Another generation in Competition policy control of Regional development policy

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Preface

This report has been prepared by the European Policies Research Centre (EPRC) under the aegis of EoRPA (European Regional Policy Research Consortium), which is a grouping of national government authorities from countries across Europe. The Consortium provides sponsorship for EPRC to undertake regular monitoring and comparative analysis of the regional policies of European countries and the inter-relationships with EU Cohesion and Competition policies. Over the past year, EoRPA members have comprised the following partners:

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- Staatssekretariat für Wirtschaft (SECO, State Secretariat for Economic Affairs), Bern

United Kingdom

- Department for Business, Innovation and Skills, London
- The Scottish Government, Enterprise, Transport and Lifelong Learning Department, Glasgow

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in sponsoring countries during the first half of 2014. The EoRPA research programme is coordinated by Professor John Bachtler, Fiona Wishlade, Dr Sara Davies and Heidi Vironen.

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The reach of the reforms has been considerable: almost every substantive State aid text has been subject to review and revision, and there have been important procedural changes, notably in relation to transparency and new requirements for evaluation. Overall, there has been a significant recalibration of policy. In some areas, the scope of compatible aid has been enlarged. By contrast, in the area of regional aid, there has been a significant *tightening* of some aspects of policy – notably regarding support for large firms in ‘c’ areas and the treatment of large cases of aid in all assisted areas.

The cornerstone of the recent reforms is the General Block Exemption Regulation, GBER 2014-20, under which the Commission estimates that around three-quarters of aid measures and two-thirds of aid expenditure will be exempted from notification. Most regional aid measures will be based on the GBER, subject to the assisted area maps determined on the basis of RAG 2014-20. At the domestic level, the focus of activity in the latter half of 2013 and early 2014 was on the preparation of new assisted area maps and associated policy instruments in line with RAG 2014-20.

There is an important interface between the RAG and the GBER. The purpose of the RAG is twofold: it defines the criteria for the assisted area maps; and it has a residual role as the basis for assessment of aid measures (whether schemes or individual aids) that do not fall within the GBER. However, some aspects of the interface between RAG and GBER lack clarity. A major change in the new framework is the treatment of aid to large firms in ‘c’ areas. The aim of the Commission was essentially to exclude expansion investment from eligibility, but it remains to be seen exactly what types of investment can be supported through regional aid in ‘c’ areas. Also important, all notifiable aid will be subject to the compatibility assessment in the RAG, potentially increasing the number of case subject to detailed scrutiny.

Among other new developments is an emphasis on evaluation. The provision of an evaluation plan can now, in effect be a precondition for the approval of a regional aid schemes, and has already been required in one published decision, though it will generally apply only to particularly large or novel measures.

An important issue that goes beyond regional aid concerns the definition of State aid. In the wake of the *Leipzig-Halle* case, considerable uncertainty surrounds the State aid relevance of public spending on infrastructure. Recent decisions on several German infrastructure-related regional development schemes have cleared some forms of intervention, but required others to be amended or to be notified on a case-by-case basis.

These developments give rise to a number of questions which can usefully be posed as the starting point for discussion:

(i) How much of a constraint are the new rules on support to large firms in 'c' areas?

The Commission's original intention had been to exclude large firms from eligibility for regional in 'c' areas. This objective was ultimately watered down, enabling certain types of investment by large firms to be aided. How far will this possibility be used? Are the definitions sufficiently clear to operationalise? Will this take the form of GBER-based aid or notification? If the latter, what concerns are there about the compatibility assessment?

(ii) What is the relevance of the assisted area map in the new context?

Historically, the negotiation of the assisted area maps has been one of the most contentious aspects of the regional aid relations between the Commission and the Member States. The 2014-20 maps have been negotiated comparatively swiftly and painlessly. Is this just the result of time pressures, the need to adopt the maps and the higher population ceilings, or has the Commission become less excised over coverage now that support for large firms in 'c' areas is limited? How useful is the map of 'c' areas considered to be for domestic policy – will the higher rates for SMEs be exploited?

(iii) To what extent are domestic policymakers concerned at the lack of 'hard edges' in the definition of State aid?

The Leipzig-Halle case has caused considerable uncertainty about the scope for public authorities to invest in infrastructure without infringing the State aid rules. To what extent are policymakers content with the current situation? Is the Commission attempt to clarify the 'notion of aid' in a notice helpful? Does the widening of the GBER diminish the need for distinguishing between the definition of State aid and compatibility?

(iv) Are the provisions on evaluation to be feared or welcomed?

The RAG and GBER both contain provisions related to the evaluation of certain aid measures, particularly large ones. DG Competition's staff working paper implies a degree of homogeneity over the approaches to be taken to evaluating regional aid measures. Is this appropriate? To what extent should the effectiveness of a measure (as opposed to its competition effects) be a concern of the Commission? How might new requirements for evaluation affect policy?

1. INTRODUCTION

The last pieces of the new regulatory framework for regional aid are finally coming together: following the adoption of the new regional aid guidelines last year, Member States have been engaged in devising assisted area maps, the last of which were approved on 16 September 2014; and, with the adoption of the general block exemption regulation this year, new instruments are being designed and implemented. More generally, over the last year or so, the European Commission has largely completed the reform programme set out in the State aid modernisation initiative (SAM) adopted in 2012.[1] SAM aimed:

- "to foster sustainable, smart and inclusive growth in a competitive internal market," reflecting the ambitions of Europe 2020[2]
- to focus Commission *ex ante* scrutiny on cases with the biggest impact on the internal market while reinforcing Member State cooperation in enforcement; and,
- to streamline the rules and provide for faster decision-making.

In seeking to achieve these objectives, the reach of the reforms has been considerable: almost every substantive State aid text has been subject to review and revision, and there have been important procedural changes, notably in relation to transparency.

Overall, there has been a significant recalibration of policy. In some areas, the scope of compatible aid has been enlarged; this is notably true of the Risk Finance Investment Guidelines (RFIG) adopted in January 2014,[3] which considerably expand the criteria under which such aid can be regarded as compatible with the Treaty, as well as the new guidelines on R&D&I, which also specify more closely the circumstances in which intervention does not involve State aid at all.[4] By contrast, in the area of regional aid, there has been a significant *tightening* of some aspects of policy – notably regarding support for large firms in 'c' areas and the treatment of large cases of aid in all assisted areas.

In the first half of 2014, regional aid was in something of an interregnum. The 2014-20 Regional Aid Guidelines (RAG 2014-20)[5] were adopted in June 2013, following nearly three years of extensive consultation and negotiation dating back to autumn 2010.[6] The guidelines were initially intended to enter into force on 1 January 2014, but the delays in agreeing the guidelines and the slow progress with the new General Block Exemption Regulation (GBER) rendered this impractical. As a result,

[1] European Commission (2012) EU State aid modernisation – SAM, COM(2012) 209 final, 8 May.
[2] European Commission (2010) Europe 2020: a strategy for smart, sustainable, inclusive growth, COM(2010) 2020 final, 3 March.
[3] Guidelines on State aid to promote risk finance investments (RFIG), OJEU C19/4 of 21 January 2014: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2014:019:0004:0034:EN:PDF
[4] Framework for State aid for research and development and innovation, OJEU No C198/1 of 27 June 2014, see: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2014:198:FULL&from=EN
[5] Guidelines on regional State aid for 2014-20 OJ C209/1 of 23 July 2013: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:209:0001:0045:EN:PDF
[6] The tortuous evolution of RAG 2014-20 has been documented elsewhere and is not rehearsed here, but see: Wishlade, F. (2013) Draft Regional Aid Guidelines 2014-20 – Revised Data and Insights from the EP debate, EPRC Policy Briefing, April 2013, rev1: http://www.eprc.strath.ac.uk/news/Policy_Briefing_Apr_2013.pdf; Wishlade, F (2013) Draft Regional aid guidelines 2014-20: what are the proposals and how might they affect regional policies in the Member States? EPRC Policy Briefing, March 2013: http://www.eprc.strath.ac.uk/news/Policy_Briefing_Mar_2013.pdf; Wishlade, F. (2012) 'Non-Paper: Non-Starter or Non-Negotiable? EU Competition Policy and Regional Aid Control Post-2013', European Policy Research Papers, No 83, University of Strathclyde: http://www.eprc.strath.ac.uk/eprc/documents/PDF_files/EPRP_83.pdf

RAG 2014-20 provided for an extension of the 2007-13 Regional Aid Guidelines[7] to end June 2014 to dovetail with the entry into force of the new GBER.[8] This meant that existing assisted area maps and notified aid schemes had to be re-notified for a further six months, though their approval was essentially a rubber-stamping exercise. Meanwhile, at the domestic level, the focus of activity in the latter half of 2013 and early 2014 was on the preparation of new assisted area maps and associated policy instruments in line with RAG 2014-20.

The cornerstone of the recent reforms is the General Block Exemption Regulation, GBER 2014-20, which involves both substantive and procedural changes.[9] The scope of the GBER is enlarged to include a number of new categories of support following the adoption of a new Enabling Regulation[10] and more flexibility is introduced in areas that were already covered. The Commission estimates that around three-quarters of aid measures and two-thirds of aid expenditure will be exempted from notification by GBER 2014-20.[11] In practice, most regional aid measures will be based on the GBER, subject to the assisted area maps determined on the basis of RAG 2014-20. There is, however, an important interface between the two documents: regional aid measures *not* falling within the scope of the GBER will be assessed on the basis of the RAG.

Following on from the State aid modernisation initiative, the Commission made a commitment to clarify the 'notion' of State aid. This took the form of a draft notice,[12] which was subject to consultation,[13] and which has still to be finalised, though clarifying the concept is not wholly within the Commission's gift since the ultimate arbiter is the European Court. Nevertheless, the widely-perceived need for such a document is testament to the elusive (and evolving) nature of the definition of State aid reflected, among other things, in the fall-out from the Court's decision in the *Leipzig-Halle* airport case and its implications for infrastructure investment.

