other hand, detected infringements of State aid rules at a far lower rate than either the Commission or us. This indicates that, so far, audit authorities have not focused sufficiently on State aid in the course of their audits.

V

During the 2007-2013 programme period the Commission did not record the State aid errors it detected or those reported by Member States in a way which allowed it to perform a proper analysis. Such an analysis could have helped the Commission to develop more focused and tailor-made preventive measures for Member States and programmes.

VI

Member States indicate in the application for projects of a significant financial size ('major projects') whether they consider that the investment involves State aid and this information can be verified by the Commission. Particularly in the beginning of the 2007-2013 programme period, the Commission did not systematically verify major projects for State aid compliance. There is a risk that some EU co-financed major projects are incompatible with the internal market, also due to the fact that prior to 2012, and the clarification provided by the Leipzig Halle judgment, Member States rarely notified investments in infrastructure to the Commission. In order to mitigate this risk for the future, the Commission stepped up its internal preventive measures and it introduced an alternative approval procedure including an Independent Quality Review for the 2014-2020 programme period. This alternative procedure is not designed always to provide legal certainty for Member States with regard to State aid compliance at the time the major project decision is taken. That certainty can only be obtained on the basis of a Member State notification followed by a Commission State aid decision.

VII

The Commission has taken actions to simplify the applicable State aid legislation for the 2014-2020 programme period which have resulted in a reduction of administrative burden and more transparency, but have also increased Member States' responsibilities for designing and implementing aid measures. Member States getting more responsibility risks increasing the number of State aid errors: the Commission's monitoring has shown that Member States made many mistakes in the design and implementation of aid schemes in the 2007-2013 programme period. To mitigate this risk, the Commission has taken actions to promote Member States' administrative capacity in the area of State aid, including the introduction of pre-conditions for State aid systems to promote the efficient and effective implementation of European Structural and Investment Funds ('ex ante conditionalities'). However, the Member States which were considered not to be fulfilling these conditions are not necessarily those where the Commission found most problems in the past. Moreover, these actions require continuous attention.

VIII

The Court recommends that:

- (a) The Commission should impose corrective actions where aid measures are not in compliance with State aid rules.
- (b) (i) The Commission should use MAPAR to record irregularities in a way that allows easy analysis of, for example, their type, frequency, seriousness, geographical origin and cause. The database should equally contain information on the follow-up of these irregularities (such as financial corrections imposed).
- (ii) With regard to IMS, the Commission should adapt the database's structure so that information on irregularities such as State aid can be extracted and analysed across Member States and type.
- (iii) DG COMP should be given access to all relevant information on State aid irregularities contained in MAPAR and IMS on a regular basis.
- (iv) Using the information available in its databases, the Commission should follow up every two years on Member States' capacity to comply with State aid rules by carrying out analyses of, for example, the type, frequency, seriousness, geographical origin and cause of State aid errors detected by the Commission itself or by Member State authorities. The Commission should use these exercises for monitoring purposes and to direct support activities such as providing training to the Member States where they are most needed.

- (c) The Commission should approve major projects only after internal State aid clearance and consistently ask Member States to notify aid where needed with a view to ensuring legal certainty for Member States, independent of the application procedure used by the Member State.
- (d) (i) The Commission should ensure that the scope and quality of audit authorities' checks of compliance with State aid rules are sufficient.
 - (ii) In view of the closure of the 2007-2013 programme period, the Commission should ask audit authorities to check the State aid compliance of those major projects that have been approved before the end of 2012.
 - (iii) The Commission should develop further guidance material, including in particular case studies illustrating good practices and the most common types and causes of infringements of State aid rules.
 - (iv) The Commission should encourage Member States to set up a central register for monitoring the cumulation of small grants which collectively are not allowed to exceed a certain amount ('de minimis' aid).
 - (v) The Commission should set up a central EU-wide database in which relevant Member States authorities can consult the identity of undertakings subject to State aid recovery orders as well as the status of recovery proceedings, in order to enable them to comply with the applicable legislation ('Deggendorf' principle). Access should be granted only on a need-to-know basis.
- (e) If the ex ante conditionality concerning State aid is not fulfilled by the end of 2016, the Commission should use its powers to suspend payments to the Member States concerned until they have rectified all significant shortcomings.

01

Competition policy seeks to ensure that companies compete with each other on an equal footing – on the basis of their products and prices – without receiving unfair advantages. Since the EU's single market guarantees free trade in goods and services across the Union, competition policy is regulated at European level¹. State aid rules are a key aspect of the EU's competition policy.

02

A company which is granted State aid no longer competes on an equal footing. For this reason, the Treaty on the Functioning of the European Union (TFEU) states that State aid is in principle incompatible with the internal market². However, there are areas and circumstances where the market does not work as it should; gaps exist where certain needs are not provided for. To accommodate public policy goals, the Treaty provides a list of State aid categories which shall or may be compatible with the internal market³. The Commission has created several rules to govern aid granted under these categories.

What is State aid and what is its financial importance in the EU?

03

The Treaty defines State aid as any aid granted by a Member State which distorts or could distort competition by giving certain companies an advantage, provided that it affects trade between Member States. For aid to be considered as State aid, all of the criteria set out in the definition must be fulfilled. These criteria are listed in **Table 1**.

- 1 Article 26 of the Treaty on the Functioning of the European Union (TFEU).
- 2 Article 107(1) TFEU.
- 3 Article 107(2) TFEU : 'The following shall be compatible with the internal market...' (for example : aid to make good the damage caused by natural disasters).
Article 107(3) TFEU : 'The following may be considered to be compatible with the internal market...' (for example : aid to promote culture and heritage conservation).

Table 1

Criteria for characterising aid as State aid

	Criterion and explanation	Examples
1	The aid is granted by the state or through state resources. 'State resources' are any resource provided by a Member State authority or an entity owned or controlled by the state ¹ .	Subsidies, tax exemptions or guarantees.
2	The aid is granted to undertakings. An undertaking is any entity which engages in an economic activity, regardless of its legal status or the way it is financed ² . An economic activity is the offering of goods or services on a market ³ .	A company that manufactures cars, a charity that supplies food or a government company that offers postal services.
3	The aid confers an advantage. An advantage is any economic benefit which the undertaking would not have obtained under normal market conditions ⁴ .	A loan granted to an undertaking with an interest rate below the market rate.
4	The advantage granted is selective. Any measure to grant aid that is not open to all undertakings operating within a Member State on an equal basis is selective.	Measures that apply only to large undertakings or to undertakings in a specific sector such as the transport or energy sector.
5	The aid distorts or threatens to distort competition. A distortion of competition is assumed when the beneficiary of the aid operates in a sector where there is, or could be, competition ⁵ .	Aid granted to a company in the textile sector, since there is competition in the textile industry.
6	The aid affects trade between Member States. When aid distorts or threatens to distort competition, it is assumed to be liable to affect trade between Member States, provided that effects on other Member States are more than marginal ⁶ .	Aid granted to a local furniture manufacturer, since there are furniture manufacturers (local or not) in various EU Member States.

1 Paragraph 17 of case 248/84, paragraph 38 of case C-482/99.

2 Paragraph 74 of joined Cases C-180/98 to C-184/98.

3 Paragraph 36 of case C-35/96.

4 Paragraph 60 of case C-39/94.

5 Paragraphs 141 to 147 of joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98.

6 Paragraph 81 of joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98.

Source: European Court of Auditors, based on the Commission's notice on the notion of State aid.

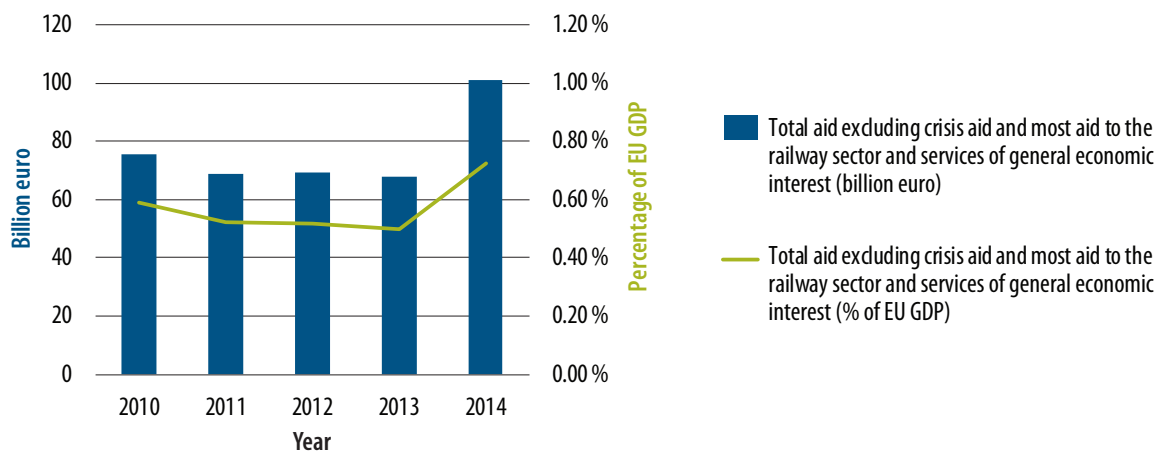
04

Member States spent an average of 76.6 billion euro on State aid per year in the 2010-2014 period⁴. This corresponds to over 0.5 % of EU Member States' GDP (see **Figure 1**). The figures are understated because they do not include most aid to the railway sector and to services of general economic interest such as transport networks or postal services, for which complete data is not available for the 2010-2014 period. Moreover, they do not include aid granted to the financial sector ('crisis' aid), which is not indicative of the amount of State aid granted under normal conditions and is outside the scope of this audit. An overview of State aid spending in each Member State in the 2010-2014 period is presented in **Annex I**. In future years, the inclusion of more renewable energy support schemes (RES) in the reporting, following the adoption of the 2014 Energy and Environmental Aid Guidelines, may result in a further increase of reporting of State aid to the Commission.

4 See the Commission's 2015 State aid scoreboard on DG COMP's website.

Figure 1

State aid in the EU, 2010 to 2014



Note: According to the Commission, the increase in expenditure in 2014 is largely (85 %) due to the inclusion of more renewable energy schemes in the reporting. Without this inclusion, State aid reported would have amounted to around 73 billion euro in 2014. In addition, EU funds are included only from 2014.

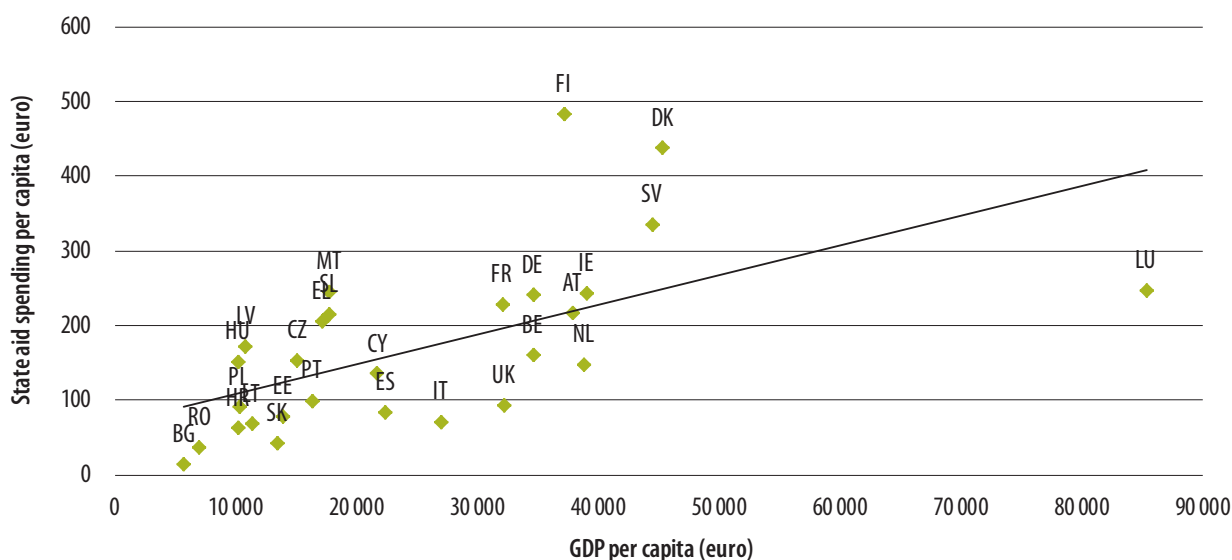
Source: European Court of Auditors, based on the Commission's 2015 State aid scoreboard.

05

Overall, there is a correlation between Member States' per capita GDP and their spending on State aid (see **Figure 2**). For the 2010-2014 period, the three Member States which spent most on State aid per capita on average were Denmark, Finland and Sweden.

Figure 2

Comparison of Member State spending on State aid and GDP per capita, 2010-2014



Source: European Court of Auditors, based on the Commission's 2015 State aid scoreboard and Eurostat's data on population and GDP per capita in current prices.

06

Cohesion policy is one of the main spending areas in the EU budget; it is implemented through the European Regional Development Fund (ERDF), the Cohesion Fund (CF) and the European Social Fund (ESF). Its purpose is to support economic development and employment in the less advantaged regions of the EU⁵. The total EU budget for cohesion policy in the 2014-2020 programme period is 352 billion euro, up from 347 billion euro in the 2007-2013 programme period⁶. During the years 2010-2014, 216 billion euro of EU funds was spent under cohesion policy⁷.

- 5 The policy is implemented through operational programmes which set out priorities, specific objectives and how EU funding will be used.
- 6 See the Commission's 'An introduction to EU Cohesion Policy 2014-2020' of June 2014 and 'Cohesion policy 2007-13 Commentaries and official texts' of January 2007 respectively. A programme period is the multi-annual framework within which Structural Funds and Cohesion Fund expenditure is planned and implemented.
- 7 See the cohesion data portal on the Commission's website.

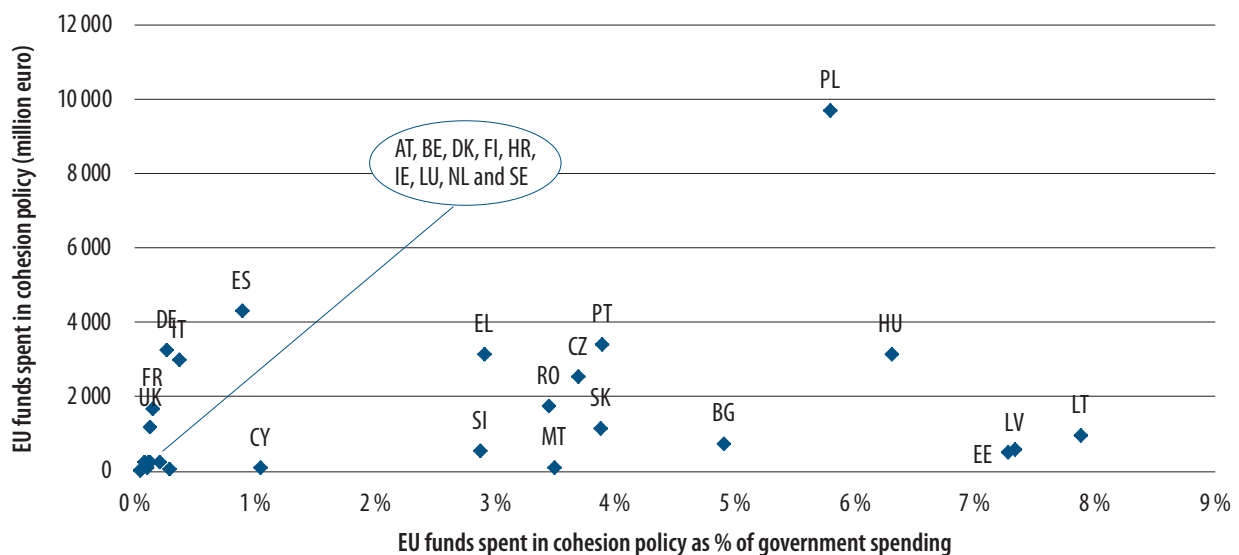
07

The allocation of cohesion policy funds is determined by taking into account differences in GDP levels, with poorer regions receiving higher levels of financial support⁸. As a result, these funds account for a significant share of total government spending in several Member States (see **Figure 3**). This is the case in particular for those Member States which joined the EU in 2004 and 2007: for example, the allocation of cohesion policy funds in 2014 accounted for more than 5 % of all government spending in Estonia, Hungary, Latvia, Lithuania and Poland.

8 Article 90 of Regulation (EU) No 1303/2013 of the European Parliament and the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development, and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development, and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ L 347, 20.12.2013, p. 320).

Figure 3

EU funds spent in cohesion policy by Member State, 2010-2014



Source: European Court of Auditors, based on Commission accounting data and Eurostat statistics on government expenditure.

Introduction

08

According to the Treaty, State aid rules apply only to aid granted by Member States to entities carrying out an economic activity⁹. Any aid granted directly by the Commission, or any other EU body such as the European Investment Bank, is therefore not subject to State aid rules. EU funding provided through cohesion policy is subject to State aid rules, since these funds are managed by Member States. The Commission estimates that during the 2007-2013 programme period, around 40 % of cohesion policy funds, amounting to 139 billion euro, was awarded to projects subject to State aid rules¹⁰. According to the Commission, total State aid spending in that period was 504 billion euro¹¹. Overall, cohesion policy funds therefore accounted for more than one-quarter of total State aid spending in the 2007-2013 programme period.

Procedures for granting State aid

Member States must notify State aid to the Commission

09

The Treaty requires that the Commission be informed of any plans to grant or alter aid¹². In practice, this means that if a Member State wants to grant State aid, it has to inform the Commission's Directorate-General for Competition (DG COMP). This process is called notification.

10

Once the Member State has notified the planned granting of aid, DG COMP determines whether it constitutes State aid. If it does, it assesses whether the aid is compatible with the internal market by weighing the positive effects of the aid (contribution to the achievement of a well-defined objective of common interest) against its negative effects (distortion of competition and trade). The Commission has the exclusive authority to make this compatibility assessment¹³.

Exemptions to notification

11

While the Treaty in principle prohibits State aid, it also provides a list of aid categories which may be compatible with the internal market. In this context, the Commission can issue rules which define criteria under which such categories of aid do not need to be notified¹⁴. The Commission develops these rules based on its experience of assessing aid measures, taking into account the case law of the European Court of Justice.

9 Article 107 TFEU.

10 See the Commission's policy brief on the 2014-2020 regional aid guidelines of September 2014.

11 See the Commission's 2011 and 2015 State aid scoreboard.

12 Article 108(2) and 108(3) TFEU.

13 Article 108 TFEU.

14 Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 248, 24.9.2015, p. 1) (codification) replacing Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid and in particular Article 108(4) TFEU.

General Block Exemption Regulation (GBER)

12

For categories of aid which the Commission considers likely to be compatible with the internal market, it has adopted a Regulation by which such aid need not be notified provided that all conditions are fulfilled unless the aid amount exceeds the thresholds mentioned therein. This Regulation is called the General Block Exemption Regulation (GBER)¹⁵. Examples of such categories are State aid to culture and environmental protection.

13

The GBER simplifies the work of the Commission and Member States considerably. It allows Member States to carry out many aid measures without going through notification procedures or the Commission's explicit compatibility assessment. The GBER sets out a number of general provisions and provisions applicable to each category of aid. Aid which falls under the GBER and complies with these provisions is automatically considered to be compatible with the internal market. Nevertheless, for large aid measures (above the notification thresholds), notification is still required due to the potential of such measures to distort competition¹⁶.

De minimis aid

14

In addition, the Commission has established that aid of up to 200 000 euro granted to a single beneficiary over a period of three years neither distorts competition nor affects trade between Member States¹⁷. This type of aid is called 'de minimis aid' and since it does not fulfil the State aid criterion of distorting or threatening to distort competition nor the one of affecting trade between Member States, it is not classified as State aid and does not need to be notified to DG COMP. For services of general economic interest, the aid threshold is increased to 500 000 euro¹⁸.

Main actors involved in managing operational programmes in cohesion policy

15

The management of ERDF/CF and ESF operational programmes is shared between Member States and the Commission. Member States select, manage and monitor projects, and the Commission supervises and monitors the Member States' management and control systems. The Commission bears ultimate responsibility for the implementation of the EU budget¹⁹.

15 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1).

16 The thresholds vary from 400 000 euro for certain aid to start-ups to 150 million euro for certain aid for renewable sources of energy.

17 Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (OJ L 352, 24.12.2013, p. 1).

18 Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p. 8).

19 Article 53 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p. 1).

Member State level

16

At Member State level, managing authorities are responsible for the day-to-day administration of operational programmes. They must ensure, through management verifications, that all co-financed projects are eligible for EU funding and that declared project expenditure complies with eligibility conditions, including compliance with State aid rules. Certifying authorities carry out checks on project expenditure claims received from managing authorities and submit them to the Commission for reimbursement. Audit authorities carry out audits of operations (i.e. projects) and of management and control systems and report on them to the Commission through annual control reports (ACRs) and audit opinions²⁰.

17

In addition, national State aid offices can, depending on their mandate, verify compliance of aid schemes at national level (whether or not EU-co-financed) or give advice or opinions to other bodies in the Member States. State aid offices exist at central level in all Member States with the exception of Belgium, which has its State aid offices at regional level. In some Member States the State aid office is embedded in ministries for finance or economic affairs, in other Member States it is an independent body or embedded in the national competition authority. State aid offices can also act as a contact point for obtaining expert knowledge and help in the design of aid schemes, thereby reducing the risk of non-compliance with State aid rules (see **Box 1**).

20 ACRs are yearly reports submitted by the audit authorities which set out the findings of all the audits they carried out for a certain or several operational programme(s). ACRs are the main document by which the audit authorities provide assurance on the management and control systems of the operational programme(s) concerned as well as on the legality and regularity of the projects co-financed.

Box 1

State aid screening by State aid office at the legislative proposal stage (Denmark)

All ministries are required to make an initial assessment of State aid relevance when they prepare a legislative proposal. This information is sent to the State aid Secretariat (staffed with State aid experts) for assessment. If it considers that the proposal conflicts with State aid rules, the ministry is required to redraft its legislative proposal. The State aid secretariat assists the ministry with suggestions and provides advice throughout the legislative process.

Commission level

18

The Directorate-General for Regional and Urban Policy (DG REGIO) is the Commission department responsible for promoting economic and social development of the various regions of the European Union, in particular the less-favoured ones; it manages the ERDF and the CF. The Directorate-General for Employment, Social Affairs and Inclusion (DG EMPL) is the Commission department responsible for EU employment and social issues; it manages the ESF.

19

Both Directorates-General draw their assurance on the compliance of ERDF/CF and ESF expenditure with the applicable EU and national rules mainly from the work of the audit authorities. In addition to reviewing the work of the audit authorities, they also carry out their own audits of operations and systems in the Member States as part of their supervisory work.

20

DG COMP is the Commission department responsible for ensuring the correct application of EU State aid rules, in all areas except agriculture and fisheries²¹. DG COMP develops State aid legislation on the basis of the Treaty and oversees its implementation. In particular, it regularly monitors aid schemes to verify whether and to what extent they respect State aid rules²². In addition, interested parties such as a Member State or a competing company may lodge a complaint with the Commission if they consider aid awarded to a certain beneficiary to be unlawful. The Commission is obliged to examine all such complaints²³.

21

Figure 4 gives a simplified overview of the actors involved in cohesion policy and the process of granting State aid.

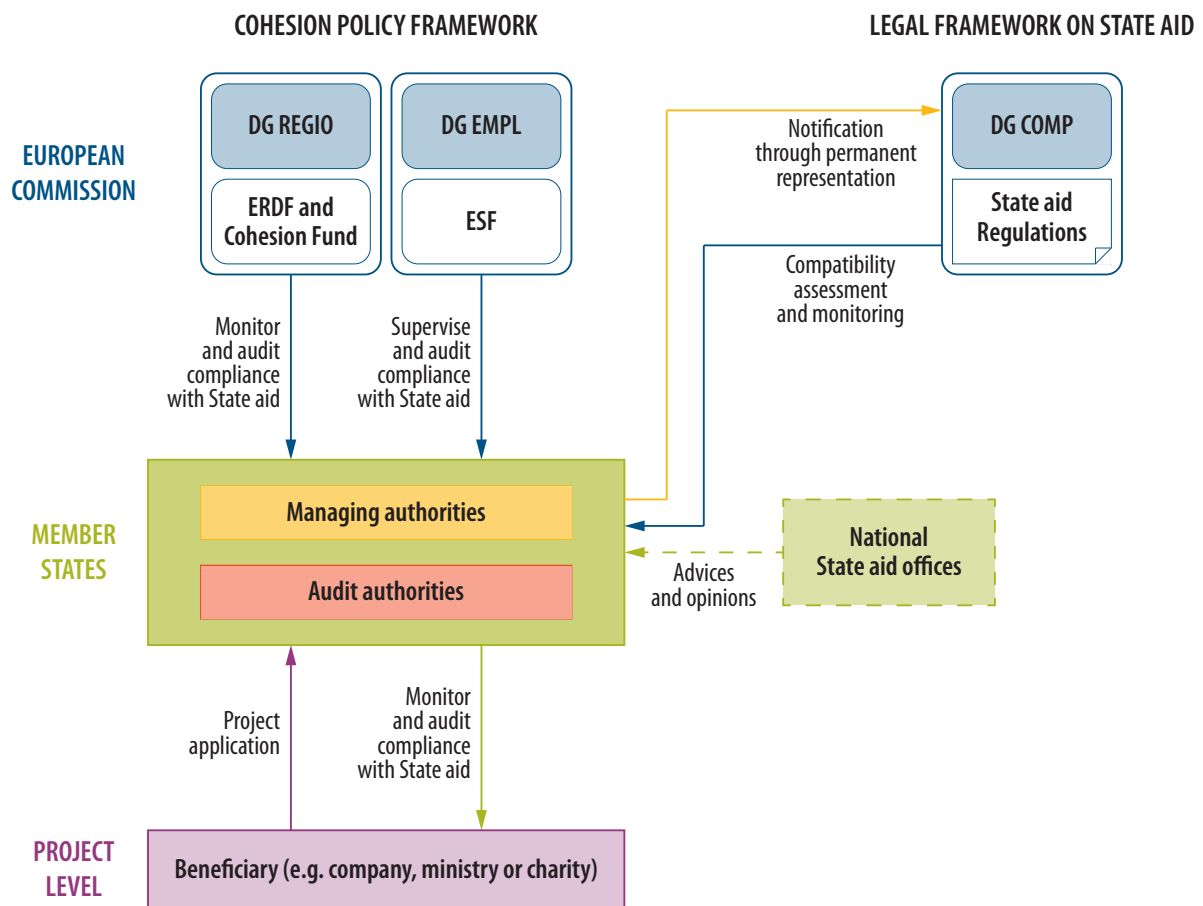
21 For agriculture and rural development as well as for maritime affairs and fisheries, responsibility for State aid control lies with the Directorates-General for Agriculture and Rural Development and for Maritime Affairs and Fisheries respectively.

22 An aid scheme is an act or law which defines in general terms what kinds of beneficiary can receive State aid under what terms.

23 Article 24 of Council Regulation (EU) 2015/1589.

Figure 4

Actors involved in cohesion policy and the process of granting State aid



Source: European Court of Auditors.

Audits of the European Court of Auditors and Member States' supreme audit institutions on State aid

22

One of our previous special reports in 2011 identified weaknesses in Member States' systems for ensuring State aid is notified, based mainly on an examination of a number of complaints and monitoring cases for the 2008-2010 period²⁴.

23

Moreover, from 2010 to 2014, we examined the compliance with State aid rules for numerous ERDF/CF and ESF projects. The results of these audits formed part of the basis for our specific assessments for the ERDF/CF and the ESF in our annual reports²⁵.

24

We carried out a survey of 28 supreme audit institutions, of which 22 responded. Most of them stated that they included, to various degrees, checks on State aid as part of their audits²⁶. Very few also performed specific audits on State aid.

24 Special Report No 15/2011 'Do the Commission's procedures ensure effective management of State aid control?' (<http://eca.europa.eu>)

25 See for example chapter 6 of our annual report concerning the financial year 2014 (OJ C 373, 10.11.2015).

26 Supreme audit institutions are national bodies responsible for auditing government revenue and spending.

25

Over the last years we have found in our annual compliance audit exercises a significant number of errors concerning compliance with State aid rules in cohesion policy. This report examines whether the Commission has taken sufficient measures to understand why this is the case, and analyses whether the actions taken by the Commission will strengthen its, and the Member States', capacity to prevent, detect and correct infringements of State aid rules.

26

Through this audit, we assessed the level of non-compliance with State aid rules in cohesion policy (i.e. ERDF/CF and ESF) in the 2007-2013 programme period and the extent to which the Commission was aware of the causes of non-compliance. Our specific analyses focused mainly on the 2010-2014 period. We also examined whether the actions undertaken by the Commission for the 2014-2020 programme period are likely to address non-compliance with State aid rules.

27

In particular, we examined:

- (a) whether the Commission had a comprehensive and up-to-date overview of the causes of non-compliance with State aid rules in cohesion policy, and whether Commission DGs and Member States detected infringements of State aid rules. We also examined whether the Commission's actions in response to State aid errors had led to an appropriate number of corrective actions; and
- (b) whether the Commission had taken appropriate actions to prevent infringements of State aid rules in cohesion policy in future.

28

Moreover, we analysed in detail the findings of our compliance audits and used examples to illustrate frequent State aid errors. In addition, we examined the Commission's approval procedure for certain projects of high financial significance ('major projects').

29

The audit consisted of documentary review (analysis for example of annual reports from audit authorities, Commission audit reports and Commission Regulations) and interviews with Commission representatives.

30

At Member State level we carried out two surveys:

- (a) a survey of 113 audit authorities in 28 Member States responsible for 440 ERDF/CF and ESF 2007-2013 operational programmes, 100 of which replied (88 %); and
- (b) a survey of 31 State aid offices in 28 Member States, 24 of which replied (77 %).

31

Finally, we visited four Member States (Denmark, Hungary, Poland and Portugal) to examine a number of different State aid processes used by various authorities.

Lack of comprehensive analysis by the Commission of State aid errors and insufficient Member State focus on State aid

32

We sought to define the extent of non-compliance with State aid rules in cohesion policy by analysing our annual compliance audits and to determine whether the Commission had an overview of State aid errors across Member States. If drawn up appropriately, such an overview would help the Commission direct its resources for auditing, monitoring and supporting Member States. We compared the detection of State aid errors by the Commission and the Member States to our own, and we examined the corrective actions taken by the Commission in response to the errors found.

Significant number of State aid errors in the European Regional Development Fund, the Cohesion Fund and, to a much lesser extent, in the European Social Fund

Court's audits of projects with State aid relevance

33

In our annual compliance audits during the 2010-2014 period, we audited 1 573 randomly selected ERDF/CF and ESF projects²⁷. Out of the 828 ERDF/CF projects 220 (26.6 %) were State aid relevant. Out of the 745 ESF projects 49 (6.6 %) were State aid relevant.

34

We found a total of 50 cases of non-compliance with State aid rules. Of these 50 cases, 46 related to ERDF/CF projects and 4 to ESF projects. State aid errors are significantly less likely to occur in the ESF, mainly because projects are generally much smaller and more likely to be de minimis aid.

35

From 2010 to 2014, both the number of projects with State aid relevance and the share of these projects being affected by State aid errors generally increased, indicating that the controls in place to prevent these errors had not improved over time. The increase in errors concerned mostly those without a financial impact on the amount of funding of the EU budget (see **Table 2**)²⁸. We found that 20.9 % of ERDF/CF projects with State aid relevance were affected by State aid errors. The corresponding figure for ESF amounted to 8.2 %.

27 For more information on how we sample and test projects, see Annex 1.1, paragraphs 4-10 of our annual report concerning the financial year 2014.

28 Having a financial impact means that we found a difference between the actual value of a transaction and the value to which it would have amounted if it had been conducted in accordance with applicable provisions. Annex 1.1 of our annual report for the financial year 2014 provides further details on our methodology.

Table 2 State aid errors detected as part of our annual compliance audits, 2010-2014

Fund (1)	Year (2)	Number of projects audited (3)	Number of projects with State aid relevance (4)	% (4/3)	Number of State aid errors (5)	% (5/4)	Number of State aid errors with financial impact	Number of State aid errors without financial impact
ERDF/CF	2010	163	37	22.7 %	2	5.4 %	2	0
	2011	168	43	25.6 %	8	18.6 %	4	4
	2012	168	30	17.9 %	6	20.0 %	2	4
	2013	168	51	30.4 %	16	31.4 %	5	11
	2014	161	59	36.6 %	14	23.7 %	3	11
Total ERDF/CF		828	220	26.6 %	46	20.9 %	16	30
ESF	2010	66	0	0.0 %	0	0.0 %	0	0
	2011	166	8	4.8 %	0	0.0 %	0	0
	2012	168	3	1.8 %	3	100.0 %	0	3
	2013	175	14	8.0 %	1	7.1 %	0	1
	2014	170	24	14.1 %	0	0.0 %	0	0
Total ESF		745	49	6.6 %	4	8.2 %	0	4
Total		1573	269	17.1 %	50	18.6 %	16	34

Source: European Court of Auditors.

36

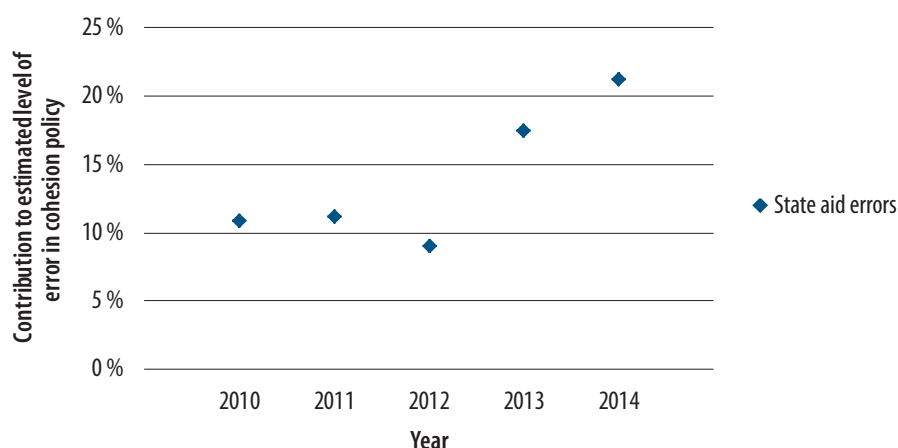
In 16 of the 50 cases of non-compliance with State aid rules (32 %), we considered that the errors we found had had a financial impact on the amount of funding from the EU budget. All of these 16 cases related to ERDF/CF projects and were an important factor contributing to our estimated level of error in cohesion policy, particularly since 2013 (see **Figure 5**)²⁹. For the 2010-2014 period, 13.5 % of our average annual estimated level of error in cohesion policy was attributable to State aid errors³⁰.

29 The estimated level of error is a statistical estimate of the likely percentage of error in the population. See Annex 1.1 paragraph 15 of our annual report on the financial year 2014.

30 In the period 2010-2014, the average annual estimated level of error in cohesion policy was 5.7 %.

Figure 5

Contribution of State aid errors to estimated level of error in cohesion policy, 2010-2014



Note: The contribution of State aid errors to the estimated level of error for cohesion policy depends on the gravity as well as the number of State aid errors.

Source: European Court of Auditors.

Four main categories of State aid errors detected

37

The State aid errors we detected as part of our annual compliance audits from 2010-2014 can be allocated into four categories (see **Figure 6**):

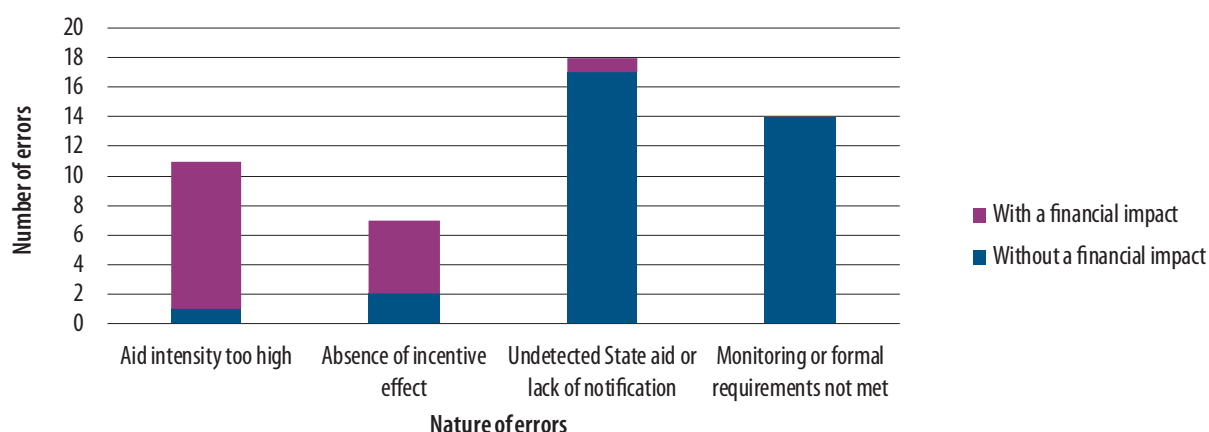
- (a) Aid intensity too high;
- (b) Absence of incentive effect;
- (c) Undetected State aid or lack of notification; and
- (d) Monitoring or formal requirements not met.

38

Of the 16 State aid errors which had had a financial impact, 15 related to the error categories 'Aid intensity too high' and 'Absence of incentive effect'.

Figure 6

Nature and number of State aid errors, 2010-2014



Source: European Court of Auditors.

Aid intensity too high

39

The Commission defines aid intensity ceilings³¹ to limit State aid amounts to the minimum needed for the aided activity to take place³². In many cases (depending, among other things, on the category of aid) the intensity ceilings can be increased for SMEs³³. This increase is called the 'SME bonus'. A frequent error in this category occurred when the managing authority treated a large company as an SME and granted it the SME bonus, which was ineligible (see **Box 2**).

31 'Aid intensity' means the aid amount expressed as a percentage of a project's eligible costs. See for example Article 2(26) of Regulation (EU) No 651/2014.

32 See the Commission's draft common principles for an economic assessment of the compatibility of State aid, available on DG COMP's website.

33 SMEs can enjoy a higher aid intensity because the Commission considers that market failures such as getting access to finance are bigger for small enterprises. See the Commission's handbook on Community State aid rules for SMEs of 25.2.2009.