Against this background, this paper begins by setting out the main implications for regional aid arising from RAG 2014-20 and GBER 2014-20 (Section 2). Section 3 outlines the criteria for the assisted area maps while Section 4 provides an overview of Member State approaches to area designation. Section 5 reflects on recent developments in the relationship between State aid and support for infrastructure. Section 6 identifies some questions as a basis for discussion.

[7] Guidelines on National Regional Aid for 2007-13 [2006] OJ C54/13 (hereafter 'RAG 2007-13').

[8] 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, OJEU No L187/1 of 26 June 2014, hereafter 'GBER 2014-20'.

[9] A new agricultural block exemption regulation (ABER) – Commission Regulation 702/2014 was also adopted in June 2014 and applies from 1 July 2014: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0702&from=en. The block exemption for the aquaculture and fisheries sector (FIBER) expired on 30 June 2014 and a new text is currently under preparation.

[10] Council Regulation 733/2013 amending Regulation 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid OJEU L204/11, 31 July 2013: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:204:0011:0014:EN:PDF

[11] Rapid Press Release (2014) State aid: Commission exempts more aid measures from prior notification, 21 May 2014: http://europa.eu/rapid/press-release_IP-14-587_en.htm

[12] European Commission (2014) Draft Commission Notice on the notion of State aid pursuant to Article 107(1)TFEU, see http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html

[13] This closed on 31 March 2014

2. THE ARCHITECTURE OF REGIONAL AID CONTROL: RAG 2014-20 AND GBER 2014-20

As with RAG 2007-13, RAG 2014-20 fulfils two main functions: first, it sets out the parameters for the regional aid maps and associated aid values; second, it sets out the criteria for assessing measures that are not exempted under the GBER and are therefore subject to notification. As now, most measures will be covered by the GBER so will not require notification. However, given the residual scope of the RAG,[14] the precise contours of those measures requiring notification are determined by the GBER. The aim of this section is to provide an overview of the different dimensions of regional aid control under the two documents; spatial coverage is dealt with separately in Section 3.

2.1 General scope

The GBER sets out common provisions (Chapter I), that apply to all categories of aid; Chapter II specifies the monitoring and reporting requirements for the Regulation as a whole; and Chapter III stipulates the criteria to be met for each category of aid subject to an exemption – Section 1 in the case of regional aid.

Under the common provisions, the GBER ceases to apply to regional investment aid schemes[15] after six months where the annual budget exceeds €150 million.[16] However, the Commission may decide to extend cover under the GBER, having assessed the evaluation plan submitted by the Member State within 20 days of the entry into force of the scheme.[17] An earlier draft of the GBER had proposed a limit of €100 million and a ceiling of 0.01 percent of GDP, above which schemes would require formal notification, but this proposal met with considerable opposition and was diluted in the final version, though it is still not widely welcomed. The significance of this provision is that, if the Commission is not satisfied with the evaluation plan, then the measure falls outside the scope of the GBER after six months. This in turn means that the scheme requires formal notification and approval, prior to implementation, enabling the Commission to attach specific conditions or time limits in relation to the operation of the scheme related, among other things, to the evaluation of the scheme.

Export-related activities – ie. those linked to quantities exported or to the setting-up and running of distribution networks, are also excluded from the GBER, as is aid contingent on the use of domestic over imported goods.[18]

To fall within the scope of the GBER, schemes must explicitly exclude the possibility of paying aid to a firm that is subject to a recovery order; *ad hoc* aid to such firms is also excluded from the GBER,[19] as is aid to firms in difficulty.[20]

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[14] RAG 2014-20, para 21.

[15] This provision does not apply to GBER exempted regional operating aid schemes.

[16] Not all categories of aid are subject to the budget limit.

[17] GBER 2014-20, Article 1(2)(a)-(b).

[18] GBER 2014-20, Article 1(2)(c)-(d).

[19] GBER 2014-20, Article 1(4)(a)-(b).

[20] GBER 2014-20, Article 1(4)(c).

Aid which entails a non-severable violation of EU law: notably in relation to location of headquarters, obligation to use domestically-produced good or restrictions on the exploitation of RD&I results in other Member States, falls outside the GBER.[21]

Also excluded from the GBER is regional aid that appears to support relocation through 'subsidy shopping', that is, aid to an undertaking that has closed down a similar activity in the EEA in the preceding two years, or which has concrete plans to do so within two years of the investment for which aid is sought.[22]

Table 1: General scope of the RAG and GBER

Excluded under the GBER	RAG provisions
After 6 months, schemes with budgets >€100k, *unless notified evaluation plan is approved* (Art. 1(2)(a)-(b)).	Not explicit, but were GBER cover to expire after 6 months, the scheme would require to be suspended until Commission approval were received, following notification. Approval could be time limited and/or made conditional on evaluation (paras 27, 142-4)
Export related aid (Art. 1(2)(c)-(d)).	Not explicit but intra-EU exports cannot be aided; owing to WTO rules, the Commission would not approve notified aid that supports exports to third countries.
Aid to firms subject to a recovery order (Art 1(4)(a)-(b)).	Not excluded, but the Commission will take account of the amount of aid still to be recovered (para 19).
Aid to firms in difficulty (Art 1(4)(c)).	Also excluded (para 18).
Aid which entails a non-severable violation of EU law (Art 1(5)(a)-(c)).	Not explicit, but the Commission would not approve aid that violated EU law.
Aid linked to relocation (Art. 13(d)).	Not *per se* excluded, but "…if there is a causal link between the aid and the relocation this will constitute a negative effect that is unlikely to be compensated for by any positive elements" (para 122).

2.2 Sectoral coverage

Like RAG 2007-13, RAG 2014-20 excludes the possibility of regional aid to steel and synthetic fibres[23] and does not apply where specific sectoral provisions are made under the Treaty.[24] RAG 2014-20 does not apply to airports or to the energy sector, which are dealt with under specific guidelines.[25] On the other hand, regional aid can be used for the development of broadband networks, provided that the criteria under the Broadband Aid Guidelines[26] are met, as well as research infrastructure, on condition that access to this infrastructure is transparent and non-discriminatory.[27] Aid to shipbuilding falls within the scope of RAG 2014-20,[28] following the expiry of sector-specific rules at the end of 2013,[29] but is excluded from the GBER; a regional aid scheme including the shipbuilding sector would

[21] GBER 2014-20, Article 1(5)(a)-(c)).

[22] GBER, Article 13(d).

[23] RAG 2014-20, para 9.

[24] Notably fisheries and aquaculture, agriculture and transport – RAG 2014-20, para 10.

[25] RAG 2014-20, para 11; Guidelines on State aid to airports and airlines, OJEU C99/3 of 4 April 2014: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2014:099:FULL&from=EN and Guidelines on State aid for environmental protection and energy 2014-20, OJEU C200/1 of 28 June 2014: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0628(01)&from=EN

[26] EU guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJEU C25/1 of 26 January 2013: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:025:0001:0026:EN:PDF

[27] RAG 2014-20, para 12-13.

[28] RAG 2014-20, footnote 9.

[29] Framework on State Aid to Shipbuilding [2011] OJ C364/9.

therefore have to be notified and assessed on the basis of the RAG. Aid for the coal sector is excluded from the GBER, but not from the RAG. Also, aid for transport and related infrastructure is excluded from the GBER, but, airports aside, transport infrastructure is not explicitly excluded from the RAG.

Table 2: Sectoral scope of RAG and GBER

	Excluded under RAG	**Regional aid *excluded* under GBER,**
General	• Steel, synthetic fibres (para 9); • Fisheries & aquaculture, agricultural production, transport (para 10) • Airports, energy sector (para 11)	• Fishery and aquaculture (Art. 1.3(a)) • Agriculture production (Art. 1.3(b)) • Processing and marketing of agricultural products where aid is related to the quantity of produced or conditional on being passed to producers (Art. 1.3(c)) • Closure of uncompetitive coalmines (Art. 1.3(d)) • Steel, coal, shipbuilding synthetic fibres, transport and related infrastructure, energy generation, distribution and infrastructure (art. 13(a)) • Sector-specific schemes (other than tourism, broadband, processing & marketing of agricultural products) (Art.13.(b)))
Transport aid	• General exclusions above.	• General exclusions above, *plus*: • Production, processing, marketing of agricultural products (Art.13.c.(i)) • Agriculture, forestry & fishing; mining & quarrying; electricity, gas, steam and air conditioning supply (Art.13.c.(ii)) • Transport of goods by pipeline (Art.13.c.(iii))
Operating aid	• General exclusions above, *plus*: finance & insurance; intragroup activities; business & other management consultancy (para 17).	• General exclusions above, *plus* finance & insurance; intragroup activities; business & other management consultancy (Art 13(e))

2.3 Forms of aid

2.3.1 Transparent aid measures

GBER 2014-20 only applies to 'transparent' aid, that is, aid where it is possible to calculate in advance the gross grant equivalent without undertaking a risk assessment.[30] Accordingly, the following are considered transparent:[31]

- Aid comprised in grants and interest rate subsidies
- Aid comprised in loans where the gross grant equivalent has been calculated on the basis of the prevailing reference rate
- Aid comprised in guarantees where:
    - Either the gross grant equivalent has been calculated on the basis of the safe harbours premiums in the Commission notice[32]

[30] GBER 2014-20, Article 5.