Box 2

Example of incorrect aid intensity (Slovenia)

In an ERDF project in Slovenia examined by us as part of our 2013 annual compliance audit exercise, aid was granted under a notified scheme for research and development activities in the automotive industry. The beneficiary was established on the basis of a consortium agreement between nine partners, one of which was an SME. All other partners were large enterprises. The beneficiary received an SME bonus while carrying out its research activities exclusively on behalf of the large enterprises. Part of the eligible expenditure should have been subject to an intensity ceiling of 25 % rather than the rate of 50 % which was applied. As a result, an aid amount of 0.4 million euro should not have been granted.

Absence of incentive effect**40**

State aid will be effective in achieving the desired public policy objective only when it has an incentive effect, i.e. when it induces the aid beneficiary to undertake activities it would not have undertaken without the aid³⁴. Therefore, the beneficiary needs to demonstrate that the supported project would not have gone ahead without the aid. For example, under the 2008 GBER, the incentive effect for large enterprises receiving state aid had to be demonstrated by showing that the aid led to a material increase in the scope, size, amount spent or speed of completion of the project (see **Box 3**)³⁵.

34 COM(2012) 209 final of 8 May 2012 'EU State aid Modernisation (SAM)'.

35 Article 8(3) of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (OJ L 214, 9.8.2008, p. 3). This Regulation was preceded by Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid.

Box 3

Example of the absence of an incentive effect (Poland)

In an ERDF project in Poland for the construction of a logistics centre, examined by us as part of our 2010 annual compliance audit exercise, the beneficiary had failed to demonstrate in its project application that the aid would have led to a material increase in the scope, size, amount spent or speed of completion of the projects, as required under 2008 GBER. As a result, the project which could have benefited from 23.2 million euro of EU financing was not eligible and subsequently withdrawn by the Member State.

41

We also found cases where work had already started before the project application was submitted to the aid-awarding authority. This also indicates that the aid was not needed to carry out the project.

Undetected State aid or lack of notification

42

For the error category where a managing authority had incorrectly classified aid to a project as not constituting State aid, or otherwise failed to notify the State aid to the Commission, we first considered whether the aid could have been exempted from notification for example under the GBER. Only if there was no basis for exemption did we consider the error to have had a financial impact (see **Box 4**).

Box 4

Example of a lack of notification (Czech Republic)

In an ERDF project in the Czech Republic for the construction of research infrastructure, examined by us as part of our 2014 annual compliance audit exercise, the managing authority did not notify the aid to the Commission, believing the project's research activities to be of a non-economic nature. While the beneficiary's research activities were partially non-economic, it also engaged in contractual research for a significant part of its activities. As a result the audited grant amounting to 1.8 million euro constituted State aid and should only have been granted following notification to and approval by the Commission.

Monitoring or formal requirements not met

43

It is important that managing authorities observe the monitoring, verification and other formal requirements set out for them to ensure that measures which constitute State aid are compatible with the internal market. These requirements also apply to de minimis aid (see paragraph 14). Here, the specific difficulty is that undertakings may receive financial aid repeatedly from multiple sources. These different aid grants may cumulatively exceed the de minimis ceiling. Several errors in this category concerned the failure to verify the cumulation of de minimis aid (see **Box 5**).

Box 5

Example of monitoring or formal requirements not being met (France)

In an ERDF project in France for the construction of an industrial building, examined by us as part of our 2011 annual compliance audit exercise, the managing authority had approved an aid award as de minimis aid. It had failed, however, to take into account two previous aid grants awarded to the same beneficiary within a three-year period. There was no financial impact since the total amount of aid was below the de minimis ceiling.

44

Shortcomings in monitoring can however also result in aid being ineligible, if for example the total approved aid exceeds the de minimis ceiling. The de minimis Regulation provides two possibilities for monitoring de minimis aid: either a self-declaration by the beneficiary confirming that the aid would not result in the de minimis ceiling being exceeded, or by means of a central register³⁶. Setting up a central register with complete information on all de minimis aid granted in the Member State concerned helps to prevent such errors (see **Box 6**).

³⁶ Recital 21 of Commission Regulation (EU) No 1407/2013.

Box 6

Use of a central register for de minimis aid (Portugal)

In Portugal any de minimis aid granted needs to be entered into a central register managed by the certifying authority for the ERDF/CF and the ESF. The register then automatically calculates the accumulated aid granted to the beneficiary and indicating whether or not the de minimis ceiling has been exceeded. If the ceiling has been exceeded, the aid awarding body has to issue a decision of annulment and withdraw the previously recorded aid from the register. The certifying authority checks twice per year that aid awards exceeding the de minimis ceiling have subsequently been withdrawn.

Commission's monitoring weakened by a lack of a comprehensive analysis and insufficient internal coordination

45

As part of its supervisory role, the Commission undertakes various types of checks in relation to State aid. In cohesion policy, DG REGIO and DG EMPL undertake on-the-spot checks mainly through their audits of ERDF/CF and ESF projects and systems; in the area of State aid DG COMP undertakes controls mainly through its monitoring exercise and the handling of complaints.

46

We examined whether and to what extent the Commission had detected infringements of State aid rules, whether this information had been recorded in a database, analysed and shared within the Commission, and to what extent it took appropriate measures to correct the cases of non-compliance with State aid rules detected by the Commission itself or by us.

37 DG REGIO 2014 annual activity report section 2.1.1 'Control effectiveness as regards legality and regularity', page 47.

DG REGIO detects a significant number of State aid errors

47

For ERDF and CF projects, we analysed a random sample of 25 out of 131 reports of audits carried out by DG REGIO in 2013 and 2014. DG REGIO had selected the projects and programmes based on a risk assessment³⁷. All reports concerned both audits of projects and systems except one report which included only audits of projects. A total of 202 projects were covered by the 25 reports.

48

Our analysis showed that 38 out of 202 projects had been affected by State aid findings. This corresponds to 19 % of all projects examined in the course of these 25 Commission audits (see **Table 3**). This detection rate is similar to our own findings (see paragraph 35, **Table 2**).

Table 3

State aid findings in DG REGIO's audits, 2013-2014

	Number of audit reports	Proportion of audit reports	Number of projects	Proportion of projects
Without State aid findings	16	64 %	110 + 54 ¹	81 %
With State aid findings only on operations (projects)	5	20 %	38	19 %
With State aid findings both on operations (projects) and on systems	2	8 %		
With State aid findings only on systems	2	8 %	-	-
Total	25	100 %	202	100 %

1 110 projects without findings covered by the 16 reports without any State aid findings, 54 projects without State aid findings spread out over the other 9 reports.

Source: European Court of Auditors, based on Commission data.

DG REGIO imposed some financial corrections for infringements of State aid rules in the 2010-2014 period

49

The Commission is obliged to take appropriate actions to correct system weaknesses or errors detected at project level³⁸. When there are serious deficiencies or when a Member State has failed to properly exercise its responsibility to detect and correct irregular expenditure, the Commission can adopt a financial correction decision. Financial corrections aim at protecting the EU budget from the burden of erroneous or irregular expenditure³⁹.

50

For the 2010-2014 period, DG REGIO implemented ten financial corrections at least partially related to State aid following its own audits. These concerned five Member States (Austria, the Czech Republic, Spain, France and Romania). Six of these financial corrections, amounting to 3.2 million euro in total and concerning two Member States, were solely related to State aid (Spain and France). In addition, DG REGIO implemented three financial corrections at least partially related to State aid following its review of audit authorities' ACRs. One of these financial corrections, amounting to 32.5 million euro and concerning one Member State (Spain), was related solely to State aid. It is not possible to quantify the State aid component of financial corrections only partially related to State aid. No information was available with regard to the total number of errors or system weaknesses DG REGIO detected in the 2010-2014 period.

51

Two years after each of our annual compliance audit exercises, we analyse whether the Commission has taken appropriate and timely corrective action in relation to the errors we detected. DG REGIO implemented or was in the process of implementing five financial corrections in relation to five of our State aid errors in the 2010-2013 period⁴⁰. These financial corrections concerned four Member States (Spain, Greece, Austria and Poland). Four of these financial corrections, amounting to 2.7 million euro in total and concerning the same four Member States, were related solely to State aid. The Commission's position on a proposed financial correction of 0.3 million euro, related to a sixth State aid error, was not yet finalised.

38 Article 59 of Regulation (EU, Euratom) No 966/2012.

39 Financial corrections can be made by withdrawing irregular expenditure from Member States' expenditure declarations or through recoveries from beneficiaries.

40 Of our 13 errors with financial impact, 5 led to a financial correction. One financial correction concerned one of our 19 errors which we had classified to be without financial impact.

DG COMP's State aid monitoring exercises reveal many problematic aid schemes

52

The Commission is required to regularly monitor aid schemes to verify whether and to what extent they are in line with State aid rules, and to take appropriate actions in particular if any aid granted is not compatible with the internal market. Such actions include recovering any incompatible aid granted⁴¹. Therefore, we examined DG COMP's monitoring exercises' results for the 2009-2014 period; these are presented in **Table 4**. The Commission continues to monitor aid schemes previously approved⁴².

41 Case C-301/87, paragraphs 17-23.

42 Article 108(1) TFEU: 'The Commission shall [...] keep under constant review all systems of aid existing in [...] [Member] States. It shall propose to [Member States] any appropriate measures required by the progressive development or by the functioning of the internal market.'

Table 4

Results of DG COMP's monitoring exercises, 2009-2014¹

Aid scheme	Number of schemes monitored	Number (and proportion) of problematic cases ³	Number (and proportion) of cases with problems that affect compatibility
Block-exempted aid	73	24 (32.9 %)	9 (12.3 %)
Notified aid	138	50 (36.2 %)	7 (5.1 %)
Other ²	1	1 (100.0 %)	0 (%)
Services of general economic interest	8	4 (50.0 %)	0 (%)
Total	220	79 (35.9 %)	16 (7.3 %)

1 We include the year 2009 because the Commission's monitoring results combine the years 2009 and 2010.

2 DG COMP found one aid scheme which was neither a GBER scheme, a 'services of general economic interest' scheme nor an authorised scheme (hence it was an illegal scheme).

3 'Problematic' is a term used by DG COMP to indicate infringements of State aid rules ranging from formal shortcomings, such as incorrect formulations of cumulation rules, to legal issues, such as an absence of GBER conditions reflected in a GBER scheme.

Source: European Commission.

53

We found that DG COMP had selected the aid schemes to be monitored based on a risk assessment and taking into account the amount of aid granted. In the 2009-2014 period, there were on average 2 401 aid schemes with reported expenditure per year. In that same period, DG COMP monitored a total of 220 aid schemes (between 30 and 75 aid schemes per year). DG COMP estimates that the schemes it monitored in the 2009-2014 period represented over 20 % of all State aid granted under aid schemes. Most aid schemes run for several years and report expenditure on a yearly basis.

Observations

54

Based on its monitoring during the period from 2009 to 2014, the Commission found that around 36 % of all aid schemes had been affected by problems. Such problems concerned weaknesses in the design of aid schemes (such as unlawful exemptions of incentive effect rules or missing provisions with regard to aid intensity ceilings) or in the implementation of individual aid (such as unlawful breaches of the notification obligation for individual aid exceeding the GBER thresholds or aid being granted to large enterprises while the aid scheme was limited to SMEs)⁴³. Problems which affected compatibility (7.3 % of all cases) are particularly significant. In these cases the Commission can proceed to the recovery of aid. Problems affecting compatibility were particularly frequent in GBER schemes (12.3 % of all GBER cases).

55

More detailed information broken down by Member State and by category of aid and covering the 2006-2014 period is presented in **Annex II**, which shows that for five Member States (Greece, Lithuania, Luxembourg, Portugal and the United Kingdom) DG COMP considered half or more of all aid schemes to be problematic. While the results of DG COMP's monitoring exercise are not specific to cohesion policy, Annex II shows that regional development is the category of aid most often subject to DG COMP's monitoring.

DG COMP's monitoring exercises in the 2009-2014 period did not result in significant recoveries of State aid

56

During the 2009-2014 period, the Commission's State aid monitoring resulted in eight voluntary recoveries of irregular expenditure from beneficiaries by the Member States concerned⁴⁴. In addition, the Commission launched eight formal actions such as investigation procedures. One of these, launched in 2014 against Cyprus, led to the recovery in 2015 of 0.3 million euro related to a measure incorrectly exempted under the GBER⁴⁵.

43 Individual aid is any aid granted under or outside of an aid scheme. DG COMP did not monitor individual aid granted outside of an aid scheme before 2015.

44 Four recoveries in 2009, one in 2011, one in 2012 and 2 in 2014.

45 See Commission decision C(2014) 9362 of 9.1.2015.

For the 2007-2013 programme period, the Commission's databases did not allow the analysis of State aid errors

57

For the 2007-2013 programme period, neither DG REGIO nor DG EMPL recorded cases of non-compliance with State aid rules it detected in a way which allowed them to perform a proper analysis of State aid errors. For the 2014-2020 programme period, they developed a database called 'MAPAR' (Management of Audit Processes, Activities and Resources) to record all findings resulting from their audits for the ERDF, CF and ESF classified by type, category and seriousness. State aid errors form a separate category in this database. We found, however, that DG COMP did not have access to MAPAR.

58

Another database, managed by OLAF and accessible by DG REGIO and DG EMPL but not by DG COMP, is the Irregularity Management System (IMS), which is used by the Commission to collect information from the Member States on a quarterly basis about all irregularities exceeding 10 000 euro in EU contributions⁴⁶. During the period 2010 to 2014, 31 irregularities related to State aid were reported by Member States. Although there were only a small number of irregularities, the Commission did not analyse them.

59

We identified the following shortcomings in the way the information on irregularities in IMS was presented:

- (a) there was no specific error typology for State aid and therefore no consistency in the categorisation of errors between Member States. State aid errors would have had to be extracted by searching for 'State aid' in all official languages; and
- (b) in many cases the information submitted does not detail the nature or type of the errors. For example, a State aid error might be described only as a 'State aid issue'.

46 Article 28 of Commission Regulation (EC) No 1828/2006 of 8 December 2006 setting out rules for the implementation of Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and of Regulation (EC) No 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund (2007-2013 programme period) (OJ L 371, 27.12.2006, p. 1) and Commission Delegated Regulation (EU) 2015/1970 of 8 July 2015 supplementing Regulation (EU) No 1303/2013 of the European Parliament and of the Council with specific provisions on the reporting of irregularities concerning the European Regional Development Fund, the European Social Fund, the Cohesion Fund, and the European Maritime and Fisheries Fund (2014-2020 programme period) (OJ L 293, 10.11.2015, p. 1).

Observations

60

While DG COMP did not have a database either, for the 2007-2013 programme period it made a horizontal analysis of the problems detected in its monitoring exercises by means of an Excel spreadsheet. It did not share this information with DG REGIO or DG EMPL. In March 2016, DG COMP started to do so.

61

The absence of robust databases and the insufficient exchange of information on detected State aid errors between the Commission DGs prevented a comprehensive analysis of State aid errors in cohesion. Such an analysis could have helped the Commission to develop more focused and tailor-made preventive measures for Member States and/or programmes (see e.g. paragraphs 101 to 105).

The Commission stepped up State aid controls of public infrastructure projects following a 2011 Court of Justice ruling

62

In 1994, the Commission issued guidelines which specified that the construction of public infrastructure projects represented a general measure of economic policy which was not subject to the rules on State aid⁴⁷. The public financing of investments in airports, ports or similar public infrastructure were thus not notified by Member States to the Commission. In those guidelines, however, the Commission already indicated that economic activities carried out inside airports which directly or indirectly benefit airlines could be considered State aid⁴⁸. This distinction between 'public' infrastructure and 'dedicated' infrastructure was made in the 1995 Annual Competition report and later in the Commission's 2003 Vademecum on State aid⁴⁹. However, this Vademecum stated that the general State aid rules did not apply, in particular, to rail, air, inland waterways and maritime transport. During the 1990s, several factors such as market liberalisation, privatisation and technological progress contributed to increase the scope for the commercial exploitation of infrastructure. From 1998 onwards, and in accordance with this interpretation, the Commission considered aid awarded to several public infrastructure projects to be State aid.

63

The European Court of Justice issued rulings in 2000 and in 2011 which confirmed the view that the public financing of infrastructure investments can have State aid relevance (see **Box 7**).

47 See paragraph 12 of Application of articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ C 350, 10.12.1994).

48 See paragraph 12 of 'Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector' (OJ C 350, 10.12.1994, p. 5).

49 See COM(96) 126 Final paragraph 175 and Vademecum Community Rules on State Aid, pages 6 and 10.

Two important Court of Justice judgments relating to public infrastructure projects' compliance with State aid rules

In the 'Aéroports de Paris' judgment, the General Court ruled in December 2000 that the operation of an airport, including the provision of airport services to airlines and service providers within airports, is an economic activity and thus subject to State aid rules⁵⁰

In the 'Leipzig Halle' judgment, the General Court ruled in March 2011 that if the construction of infrastructure (for example, a runway) is inseparably linked to an economic activity (for example, transporting passengers by aeroplane), the construction itself is an economic activity⁵¹.

⁵⁰ Case T-128/98, Aéroports de Paris.

⁵¹ Joined cases T-443/08 and T-445/08, Leipzig Halle.

64

In August 2012, DG COMP issued guidance documents (referred to as 'analytical grids') to help Member States assess whether aid granted to infrastructure projects should be notified to the Commission, based on the 'Leipzig Halle' judgment.

65

It was only following the 'Leipzig Halle' judgment and the 2012 Commission guidance to the Member States that the number of notifications of infrastructure projects increased⁵². In 2014, referring to the 'Aéroports de Paris' and 'Leipzig Halle' judgments, the Commission expressed the view that the Court rulings would be 'applicable to any infrastructure operated for an economic activity', regardless of the sector concerned⁵³.

⁵² For example, DG COMP stated in the letter 'State aid Questionnaire on the functioning and the taxation of ports' of 3 July 2013 that: 'Following the Leipzig/Halle judgment of the European Court of Justice the European Commission received an increasing number of notification of port infrastructure investment projects involving public support.' See COMP/E3/H3/IA/jf/20 13/68609.

⁵³ Paragraph 35 of the draft Commission notice on the notion of State aid pursuant to Article 107(1) TFEU, published in 2014. The notice was adopted on 19 May 2016 (http://ec.europa.eu/competition/state_aid/modernisation/notice_aid_en.html) which includes a similar wording.

Inadequate coordination between Commission DGs to ensure that major project decisions also take account of State aid rules until the end of 2012

66

Some ERDF/CF projects are so financially significant that a specific Commission decision is required for the Member State to obtain EU co-financing. They have a total eligible cost exceeding 50 million euro, and are generally large-scale infrastructure projects⁵⁴. These projects are called major projects. If aid granted to a major project constitutes State aid, it is also likely that it needs to be notified due to its size⁵⁵.

67

For the 2007-2013 programme period, the Commission adopted 918 major project decisions representing over 75 billion euro of EU contributions; the average EU contribution to these projects was 82.6 million euro. Together these projects accounted for more than 25 % of all ERDF/CF spending, with significant differences between Member States (see **Figure 7**).

68

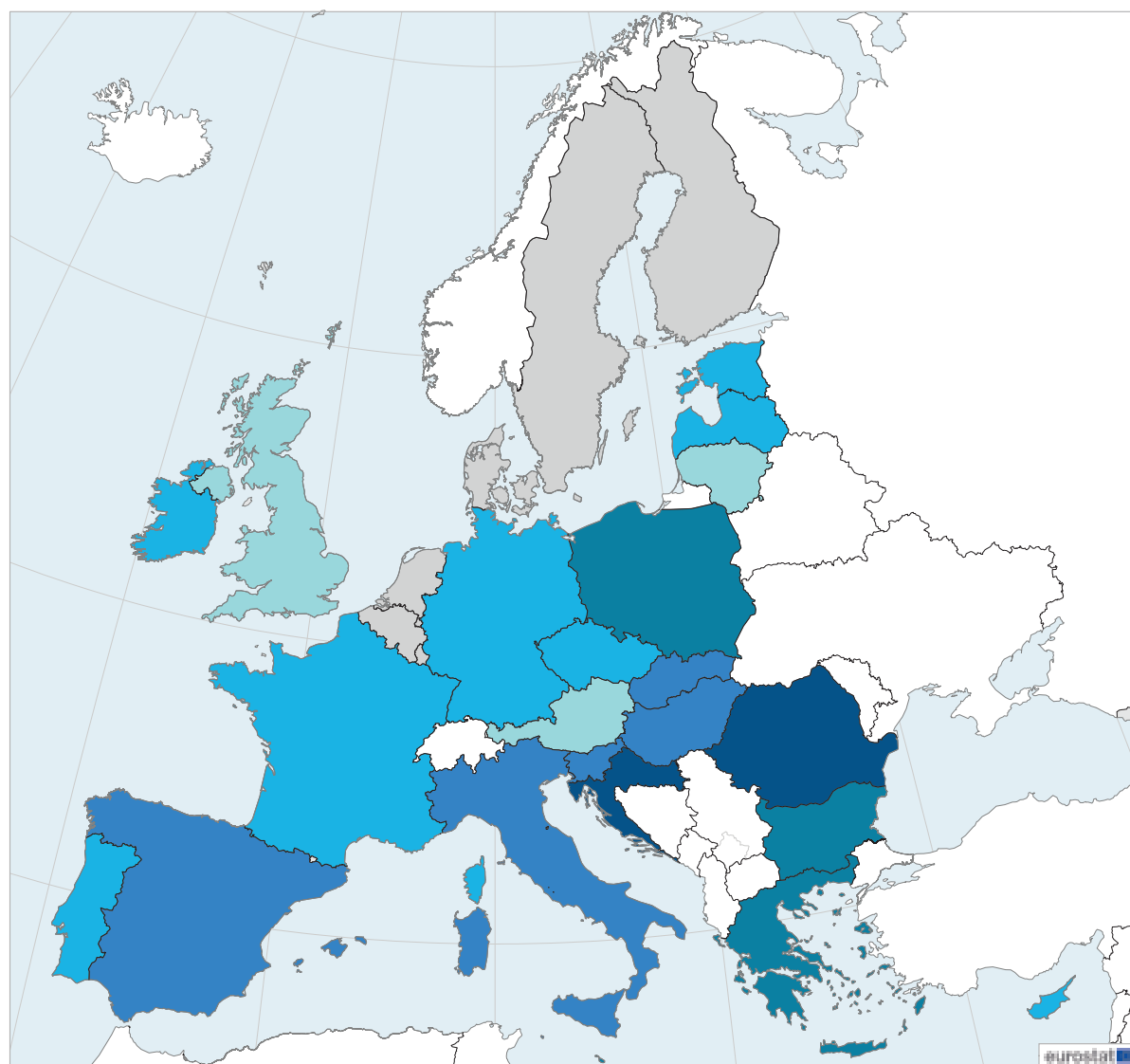
More detailed information on major projects adopted by the Commission for the 2007-2013 programme period is presented in **Annex III**.

54 For certain projects, the threshold is 75 million euro. See Article 100 of Regulation No 1303/2013.

55 The only categories of aid under the GBER with notification thresholds exceeding 50 million euro are regional investment aid, investment aid for culture and heritage conservation and aid for broadband infrastructure as well as, under certain conditions, aid for research and development and operating aid for renewable sources of energy. The notification threshold for services of general economic interest is 15 million euro. Article 4 of Regulation 651/2014 and Article 2 of Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest.

Figure 7

EU contributions to major projects as a proportion of all ERDF/CF spending by Member State



Legend

- 0 - 12.5 %
- 12.5 - 25 %
- 25 - 37.5 %
- 37.5 - 50 %
- 50+ %
- No major projects
- Not an EU country

Administrative boundaries: © EuroGeographics © UN-FAO © Turkstat
Cartography: Eurostat — GISCO, 01/2015

0 200 400 600 800 km

Source: European Court of Auditors, based on 2015 Commission data.

69

Member States are required to include various kinds of information in a major project application to allow the Commission to make a reasoned decision based on an assessment of the project's relevance, viability, sustainability, environmental profile and justification of requested funding as well as information provided by the Member State on whether State aid is involved. According to the Commission, since the end of 2012 DG REGIO formally consults DG COMP on all major project applications as part of its internal procedures, at which stage DG COMP may indicate to DG REGIO that the project should be notified. Furthermore, DG REGIO as the lead DG must consult DG COMP and other relevant DGs on the major project approval decision⁵⁶.

70

This consultation is especially important when the Member States indicate in the major project application that State aid is not involved, since in this case DG COMP does not receive a notification. But even if the Commission approves a major project by taking a decision, there is no guarantee that the project complies with State aid rules. An analysis of Commission decisions for major projects showed that there was no mention that the decision did not constitute confirmation of the projects' compliance with the applicable State aid legislation.

71

Of the 918 major projects adopted for the 2007-2013 programme period, the Commission adopted 440 before the end of 2012. For these projects DG COMP did not systematically verify whether the investments in public infrastructure might involve State aid. Moreover, in November 2012, the Commission issued a guidance note to Member States, stating that it did 'not intend to examine systematically compliance with the State aid rules of major infrastructure projects covered by this note which have already been subject of a decision [...] before the date of this note'⁵⁷. In principle, it is thus possible for a Member State to have received a Commission decision approving a major project while being in breach of State aid rules.

56 All relevant Commission departments shall have 10 to 15 working days for their assessment of the project application as well as for their assessment of the major project approval decision.

57 European Commission; Guidance Note to the COCOF No 12-0059-01 'Verification of compliance with state aid rules in infrastructure cases'; 21 November 2012.

Insufficient focus of Member States' audit authorities on compliance with State aid rules

72

Member States' audit authorities are an important part of the control chain on which the Commission builds its assurance in cohesion policy. It is therefore important that the audit authorities have the necessary expertise and perform checks of an appropriate quality. This is particularly important for checking compliance with State aid rules, which are an important source of errors and irregular expenditure in cohesion policy, though much less so for the ESF than for the ERDF and the CF (see paragraphs 33 to 36).

73

We asked audit authorities for their audit results related to State aid through our survey and examined the reporting of State aid errors in their annual control reports (ACRs) for ERDF/CF operational programmes. As part of our annual compliance audits, we reviewed the audit authorities' checklists for auditing compliance with State aid rules. We also asked the audit authorities whether they had received sufficient support from the Commission and how frequently they cooperated with other Member State authorities (such as State aid offices) in the area of State aid.

Audit authorities detected significantly fewer cases of non-compliance with State aid rules than the Commission or the Court

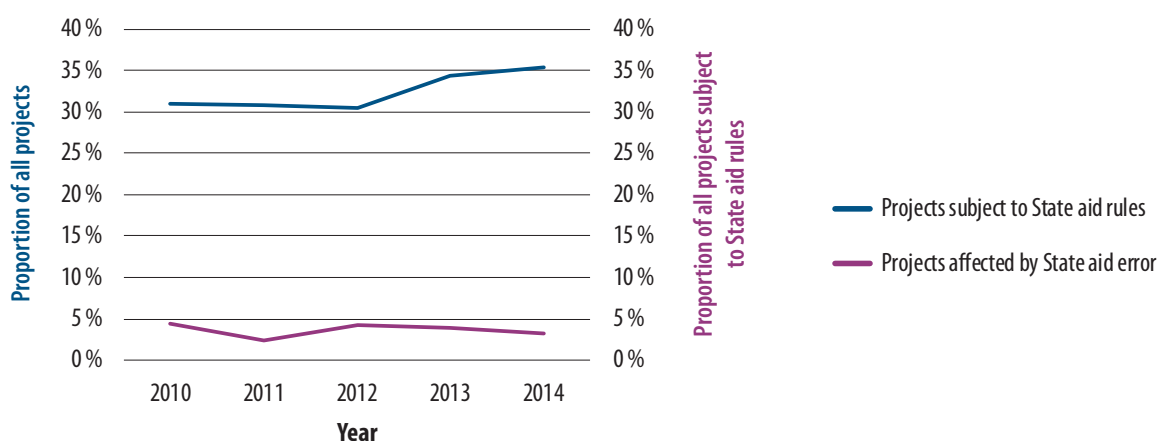
74

During the 2010-2014 period, based on information provided in the survey, audit authorities estimated that around a third (32.4 %) of the ERDF/CF and ESF projects audited by them had been State aid relevant. Audit authorities found State aid errors on average in 3.6 % of those projects (see **Figure 8**). Over that same period, we detected State aid errors in ERDF/CF and ESF projects at more than five times this rate (see paragraph 35, **Table 2**), even though we have a similar sampling methodology⁵⁸.

58 As a general rule, audit authorities are required to sample projects randomly. See Article 17 of Commission Regulation (EC) No 1828/2006 for the 2007-2013 programme period and Article 127 Regulation (EU) No 1303/2013 for the 2014-2020 programme period.

Figure 8

State aid in audit authorities' audits of projects, 2010-2014



Source: European Court of Auditors, based on survey results.

75

We also analysed 1026 ACRs for ERDF/CF operational programmes submitted to DG REGIO in the 2010-2014 period (see **Table 5**). Audit authorities were required to report on the 'principal results' of their audits of projects in the ACRs⁵⁹. In particular, we looked for reporting on State aid errors. We found that a reference to State aid errors was made in only 40 of the 1026 ACRs (3.9%). The most common error reported in the ACRs concerned 'de minimis' aid.

59 Commission Regulation (EC) No 1828/2006, Annex VI.

Table 5

ACRs submitted to DG REGIO, 2010-2014

Year	Number of ACRs reviewed	Number of ACRs with State aid irregularities identified	Identification frequency
2010	199	4	2.0 %
2011	211	8	3.8 %
2012	203	9	4.4 %
2013	209	9	4.3 %
2014	204	10	4.9 %
Total	1 026	40	3.9 %

Source: European Court of Auditors, based on analysis of ACRs submitted to DG REGIO.

76

Our analysis showed that the proportion of ACRs with reported State aid errors varied between Member States; for Denmark we found a total of five ACRs that mentioned State aid errors, for Cyprus, Estonia and France we found four and for Hungary and Lithuania we found three. For eight Member States (Belgium, Ireland, Italy, Luxembourg, Malta, Austria, Slovenia and Slovakia) we did not find any ACRs that mentioned State aid errors.

77

Compared to the results of the checks performed by the Commission (see paragraphs 47 to 56) and us (see paragraphs 33 to 44), the audit authorities detected State aid errors at a significantly lower rate.

78

As part of the work for our annual compliance audit for 2014 we reviewed a sample of 53 audit checklists used by the audit authorities in their audits of projects. We found that 18 of them (around 33 %) had significant shortcomings; for example, the checklist did not require a verification of the aid intensity, which is one of the main sources of errors in our audits (see paragraph 39)⁶⁰. Proper State aid checklists could help audit authorities in detecting State aid errors.

79

During 2015, the Commission encouraged audit authorities to address this issue, and our analysis found significant improvements in this regard⁶¹.

60 See paragraph 6.65 of our annual report concerning the financial year 2014.

61 See paragraph 6.59 of our upcoming annual report concerning the financial year 2015.

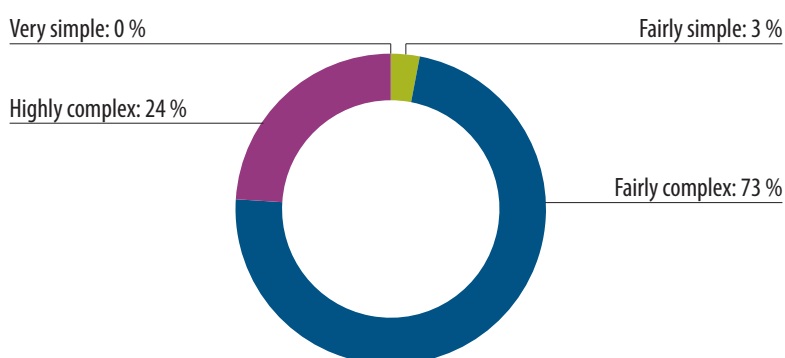
Member State authorities need additional support in relation to auditing compliance with State aid rules

80

Almost all audit authorities which responded to our survey considered the EU's legal framework for State aid to be at least fairly complex (see **Figure 9**). More than 35 % of them cited the volume of legislation as the biggest factor causing complexity in State aid. Another 35 % stated that they had difficulty in applying legislation in practice. An overview of the legal framework in the area of State aid is provided in **Annex IV**.

Figure 9

Assessment of the EU's legal framework for State aid – survey responses by audit authorities

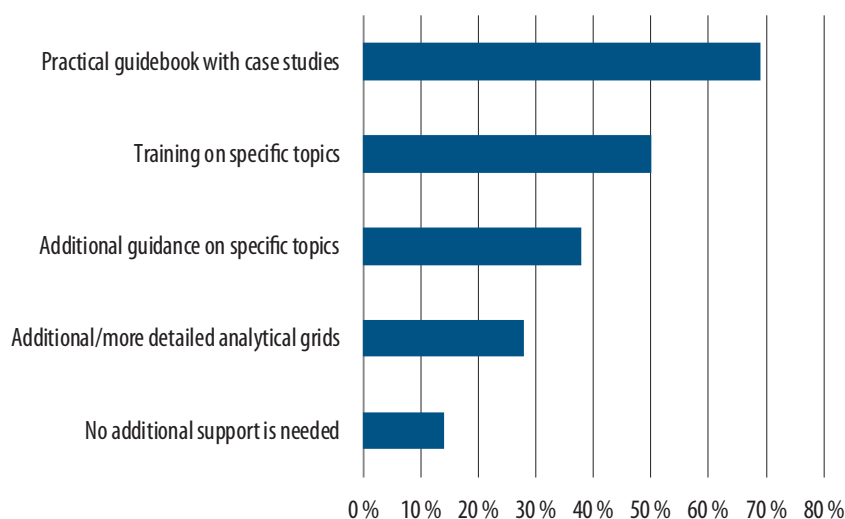


Source: European Court of Auditors, based on survey results.

81

More than 85 % of all audit authorities which responded to our survey also considered that they would benefit from further support from the Commission (see **Figure 10**). The support most often suggested was a practical guidebook with case studies (almost 70 %) and additional training measures (50 %).

Figure 10

Additional support needed from the Commission on State aid – survey responses by audit authorities

Source: European Court of Auditors, based on survey results.

82

The survey also showed that almost 70 % of audit authorities rarely or never had contact with State aid offices. Audit authorities from 8 Member States were not aware of the existence of a State aid office at central level in their Member State. Audit authorities can build on their State aid expertise by cooperating with the State aid offices more frequently.

Commission has taken action to simplify applicable State aid legislation and to promote administrative capacity of Member States

83

We have sought to identify whether the Commission has addressed the problem of non-compliance with State aid in the area of cohesion policy by taking appropriate preventive actions. Actions can encompass legislative actions such as simplifying rules or introducing reporting requirements for monitoring purposes and non-legislative actions such as training, seminars and dissemination of good practice. Such actions can relate to authorities involved in managing and controlling State aid in the area of cohesion policy as well as beyond.

Expanded General Block Exemption Regulation leads to a shift of responsibility from the Commission to Member States

The new GBER provides greater exemption from notification, strengthens transparency and introduces evaluation requirements

84

In the 2009-2014 period, over 115 billion euro was spent under the GBER⁶². In June 2014, the Commission adopted a new GBER to replace the 2008 GBER. The adoption of the new GBER is the most significant action taken by the Commission for the 2014-2020 programme period in the area of State aid. The main modifications in the 2014 GBER are:

- (a) an increase in the scope of the Regulation;
- (b) a change in the application of the incentive effect;
- (c) stronger transparency requirements; and
- (d) ex post evaluation of large aid schemes.

Increase in scope

85

The scope of the GBER was increased by introducing new categories of aid⁶³, expanding the scope of categories of aid already exempted under the 2008 GBER⁶⁴ and by increasing the notification thresholds and aid intensities for certain aid measures⁶⁵.

62 See the Commission's 2015 State aid scoreboard.

63 A total of 22 new exemption categories such as aid for broadband infrastructure and aid for sport and multifunctional recreational infrastructures have been created. Some categories such as aid for small enterprises newly created by female entrepreneurs have been removed. Other categories such as aid for innovation advisory services and for innovation support services and aid for the loan of highly qualified personnel have been merged. In total, the number of exemption categories has increased from 26 to 43.

64 The scope has been expanded for example in risk finance aid, investment aid for research infrastructure and environmental aid.

65 30 % of existing GBER categories have increased notification thresholds (for example R&D notification thresholds have doubled). Aid intensity levels have increased for example for investment aid for environmental protection, from 35-55 % to 40-75 %.

86

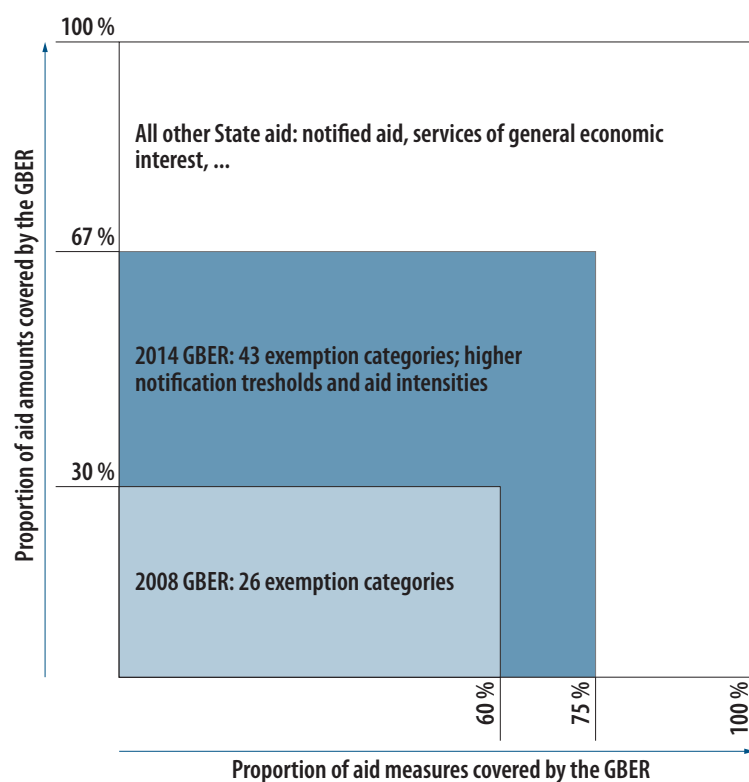
The increase in scope is significant: DG COMP estimates that the 2008 GBER covered 60 % of aid measures and 30 % of aid amounts granted⁶⁶. In contrast, DG COMP estimated that, in the 2014-2020 programme period, between 75 % and 90 % of aid measures and 67 % of aid amounts granted could be covered by the 2014 GBER (see **Figure 11**)⁶⁷. The precise impact of the increase in scope can only be assessed in the years to come.