[31] This list is not exhaustive, but covers the main forms relevant to regional policy

[32] Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C155/10 of 20 June 2008: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0620(02)&from=EN

    - Or where the Commission has already explicitly accepted the method proposed by the Member State for calculating the aid element in guarantees.[33]
- Aid in the form of tax advantages where there is a cap on the amount so that the ceilings is not breached
- Regional urban development measures that meet the criteria set out in GBER Article 16 – essentially EU Structural and Investment Fund co-financed schemes, similar to JESSICA in 2007-13.
- Aid in the form of risk finance for SMEs which meets the criteria set out in GBER Article 21.

Aid which is *not* considered transparent does not meet the criteria of the GBER and, in the case of regional aid, would therefore fall to be assessed on the basis of RAG 2014-20.

2.3.2 Aid schemes and **ad hoc** *aid*

Unlike its predecessor, GBER 2014-20 includes all *ad hoc* aid within its scope (provided that the relevant conditions are met).[34] Under GBER 2007-13, *ad hoc* regional investment aid only fell with the scope of the exemption where it supplemented aid offered under a scheme and did not exceed 50 percent of the total amount of aid offered[35] – this would cover a situation in which a grant was offered under GBER-exempt scheme offered, for example, by a national agency, and supplemented by 'one-off' support from, say, a local economic development agency. However, it also meant that aid measures which met the criteria in every way, except that they were not offered on the basis of an aid scheme, had to be notified individually. In 2007-13, in the case of Poland, where aid decisions were based on individual 'ordinances' rather than aid schemes, a number of *ad hoc* measures had to be notified even though they would have been exempted on the basis of the GBER if the legal basis had been in the form of an aid scheme. GBER 2014-20 largely removes this distinction between *ad hoc* aid and aid schemes. However, *ad hoc* aid to large firms must meet additional conditions in relation to the so-called 'incentive effect'.[36]

Aid must have an incentive effect in order to be covered by the GBER. In general, aid is considered to have an incentive effect if the beneficiary has submitted a written application for the aid before work on the project or any activity starts. This application must contain at least: the name and size of the undertaking; a description of the project, including the start and end date; location of the project; list of project costs; and type of aid and amount of public funding needed.

Ad hoc aid to large firms must fulfil additional conditions in relation to incentive effect.[37] In the case of regional investment aid, the Member State must also verify documentation provided by the beneficiary which demonstrates that the project would not have been carried out in the area considered or would not have been sufficiently profitable for the beneficiary in the area concerned in the absence of aid. This is, in effect, a relaxation of the conditions in relation to incentive effect since it now applies only to *ad hoc* aid to large firms (where previously it applied to regional aid *schemes*), and the conditions

[33] Methods may be notified by Member States and, once approved, can be used for relevant schemes under the GBER. See for example, from the period to end 2013, State aid N 185/2008 Austria – methodology to calculate the aid element of guarantees, K(2009) 1473 final, Brussels 24 March 2009: http://ec.europa.eu/competition/state_aid/cases/225180/225180_937737_37_1.pdf

[34] GBER 2014-20, Article 3.

[35] GBER 2008-13, Article 13(1).

[36] GBER 2014-20, Article 6.

[37] GBER 2014-20, Article 6(3).

governing the use of *ad hoc* aid itself are eased compared to GBER 2008-13. The Commission had initially sought to tighten the requirements to prove that aid was altering the investment decisions of large firms in the case of aid *schemes.* These requirements were already present in GBER 2008-13, though often thought by awarding bodies to be unworkable. However, the Commission view did not prevail and the additional incentive effect criteria only apply to *ad hoc* aid to large firms, while only the 'formal' criteria have to be complied with for aid schemes, even in the case of large firms.

2.3.3 Type of aid

So-called operating aid is not explicitly mentioned as being transparent under Article 5, however, a new development in GBER 2014-20 is the extension of GBER to cover certain types of operating aid which have until now been subject to notification and prior approval. These only apply to sparsely-populated areas as designated under RAG 2014-20[38] and Outermost regions (OMR) as identified in the Treaty.[39]

GBER 2014-20 extends the block exemption to cover certain types of operating aid which have been routinely approved under RAG 2007-13.[40] However, not all operating aid schemes will fall within the GBER and those excluded will be assessed under RAG 2014-20. Operating aid under the GBER falls into two main groups:

- Transport aid in sparsely-populated areas and OMR
- Operating aid other than transport costs in the OMR only

Transport aid concerns the additional costs of transporting goods produced within an eligible area (a designated sparsely-populated region or an OMR) inside the national border of a Member State. This must be based on the cheapest form of transport. Aid must be objectively quantifiable in advance on the basis of a fixed sum or per tonne/kilometre ratio or other relevant unit. In the OMR *only*, eligible costs also include the transport of goods from their place of production to the eligible area for further processing. In the case of the Swedish transport scheme[41] as approved under RAG 2007-13 from 2007 to end June 2014, this would mean that the *outward* transport elements of the scheme would fall within GBER 2014-20, while the *inward* element, because it is restricted to OMR under the GBER, would require notification and prior approval from the Commission on the basis of RAG 2014-20.

Aid for other additional operating costs, apart from transport costs, incurred as a direct result of the permanent handicaps faced in OMR[42] is covered by GBER 2014-20 provided that:

- The beneficiaries have their economic activity in an Outermost region
- The annual aid amount per beneficiary under all operating aid schemes does not exceed:
  - 15 percent of the gross value-added created annually by the beneficiary in the OMR concerned; or
  - 25 percent of its annual labour costs in the OMR; or

[38] RAG 2014-20, Article 161.

[39] Article 349 TFEU.

[40] GBER 2014-20, Article 15.

[41] Regional transport subsidy scheme – State aid no 152/2007 – Sweden: http://ec.europa.eu/competition/state_aid/cases/219384/219384_741489_8_1.pdf

[42] Namely - remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products – see Article 349 (TFEU).

- 10 percent of annual turnover realised in the OMR.

The overall amount of aid must not exceed the eligible additional costs.

Table 3: Operating aid covered by the GBER

	Eligibility criteria	**Eligible areas**
Additional transport costs	Outward transport within the Member State	Sparsely-populated areas OMR
	Inward transport within the Member State	OMR
Other operating aid	Aid amount not exceeding: • 15% of GVA • 25% of annual labour costs • 10% of annual turnover	OMR

Source: GBER, Article 15.

As already mentioned, GBER 2014-20 does not cover inward transport costs in sparsely-populated regions, meaning that continuation of that element of the Swedish transport scheme would require notification and assessment on the basis of RAG 2014-20. The GBER also does not cover the Norwegian social security concession, which has been the subject of notification to the EFTA Surveillance Authority (ESA). Following lengthy negotiations between ESA and the Norwegian government, focused in particular on the sectoral coverage of the scheme, the social security concession has been approved.[43] This is discussed further below.

2.3.4 Eligible investment projects and firm size

The treatment of investment aid to large firms in 'c' areas has been a major issue since DG Competition first floated proposals for RAG reform in its 2011 'non-paper'.[44] These proposals involved a complete ban on aid to large firms in the 'c' areas. This was arguably the most contentious aspect of the reform proposals and two joint letters to Commissioner Almunia attracted support from the majority of countries with a least some 'c' area coverage. In addition, the Commission's initial RAG proposals were the subject of intensive bilateral lobbying from a number of quarters.

RAG 2014-20 and GBER 2014-20 ultimately pulled back from the complete ban on investment aid to large firms in 'c' areas, but nonetheless impose some very significant constraints on aiding such investment, reflecting the Commission's concern to focus aid on cases where it is perceived to have an incentive effect.

Under GBER 2014-20, aid to large enterprises in 'c' areas 'shall only be granted for an initial investment in favour of new economic activity in the area concerned.'[45]

According to the GBER, 'initial investment in favour of new economic activity' means:[46]

[43] EFTA Surveillance Authority Decision of 18 June 2014 on regionally differentiated social security contributions 2014-20 (Norway), Decision 225/14 COL: http://www.eftasurv.int/media/state-aid/Consolidated_version_-_Decision_225_14_COL__NOR_Social_Security_contributions_2014-2020.pdf

[44] This was not published, but see: Wishlade, F. (2012) 'Non-Paper: Non-Starter or Non-Negotiable? EU Competition Policy and Regional Aid Control Post-2013', European Policy Research Papers, No 83, University of Strathclyde: http://www.eprc.strath.ac.uk/eprc/documents/PDF_files/EPRP_83.pdf

[45] GBER 2014-20, Article 14(3).

(a) In investment in tangible and intangible assets related to the setting up of a new establishment, or to the diversification of the activity of an establishment, under condition that the new activity is not the same or a similar activity to the activity previously performed in the establishment;

(b) The acquisition of the assets belonging to an establishment that has closed down or would have closed down had it not been purchased, and is bought by an investor unrelated to the seller, under the condition that the new activity to be performed using the acquired assets is not the same or a similar activity to the activity performed in the establishment prior to its acquisition.

Further, 'the same or similar activity' means an activity falling under the same class (four digit numerical codes) of the NACE classification of activities.[47] In practice, the NACE classification seems rather ill-suited to this task favouring, as it does, traditional activities for which the breakdown is much more fine-grained, over new products and services. Table 4 serves to illustrate this point.

Table 4: Examples of four-digit NACE classes

Four digit NACE code	Activity description
14.11	Manufacture of leather clothes
14.12	Manufacture of workwear
14.13	Manufacture of other outerwear
14.14	Manufacture of underwear
14.19	Manufacture of other wearing apparel and accessories
14.20	Manufacture of articles of fur
14.31	Manufacture of knitted and crocheted hosiery
14.39	Manufacture of other knitted and crocheted apparel
21.20	Manufacture of pharmaceutical preparations
26.20	Manufacture of computers and peripheral equipment
26.40	Manufacture of consumer electronics
63.11	Data processing, hosting and related activities

Source: Statistical Classification of economic activities in the European Community, NACE Rev. 2, see: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-RA-07-015/EN/KS-RA-07-015-EN.PDF

While some elements of the rules are the subject of specific definitions, others are not. For example, to what does 'the area concerned' refer? The draft GBER had specified that the 'new establishment' had to be in a different NUTS 3 region from any existing operations of the firm, but this requirement has been dropped. On the other hand:

> 'any initial investment started by the same beneficiary (at group level) within a period of three years of the date of start of works on another aided investment in the same [NUTS 3 region] shall be considered to be part of a single investment project.'