66 See the Commission's press release IP 14 587 of 21.5.2014.

67 See European Commission Memo 14-369 of 21.5.2014.

Figure 11

Estimated minimum impact of the increase in scope of the 2014 GBER compared to the 2008 GBER



Source: European Court of Auditors, based on Commission estimates and the 2008 and 2014 GBERs.

87

By increasing the scope of the GBER, the Commission has significantly reduced administrative burdens for Member States and its own DGs, since significantly fewer aid measures will need to be notified. However, by increasing the scope of the GBER, the Commission has also shifted more responsibility to Member States. They will now have to verify for a larger number of aid measures whether they are compliant with State aid rules, such as the respect of aid intensity ceilings and the demonstration of the incentive effect. The Commission's monitoring exercises have shown that Member States made many mistakes in the design and implementation of aid schemes in the 2009-2014 period. These mistakes were likely to affect compatibility, in particular for GBER schemes (see paragraphs 52 to 54).

Change in the application of the incentive effect

88

State aid can be effective in achieving the desired public policy objective only when it has an incentive effect, i.e. it induces the aid beneficiary to undertake activities it would not have done without the aid (see paragraph 40). The second main change of the 2014 GBER has been to make it easier for large enterprises to demonstrate such an incentive effect when receiving aid under an aid scheme by aligning the requirements to those applicable to SMEs (see **Table 6**). This represents another reduction in administrative burdens for the Commission, Member States and these enterprises.

Table 6

Demonstrating the incentive effect, 2008 GBER versus 2014 GBER

	2008 GBER	2014 GBER
SME aid	(a) submitting the project application before work on the project or activity has started	
Aid to large enterprises awarded under aid schemes	(a) submitting the project application before work on the project or activity has started	
	(a) verification that documentation prepared by the beneficiary establishes that the aid led to a material increase in the size, the scope or the speed of completion of the project or a material increase in the amount spent on the project	-
Aid awarded to large enterprises outside of an aid scheme	(a) submitting the project application before work on the project or activity has started; and (b) verification that documentation prepared by the beneficiary establishes that the aid led to a material increase in the size, the scope or the speed of completion of the project or a material increase in the amount spent on the project	

Source: European Court of Auditors, based on the 2008 and 2014 GBERs.

Stronger transparency requirements

89

The third main change of the 2014 GBER is a considerable increase in transparency requirements for individual aid. Transparency provisions now require Member States to publish information not only on aid schemes and ad hoc aid but also on all individual aid measures exceeding 500 000 euro granted under aid schemes⁶⁸. Under the 2008 GBER, Member States were required to send information only on larger individual aid measures and only to the Commission (without publication), and only in the regional investment and research and development aid categories, under specified circumstances⁶⁹.

90

To facilitate central publication of all information posted on the national or regional websites for these State aid awards, DG COMP developed a specific IT tool in cooperation with Member States called the Transparency Award Module. This tool was made available on 1 July 2016⁷⁰.

91

We expect increased transparency to improve compliance with State aid rules in the Member States, since interested parties will have better information to file complaints about unlawful aid. The Commission is required to examine all such complaints (see paragraph 20).

Ex post evaluation of large aid schemes

92

For the 2014 GBER the Commission has introduced the concept of ex post evaluation for aid schemes in certain categories with an annual budget exceeding 150 million euro⁷¹. Such evaluations must be carried out by Member States with a view to weighing the positive effects against the negative effects of an aid scheme. Ex post evaluation increases administrative burdens for Member States; DG COMP has, however, limited this increase by restricting the requirement of evaluation to large aid schemes. By the end of 2015 Member States had submitted 18 evaluation plans under the 2014 GBER to DG COMP. The first evaluation results are expected in 2017.

68 The information, including all relevant aspects of an aid award such as the amount of the grant, the granting body and the beneficiary, is to be published on a comprehensive State aid website, at national or regional level, starting 1 July 2016 at the latest. See Article 9 of the 2014 GBER.

69 Article 9 of the 2008 GBER.

70 <https://webgate.ec.europa.eu/competition/transparency/public/search/chooseLanguage>.

71 Article 1(2) of the 2014 GBER. The categories are regional aid, aid for SMEs and for access to finance for SMEs, aid for R&D&I, aid for environmental protection and aid for broadband infrastructures.

Retroactive application of the new GBER

93

The new GBER was published on 26 June 2014 and entered into force on 1 July 2014. Article 58(1) states that 'this Regulation shall apply to individual aid granted before its entry into force'⁷². This means that aid granted before the entry into force of the 2014 GBER which was incompatible with the internal market at the time it was granted could subsequently be declared to be compatible, if the aid is compatible under new or changed provisions included therein⁷³. For example, a beneficiary might be in breach of the incentive effect stipulations in force at the time the aid was granted, though not of the new stipulations of the 2014 GBER. Because of the retroactive application of the 2014 GBER, Member States would no longer be required to recover this aid.

94

The retroactive application could result in aid measures being declared incompatible with the internal market because of a change in a provision or because the introduction of a new provision which was not in force at the time the aid was granted. In its monitoring exercises during the 2009-2014 period, the Commission found 16 problems which affected compatibility at the time the aid was granted. In four of these cases, it later found the aid to be compatible because of the retroactive application of the 2014 GBER. Similarly, in our 2014 annual compliance audits we found two State aid errors which had a financial impact at the time the aid was granted (when the 2008 GBER was in force) but were only a compliance issue without financial impact by the time of our audit (when the 2014 GBER had entered into force).

Difficulties persist in monitoring the status of recovery of unlawful aid across Member States

95

The 2014 GBER maintains the principle already set out in the 2008 GBER according to which it is prohibited to grant aid to undertakings which are subject to an outstanding recovery order⁷⁴. This provision is called the 'Deggendorf' principle.

72 The 2008 GBER contained a similar stipulation, see Article 44.

73 The situation where the Commission decides on the compatibility of aid after it is granted occurs when the aid is unduly not notified and the Commission is made aware of that fact, for example through a complaint by an interested party.

74 Article 1(4) the 2014 GBER and Article 1(6) of the 2008 GBER.

96

When the Commission adopts a recovery decision, the Member State concerned is obliged to recover the unlawful aid from the beneficiary. Recovery decisions are published in the Official Journal of the European Union. Unlike for individual aid, where the recovery decision identifies the beneficiary, in case of aid schemes, it is generally up to the Member State to identify and inform the Commission which undertakings benefited from the aid and what is the relevant aid amount to recover. As a result, in the case of recovery decisions applying to national aid schemes, the decision published in the Official Journal does not identify the specific undertakings concerned. Moreover, it is the Member State which is responsible for the recovery and for informing the Commission about it. However, there is no system in place through which the status of these recovery proceedings (i.e. whether or not the recovery order is still outstanding) across EU Member States is made accessible to the relevant authorities of another Member State. This poses a particular problem in relation to undertakings which operate in more than one Member State.

Stricter aid conditions in regional aid guidelines encourage the use of the GBER

97

The Commission considers aid granted under State aid guidelines (see **Annex IV**) to present a particular risk to the internal market, either because of the size of the aid (individual aid which exceeds the GBER notification thresholds) or the type of the aid (for example, operating aid to SMEs in certain regions must be notified under the regional aid guidelines⁷⁵). For this reason, the provisions of the guidelines are stricter than those of the GBER. The regional aid guidelines, which are one of seven State aid guidelines revised for the 2014-2020 programme period, focus on the development of disadvantaged areas in terms of living standards (certain areas where the GDP per capita is below or equal to 75 % of the EU average) or population density (certain areas with less than 12.5 inhabitants per km²) and are particularly relevant for cohesion policy.

98

The regional aid guidelines for the 2014-2020 programme period increase transparency by mandating the publishing of relevant information on a central website⁷⁶. They reduce the risk of aid distorting the internal market by lowering the maximum aid intensities allowed for large undertakings in all but the poorest regions⁷⁷. They also change the application of the incentive effect. For example, in the field of investment aid, they now require aid recipients to explain counterfactually what would have happened had they not received the aid⁷⁸. This requirement also applies to SMEs, making the regional aid guidelines much stricter than the GBER with regard to demonstrating the incentive effect (see paragraph 88).

- 75 The Commission considers operating aid to present particular risk to the internal market. For example, operational programmes for the 2014-2020 programme period contain a disclaimer that particular attention needs to be paid to State aid rules for operating aid.
- 76 Section 3.8 of the 2014-2020 regional aid guidelines.
- 77 Section 5.4 of the 2014-2020 regional aid guidelines versus section 4.1.2 of the 2007-2013 regional aid guidelines.
- 78 Section 3.5 of the 2014-2020 regional aid guidelines versus section 4.1.1(38) of the 2007-2013 regional aid guidelines.

99

Regional aid guidelines also require ex post evaluation of aid schemes, under certain conditions. Ex post evaluation may be imposed by DG COMP for aid schemes with large budgets, containing novel characteristics or when significant market, technology or regulatory changes are foreseen⁷⁹. As of 30 June 2016, Member States submitted ten evaluation plans under State aid guidelines, including regional aid guidelines.

Newly introduced ex ante conditionalities and major project procedure may improve compliance with State aid rules in cohesion policy

100

The Common Provisions Regulation for the 2014-2020 programme period introduces two changes with particular relevance for State aid in cohesion policy⁸⁰:

- (a) ex ante conditionalities; and
- (b) a new, optional procedure for approving major projects.

Member States not fulfilling ex ante conditionalities are not those where the Commission found most problems in the past

101

Ex ante conditionalities are conditions, based on pre-defined criteria, which the Commission regards as necessary prerequisites for the effective and efficient use of EU funds. State aid is one area for which such conditions are specified. According to the Commission, fulfilling these conditions has the potential to reduce the number of errors and problematic cases of State aid as it helps to improve management and control systems in the Member States which should improve compliance with State aid.

102

Member States were required to carry out a self-assessment of whether and how they met the following three criteria: the effective application of State aid rules; training and dissemination of information for staff; and administrative capacity⁸¹. Five Member States concluded in agreement with the Commission that they did not fulfil the conditions at the time of the adoption of the partnership agreements (see **Table 7**).

79 See 'Guidance for the Commission and Member States on a common methodology for the assessment of management and control systems in the Member States' of 18 December 2014.

80 Regulation (EU) No 1303/2013.

81 Article 19 of Regulation (EU) No 1303/2013.

Table 7

Member States not fulfilling the State aid ex ante conditionality criteria

Criterion	Croatia	Czech Republic	Italy	Romania	Slovakia
Arrangements for the effective application of State aid rules	-	-	-	-	-
Arrangements for training and dissemination of information for staff	-	√	-	√	√
Arrangements to ensure administrative capacity	-	-	-	√	-

Note: √ means the criterion is fulfilled
 - means the criterion is not fulfilled

Source: European Court of Auditors, based on Commission data.

103

In each case, DG REGIO and the Member State concerned agreed on a number of actions to be taken by the Member States which are documented in action plans. Examples of some actions are presented in **Box 8**.

Box 8

Examples of actions to be implemented to fulfil State aid ex ante conditionality criteria

Arrangements have to be put in place for the Member States in **Table 7** concerning:

The effective application of State aid rules. Examples of agreed actions:

Setting up central State aid registers for complying with the 2014 GBER or for registering de minimis aid (Italy and Romania)

Ensuring compliance with the Deggendorf principle by, for example, publishing a list of companies with outstanding recovery orders (the Czech Republic, Italy and Romania)

Training and dissemination of information for staff. Examples of agreed actions:

Requiring staff to follow at least two State aid training courses per year (Italy)

Setting up an operational network of State aid experts and coordinators (Croatia)

Ensuring administrative capacity. Examples of agreed actions:

Requiring a Member State to reinforce its administrative capacity by 10 to 15 posts (Slovakia)

Adopting a recruitment plan for national authorities involved in the management of the structural and investment funds (Croatia)

Source: European Court of Auditors, based on State aid ex ante conditionality action plans.

104

These actions must be completed by the end of 2016. Following the reporting on the fulfilment of the action plans by the Member States, the Commission will assess their completion. If the Commission concludes, based on its assessment, that an action plan has not been properly implemented, it can suspend payments to the Member State⁸². At the end of August 2016, the Commission assessment on whether the five Member States had implemented all actions in their action plans was still ongoing.

105

The Common Provisions Regulation did not require Member States to base their self-assessments on compliance with State aid rules during the 2007-2013 programme period, but laid down three specific criteria on administrative arrangements (see **Table 7**). When assessing the adequacy of the Member States' self-assessments, the Commission was not effective in making use of available monitoring information with a view to specifying action plans for all Member States where significant problems had been found in the past. In particular, according to the results of DG COMP's monitoring exercises carried out during 2006-2014, several Member States had a higher frequency of problems in the design and implementation of aid measures than the ones which concluded that they did not fulfil the State aid ex ante conditionalities (see paragraph 55).

Alternative approval procedure for major projects may improve clearance of State aid issues within the Commission, but is not designed always to provide legal certainty to Member States

106

For the 2007-2013 programme period, major projects were adopted by the Commission after it reviewed the project applications sent by the Member States (see paragraphs 66 to 71). In the 2014-2020 programme period a second, alternative approval procedure for major projects was introduced by the Common Provisions Regulation⁸³, where the application is appraised by an independent expert before being notified to the Commission by the Member State (see **Box 9**). Use of the alternative procedure is optional; as of June 2016, only one major project application had been submitted under the alternative procedure.

82 Article 19 of Regulation (EU) No 1303/2013.

83 Article 101 of Regulation (EU) No 1303/2013.

Box 9

Appointment of an independent expert and validation of the independent quality review

The independent expert reviews the major project proposal. This review includes an analysis of the aid character of the measure and its compatibility with the internal market. If the project application is assessed positively, the managing authority can approve the major project and send it to the Commission. The Commission can object to the project approval within three months if it establishes a 'significant weakness' in the independent quality review report.

The expert is chosen by the Member State, subject to Commission approval. The Commission has already pre-approved an expert group called 'Joint assistance to support projects in European regions' (JASPERS)⁸⁴.

⁸⁴ JASPERS is a technical assistance partnership between DG REGIO, the European Investment Bank and the European Bank for Reconstruction and Development. It is provided to Member States free of charge.

107

This alternative procedure for major projects may improve clearance of State aid issues within the Commission, but is not designed always to provide legal certainty for Member States with regard to State aid compliance at the time the major project decision is taken. That certainty can only be obtained on the basis of a Member State notification followed by a Commission State aid decision (see paragraph 70).

A State aid common action plan set up by the Commission aims to strengthen the administrative capacity of Member States and requires continuous attention

108

In March 2015, DG COMP and DG REGIO agreed on a State aid common action plan⁸⁵.

109

The action plan originally comprised six actions intended to raise awareness and improve knowhow in the field of State aid in all Member States: identification and dissemination of good practice, training courses for State aid specialists, country-specific workshops, seminars for specialists, the further development of a question-and-answer database (the ECN-ET network⁸⁶) and the development of a State aid information database. In 2016, the Commission added a seventh action (see **Table 8**).

⁸⁵ 'Strengthening administrative capacity for the management of the funds of Member States in the field of State aid – a common action plan', adopted by the Commission 18 March 2015.

⁸⁶ The European Competition Network - Electronic Transmission (ECN-ET) is an electronic interface where Member States can ask State aid-related questions to DG COMP. In general, both the questions and DG COMP's replies are published for all Member States to see. An example of an exception to publication is where a very specific case is not useful to other Member States.

Table 8

The Commission's State aid common action plan

Number	Action and deadline	Description	State of play as of August 2016
1	Identification and dissemination of good practice Early outcomes expected by Q2 2015	Compiling an inventory of effective tools existing in various Member States to build administrative capacity and to identify good practices which can be shared.	Finalised in 2016
2	Training for national State aid specialist on European Structural and Investment Funds ¹ Q2 2015	A one-day training session tailor-made for national State aid specialists to be held in Brussels.	Has not taken place as of August 2016.
3	Country-specific workshops Starting from Q2 2015	Organising interactive country-specific seminars in Member States which do not fulfil the ex ante conditionality on state aid or where serious bottlenecks were identified.	Seminars have been organised in 2014 (Spain) and 2015 (Bulgaria Croatia, the Czech Republic, Italy, Romania and Slovakia).
4	Seminars for specialists, internet training courses Continuous action	Disseminating knowledge through very specific, tailor-made seminars focused on a particular topic/issue.	A thematic workshop for Research, Development and Innovation took place in Brussels in January 2016.
5	Development of question-and-answer database Continuous action	Providing guidance regarding the interpretation of the new rules to all national State aid specialists through a shared IT platform fully managed by DG COMP.	More than 600 questions and answers have been submitted as of June 2016; these are being migrated to the eState aid wiki (see action 6).
6	Development of State aid wiki Continuous action	A number of pages summarising the relevant questions asked through the ECN-ET.	Went online in February 2016 and is called eState aid wiki. Around 270 questions and answers had been posted as of June 2016.
7	Development of a dedicated training module	A series of two-day State aid training sessions is under development by DG REGIO/DG EMPL and DG COMP together with the European Institute of Public Administration. Two training sessions will take place in Brussels in November and December 2016; more can be added based on Member State demand. The target group is European Structural and Investment Fund practitioners with some experience of State aid.	Intended for November and December 2016

1 The European Structural Investment Funds are the ERDF, the CF, the ESF, the European Agricultural Fund for Rural Development, and the European Maritime and Fisheries Fund.

Source: European Court of Auditors, based on Commission information.

110

Out of the seven actions in the State aid common action plan, actions 1 and 3 had been fully implemented; actions 5 and 6 had been implemented and are supposed to function on a continuous basis. The remaining three actions had not been implemented as of August 2016: one was in the process of being rolled out (action 4) and two were yet to start (actions 2 and 7).

111

In addition we found that DG REGIO and DG EMPL had significantly increased the total number of training courses provided from 5 in the 2012-2013 period to 17 in the 2014-2015 period. DG COMP organised 37 training courses on the reform of State aid legislation for the 2014-2020 programme period in 2014 and 2015 on the request of 19 Member States⁸⁷. In addition, by January 2016 DG COMP had organised training courses on State aid and infrastructure for five Member States⁸⁸.

112

The State aid common action plan and the increase in training activities provided by the Commission are part of a concerted effort to improve Member States' compliance with State aid rules, partially as a response to their increased responsibilities in the area of State aid. These initiatives are important to mitigate the risk of increasing the Member States' role in designing and implementing aid measures. Our survey results show that the eState aid wiki in particular was received very positively. It has been used extensively by Member States: as of 30 June 2016, about 270 questions and answers had been posted⁸⁹.

113

The extent to which these actions will lead to improvements in the detection and prevention of State aid errors in the Member States can only be assessed in the future.

87 All Member States except Denmark, Ireland, Greece, Cyprus, Lithuania, Luxembourg, Malta, the Netherlands and Austria.

88 Bulgaria, Croatia, the Czech Republic, Romania and Slovakia.

89 Over 600 questions and answers had been posted in the preceding ECN-ET network; these are being migrated to the eState aid wiki.