'Establishment' is, however, presumably different from 'investment project' and as a result, the geographical scope of 'area' is unclear in the context of a 'new establishment'.

Related, the notion of 'establishment' is not defined. What functions would need to be carried out within operation in order to constitute an 'establishment', and accordingly, when does an operation become a 'new establishment' (aid to which falls within the GBER) rather than an extension of an

[46] GBER 2014-20, Article 2(51).

[47] GBER 2014-20, Article 2(50).

existing one (which does not?) These definitional issues are important since they determine the circumstances in which a project can be aided with GBER cover.

Table 5: Eligible project types by firm size, region and basis for eligibility

	SMEs ‘a’ and ‘c’ regions	Large firms in ‘a’ regions	Large firms in ‘c’ areas
Setting-up new establishment	GBER	GBER	GBER
Extension of the capacity of an existing establishment	GBER	GBER	Incompatible
Diversification into products not previously produced	GBER	GBER	RAG? (para 15, 24)
Fundamental change in the overall production process	GBER	GBER	RAG? (para 15)
Acquisition of assets of an establishment that has closed or would have closed	GBER	GBER	Incompatible
Acquisition of assets of an establishment that has closed, or would have closed, on condition of diversification into new activities that are not the same or similar	GBER	GBER	GBER
Diversification of the activity of an establishment into new activities that are not the same or similar	GBER	GBER	GBER
Diversification of an existing establishment into new products or new process innovations	GBER	GBER	RAG (para 15)

Note: In all cases, the GBER only applies up to the adjusted aid amount.

Under RAG 2014-20, regional aid for large undertakings in ‘c’ areas may only be granted for ’initial investments that create new economic activities’ or ‘for the diversification of existing establishments into new products or new process innovations.’[48] This is wider than the scope of the GBER, which does not allow for the possibility of regional aid to large firms for *new process innovations* in ‘c’ areas. New process innovations are not defined in RAG 2014-20, though it does specify that eligible costs ‘for a fundamental change in the production process’, must exceed the depreciation of the assets linked to the activity to be modernised in the course of the preceding three years.[49] However, it is not clear whether ‘new process innovations’ are the same as ‘a fundamental change in the production process.’

Further, while the GBER exempts from notification aid for the ‘diversification of the activity of an establishment’,[50] RAG 2014-20 explicitly requires the notification of aid ‘to diversify an existing

[48] RAG 2014-20, para 15.

[49] RAG 2014-20, para 96.

[50] GBER 2014-20, Article 15(3) as defined by Article 2(51)(a)

establishment in a 'c' area into new products'.[51] In short, is there a lack of clarity surrounding the notions of 'activity' and 'product' and whether the two are in fact interchangeable.

In broad terms, it can be seen that the *intention* of the Commission is to exclude aid for simply expanding existing large businesses in c' areas. In practice, however, the GBER and the RAG do not define precisely enough what is eligible; this may make operationalisation of the GBER difficult in certain cases, while also leaving the scope of the RAG unclear.

2.3.5 Notification threshold

The GBER only applies to aid amounts up to a given threshold,[52] beyond which awards are subject to notification and a compatibility assessment on the basis of the RAG. The notification threshold varies according to the aid intensity applicable in the region concerned and is calculated as follows:[53]

Maximum aid amount = R x (A+0.5*B+0*C), where:

R is the maximum aid intensity in the area on the basis of the approved map, excluding the SME bonus

A is the first €50 million of eligible costs;

B are the eligible costs between €50million and €100 million; and

C are the eligible costs over €100 million.

In effect, the result of this formula is that, as previously, proposed aid must be notified for prior approval if it exceeds the adjusted aid amount which an eligible investment of €100m could obtain; this corresponds to the notification thresholds set out in Table 6.

Table 6: Notification thresholds expressed as amounts of aid against prevailing aid ceilings

Prevailing ceiling	**10%**	**15%**	**25%**	**35%**	**50%**
Notification threshold	€7.5m	€11.25m	€18.75m	€26.25m	€37.5m

Source: RAG 2014-20, para 20(n).

These notification thresholds are unchanged. However, the RAG 2007-13 market share and production capacity 'screens'[54] beyond which aid is subject to a formal investigation are dropped in RAG 2014-20. These screens concerned beneficiaries that had, or would have had, more than 25 percent market share of the product concerned or projects which resulted in an increase in capacity of more than 5 percent (except in rapidly expanding markets).[55] The abolition of the screens reflects the implications of the *Smurfit Kappa* judgment,[56] but there were anyway doubts about their effectiveness

[51] RAG 2014-20, para 24.

[52] GBER 2014-20, Article 4(1)(a).

[53] GBER 2014-20, Article 2(20)

[54] RAG 2007-13, para 68.

[55] In practice, most of these investigations were opened because the Commission had doubts about whether the screens were exceeded.

[56] In this case, the Court found that the Commission is not precluded from opening the formal procedure if the market share or capacity criteria are not exceeded and that, by inferring that the aid complied with the guidelines

and utility.[57] Under RAG 2014-20, *all* notified aids are subject to the compatibility assessment set out in RAG 2014-20: there is no *per se* presumption of compatibility of the basis of market analysis and there is no explicit trigger for the opening of a formal investigation. Although this affects relatively few cases, the scale of the aid concerned in those cases is significant and it reflects an important underlying shift in philosophy. It remains to be seen what impact this will have on the likelihood of notification by domestic authorities and on the workload of DG Competition, particularly in the context of the narrower GBER criteria for aid to large firms in 'c' areas.

2.4 The compatibility assessment under the Regional Aid Guidelines

It can be anticipated that, as under RAG 2007-13, the vast majority of schemes will fall under the GBER; indeed, there is a powerful incentive to domestic authorities to design measures that are GBER compliant. Moreover, the GBER is extended to include *ad hoc* aid offered independently of a scheme At the same time, the assessment criteria under the RAG are toughened and tightened, creating a disincentive for policymakers to notify, and arguably contributing further to the homogenisation of aid policy.

The State aid modernisation initiative (SAM)[58] called for 'common principles' for the compatibility of State aid with the Treaty. Reflecting this, aid is compatible only if it meets specified criteria.[59] The approach is consistent with the 'balancing test' in other areas of State aid and the Commission Guidance on aid to large investments (LIPS guidance)[60] applicable under RAG 2007-13, though the 'balancing' is less explicit than in the LIPS guidance which it effectively replaces. In considering a notified measure, the Commission essentially seeks to analyse whether the positive impact of the measure in addressing an objective of common interest outweighs its potential negative effects on trade and competition. In doing so, the Commission will consider a range of criteria.

The way in which these criteria are applied varies according to whether the notified measures are individual aids, investment aid schemes or operating aids. *All* must be met for the measure to be considered compatible under the balancing test:

a) **Contribution to a well-defined objective of common interest:**[61] investment aid schemes should form part of a regional development strategy (such as an EU Cohesion policy Operational Programme); individual aid may be justified on the basis of a variety of indicators (such as job creation, training, clustering effects, knowledge spillovers); Member States must demonstrate the existence of specific difficulties.

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because the market screens were not exceeded without assessing the importance of the project for regional development, the Commission had both misconstrued the scope of the guidelines and failed to exercise its discretion – see Case T-304/08 *Smurfit Kappa v Commission* (judgment of 10 July 2012).

57 Kai-Uwe Kühn (2012) *Making State Aid Rules More Effective: the Reform of the Regional Aid Guidelines,* 10th annual Experts' forum on European State Aid Law, Brussels, 7 June; Friederiszick, H. and Tosini, N. (2013) *Implications of the State aid Modernisation for the Assessment of Large Investment Projects,* European State Aid Law Quarterly, 1, pp46-60.

58 European Commission (2012) EU State aid modernisation – SAM, COM(2012) 209 final, 8 May.

59 RAG 2014-20, para 26.

60 Communication from the Commission concerning the criteria for an in-depth assessment of regional aid to large investment projects [2009] OJ C 223/3.

61 RAG 2014-20, para 30-46.

b) **Need for state intervention:**[62] it is sufficient that projects are located within the assisted area map, this being a reflection of the fact that the market is not delivering the Cohesion objective.

c) **Appropriateness:**[63] a notified aid measure will not be considered compatible if less distortive instruments or aid types can achieve the same positive contribution to regional development. The onus is on Member States to demonstrate the appropriateness of the aid proposed, including a consideration of forms of aid considered to be less distortive.

d) **Incentive effect:**[64] aid is only compatible if it alters the behaviour of the beneficiary. Member States must use a standard application form and applicants must explain what would have happened in the absence of aid; large firms must provide documentary evidence in support of the counterfactual described. Aid will be considered to have an incentive effect if it results in additional activity that the beneficiary would not carry out without aid or would do so on a smaller scale or in a different location. For notifiable individual aid, incentive effect can be proven in two possible scenarios: (i) the investment would not take place at all without the aid because it would not be sufficiently profitable for the beneficiary (investment decision); or (ii) the investment would not take place in that location without aid because aid is required to compensate for the net disadvantages and costs in the assisted area (location decision). This seems likely to be the most difficult criterion to meet in the assessment. There are comparatively onerous documentation requirements to establish the counterfactual – ie. what the undertaking would have done in the absence of aid. On the other hand, it is not wholly convincing that a firm would rely on regional aid to render a project profitable when the approval of the aid was dependent on a potentially lengthy assessment process by the Commission.

e) **Proportionality:**[65] Member States must ensure that aid is limited to the minimum needed. For notified aid schemes available to large firms and individual aid to large firms this is based on the 'net extra cost approach' – meaning that aid must be limited to the additional cost of the project in the area concerned, compared to the counterfactual, in the absence of aid. For SMEs, the aid ceilings specified in RAG 2014-20 offer a 'safe harbour'.

f) **Avoidance of undue negative effects on competition and trade:**[66] the negative effects on trade and competition must be limited and outweighed by the contribution to the objective of common interest. Nevertheless, the RAG outlines three instances where the negative effects 'manifestly' outweigh the positive impact and notified individual aid cannot be found compatible: (i) where the project creates capacity in a market that is in structural decline; (ii) where, without the aid, the project would have located in a region where the aid maximum is the same or higher and (iii) where there is a link between aid and relocation.

g) **Transparency:**[67] Member States must publish on a single website the text of notified measures and specified information on beneficiaries.

RAG 2014-20 only applies to aid schemes intended to be implemented after 30 June 2014.[68] As such, there are as yet no *published* European Commission decisions with RAG 2014-20 as their basis, other than those relating to the assisted area maps for the new period. However, the EFTA

[62] RAG 2014-20, para 47-49.
[63] RAG 2014-20, para 50-59.
[64] RAG 2014-20, para 60-76.
[65] RAG 2014-20, para 77-111.
[66] RAG 2014-20, para 122-140.
[67] RAG 2014-20, para 141.
[68] RAG 2014-20, para 188.

Surveillance Authority has published its decision[69] to approve regionally-differentiated social security contributions in Norway for 2014-20. The decision is based on the ESA Guidelines on Regional Aid,[70] which are analogous to RAG 2014-20 for the sectors covered by the EEA agreement.[71]

The Norwegian social security concession is distinctive in several respects. First, it constitutes regional operating aid, which is rarely approved under the regional aid rules and then only in closely-defined circumstances. Second, assisted areas for operating aid are different from those for investment aid – they are not based on the population ceilings or designation criteria set out in the RAG, but rather subject to a separate assessment by the Commission, or, in this case, ESA. Third, the scheme is extremely large – annual spend is around NOK 13 billion – some €1.8 billion, of which around half is accounted for by undertakings engaged in economic activities. In other words, about €936 million involves State aid with the remainder accounted for by, for example, public sector bodies not engaged in economic activities, and therefore not State aid recipients.

The rather anodyne text of ESA decision conceals a considerable amount of controversy over the approval of the scheme. Perhaps surprisingly, given recent population trends in Norway, the controversy did *not* concern the assisted area coverage of the scheme. The Norwegian authorities proposed an increase in coverage compared to 2007-13, with the population rising from 17.7 percent[72] to 21.1 percent of the population and the assisted area map proposals proved uncontentious. By contrast, the *sectoral* focus of the scheme was the subject of intense negotiations. The previous scheme (2007-2013) had been available to all sectors of activity, with the exception of steel and shipbuilding.[73] The new scheme was made subject to the sectoral restrictions introduced under RAG 2014-20 – see Table 2– most notably the exclusion of the transport and energy sectors, but also the financial and insurance sectors. These had hitherto been eligible on the basis of the 'horizontal' nature of the scheme. The Norwegian authorities argued vigorously for the horizontal approach to be maintained and for precise definitions of the sectors subject to limitations under the RAG and GBER.[74]

This approach was rejected by ESA, in league with the Commission, but ESA did specify more closely which sectors would be *ineligible*.[75] These are:

- Steel[76]
- Synthetic fibres[77]
- Transport – namely, the transport of passengers by aircraft, maritime transport, road or rail and by inland waterway or freight transport services for hire or reward, ie.[78]

[69] EFTA Surveillance authority Decision of 18 June 2014 on regionally-differentiated social security contributions 2014-20 (Norway), Dec no: 225/14/COL: http://www.eftasurv.int/media/decisions/225-14-COL.pdf

[70] http://www.eftasurv.int/media/state-aid-guidelines/Part-III.pdf

[71] The EEA Agreement does not cover the common agriculture and fisheries policies.

[72] Though the population living in the assisted area had declined to around 16.6 percent.

[73] EFTA SURVEILLANCE AUTHORITY DECISION of 19 July 2006 on the notified scheme concerning regionally differentiated social security contributions (Norway), Decision No: 228/06/COL, http://www.eftasurv.int/media/esa-docs/physical/10178/data.pdf

[74] Letter from the Ministers for Local Government and Modernisation and Finance, 28 April 2014: http://www.regjeringen.no/upload/KMD/REGA/letter_almunia_29_4_2014.pdf

[75] Somewhat curiously, perhaps, the shipbuilding sector, which was previously excluded, now appears to be eligible.

[76] RAG 2014-20, Annex IV; ESA RAG 2014-20, Annex II

[77] RAG 2014-20, Annex IV; ESA RAG 2014-20, Annex II(a)

  - NACE 49: land transport and transport via pipelines, excluding: NACE 49.32 taxi operation; NACE 49.42 removal services; and NACE 49.5 transport via pipeline
  - NACE 50: water transport
  - NACE 51: air transport, excluding NACE 51.22 space transport.
- Airports[79]
- Energy – here the ESA decision refers to the GBER, noting the definition of the energy sector as "energy generation, transmission and infrastructure". On this basis it concludes that the entire NACE division 35 should be excluded.[80]
- Financial and insurance activities (NACE Section K).[81]
- Undertakings performing intra-group activities and whose principal activity falls under NACE classes 70.10.[82]

The compatibility assessment itself appears rather mechanistic, though the substance of the underlying discussions is not always easy to discern. In the context of *proportionality*, for example, the decision appears simply to accept the rates proposed by the Norwegian authorities (which are themselves rolled forward from 20107-13) without attempting explicitly to calibrate these with regional disparities.

More noteworthy are the conditions attached to the evaluation of the scheme. This must be delivered to ESA by end 2018 and quite stringent criteria are associated with the goals and conduct of the evaluation. This is discussed in more detail below.

2.5 Award values

RAG 2014-20 reduces aid intensities across the board, except for the very poorest regions and the sparsely-populated areas. The main maximum aid intensities are shown in Table 7, though actual intensities on the approved maps may differ.

[78] This corresponds to the definition in GBER 2014-20, Article 2(45).

[79] RAG 2014-20, para 11.

[80] Section 35 includes the activity of providing electric power, natural gas, steam, hot water and the like through a permanent infrastructure (network) of lines, mains and pipes. The dimension of the network is not decisive; also included are the distribution of electricity, gas, steam, hot water and the like in industrial parks or residential buildings. This section therefore includes the operation of electric and gas utilities, which generate, control and distribute electric power or gas. Also included is the provision of steam and air-conditioning supply. However, Section 35 *excludes* the production of crude petroleum, the mining and extraction of oil from oil shale and oil sands and the production of natural gas and recovery of hydrocarbon liquids (Division 06). Section 35 also excludes the (typically long-distance) transport of gas through pipelines, see: Statistical Classification of economic activities in the European Community, NACE Rev. 2, see: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-RA-07-015/EN/KS-RA-07-015-EN.PDF

[81] RAG 2014-20, para 17.

[82] Ibid.

Table 7: RAG 2014-20 Maximum aid intensities ('standard' matrix) gross grant-equivalent

	Large firms	Medium-sized firms	Small firms
'a' regions GDP per head <45% EU27 av.	50%	60%	70%
'a' regions GDP per head < 60% EU27 av.	35%	45%	55%
'a' regions GDP per head <75% EU27 av	25%	35%	45%
'c' areas – ex 'a' regions until 31.12.2017	15%	25%	35%
'c' areas – sparsely populated/border	15%	25%	35%
'c' areas	10%	20%	30%

Note: (i) As discussed, aid to large firms in 'c' areas is restricted to certain types of investment, so that in practice a zero rate will often apply. **(ii)** Rates for OMRs are increase by up to 20 percent for those with GDP per head at or below 75 percent of the EU average and 10 percent for the remainder. **(iii)** In 'c' areas (at NUTS 3 or below) that are adjacent to 'a' areas, the aid intensity may be increased so that the differential does not exceed 15 percentage points.
Source: RAG 2014-20, para 171-177.