Conclusions and recommendations

114

Since 2010, our audits in cohesion policy found a significant level of non-compliance with State aid rules. This report points to a need for more awareness of the applicable rules at Member State level and for continued Commission support to effectively prevent, detect and correct infringements of State aid rules. Overall, we found that:

- (a) Over the 2010-2014 period, the Commission and the Court of Auditors detected infringements of State aid rules in a significant number of our audits; State aid errors in ERDF and CF were an important factor contributing to our estimated level of error in cohesion policy. We found that the Commission's own audits and monitoring in the cohesion area resulted in a detection rate which was similar to our own findings. The audit authorities in the Member States, on the other hand, detected infringements of State aid rules at a far lower rate than either the Commission or us. This indicates that, so far, audit authorities have not focused sufficiently on State aid in the course of their audits.
- (b) During the 2007-2013 programme period the Commission did not record the State aid errors it detected or those reported by Member States in a way which allowed it to perform a proper analysis. Such an analysis could have helped the Commission to develop more focused and tailor-made preventive measures for Member States and programmes.
- (c) Particularly in the beginning of the 2007-2013 programme period, the Commission did not systematically verify major projects for State aid compliance. There is a risk that some EU co-financed major projects are incompatible with the internal market, also due to the fact that prior to 2012, and the clarification provided by the Leipzig Halle judgment, Member States rarely notified investments in infrastructure to the Commission. In order to mitigate this risk for the future, the Commission stepped up its internal preventive measures and it introduced an alternative approval procedure including an Independent Quality Review for the 2014-2020 programme period. According to the Commission, independent of the procedure used by the Member State, major projects will only be approved after internal State aid clearance.
- (d) The Commission has taken actions to simplify the applicable State aid legislation for the 2014-2020 programme period which have resulted in a reduction of administrative burdens and more transparency, but have also increased Member States' responsibilities for designing and implementing aid measures. Member States getting more responsibility risks increasing the number of State aid errors: the Commission's monitoring has shown that Member States made many mistakes in the design and implementation of aid schemes in the 2007-2013 programme period. To mitigate this risk, the Commission has taken actions to promote Member States' administrative capacity in the area of State aid, including the introduction of pre-conditions for State aid systems to promote the efficient and effective implementation of European Structural and Investment Funds ('ex ante conditionalities'). However, the Member States which were considered not to be fulfilling these conditions are not necessarily those where the Commission found most problems in the past. Moreover, these actions require continuous attention.

No comprehensive overview of State aid errors by the Commission, insufficient Member State focus on State aid and insignificant recovery of State aid following the Commission's monitoring exercises

115

Over the 2010-2014 period, we found a significant number of cases of non-compliance with State aid rules in 269 projects audited in the area of cohesion to which these rules applied; State aid errors were an important factor contributing to our estimated level of error in cohesion policy. DG REGIO's own audits in the area of cohesion have results similar to ours (see paragraphs 33 to 36 and 47 to 48).

116

In order to protect the EU budget, the Commission imposes financial corrections on Member States when cases of non-compliance with State aid rules are detected. For the 2010-2014 period, DG REGIO has implemented or was in the process of implementing 18 financial corrections against seven Member States that resulted at least partially from infringements of State aid rules. Ten resulted from DG REGIO's own audits, five from our audits and three from DG REGIO's review of the audit authorities' ACRs. 11 of these financial corrections, amounting to 38.4 million euro in total and covering five Member States, were solely related to State aid⁹⁰. It is not possible to quantify the State aid component of the other financial corrections (see paragraphs 49 to 51).

117

The Commission is required to regularly monitor aid measures to verify whether and to what extent they respect State aid rules. If it finds that any aid granted is incompatible with the internal market, it can proceed to the recovery of aid. DG COMP has so far only taken limited corrective action in view of the number and seriousness of the issues detected through its monitoring exercises. On average, based on its monitoring, DG COMP considers that around 36 % of all aid schemes were affected by problems in the 2009-2014 period. Problems which affected compatibility (7.3 % of all schemes) were particularly significant. During this period, DG COMP's monitoring resulted in eight voluntary recoveries and in eight formal actions, the latter of which led to a total recovery of 0.3 million euro (see paragraphs 52 to 56).

Recommendation 1

The Commission should impose corrective actions where aid measures are not in compliance with State aid rules.

Target implementation date: immediately

⁹⁰ Greece, Spain, France, Austria and Poland.

Conclusions and recommendations

118

For the 2007-2013 programme period, neither DG REGIO nor DG EMPL recorded cases of non-compliance with State aid rules they had detected in a way which allowed them to perform a proper analysis of State aid errors (see paragraphs 57 to 61).

119

The Commission has developed a database for the 2014-2020 programme period (MAPAR) for recording information on cases of non-compliance with State aid rules it detects during its own audits for ERDF, CF and ESF. This system represents a considerable improvement, but no access has been granted to DG COMP (see paragraph 57).

120

State aid errors reported by Member State authorities are encoded in the Commission's Irregularity Management System (IMS). IMS shows several weaknesses such as the absence of a specific error typology for State aid and an insufficient description of errors; it is therefore of limited use in practice. DG COMP does not have access to IMS either (see paragraphs 58 and 59).

Recommendation 2

- (a) The Commission should use MAPAR to record irregularities in a way that allows easy analysis of, for example, their type, frequency, seriousness, geographical origin and cause. The database should equally contain information on the follow-up of these irregularities (such as financial corrections imposed).

Target implementation date: immediately

- (b) With regard to IMS, the Commission should adapt the database's structure so that information on irregularities such as State aid can be extracted and analysed across Member States and type.

Target implementation date: by the end of 2017

- (c) DG COMP should be given access to all relevant information on State aid irregularities contained in MAPAR and IMS on a regular basis.

Target implementation date: immediately

121

The Commission decision approving major projects is based on an assessment of the projects' relevance, viability, sustainability, environmental profile and justification of requested funding as well as information provided by the Member State on whether State aid is involved; however, it is not designed always to provide legal certainty for Member State as to compliance with State aid rules at the time the major project decision is taken. That certainty can only be obtained on the basis of a Member State notification followed by a Commission State aid decision (see paragraphs 69 and 70).

122

Particularly at the beginning of the 2007-2013 programme period, the Commission did not systematically verify major projects for State aid compliance. As a result, there is a risk that some EU co-financed major projects are incompatible with the internal market, also due to the fact that prior to 2012, and the clarification provided by the Leipzig Halle judgment, Member States rarely notified investments in infrastructure to the Commission. In order to mitigate this risk for the future, the Commission stepped up its internal preventive measures and introduced an alternative approval procedure including an Independent Quality Review for the 2014-2020 programme period (see paragraphs 62 to 65, 70 and 106 to 107).

Recommendation 3

- (a) The Commission should approve major projects only after internal State aid clearance and consistently ask Member States to notify aid where needed with a view to ensuring legal certainty, independent of the application procedure used by the Member State.

Target implementation date: immediately

123

During the 2010-2014 period, audit authorities estimated that around a third of the ERDF/CF and ESF projects they audited had been State aid relevant. They detected State aid errors in only 3.6 % of those projects. Over that same period, we detected State aid errors in ERDF/CF and ESF projects at more than five times this rate. There were significant shortcomings in the State aid section of slightly over one third of the checklists used by audit authorities that we reviewed. Improvements in this regard were made in 2015. Most of the errors reported in audit authorities' annual control reports related to de minimis aid. Setting up a central register with complete information on all de minimis aid granted in the Member State concerned could help to prevent such errors (see paragraphs 43 and 74 to 79).

Conclusions and recommendations

124

Almost all audit authorities considered the EU's legal framework for State aid to be at least fairly complex. Audit authorities expressed a need for additional support in relation to auditing compliance with State aid rules, in particular for a practical guidebook with case studies. On specific aspects, such as the status of recovery decisions, Member State authorities do not have the necessary information to verify compliance with the applicable State aid rules (Deggendorf principle) (see paragraphs 80 to 82 and 95 to 96).

Recommendation 4

- a) The Commission should ensure that the scope and quality of audit authorities' checks of compliance with State aid rules are sufficient.

Target implementation date: March 2017

- (b) In view of the closure of the 2007-2013 programme period, the Commission should ask audit authorities to check the State aid compliance of those major projects that have been approved before the end of 2012.

Target implementation date: March 2017

- (c) The Commission should develop further guidance material, including in particular case studies illustrating good practices and the most common types and causes of infringements of State aid rules.

Target implementation date: by the end of 2017

- (d) The Commission should encourage Member States to set up a central register for monitoring de minimis aid.

Target implementation date: by the end of 2017

- (e) The Commission should set up a central EU-wide database in which relevant Member State authorities can consult the identity of undertakings subject to State aid recovery orders as well as the status of recovery proceedings, in order to enable them to comply with the Deggendorf principle. Access should be granted only on a need-to-know basis.

Target implementation date: by the end of 2017

Commission has taken action to simplify applicable State aid legislation, which increases Member States' responsibilities, and to promote Member States' administrative capacity

125

The Commission adopted a new GBER for the 2014-2020 programme period. The scope of the 2014 GBER has increased significantly, which will lead to even more aid measures falling under it. By increasing the scope of the GBER, the Commission has significantly reduced administrative burdens for Member States and itself, since significantly less aid measures will need to be notified. Member States will have to ensure and verify for a larger number of aid measures whether they are compliant with State aid rules such as the respect of aid intensity ceilings and the demonstration of the incentive effect. The provisions of the regional aid guidelines for the 2014-2020 programme period are generally stricter than those of the GBER, further encouraging its use (see paragraphs 85 to 87 and 97 to 98).

126

By itself, Member States' bigger role due to the expansion of the GBER risks increasing the number of State aid errors: the Commission's monitoring exercises have shown that Member States made many mistakes in the design and implementation of aid schemes in the period 2009-2014. These problems were likely to affect compatibility in particular for GBER schemes (see paragraphs 52 to 54).

127

However, the provisions of the GBER have been changed to mitigate this risk. The 2014 GBER makes it easier for large enterprises which are granted State aid under an aid scheme to demonstrate the incentive effect. Another significant change in the GBER is an increase in transparency requirements, which we expect to improve compliance with State aid rules in the Member States since interested parties will have better information to file complaints about unlawful aid (see paragraphs 88 to 91).

Conclusions and recommendations

128

To improve the way in which Member States design aid schemes, the Commission introduced ex post evaluations for the 2014-2020 programme period. Evaluation in particular will be carried out for the largest aid schemes – under the GBER, evaluation is mandatory in certain categories for aid schemes with an annual budget exceeding 150 million euro. Member States are expected to present their first results by 2017 (see paragraphs 92 and 99).

129

The Common Provisions Regulation introduced ex ante conditionalities regarding Member States' State aid systems. Fulfilment of these conditions may reduce infringements of State aid rules. Based on a self-assessment, five Member States had not yet fulfilled these conditions by the end of 2015. However, the Member States which were considered not to be fulfilling these conditions are not necessarily those where the Commission found most problems in the past. Moreover, these actions require continuous attention. To further promote administrative capacity in the area of State aid, DG REGIO and DG COMP adopted a joint State aid action plan in March 2015. This action plan has, for example, led to an increase in training activities organised by the Commission and in the set-up of an online interface, positively received by Member State authorities, where they can ask State aid questions to the Commission (see paragraphs 101 to 105 and 108 to 113).

130

The extent to which the promotion of administrative capacity by the Commission and the introduction of ex post evaluation can compensate for the increased responsibility of Member States and the extent to which these initiatives will lead to the better detection and prevention of State aid errors in the Member States can only be assessed in the future.

Recommendation 5

- (a) If the ex ante conditionality concerning State aid is not fulfilled by the end of 2016 the Commission should use its powers to suspend payments to the Member States concerned until they have rectified all significant shortcomings.

Target implementation date: once the Commission has finalised its assessment

- (b) Using the information available in its databases, the Commission should follow up every two years on Member States' capacity to comply with State aid rules by carrying out analyses of, for example, the type, frequency, seriousness, geographical origin and cause of State aid errors detected by the Commission itself or by Member State authorities. The Commission should use these exercises for monitoring purposes and to direct support activities such as providing training to the Member States where they are most needed.

Target implementation date: every two years starting from the end of 2017

This Report was adopted by Chamber II, headed by Mr Henri GRETHEN, Member of the Court of Auditors, in Luxembourg at its meeting of 7 September 2016.

For the Court of Auditors



Vítor Manuel da SILVA CALDEIRA
President

Spending on State aid by Member State, 2010-2014, million euro

Member State	2010	2011	2012	2013	2014	Total	Percentage of total
Belgium	2 400	1 655	1 556	1 614	1 711	8 936	2.33 %
Bulgaria	40	43	77	121	240	520	0.14 %
Czech Republic	1 242	1 406	1 558	1 714	2 169	8 089	2.11 %
Denmark	2 211	2 369	2 591	2 561	2 509	12 241	3.20 %
Germany	16 266	14 000	13 574	13 808	39 559	97 208	25.39 %
Estonia	49	52	62	123	236	522	0.14 %
Ireland	1 718	1 057	853	1 144	825	5 597	1.46 %
Greece	2 083	2 509	1 931	2 903	1 929	11 354	2.97 %
Spain	4 898	4 507	3 905	3 084	3 197	19 591	5.12 %
France	15 917	13 912	15 706	13 733	15 543	74 811	19.54 %
Croatia	-	-	-	258	276	534	0.14 %
Italy	4 127	3 840	4 399	3 469	5 509	21 343	5.58 %
Cyprus	121	140	116	104	100	580	0.15 %
Latvia	202	284	398	378	492	1 754	0.46 %
Lithuania	180	222	230	208	181	1 020	0.27 %
Luxembourg	108	114	101	164	168	655	0.17 %
Hungary	2 051	1 173	1 167	1 452	1 702	7 545	1.97 %
Malta	92	102	108	132	82	516	0.13 %
Netherlands	2 782	2 827	2 510	2 064	2 238	12 420	3.24 %
Austria	2 085	1 777	1 914	1 871	1 479	9 126	2.38 %
Poland	3 499	2 942	3 001	2 978	4 929	17 349	4.53 %
Portugal	1 535	1 553	933	471	732	5 224	1.36 %
Romania	315	677	878	896	972	3 737	0.98 %
Slovenia	375	455	459	472	453	2 214	0.58 %
Slovakia	313	173	133	200	313	1 131	0.30 %
Finland	2 287	3 126	2 523	2 589	2 545	13 071	3.41 %
Sweden	3 210	3 155	3 172	3 255	3 204	15 996	4.18 %
United Kingdom	5 574	4 797	5 524	5 953	7 872	29 719	7.76 %
European Union	75 680	68 866	69 376	67 719	101 161	382 802	100 %

Note: According to the Commission, the increase in expenditure in 2014 is largely (85 %) due to the inclusion of more renewable energy schemes in the reporting. Without this inclusion, State aid reported would have amounted to around 73 billion euro in 2014. In addition, EU funds are included only from 2014.

Source: European Court of Auditors, based on the Commission's 2015 State aid scoreboard.

Results of the monitoring exercises carried out by the Directorate-General for Competition, 2006-2014

	Number of schemes monitored	Number of problematic cases	Ratio of problematic cases
Block-exempted aid	121 (of which 26 in 2014)	31	26 %
Authorised aid	166 (of which 42 in 2014)	53	32 %
Other	1 (of which 0 in 2014)	1	100 %
Services of general economic interest	8 (of which 7 in 2014)	4	50 %
Total	296 (of which 75 in 2014)	89 (of which 27 in 2014)	30 % (36 % in 2014)
Broadband	7	2	29 %
Culture	11	3	27 %
Employment	15	5	33 %
Environment and energy	45	14	31 %
Other horizontal	2	0	0 %
Regional development	64	18	28 %
Research and Development	47	19	40 %
Risk capital	10	6	60 %
Sectoral development	5	1	20 %
SMEs	31	5	16 %
Training	25	4	16 %
Transport	16	6	38 %
Rescue & Restructure	9	1	11 %
Services of general economic interest	8	4	50 %
Other	1	1	100 %

	Number of schemes monitored	Number of problematic cases	Ratio of problematic cases
Belgium	15	7	47 %
Bulgaria	4	1	25 %
Czech Republic	10	3	30 %
Denmark	5	1	20 %
Germany	26	3	12 %
Estonia	4	1	25 %
Ireland	11	1	9 %
Greece	11	6	55 %
Spain	21	5	24 %
France	29	10	34 %
Italy	28	6	21 %
Cyprus	4	1	25 %
Latvia	3	1	33 %
Lithuania	4	2	50 %
Luxembourg	4	2	50 %
Hungary	9	1	11 %
Malta	3	1	33 %
Netherlands	13	6	46 %
Austria	11	4	36 %
Poland	17	4	24 %
Portugal	9	6	67 %
Romania	6	1	17 %
Slovenia	4	1	25 %
Slovakia	5	0	0 %
Finland	4	1	25 %
Sweden	7	0	0 %
United Kingdom	29	15	52 %

Source: European Commission.

Major projects adopted by the Directorate-General for Regional and Urban Policy for the 2007-2013 programme period

Member State	Number of major projects adopted	Proportion of major projects adopted	Average EU contribution per major project approved (in million euro)	Total EU contribution to major projects approved (in million euro)
Belgium	0	0.0 %	-	0.0
Bulgaria	18	2.0 %	108.8	1 958.4
Czech Republic	49	5.3 %	89.5	4 387.8
Denmark	0	0.0 %	-	0.0
Germany	44	4.8 %	41.6	1 830.3
Estonia	9	1.0 %	50.8	457.3
Ireland	3	0.3 %	24.8	74.5
Greece	59	6.4 %	105.6	6 228.4
Spain	70	7.6 %	83.6	5 852.3
France	36	3.9 %	28.8	1 035.7
Croatia	12	1.3 %	39.2	470.3
Cyprus	3	0.3 %	34.0	102.0
Latvia	10	1.1 %	70.3	702.7
Lithuania	10	1.1 %	49.7	496.5
Luxembourg	0	0.0 %	-	0.0
Hungary	51	5.6 %	114.7	5 849.2
Malta	7	0.8 %	40.9	286.3
Netherlands	0	0.0 %	-	0.0
Austria	1	0.1 %	4.1	4.1
Poland	274	29.8 %	98.6	27 022.9
Portugal	39	4.2 %	47.5	1 852.0
Romania	100	10.9 %	80.4	8 044.4
Slovenia	16	1.7 %	58.2	931.1
Slovakia	33	3.6 %	79.8	2 634.8
Finland	0	0.0 %	-	0.0
Sweden	0	0.0 %	-	0.0
United Kingdom	13	1.4 %	38.6	501.2
Total	918	100.0 %	82.6	75 790.3

Source: European Court of Auditors, based on Commission data.

Legal framework in the area of State aid

TFEU – The Treaty lays the foundation of all State aid rules in Articles 107 to 109. The Treaty has the highest legal standing and all other legislation must be in conformity with its provisions. Articles 108(4) and 109 provide for the adoption of Regulations in the area of State aid.

Case law – Judgments from the Court of Justice which interpret the provisions of the Treaty and secondary law. The judgments of the Court of Justice are binding on the Commission and on Member States. The Commission must adapt its approach to the judgments of the Court.

Regulations – Regulations are acts of secondary law adopted by the institutions. They have general application, are binding in their entirety and directly applicable in Member States on the date of their entry into force (without requiring separate incorporation into national law)¹. The most important Regulation in the area of State aid is the GBER.

Soft law

Guidelines – Guidelines are soft law which lack legally binding force but may have legal effects. The Court of Justice has in the past annulled Commission Decisions because they failed to comply with soft law. Guidelines set out criteria by which the Commission will assess the compatibility with the internal market of notified aid measures. The Commission is likely to consider notified aid measures which do not abide by the criteria set out in the guidelines to be incompatible. Guidelines exist at horizontal level (for example: guidelines on research, development and innovation) and at sectoral level (for example: guidelines on airports and airlines).

Analytical grids – Guidance documents designed specifically to help Member States assess whether aid granted to infrastructure projects should be notified to the Commission.