As under RAG 2007-13, regional aid for large investments, defined as projects with eligible expenditure exceeding €50m, is subject to an adjusted aid amount. This is set out in Table 8; SME bonuses do not apply to large investment projects irrespective of firm size.[83]

Table 8: Adjusted aid amounts for eligible investment exceeding €50m

Eligible expenditure	Aid ceiling
Up to €50 m	100% of applicable aid ceiling
For the part between €50m and €100m	50% of applicable aid ceiling
For the part exceeding €100m	34% of applicable aid ceiling

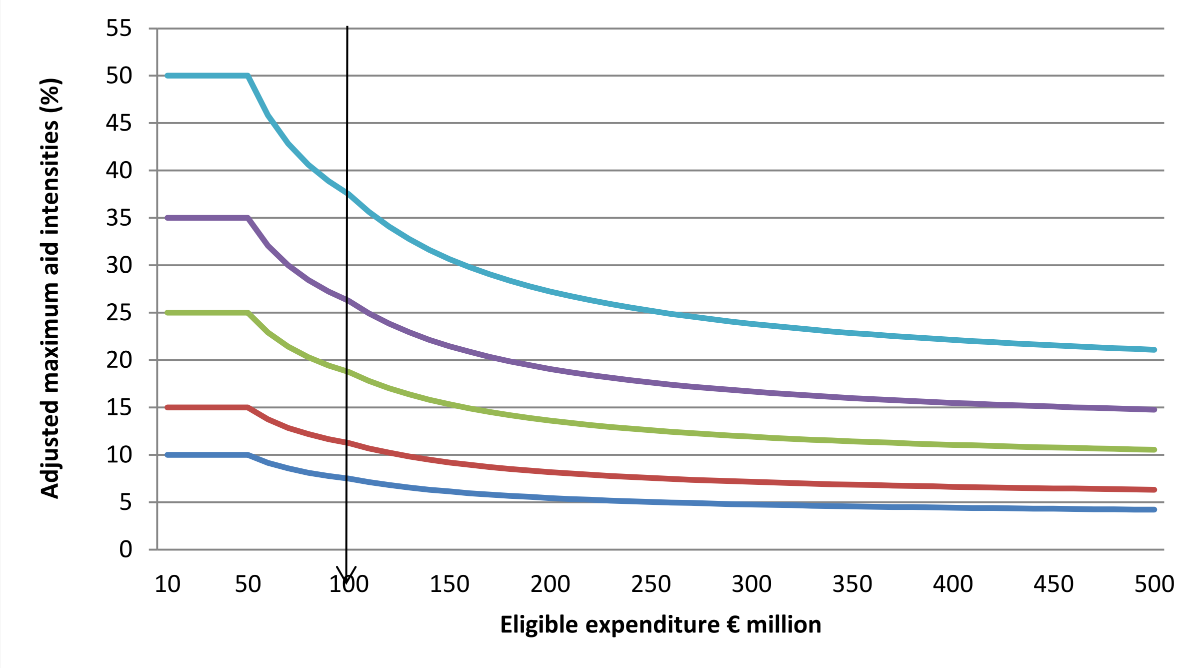
Source: RAG 2014-20, para 20(c).

As is evident from Table 8, where eligible project costs exceed €50 million, the full aid intensity applicable in the region cannot be applied and the aid rate is adjusted. As already mentioned proposed aid must be notified for a compatibility assessment and prior approval if it exceeds the adjusted aid amount which an eligible investment of €100m could obtain; this corresponds to the notification thresholds set out in Table 6 above.

Importantly, notified aid to large firms must be limited to the minimum necessary to induce the investment to take place, calculated on a 'net extra cost' basis, in order to fulfil the proportionality criterion under the compatibility assessment. The rates illustrated in Figure 1 therefore act as a cap on the minimum necessary. For SME aid under notified schemes, the rates in Table 7 act as 'safe harbours' – at or below these levels, the proportionality criterion is deemed to be fulfilled.

[83] RAG 2014-20, footnote 76.

Figure 1: Adjusted aid intensities by maximum rate and eligible expenditure



Note: The initial rates vary according to the maximum aid intensity for the region, then decline for eligible expenditures over €50 million; where the proposed aid amount is higher than that for which a €100 million eligible investment would qualify (€7.5 million in a 10 percent area; €11.25 million in a 15 percent area, etc), then aid must be notified. However, in any event the adjusted aid amount is a ceiling.
Source: Calculated on the basis of RAG 2014-20, para 20(c).

2.6 Relations between regional aid control and EU cohesion policy

Since the 1988 reform of the Structural Funds relations between Cohesion policy and Competition control of regional aid have often been strained. Historically, this has been particularly so in context of assisted area coverage, and the lack of coincidence between the EU Cohesion policy and national assisted area maps. However, this has been less controversial since 2000, when Member States gained greater flexibility in choosing both sets of areas, and especially since 2007, when Cohesion policy ceased to be spatially restricted. In this context, the interface between Cohesion policy and the GBER is now of more relevance than relations with the RAG. Nevertheless, it is interesting to note a greater degree of coordination between RAG 2014-20 and the objectives of Cohesion policy. This is reflected in the explicit use of Cohesion policy criteria in State aid compatibility assessments and in the specific provisions made for territorial cooperation and regional urban aid.

Regarding the *contribution to a common objective*, schemes implemented within the context of Cohesion policy programmes are deemed to meet this criterion, whereas for purely national or regional measures Member States must demonstrate how they contribute to a regional development strategy[84] and schemes must include selection criteria that are in line with that strategy. In other words, there is a presumption of compatibility for Cohesion policy based measures that is not extended to domestic regimes. Similarly, where a scheme is introduced outwith a Cohesion policy programme, Member States must indicate why regional aid is an *appropriate instrument* and why, where applicable, a sectoral focus might be justified.[85] By contrast, for aid schemes implementing

[84] RAG 2014-20, para 33 and Draft GBER, Article 15(3).
[85] RAG 2014-20, para 52-3.

Cohesion policy programmes, the instrument proposed is considered to be appropriate without the need for further justification.

The GBER makes specific provision to accommodate investments in Cohesion policy European Territorial Cooperation projects. This enables the rate of award applicable where the major part of investment occurs to apply to all partners where they would otherwise differ.[86] However, the standard RAG 2014-20 restrictions on aid to large firms in 'c' areas still apply and the practical usefulness of this provision may be limited by its relevance to ETC projects. Also in the context of ETC projects, the GBER makes specific provision for SMEs participating in cooperation projects.[87] This allows for up to 50 percent of eligible costs, subject to a ceiling of €2 million per undertaking per project to fall within the GBER. The restriction of Article 20 to SMEs is a seriously limiting factor, as is the maximum aid intensity, which is substantially below ETC cofinancing rates.

GBER 2014-20 adds 'regional urban development aid' as an exemption category;[88] this was a relatively late addition to the text - it was not in the document on which the Commission consulted in May 2013. However, the exemption is only available in respect of projects that fulfil all three of the following criteria (as well as the general criteria of the GBER):

- they must be implemented through urban development funds *in assisted areas;*
- they must be co-financed by the EU Structural and Investment Funds; and,
- they must support the implementation of an integrated approach to sustainable urban development.

In addition, it is proposed to cap the total investment into an urban development project at €20 million. It is important to note that the exemption applies only to urban development projects that are located in assisted areas. Two key points flow from this: first, in many countries there is not necessarily an overlap between the areas targeted for regional policy and those targeted for urban development; second, it is unclear how the eligibility restrictions on investments by large undertakings would play out in the context of regional urban development aid.

More generally, the scope of this provision in the GBER is rather limited, partly owing to the spatial coverage restrictions limiting the exemption to the assisted areas (and associated impact on the eligibility of large firms) and partly due to the overall limit of €20 million currently proposed. As a result, it seems probable that many JESSICA-type measures in future will either have to be structured in order not to contain aid or will require notification (as has been the case in 2007-13).

2.7 Transparency

As mentioned above, transparency obligations are included in the common assessment criteria for notified aid.[89] These include online publication of the full text of the aid scheme, its implementing provisions and award data, notably names of beneficiaries, aid amounts and intensities. In principle, Member States were already required to provide online information on aid *schemes* approved under

[86] GBER 2014-20, para 14(15).
[87] GBER 2014-20, Article 20.
[88] GBER.2014-20, Article 16.
[89] RAG 2014-20, para 141.

the GBER, though in practice the links to such information have often been poorly maintained and the information limited in detail.

Reporting was required under RAG 2007-13 for aid to all *large* projects (those involving investment exceeding €50 million, irrespective of the amount of aid). RAG 2014-20 extends this to *all* projects and requires aid awards exceeding €3 million to be reported to the Commission within 20 days of the award.

Under GBER 2014-20, Member States are required to develop websites providing information on the implementation of the GBER by 30 June 2016 - two years from the entry into force of the Regulation. More specifically, the GBER requires the publication on a comprehensive State aid website at national or regional level of: [90]

- the summary information set out in a standardised format or a link providing access to that information;
- the full text of each aid measure or a link providing access to it;
- information on each individual aid award exceeding €500,000.

Early indications are that the Commission will reinforce its monitoring of compliance.

2.8 Evaluation

A further innovation is the emphasis on evaluation. RAG 2014-20 provides the possibility for the Commission to limit the validity of aid schemes to four years in order for an evaluation to be carried out.[91] The precise terms of any requirement to undertake an evaluation[92] would be defined in the approval of the aid measure. However, evaluations must by undertaken by experts independent from granting authorities, on the basis of a common methodology (which the Commission may provide) and must be made public. The circumstances in which an evaluation would be imposed as a condition of approval will be limited to those with large budgets, schemes with novel characteristics or in areas where significant market, technological or regulatory changes are envisaged. Evaluations must be carried out in sufficient time for the results to feed in to the Commission decision on any extension of the scheme proposed, or at expiry.[93] GBER 2014-20 provides for the expiry of GBER cover after six months for schemes with annual budgets exceeding €150 million, pending the approval by the Commission of an appropriate evaluation plan.

There is little experience to date of what might be required either in terms of notified aid under the RAG where an evaluation has been imposed or what type of 'evaluation plan' will satisfy the Commission under GBER 2014-20. However, there are indications that this could be demanding.

[90] GBER 2014-20, Article 9.

[91] RAG 2014-20, para 27.

[92] See also: http://ec.europa.eu/competition/state_aid/modernisation/evaluation_issues_paper_en.pdf

[93] RAG 2014-20, para 144.

The only published decision containing an evaluation requirement concerns the Norwegian social security concession approved by ESA[94] this provides for quite an exhaustive evaluation designed to assess:

1. The impact of the scheme on job opportunities and employment in the eligible regions, using results indicators that measure the impact which lowering employment costs through the scheme has on:
    a. Labour market participation rates
    b. Employment growth in the public and private sector
    c. Wage formation and household disposable income
    d. Industrial structure
    e. Educational level of the workforce
    f. Municipal and state finances

    The analysis is to include the effects of the scheme on the labour market by region and sector and assess the impact of the scheme on both undertakings and employees, in order to determine who benefits.