¹ See Article 288 TFEU.

IV

The Commission closely and continuously works with audit authorities to improve their capacity as regards audit of State aid. Beyond targeted training, actions and guidance, it provided ready to use State aid checklists to audit authorities in 2011 and updated ones in November 2015.

The Regulation requires audit authorities to submit in their annual control reports (ACR) the principal results of the audits but not detailed information regarding the nature of errors identified. The Commission services' reviews of the ACRs include an examination of the methodology for system audits and audits of operations (including check-lists) as well as re-performing audits already done by Member States' audit authorities. Based on its reviews, the Commission considers that in some cases audit authorities may have detected State aid errors while reporting them under a different category, leading to a possible under-reporting in the ACRs. But it has also identified weaknesses and requested the audit authorities to improve their controls on State aid issues. Finally, the Commission's own verifications have lately found significant improvements concerning the quality of State aid check lists used by audit authorities, in line with the Court's assessment.

V

The Commission notes that both DG REGIO and DG EMPL have made use of databases to record audit findings under the 2007-2013 financial period. While these databases were not intended to serve as tools for an analysis of sources of errors, this did not prevent the Commission from undertaking appropriate and preventive measures addressing the well-known recurrent State aid issues. DG COMP shared in March 2016 its experience in ex-post monitoring of State aid schemes with DG REGIO and DG EMPL. In particular, DG COMP provided the outcome of the 2015 monitoring cycle to DG REGIO and DG EMPL. Moreover, the Commission is improving the exchange of information on errors in State aid between the Directorates-General where and when needed.

As regards the preventive measures undertaken, DG REGIO and DG COMP implement since March 2015 a comprehensive action plan for 'Strengthening administrative capacity for the management of the Funds of Member States in the field of State aid'. For the 2014-2020 programming period, the legislative framework introduces ex-ante conditionalities on State aid with a view to improve some Member States' administrative capacity in this area through action plans, before programme implementation.

VI

The Commission stresses that the obligation to notify State aid measures lies with the Member States and the decision on the major project is not a decision on compliance of the major project with State aid rules. In addition, Member States have to assess whether State aid is granted to projects or not, and, where they assess that State aid is granted, to demonstrate State aid compliance when they submit a major project proposal, regardless of which related decision-making procedure is chosen under the Common Provisions Regulation.

DG COMP was consulted in formal inter-service consultations by DG REGIO on major projects decisions already before the end of 2012, although not systematically. Internal cooperation with DG COMP on the approval of major projects was improved following the Leipzig-Halle judgement. Appropriate checks and balances have been introduced as preventive measures to avoid that State Aid non-compliant decisions are taken on major projects in 2014-2020.

The Commission therefore considers that the preventive measures and cooperation with DG COMP put in place for the 2014 to 2020 period both at project preparation stage and at project decision-making stage appropriately mitigate the risk mentioned by the Court.

Going further and trying to obtain legal certainty on State aid compliance through systematic formal notifications followed by a Commission State aid decision on all major projects (independently of legal requirements) would conflict with the State aid modernisation process but also with the overarching objective of simplification and reduction of administrative burden of all stakeholders, and would entail additional risk for timely implementation of ERDF/CF funded major projects.

VII

In the context of the State Aid Modernisation which increased Member States' responsibility in granting aid, DG COMP reinforced its sample based monitoring of implementation of State aid measures. DG COMP's monitoring targets errors and irregularities in the implementation of aid measures but serves also to learn how Member States actually implement aid measures in practice. This enables DG COMP to draw good and bad practices and to share them with the Member States (through the Member States' working groups, the country coordinators network etc.).

DG COMP further developed and shared with the Member States the General Block Exemption Regulation (GBER – Commission Regulation No 651/2014 of 17 June 2014) checklists to make it easier for them to check in advance that all applicable compatibility conditions are met. The GBER checklists are also shared with DG REGIO and DG EMPL and with Cohesion policy audit authorities.

Moreover, DG COMP offers a dedicated IT-platform where it replies to Member States' interpretation questions (eState aid WIKI) and also publishes FAQ documents on the basis of those questions and replies.

As regards the assessment of ex-ante conditionalities on State aid, as stipulated in the Common Provisions Regulation (CPR), it is to be based on the three criteria defined in the annex XI of the CPR. The compliance with State aid rules during the 2007-2013 programming period is not a criterion for fulfilment as such. However the Commission will continue to monitor all issues related to compliance with State aid for all Member States and will take appropriate action as necessary.

VIII (a)

The Commission accepts the recommendation and considers that it is already implementing it.

It uses available corrective measures in case monitoring detects instances of non-compliance with State aid rules.

In this context, it is necessary to distinguish between illegality and incompatibility. An aid measure is illegal when granted without prior notification to the Commission and when not covered by GBER. The Commission, however, can only order recovery of such measure, if it is incompatible with the internal market (i.e. it cannot be found compatible on the basis of any Guidelines or directly on the basis of the Treaty).

If DG COMP's monitoring detects an illegal aid measure, it first examines whether such measure can be found compatible with the internal market.

Only if the error detected results into granting incompatible aid, corrective measures consisting in recovery of aid can be used.

For other types of errors, adjustment to the design of the scheme and/or to the control mechanisms is more appropriate. For some errors, corrective measures would be difficult to achieve (e.g. the aid was incompatible at the moment when it was granted, but can be found compatible on the basis of the later revised rules).

VIII (b) (i)

The Commission accepts the recommendation and is already implementing it in its audit tool MAPAR.

MAPAR provides for a comprehensive database of all irregularities identified, including State aid errors. For State aid irregularities specifically, seven types of findings are defined for the time being in MAPAR.

Moreover, MAPAR will allow to better structure the information on audit findings. It offers full flexibility to add or modify any category or sub-category of findings, including for State aid ones, as per identified audit needs or findings.

The MAPAR audit tool is also designed to allow the concerned Commission services following-up all identified irregularities, including financial corrections.

VIII (b) (ii)

The Commission accepts the Court's recommendation and will adapt the typology of errors so that an analysis can be made.

VIII (b) (iii)

The Commission accepts the recommendation and is already implementing it.

As far as MAPAR is concerned, DG EMPL and DG REGIO will communicate once a year the relevant data on State aid to DG COMP on the basis of a tailor-made reporting (typologies of State aid findings evidenced by Commission audits).

Regarding the exchange of information between the Commission services, DG REGIO, DG EMPL and DG COMP are increasing their communication channels to share information. DG EMPL and DG REGIO share results between each other and they consult DG COMP on audit issues related to State Aid when necessary.

As far as IMS is concerned, DG COMP will be granted access to information on a 'need-to-know' basis.

VIII (b) (iv)

The Commission accepts the recommendation.

Reply of the Commission

It will follow-up Member States' capacity to comply with State aid rule, based on the information available in its databases and stemming in particular from available audit findings.

The Commission will use the results of the follow-up exercise to better target its monitoring and training activities it offers to the concerned programme authorities in the Member States

VIII (c)

The Commission accepts the recommendation and has already implemented it since Member States have to demonstrate that they have thoroughly checked State aid compliance when they submit a major project proposal, regardless of which related decision-making procedure is chosen under the Common Provisions Regulation, including through State aid notification where needed.

In case of State aid subject to a Commission decision, the Member State must wait until the State aid decision is approved by the Commission before submitting to the Commission the Major project application or the major project notification.

This is a preventive measure to avoid that State Aid non-compliant decisions are taken on major projects in 2014-2020.

VIII (d) (i)

The Commission accepts the recommendation and has already implemented it.

The Commission examines the quality of the work of audit authorities with regards to State aid in different audit procedures: in the Commission's risk-based audits on the work performed by audit authorities, which include an examination of the methodology (including check-lists) used by audit authorities for system audits and audits of operations; during re-performance work on audits already done by audit authorities, to check the validity of the reported results; or during the review each year of Annual Control Reports submitted to the Commission by audit authorities, to confirm whether the audit authority's opinion is solidly grounded on the basis of the results of system and operations audits.

In some cases, the Commission had already recommended to the audit authorities concerned, to reinforce their check-lists to better cover the verification of State aid. The Commission will continue to ensure that audit authorities use appropriate checklists.

VIII (d) (ii)

The Commission does not accept the recommendation as it goes against the Commission's objective pursued through its guidance given to Member States in 2012 to not systematically re-examine the projects decided before that date – leaving to the Member States the possibility to notify or not – and to provide stability to Member States and beneficiaries as regards the treatment of such projects.

VIII (d) (iii)

The Commission accepts the recommendation and is already implementing it.

In the context of the implementation of the State aid action plan, the Commission already works on the basis of its State aid decisions which are used as case studies: for instance, over half of the programmes of the thematic seminars (RDI and Energy have taken place so far) is based on concrete cases (actual State aid decisions).

The Commission services provide also guidance in the form of grids, checklists or quick replies to interpretation questions submitted by aid granting authorities. The questions and answers serve as the basis for the publication of FAQ documents.

The Commission will continue to update the guidance material for all concerned authorities, including ESIF programme authorities, if developments require it.

Finally, the recently adopted Commission Notice of the Notion of aid provides guidance on when public spending falls within, and outside, the scope of EU State aid control.

VIII (d) (iv)

The Commission does not accept the recommendation since the *de minimis* Regulation leaves the choice to Member States whether to set up a central register for monitoring *de minimis* aid or to work on the basis of other means (e.g. self-declarations by beneficiaries).

While a central register of *de minimis* aid is preferable, Article 6 of the *de minimis* Regulation does not oblige the Member State to have such register and allows implementing the cumulation rule with other means. Leaving the Member States the choice is in line with the general principle that Member States can decide on the most appropriate administrative setting for their Member State. The Commission also noted the negative reaction of several Member States on the idea to have a mandatory *de minimis* register in the context of the first consultation for the revision of the *de minimis* Regulation.

(http://ec.europa.eu/competition/consultations/2013_de_minimis/index_en.html).

VIII (d) (v)

The Commission does not accept the recommendation as it considers that the Deggendorf principle can only be applied at the level of an individual Member State. The Commission intends to clarify this point in the ongoing review of the 2014 GBER.

Should a Member State have doubts or face difficulties with identifying whether a certain undertaking is subject to an outstanding recovery order, it can approach DG COMP in the context of mutual cooperation.

VIII (e)

The Commission accepts this recommendation.

The Directors-General of the four European Structural and Investment Fund Directorates-General meet already regularly in the ex-ante conditionality suspension committee. The current approach which is both preventive (with the implementation of national action plans for non-fulfilment of ex ante conditionality) and corrective (with suspension of payments when necessary), will continue to be applied strictly and consistently.

Reply of the Commission

Common reply to paragraphs 34 to 36

The Commission has carefully followed-up all State aid issues detected over the last years following the Court's and its own audit findings in this field and requested financial corrections from the concerned Member States and programmes, whenever it deemed necessary (see paragraphs 50 and 51).

The Commission notes nevertheless that as shown by the Court in table 2, the number of State aid errors detected in its samples has recently decreased. The number of errors with a financial impact decreased from 5 cases in 2013 to 3 cases in 2014. The Commission expects this trend to continue also due to the application of the 2014 GBER (Regulation (EU) No 651/2014).

Common reply to paragraphs 37 to 44

The Commission agrees with the typology of errors in the area of State aid presented by the Court and also detected through its own audits (see paragraphs 47 and 48). Experience from past errors has led the Commission to clarify and simplify rules, in particular on the incentive effect in the 2014 GBER.

53

The Commission notes that, during the period covered by the Court's report, the Commission's State aid monitoring covered roughly 6% to 9% of total expenditure of State aid each year. A significant portion of schemes has been monitored at least once in their lifetime.

55

Given the limited number of schemes monitored for individual Member States, the ratio of problematic cases should be related to the overall number of schemes monitored. For example, in case of Lithuania and Luxembourg, the 50% ratio of problematic cases is based on the monitoring of four schemes only (i.e. two out of four were found problematic). 'Problematic' is a term used by DG COMP to indicate infringements of State aid rules ranging from formal shortcomings such as incorrect formulation of cumulation rules to legal issues such as an absence of GBER conditions reflected in a GBER scheme.

56

DG COMP's monitoring resulted into several corrective measures including voluntary and imposed recovery of incompatible aid.

Cases where voluntary recovery takes place are followed up by the Commission with the Member State concerned. No separate records are being kept of all cases of voluntary recovery. In some instances, recovery is not appropriate as the measure although illegal can be found compatible with the internal market, or because the measure once incompatible became compatible due to a later change in State aid rules.

In such cases, the Commission issues recommendations and eventually requests the Member States to change the design of the aid scheme if needed.

57

The Commission notes that both DG REGIO and DG EMPL have made use of databases to record their audit findings under the 2007-2013 programming period. While these databases were not intended to serve as tools for an analysis of sources of errors, this did not prevent the Commission from undertaking appropriate and preventive measures addressing recurrent issues in the context of State aid, such as the SME bonus or incentive effect.

For the 2014-2020 programming period, the internal monitoring tool used by the Commission to follow-up on its own audit findings has considerably improved with the introduction of a common IT tool to manage and monitor the audit process, called 'MAPAR' (Management of Audit Processes, Activities and Resources) for the ERDF, the CF and the ESF.

In order to improve the information flow and analysis capacity of all concerned Commission services, DG EMPL and DG REGIO have agreed with DG COMP in mid-2016 to annually communicate to DG COMP the relevant data on their State aid audit findings from now on.

59

IMS is a tool dedicated to the irregularity (including fraud) reporting by Member States. The type of irregularity is indicated via drop-down-lists (codes) while the applied *modus operandi* is described in text which enriches the information provided through codified fields. Analysis can be performed on basis of the type of irregularity. IMS is not a State-aid control instrument, but it is possible to add a specific typology for State aid to the already existing drop-down-lists.

61

The Commission notes that it did take preventive measures addressing recurrent State aid issues during the 2007-2013 period, notably as a result of regular exchanges between the relevant Commission services. The Commission DGs have for example been sharing audit reports since the beginning of the 2007-2013 programming period. DG COMP is also consulted on audit issues related to State aid when necessary before finalising the audit conclusions.

See also paragraph 60 and Commission reply to paragraph 57.

The Commission services agreed in March 2015 on a State aid action plan with specific targeted actions, based on lessons learned from available audit findings (see the Court's observation under paragraphs 108 to 110).

In addition the legislative framework for the 2014-2020 programming period adopted in December 2013 introduces an ex-ante conditionality on State aid with a view to enhance the Member States' capacity to comply with State aid rules ahead of programmes' implementation.

62

The Commission notes that the *Vademecum* refers to the transport sector. The Commission does not say that State aid rules are not applicable in that sector, but that instead of the general State aid rules, specific State aid (compatibility) rules apply, pursuant to Article 93 TFEU. The statement in the *Vademecum* should not be understood to mean that the State aid qualification as such is different in the transport sector.

Reply of the Commission

Common reply to paragraphs 69 to 71

The Commission notes that the obligation to notify State aid measures lies with the Member States and that the decision on the major project is not a decision on compliance of the major project with State aid rules.

A distinction needs to be made between the situation before the Leipzig –Halle judgment and after it and between the 2007-2013 and the 2014-2020 programming periods.

The Commission underlines that the DG COMP was consulted in formal inter-service consultations by DG REGIO on major projects decisions already before the end of 2012, although not systematically.

Following the Leipzig-Halle judgement, DG REGIO and DG COMP have enhanced their cooperation in relation to the assessment of major projects application. The Commission stresses that there is no major project for which the Commission adopted a decision approving ERDF or CF funding in recent years and for which subsequently a negative decision under State aid rules was adopted. This shows that the cooperation arrangements put in place work well in practice.

For the 2014-2020 period the Member State has to prepare a major project application in which it is required to demonstrate the compliance with State aid before submission to DG REGIO, regardless of which major project decision-making procedure it is choosing (Article 102.1 or Article 102.2 of the CPR). In any event, if a State aid decision is needed, it has to be adopted before the major project can be submitted to DG REGIO.

In addition to the enhanced cooperation referred to by the Court, an additional preventive measure has been put in place: the possibility for the Member State and IQR experts to contact DG COMP at project preparation level in case of doubts whether the respective major project needs to be the subject of a State Aid Notification procedure to DG COMP or not.

The Commission therefore considers that the current preventive measures and cooperation with DG COMP put in place for the 2014 to 2020 period both at project preparation stage and at project decision-making stage appropriately mitigate the risk mentioned by the Court in paragraph 70.

Common reply to paragraphs 74 to 79

The Regulation requires audit authorities to submit in their annual control reports (ACR) the principal results of the audits but not detailed information regarding the nature of errors identified in the framework of the audits of operations. This can however be done on a voluntary basis.

Moreover, based on its own reviews, the Commission considers that in some cases Audit authorities may have detected State aid errors while reporting them under a different category, such as non-compliance with national eligibility rules, leading to a possible under-reporting in the ACR.

The Commission services are also continuously and closely working with audit authorities in order to increase their audit capacity on State aid issues through training, guidance and exchange of experience, including on the sharing of specific audit checklists which the Commission did in 2011 and again in 2015 with updated checklists. During the ACRs' review, the Commission examines whether the audit authority's opinion is solidly grounded on the basis of the results of system and operations audits.

Finally, the Commission's own verifications have found significant improvements concerning the quality of State aid check lists used by audit authorities, in line with the Court's assessment (see paragraph 79).

Common reply to paragraphs 81 and 82

In recent years, the Commission services have stepped up their training support for Member States in a very considerable manner. First, they have organised or contributed to a significant number of seminars and workshops throughout the EU (for instance, they provided training on the GBER in most Member States, including to all audit authorities, see paragraph 111). In addition, they provide guidance in the form of grids, checklists or quick replies to interpretation questions submitted by aid granting or audit authorities.

The recently adopted Commission Notice on the Notion of aid also provides further guidance on when public spending falls within, and outside, the scope of EU State aid control. This guidance should help public authorities and companies to identify when public support measures can be granted without needing approval under EU State aid rules.

The Commission services note the outcome of the survey conducted by the Court and the preference given, out of other possibilities, to a practical guidebook with case studies and additional training measures. In the field of State aid, the specific circumstances of a case play a significant role in its assessment. DG COMP considers that the Commission's State aid decisions constitute the best examples for useful guidance for Member States.

The Commission will continue to support audit authorities and will encourage them to have increased contacts with State aid offices in the Member States.

Common reply to paragraphs 92 to 94

The main purpose of the 2014 review of the GBER was to further clarify and simplify State aid rules and to reduce the administrative burden on Member States. In particular, the extension of the scope of the GBER led to a considerable reduction of the number of State aid measures to be notified to the Commission. This should also facilitate the implementation of ESIF operations.

93

The GBER is about the need to notify. Its scope of application extends to measures that were not exempted from the obligation to notify before the entry into force of the GBER 2014. Those measures could have been declared compatible after an assessment by the Commission also before the entry into force of the 2014 GBER.

96

The Commission considers that the Deggendorf principle can only be applied at the level of an individual Member State. The Commission intends to clarify this point in the ongoing review of the 2014 GBER.

Should a Member State have doubts or face difficulties with identifying whether a certain undertaking is subject to an outstanding recovery order, it can approach DG COMP in the context of mutual cooperation.

Common reply to paragraphs 102 to 104

Member States adopted action plans that must be implemented and completed by end 2016. This is thoroughly monitored by the Commission services (DG REGIO and DG COMP) and can eventually lead to suspension of payments by the Commission in case of non-fulfilment.

105

The Commission notes that the ex-ante conditionalities concern the implementation of the European Structural and Investment Funds, while schemes monitored by DG COMP do not necessarily involve funding from ESI funds.

Also, as indicated by the Court the Common Provisions Regulation stipulates that the assessment of the ex-ante conditionality on State aid is to be based on the three sub-criteria defined in the Annex XI of the Common Provisions Regulation. The compliance with State aid rules during the 2007 – 2013 period is not a criterion for fulfilment as such.

However the Commission will continue to monitor all issues related to compliance with State aid for all Member States and will take appropriate action as necessary.

106

The procedure to approve major projects under the 2014 – 2020 period has improved compared to the previous period (see common reply to paragraphs 69 to 71).

The Commission services are committed to undertake further efforts to streamline the treatment of major projects co-financed by ESI Funds which are submitted via the new IQR procedure (Article 102.1 of the CPR).

In this context, DG COMP has set up internal procedures to ensure the efficient and effective treatment of consultations on major projects under the IQR procedure.

The IQR report should contain a comprehensive analysis on the aid character of the measure and/or on its compatibility on the basis of an exemption or an existing scheme. In addition, on the basis of Article 23 of the Commission Delegated Regulation 480/2014, IQR experts can contact DG COMP to clarify the State aid issues arising in a major project.

Therefore also in this new IQR procedure, State aid issues notified to DG COMP have to be cleared before the major project documents can be submitted to the Commission.

107

The Commission underlines that Member States have to demonstrate that they have checked thoroughly State aid compliance when they submit a major project proposal, regardless of which related decision-making procedure it is choosing (Article 102.1 or Article 102.2 of the CPR). Major project proposals cannot be submitted to the Commission without such a detailed assessment on State aid compliance.

Only projects with a positive IQR report can be notified to the Commission according to Article 102.1 of the CPR, which means all requirements have been complied with by the Member State, including the State aid related ones.

The Commission services consider that the procedure can have a number of positive effects since it includes a more detailed State aid assessment by the Member State submitting the application and a more in-depth verification of the State aid issues by the IQR team of independent experts. In addition, DG COMP has put in place arrangements to enable the IQR teams to consult it on State aid issues arising in a Major Project reviewed by them.

Going further and trying to obtain legal certainty on State aid compliance through systematic formal notifications followed by a Commission State aid decision on all major projects (independently of legal requirements) would conflict with the State aid modernisation process but also with the overarching objective of simplification and reduction of administrative burden of all stakeholders, and would entail additional risk for timely implementation of ERDF/CF funded major projects.

114

The Commission is supporting Member States' ability to correctly interpret and/or implement the State aid rules since they are primarily responsible for taking the appropriate measures to comply with these rules.

In order to address deficiencies, the Commission services (at the level of the DG REGIO and DG COMP) are implementing a common action plan on 'Strengthening Administrative Capacity for the Management of the Funds of Member States in the Field of State Aid'. Trainings were provided to several Member States and the target audience are all relevant bodies involved in management and implementation of ESI Funds – the Managing Authorities, the Intermediate Bodies as well as the main beneficiaries.

Furthermore, for the 2014-2020 financial period, the Common Provisions Regulations foresees an ex-ante conditionality related to State aid with the purpose to ensure ex-ante conditions for effective application of EU State aid rules. For those Member States not fulfilling this ex-ante conditionality, action plans have been set out that must be implemented and completed by end 2016. This is thoroughly monitored by the Commission services and can eventually lead to suspension of payments by the Commission in case of non-fulfilment.

114 (a)

The Commission closely and continuously works with audit authorities to improve their capacity as regards audit of State aid. Beyond targeted training, actions and guidance, it provided ready-to-use State aid checklists to audit authorities in 2011 and updated ones in November 2015. The Commission's own verifications have lately found significant improvements concerning the quality of State aid check lists used by audit authorities, in line with the Court's assessment.

The Commission services' reviews of the ACRs include an examination of the methodology for system audits and audits of operations (including check-lists) as well as re-performing audits already done by Member States' audit authorities. In such audits, the Commission services have identified weaknesses and requested the audit authorities to improve their controls on State aid issues.

114 (b)

The Commission notes that both DG REGIO and DG EMPL have made use of databases to record audit findings under the 2007-2013 financial period. While these databases were not intended to serve as tools for an analysis of sources of errors, this did not prevent the Commission from undertaking appropriate and preventive measures addressing the well-known recurrent State aid issues. DG COMP shared in March 2016 its experience in ex-post monitoring of State aid schemes with DG REGIO and DG EMPL. In particular, DG COMP provided the outcome of the 2015 monitoring cycle to DGs REGIO and EMPL. Moreover, the Commission is improving the exchange of information on errors in State aid between the Directorates-General where and when needed.

As regards the preventive measures undertaken, the legislative framework for the 2014-2020 programming period introduces ex-ante conditionalities on State aid.

In addition, the DGs REGIO and COMP are implementing a comprehensive action plan since March 2015 for strengthening administrative capacity for the management of Structural Funds in the field of State aid.

See also Commission replies to paragraphs 57 and 61.

114 (c)

The Commission stresses that the ex-ante obligation to notify State aid measures lies with the Member States and the decision on the major project is not a decision on compliance of the major project with State aid rules.

DG COMP was consulted in formal inter-service consultations by DG REGIO on major projects decisions already before the end of 2012, although not systematically.

Appropriate checks and balances have been introduced, in the major projects information requirements and in both decision-making procedures concerning major projects (Article 102.1 and Article 102.2 of the CPR), as preventive measures to avoid that State Aid non-compliant decisions are taken on major projects in 2014-2020.

See also Commission reply to paragraph 69.

114 (d)

In the context of the State Aid Modernisation which increased Member States' responsibility in granting aid, DG COMP reinforced its sample based monitoring of implementation of State aid measures. DG COMP's monitoring targets errors and irregularities in the implementation of aid measures but serves also to learn how Member States actually implement aid measures in practice which enables DG COMP to draw good and bad practices.

DG COMP shares with the Member States (through the Member States' working groups, the country coordinators network etc.) the experience and lessons learned from monitoring.

DG COMP further developed and shared with the Member States the General Block Exemption Regulation (GBER – Commission Regulation No 651/2014 of 17 June 2014) checklists to make it easier for them to check in advance that all applicable compatibility conditions are met. The GBER checklists are also shared with DG REGIO and DG EMPL and with Cohesion Policy audit authorities.

Moreover, DG COMP offers a dedicated IT-platform where it replies to Member States' interpretation questions (eState aid WIKI) and also publishes FAQ documents on the basis of those questions and replies.

As regards the assessment of ex-ante conditionalities on State aid, as stipulated in the CPR, it is to be based on the three criteria defined in the annex XI of the CPR. The compliance with State aid rules during the 2007-2013 programming period is not a criterion for fulfilment as such.

However, the Commission will continue to monitor issues related to compliance with State aid for all Member States and will take appropriate action as necessary.

117

DG COMP considers that it properly uses available corrective measures in case monitoring detects incompliance with State aid rules.

The Commission can only use corrective measures consisting in voluntary or imposed recovery if the aid granted is incompatible with the internal market.

For other types of errors, adjustment to the design of the scheme and/or to the control mechanisms is more appropriate. For some errors, corrective measures would be difficult to achieve (e.g. the aid was incompatible at the moment when it was granted, but can be found compatible on the basis of later revised rules). In any event recommendations are given to the Member State and where appropriate re-monitoring of the scheme is envisaged after a while to verify that recommendations have been implemented.

Cases where voluntary recovery takes place are followed up by the Commission with the Member State concerned. No separate records are being kept of all cases of voluntary recovery. However, the Commission considers recovery of incompatible aid voluntarily implemented by Member States to be a useful tool to swiftly and effectively remove the unfair advantage from the market and to incentivise Member States not to grant unlawful aid.

Recommendation 1

The Commission accepts the recommendation and considers that it is already implementing it.

It uses available corrective measures in case monitoring detects instances of non-compliance with State aid rules.

In this context, it is necessary to distinguish between illegality and incompatibility. An aid measure is illegal when granted without prior notification to the Commission and when not covered by GBER. The Commission, however, can only order recovery of such measure, if it is incompatible with the internal market (i.e. it cannot be found compatible on the basis of any Guidelines or directly on the basis of the Treaty).

If the DG COMP's monitoring detects an illegal aid measure, it first examines whether such measure can be found compatible with the internal market.

Only if the error detected results into granting of incompatible aid, corrective measures consisting in recovery of aid can be used.

For other types of errors, adjustment to the design of the scheme and/or to the control mechanisms is more appropriate. For some errors, corrective measures would be difficult to achieve (e.g. the aid was incompatible at the moment when it was granted, but can be found compatible on the basis of the later revised rules).

118

The Commission notes that both DG REGIO and DG EMPL have made use of databases to record their audit findings under the 2007-2013 financial period. While these databases were not intended to serve as tools for an analysis of sources of errors, this did not prevent the Commission from identifying the recurrent types of errors in this area and to implement concrete and targeted measures to prevent State aid errors.

See also Commission replies to paragraphs 57 and 61.

119

DGs REGIO and EMPL will be able to provide more detailed overview of the type of irregularities on the basis of its IT audit tool MAPAR, which covers the 2014-2020 programme period for ERDF/CF and ESF. One objective of the MAPAR tool is to register and classify identified errors and irregularities, thus providing a database of detailed audit findings. Also, in the context of the continuous dialogue with audit authorities, the Commission services will continue to work with Member States to develop a common typology of State aid errors, which will be based on and reflected in MAPAR.

In addition, this tailor made reporting on the typologies of errors introduced in MAPAR will enable DG REGIO and DG EMPL to transmit to DG COMP on a yearly basis the relevant data on their State aid audit findings.

See also Commission replies to paragraphs 57, 59 and 61.

120

IMS is a tool dedicated to the irregularity (including fraud) reporting by Member States. The type of irregularity is indicated via drop-down-lists (codes) while the applied *modus operandi* is described in text which enriches the information provided through codified fields. Analysis can be performed on basis of the type of irregularity. IMS is not a State-aid control instrument, but it is possible to add a specific typology for State aid to the already existing drop-down-lists.

Recommendation 2 (a)

The Commission accepts the recommendation and is already implementing it in its audit tool MAPAR.

MAPAR provides for a comprehensive database of all irregularities identified, including State aid errors. For the reporting of State aid irregularities specifically, seven types of findings are defined for the time being in MAPAR.

Moreover, MAPAR will allow to better structure the information on audit findings. It offers full flexibility to add or modify any category or sub-category of findings, including for State aid ones, as per identified audit needs or findings.

The MAPAR audit tool is also designed to allow to the concerned Commission services the follow-up of all identified irregularities, including financial corrections.

The Commission also refers to its reply to paragraph 57.

Recommendation 2 (b)

The Commission accepts the Court's recommendation and will adapt the typology of errors so that the analysis can be made.

Recommendation 2 (c)

The Commission accepts the recommendation and is already implementing it.

As far as MAPAR is concerned, DG EMPL and DG REGIO will communicate once a year the relevant data on State aid to DG COMP on the basis of a tailor-made reporting (typologies of State aid findings evidenced by Commission audits).

Regarding the exchange of information between the Commission services, DG REGIO, DG EMPL and DG COMP are increasing their communication channels to share information. DG EMPL and DG REGIO share results between each other and they consult DG COMP on audit issues related to State Aid when necessary.

As far as IMS is concerned, DG COMP will be granted access to information on a 'need-to-know' basis.

Common reply to paragraphs 121 and 122

The Commission stresses that the ex-ante obligation to notify State aid measures lies with the Member States and the decision on the major project is not a decision on compliance of the major project with State aid rules.

DG COMP was consulted in formal inter-service consultations by DG REGIO on major projects decisions before the end of 2012, although not systematically.

The Commission put in place preventive measures and enhanced the cooperation between its services to ensure that in the programming period 2014-2020, only major projects compliant with the new State-aid related legislation are presented by the Member State and decided by the Commission.

Going further and trying to obtain legal certainty through formal State aid notifications on all major projects would conflict not only with the State Aid Modernisation process but also with the overarching objective of simplification and reduction of administrative burden of all stakeholders, and would entail further risk for timely implementation of ERDF/CF funded major projects.

See also Commission replies to paragraphs 69, 107 and 114 (c).

Recommendation 3

The Commission accepts the recommendation and has already implemented it since Member States can only submit to the Commission a major project proposal when all State aid compliance issues have been cleared, including through State aid notification where needed.

The Commission also enhanced the cooperation between its services to ensure that in the 2014-2020 programming period only major projects for which Member States have thoroughly assessed compliance with the recently updated State-aid related legislation are presented by the Member States and decided by the Commission.

123

The 2007 - 2013 regulatory framework requires audit authorities to submit in their annual control reports (ACR) the principal results of the audits but not detailed information regarding the nature of errors identified in the framework of the audits of operations. This can however be done on a voluntary basis. Therefore information communicated by audit authorities may understate their capacity to detect State aid.

Reply of the Commission

The Commission services are also continuously and closely working with audit authorities in order to increase their audit capacity on State aid issues through training, guidance and exchange of experience, including on the sharing of specific audit checklists which the Commission did in 2011 and again in 2015.

Finally, the Commission's own verifications have found significant improvements concerning the quality of State aid check lists used by audit authorities, in line with the Court's assessment (see paragraph 79).

124

The Commission services have already shared with Member States audit and coordination bodies the GBER Check-lists enabling them to check in advance whether all compatibility conditions are fulfilled or to improve audits in this area. Typology of problems detected, good and bad practices and lessons learned from monitoring are also shared with Member States in different ways (working groups, country coordination network, multilateral or bilateral audit coordination meetings, etc.). Interpretation of State aid rules is further provided by the system of interpretative questions (eState aid Wiki), by analytical grids etc.

The Commission considers that the Deggendorf principle can only be applied at the level of an individual Member State. The Commission intends to clarify this point in the ongoing review of GBER 2014.

Should a Member State have doubts or face difficulties with identifying whether a certain undertaking is subject to an outstanding recovery order, it can approach DG COMP in the context of mutual cooperation.

Recommendation 4 (a)

The Commission accepts the recommendation and has already implemented it.

The Commission examines the quality of the work of audit authorities with regards to State aid in different audit procedures: in the Commission's risk-based audits on the work performed by audit authorities, which include an examination of the methodology (including check-lists) used by audit authorities for system audits and audits of operations; during re-performance work on audits already done by audit authorities, to check the validity of the reported results; or during the review each year of Annual Control Reports submitted to the Commission by audit authorities, to confirm whether the audit authority's opinion is solidly grounded on the basis of the results of system and operations audits.

In some cases, the Commission had already recommended to the audit authorities concerned, to reinforce their check-lists to better cover the verification of State aid. The Commission will continue to ensure that audit authorities use appropriate checklists.

Recommendation 4 (b)

The Commission does not accept the recommendation as it goes against the Commission's objectives pursued through its guidance given to Member States in 2012 to not systematically re-examine the projects decided before that date – leaving it to Member States the possibility to notify or not - and to provide stability to Member States and beneficiaries as regards the treatment of such projects.

Recommendation 4 (c)

The Commission accepts the recommendation and is already implementing it.

In the context of the implementation of the State aid action plan, the Commission already works on the basis of its State aid decisions which are used as case studies: for instance, over half of the programmes of the thematic seminars (RDI and Energy have taken place so far) is based on concrete cases (actual State aid decisions).

The Commission services provide also guidance in the form of grids, checklists or quick replies to interpretation questions submitted by aid granting authorities. The questions and answers serve as the basis for the publication of FAQ documents.

The Commission will continue to update the guidance material for all concerned authorities, including ESIF programme authorities, if developments require it.

Finally, the recently adopted Commission Notice of the Notion of aid provides guidance on when public spending falls within, and outside, the scope of EU State aid control.

Recommendation 4 (d)

The Commission does not accept the recommendation since the *de minimis* Regulation leaves the choice to Member States whether to set up a central register for monitoring *de minimis* aid or to work on the basis of other means (e.g. self-declarations by beneficiaries).

While a central register of *de minimis* aid is preferable, Article 6 of the *de minimis* Regulation does not oblige the Member State to have such register and allows implementing the cumulation rule with other means (e.g. on the basis of self-declarations by the beneficiaries). Leaving to the Member States the choice is in line with the general principle that Member States can decide on the most appropriate administrative setting for them. The Commission also noted the negative reaction of several Member States on the idea to have a mandatory *de minimis* register in the context of the first consultation on the revision of the *de minimis* Regulation. (http://ec.europa.eu/competition/consultations/2013_de_minimis/index_en.html).

Recommendation 4 (e)

The Commission does not accept the recommendation as it considers that the Deggendorf principle can only be applied at the level of an individual Member State. The Commission intends to clarify this point in the ongoing review of the GBER 2014.

Should a Member State have doubts or face difficulties with identifying whether a certain undertaking is subject to an outstanding recovery order, it can approach DG COMP in the context of mutual cooperation.

129

As regards the assessment of ex-ante conditionalities on State aid, as stipulated in the Common Provisions Regulation (CPR), it is to be based on the three criteria defined in the annex XI of the CPR. The compliance with State aid rules during the 2007-2013 programming period is not a criterion for fulfilment as such.

However the Commission will continue to monitor all issues related to compliance with State aid for all Member States and will take appropriate action as necessary.

Reply of the Commission

Recommendation 5 (a)

The Commission accepts this recommendation.

The Directors-General of the four European Structural and Investment Fund Directorates-General meet already regularly in the ex-ante conditionality suspension committee. The current approach which is both preventive (with the implementation of national action plans for non-fulfilment of ex ante conditionality) and corrective (with suspension of payments when necessary), will continue to be applied strictly and consistently.

Recommendation 5 (b)

The Commission accepts the recommendation.

It accepts to follow-up Member States' capacity to comply with State aid rule, based on the information available in its databases and stemming in particular from available audit findings.

The Commission will use the results of the follow-up exercise to better target its monitoring and training activities it offers to the concerned programme authorities in the Member States.

HOW TO OBTAIN EU PUBLICATIONS

Free publications:

- one copy:
via EU Bookshop (<http://bookshop.europa.eu>);
- more than one copy or posters/maps:
from the European Union's representations (http://ec.europa.eu/represent_en.htm);
from the delegations in non-EU countries (http://eeas.europa.eu/delegations/index_en.htm);
by contacting the Europe Direct service (http://europa.eu/europedirect/index_en.htm) or
calling 00 800 6 7 8 9 10 11 (freephone number from anywhere in the EU) (*).

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

Priced publications:

- via EU Bookshop (<http://bookshop.europa.eu>).

Event	Date
Adoption of the Audit Planning Memorandum/Start of audit	12.11.2014
Official sending of draft report to Commission (or other auditee)	16.6.2016
Adoption of the final report after the adversarial procedure	7.9.2016
Commission's (or other auditee's) official replies received in all languages	27.9.2016

Over the past several years the Court of Auditors found a significant level of non-compliance with State aid rules in cohesion policy. The Court of Auditors and the Commission detected infringements of State aid rules at a far higher rate than the Member States, pointing to a need for more awareness and continued Commission support. For the 2007-2013 programme period, the Commission's databases did not allow a proper analysis of State aid errors nor did its monitoring result in significant recovery of State aid. The Commission has taken actions to simplify the applicable State aid legislation and to promote Member States' administrative capacity. Responsibility for implementation of State aid measures has been shifted to the Member States in the 2014-2020 programme period, which risks an increase in State aid errors.



EUROPEAN
COURT
OF AUDITORS



Publications Office