2. The impact of the scheme on competition and trade, including issues related to size of undertaking and international competition.

A detailed timeline for the evaluation, as well as the participation of ESA in a methodological workshop, is also provided for. The evaluation process is set to begin with a feasibility study in the first quarter of 2015 and conclude with the delivery of the evaluation to ESA by end 2018.

GBER 2014-20 sets out the minimum requirements for an evaluation plan;[95] this should set out:

- the objectives of the aid scheme
- evaluation questions
- result indicators
- the methodology envisaged
- data collection requirements
- proposed timing, including the date of submission of the final report
- description of the independent body conducting the evaluation or the criteria to be used for selecting the evaluator
- mechanisms for publicising the evaluation.

A provisional supplementary information sheet for the submission of an evaluation plan has been prepared. Its use is not yet mandatory as this requires changes to the Implementing Regulation. However, its use is recommended and it refers Member States to a staff working document on a common methodology for evaluation.[96] A version of this document had been subject to consultation at

[94] EFTA Surveillance authority Decision of 18 June 2014 on regionally-differentiated social security contributions 2014-20 (Norway), Dec no: 225/14/COL: http://www.eftasurv.int/media/decisions/225-14-COL.pdf

[95] GBER 2014-20, Article 2(14).

[96] Commission Staff Working Document "Common methodology for State aid evaluation, 28 May 2014, SWD(2014) 179 final http://ec.europa.eu/competition/state_aid/modernisation/state_aid_evaluation_methodology_en.pdf

the end of 2013 and many Member States expressed concern at the ambition of the proposal and, more fundamentally, at the competence of the Commission to require the evaluations of the effectiveness of measures financed with purely domestic resources.

3. SPATIAL COVERAGE AND AREA DESIGNATION

Many of the key principles underlying spatial coverage and area designation were unchanged from RAG 2007-13 to RAG 2014-20. However, there were some important changes of detail which affect countries differently. This section briefly outlines the provisions of RAG 2014-20, highlighting differences with RAG 2007-13, before reviewing area designation exercises in the EoRPA partner countries.

3.1 Spatial coverage

The distinction between 'a' regions and 'c' areas is maintained in RAG 2014-20 as in RAG 2007-13, but the differentiation is heightened by the fact that aid to large firms in the 'c' areas is only compatible in respect of 'initial investment in favour of new economic activity', as discussed above.

The *initial* population ceiling set in RAG 2014-20 is 46.53 percent of the EU27 population (equivalent to 47 percent of the EU28 population – i.e. following the accession of Croatia).[97] This is higher in absolute terms than the RAG 2007-13 initial ceiling (42 percent of EU25), and leads to higher final coverage once all the adjustments (safety net, minimum coverage, etc. – which all adjust coverage upwards) are made (see Table 9).

The basic definition of Article 107(3)(a) regions[98] - ***'a' regions*** - as NUTS 2 regions with GDP(PPS) per head below 75 percent of the EU average is unchanged,[99] but eligibility is determined with reference to EU27, rather than EU25. In addition, and irrespective of their level of GDP per head, the Outermost regions (OMR) referred to in Article 349 TFEU also retain 'a' status. Further, and in line with convention, the eligibility threshold was based on EU membership when the guidelines were adopted, so that the designation of Croatia as an 'a' area was based on the EU27 threshold.

The coverage of Article 107(3)(c) areas - ***'c' areas*** - comprises two elements that are now referred to as 'predefined' areas and 'non-predefined' areas.[100] This is broadly as before, but importantly the 'predefined' population cannot be transferred to other areas – ie. it may only be used to designate areas that fulfil the predefined criteria.[101] Countries are not obliged to designate pre-defined areas, but the eligible population associated is 'lost' from the overall total if it is not used.

There are two categories of ***predefined 'c' area***, as before: (i) regions with 'a' status in 2011-13 that are now over the 75 percent threshold;[102] and (ii) sparsely populated areas.[103]

Former 'a' regions cover almost 7 percent of the EU population, and a very significant proportion of some countries (see Table 9). The statistical effect category in RAG 2007-13 is not retained.[104]

[97] RAG 2014-20, para 148.
[98] RAG 2014-20, para 150.
[99] Based on Eurostat data for 2008-10.
[100] RAG 2014-20, para 155.
[101] RAG 2014-20, para 159.
[102] RAG 2014-20, para 158(a).
[103] RAG 2014-20, para 158(b).
[104] RAG 2007-13, para 18-20.

Sparsely-populated areas are defined as: NUTS 2 regions with fewer than 8 inhabitants per km^2 or NUTS 3 regions with fewer than 12.5 inhabitants per km^2.[105] This differs from the RAG 2007-13 definition, which refers only to the NUTS 3 based element of the definition.[106] This change does not alter the outcomes for Sweden or Norway.[107] However, it is significant for Finland since it results in the inclusion of a single NUTS 2 region, while the component NUTS 3 areas do not all meet the 12.5 inhabitants per km^2 threshold (so coverage is higher than it would be if coverage were based on the NUTS 3 criterion alone).[108]

Table 9: Assisted area coverage 2014-20

	'a' regions	**'c' areas**	*Of which, ex-'a'*	*Sparsely-popd*	*Non-predefd 'c'*	**Total**
EU28	25.82	21.85	*6.74*	*0.58*	*14.53*	**47.67**
EU27	25.17	22.04	*6.80*	*0.58*	*14.66*	**47.21**
BE	0.00	29.95	*12.06*		*17.89*	**29.95**
BG	100.00					**100.00**
CZ	88.10					**88.10**
DK		7.97			*7.97*	**7.97**
DE		25.85	*11.9*		*13.95*	**25.85**
EE	100.00					**100.00**
IE		51.28			*51.28*	**51.28**
EL	45.91	54.09	*10.08*	*0.17*	*43.84*	**100.00**
ES	6.90	61.76	*28.25*	*0.51*	*33.00*	**68.66**
FR	2.93	21.24			*21.24*	**24.17**
IT	29.04	5.03			*5.03*	**34.07**
CY		50.00			*50.00*	**50.00**
LV	100.00					**100.00**
LT	100.00					**100.00**
LU		8.00			*8*	**8.00**
HU	70.38	6.33			*6.33*	**76.71**
MT		100.00	*100*			**100.00**
NL		7.50			*7.5*	**7.50**
AT		25.87			*25.87*	**25.87**
PL	86.30	13.70	*13.7*			**100.00**
PT	69.25	15.77			*15.77*	**85.02**
RO	89.44	10.56	*10.56*			**100.00**
SI	52.92	47.08	*47.08*			**100.00**
SK	88.48					**88.48**
FI		26.10		*24.25*	*1.85*	**26.10**
SE		12.26		*12.26*		**12.26**
UK	3.91	23.14		*0.35*	*22.79*	**27.05**
HR	100.00					**100.00**
IS				*36.5*		**36.5**
NO				*25.51*		**25.51**

Note: As mentioned below, the change in definition of sparsely-populated regions could, apparently, result in Iceland being designated in its entirety; the lower figure corresponds to the definition based on NUTS 3, as now.
Source: RAG 2014-20, Annex I and ESA RAG 2014-20, para 142 for Iceland and Norway.

[105] Based on Eurostat population density data for 2010.

[106] RAG 2007-13, para 26, footnote 29 and para 30(b).

[107] Coverage in Norway is reduced but this is because of higher population density in Aust Agder county, not because of the change in definition.

[108] In principle, it could also have resulted in the inclusion of Iceland in its entirety since Iceland constitutes a single NUTS 2 region, with population density of 3.2 per km^2; however, ESA did not apply this principle but retained the approach used in the ESA RAG 2007-13.

As previously, the population of ***non-predefined 'c' areas*** was calculated by subtracting the 'a' regions and the predefined 'c' areas from the initial ceiling. The population was distributed between countries on the basis of both national *and* EU disparities in GDP per head and unemployment rates.[109] There were significant detailed changes to the methodology for the distribution of the population compared to RAG 2007-2013 and 2000-6,[110] which both followed the same approach and one which emphasised *national* disparities within an EU context. For some countries the new method had a significant impact, as reflected in Figure 2.

A series of further ***adjustments*** was made to 'c' area coverage resulting from the population distribution methodology:

- A 'safety net' was applied so that no Member State lost more than 50 percent of existing coverage[111] (as in RAG 2007-13); Cyprus and Luxembourg benefited from this
- Each Member State was assigned minimum coverage of 7.5 percent of the population.[112] This was a new provision compared to RAG 2007-13, but finds a precedent in RAG 2000-6 which set a floor of 15 percent of coverage. The Netherlands benefitted from this.
- Special provisions were made for Member States subject to various 'bailout' mechanisms, such that those countries affected did not see a reduction in coverage.[113] Greece, Cyprus (in a further adjustment) and Portugal benefitted from this.

As discussed below, the actual selection of 'c' areas is undertaken by domestic authorities, based on parameters set in RAG 2014-20;[114] similar to the position in 2007-13.

The Commission will review coverage of the 'a' regions in 2016 to establish whether the list of such regions should be extended (there is no implication that it would be reduced); this would entail changes to 'c' area coverage in the countries concerned.[115]

Figure 2 illustrates the impact of RAG 2014-20 on spatial coverage. At the EU level, the most striking point to note is that, while overall coverage increases by around one percentage point, there is a pronounced shift in the *composition* of this coverage – with 'a' region coverage falling from around 33 percent to some 25 percent of the EU27 population and 'c' areas rising from under 14 percent to over 22 percent.

At country level, patterns of change vary widely. In *relative* terms, the biggest 'loser' is Luxembourg, where coverage is halved. In *absolute* terms, the biggest loser is Hungary, which loses over 23 percent of existing coverage (down from 100 percent to under 77 percent). Finland and Sweden each lose around 20 percent of current coverage. Germany sees a reduction of almost four percentage points, but also significant is that no German region has 'a' status from July 2014. In Denmark and Italy there are more modest reductions in coverage.

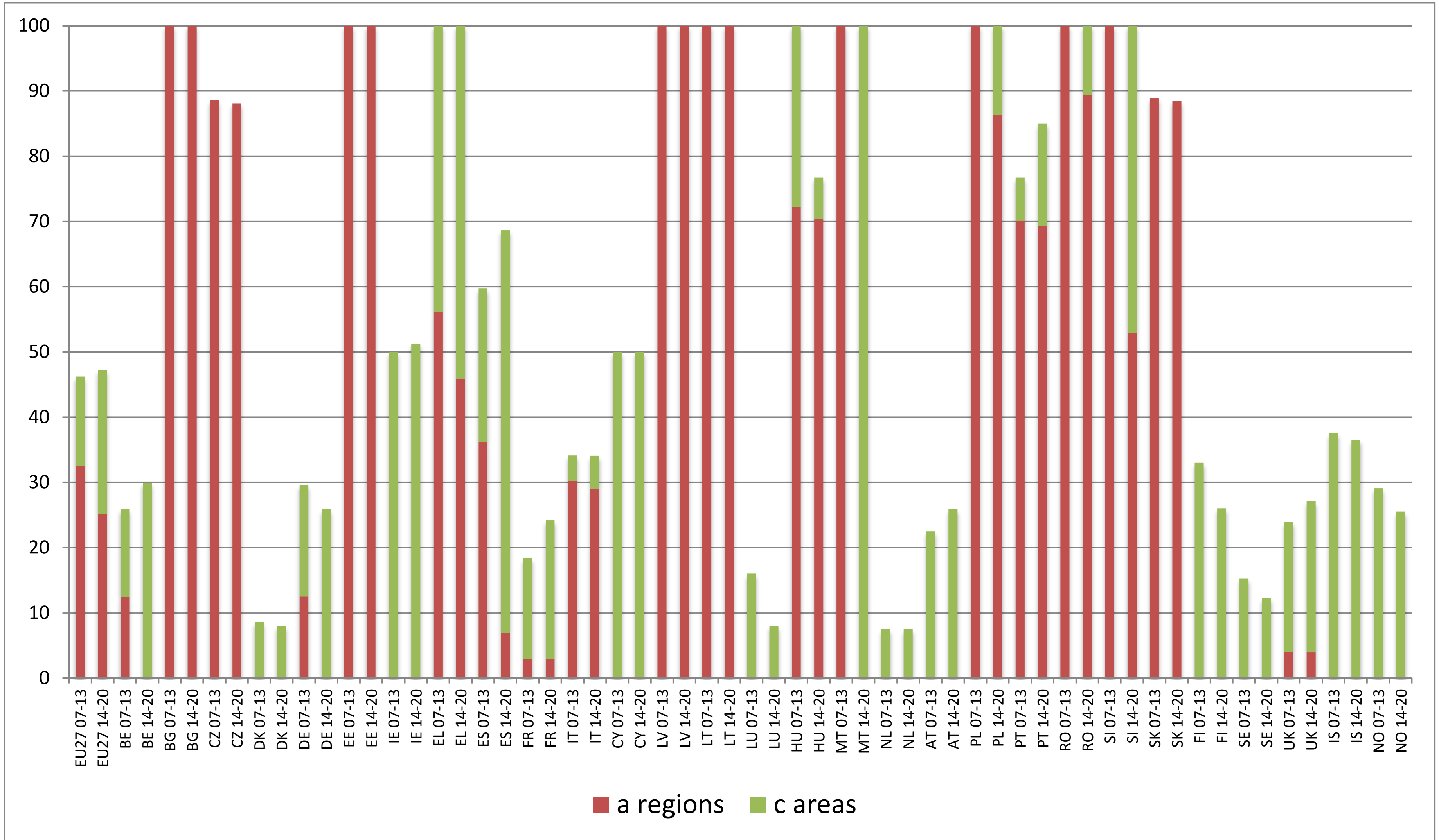
[109] RAG 2014-20, Annex II.
[110] Guidelines on national regional aid [1998] OJ C74/9 (RAG 2000-6)
[111] RAG 2014-20, para 165(b).
[112] RAG 2014-20, para 165(c).
[113] RAG 2014-20, para 163.
[114] RAG 2014-20, para 167-170.
[115] RAG 2014-20, para 183-185.

Some countries see no change in overall coverage: Bulgaria and the three Baltic states retain 100 percent 'a' region coverage; and Malta has 100 percent coverage, but with 'c' area rather than 'a' region status. Overall coverage is also unchanged in Poland, Romania and Slovenia but the capital regions now have 'c' area rather than 'a' region status. In the Czech Republic and Slovakia coverage is essentially unchanged; the differences shown in Figure 2 are the result of demographic change. Greece and Cyprus benefit from the special provisions for countries in receipt of 'bail out' mechanisms and retain coverage at existing levels. Coverage remains unchanged in the Netherlands which relies on the minimum 7.5 percent coverage, (the same as previous coverage). Coverage of Croatia is not mentioned in RAG 2014-20 but, on the basis of the relevant GDP data, qualifies as an 'a' region in its entirety.

At the opposite end of the spectrum, the biggest 'winner' in *relative* terms is France, which sees an increase in existing coverage of over 30 percent. In *absolute* terms, the main gains are in Portugal and Spain – where coverage increases by 8.3 and 9 percentage points respectively. Austria, Belgium and the United Kingdom see coverage increase by around three to four percentage points, and there are more modest gains in Ireland.

Though it is striking that some of the more prosperous Member States see an increase in coverage, it should also be recalled that RAG 2014-20 is much more restrictive in its treatment of large firms in 'c' areas than in 'a' regions. As such, the 'c' area maps, in practice, serve mainly to determine eligibility for greenfield and diversification investments by large firms and those areas in which the SME 'bonus' applies.

Figure 2: Population coverage 2007-13 and 2014-20 (% of total)



Note: 2007-13 figures in fact relate to 2011-13, i.e. following the 2010 review when Statistical effect areas were re-designated as ‘full’ ‘a’ regions or ‘c’ areas.
Source: RAG 2007-13, RAG 2014-20 and own calculations from Eurostat data,

3.2 The selection of eligible areas

Under RAG 2014-20, as under RAG 2007-13, 'a' region coverage is predetermined by the Commission. An important change under RAG 2014-20 is that the population allocation determined by the predefined areas former 'a' areas (broadly analogous to the economic development areas in RAG 2007-13) may only be used to designate those areas.[116] In 2007-13 some countries (for example the United Kingdom and Italy) used this population to designate areas *other* than in the qualifying regions; this is not possible under RAG 2014-20. [117]

There is slightly more flexibility in the designation of sparsely-populated areas (as was the case under RAG 2007-13). Whilst in principle these should concern NUTS 2 regions with fewer than 8 inhabitants per km^2[118] or NUTS 3 areas with fewer than 12.5 inhabitants per km^2, parts of adjacent NUTS 3 areas may also be designated, provided that those parts also have population density below the 12.5 inhabitant per km^2 threshold.

Proposals for the designation of the non-predefined areas are the responsibility of domestic authorities, subject to the parameters set out in RAG 2014-20[119] and Commission approval of the resulting map. The parameters set by the Commission concern both designation criteria and geographical units of analysis – 'building blocks'.

3.2.1 Area designation criteria for investment aid (non-predefined 'c' areas)

The key *designation criteria* are set out in Table 10. At first sight this appears as a rather complex matrix of options. In practice, however, the criteria are similar to those for RAG 2007-13: in general, areas must have GDP(PPS) below the EU average or an unemployment rate 15 percent higher than the national average. The key differences between RAG 2014-20 and its predecessor are that there is now greater flexibility on minimum population coverage for countries with relatively low coverage and that the 'structural change' criterion, which requires a minimum population of 50,000 cannot be used to designate areas that could qualify under Criterion 1, or Criterion 2. Also, the capacity to target very localised problems for areas with a minimum coverage of 20,000 through support for SMEs has been dropped. While the minimum population criteria show more flexibility, at least for some countries, as will be seen below, the building block requirements introduce new constraints.

[116] RAG 2014-20, para 159.

[117] Though Member States could opt not to include all the predefined areas in the proposed map; the corresponding population quota would however, be 'lost'.

[118] As noted earlier, the reference to NUTS 2 areas as the basis for predefined sparsely-populated areas is new, but the flexibility to designate parts of NUTS 3 areas is not.

[119] RAG 2014-20, para 168-70.

Table 10: Key area designation criteria for non-predefined ‘c’ areas

Criterion	Conditions	Minimum population
1. Contiguous areas	Within NUTS 2 or NUTS 3 regions with either: • GDP(PPS) per head ≤ EU27 or • Unemployment rate ≥ 115% of national average	• General case: 100,000 • For MS with ‘c’ coverage <1million: 50,000 • For MS with national pop <1million: 10,000
2. NUTS 3 regions with pop < 100,000	• GDP(PPS) per head ≤ EU27 or • Unemployment rate ≥ 115% of national average	Not applicable
3. Islands and other contiguous areas characterised by geographical isolation	• GDP(PPS) per head ≤ EU27 or • Unemployment rate ≥ 115% of national average or • <5000 population	None
4. Border areas	• Contiguous areas • NUTS 3 or parts of • Adjacent to ‘a’ region, or • Land border with non-EEA country	None
5. Structural change or serious decline	• Must not be within areas that fulfil criteria 1-4 above • Contiguous areas	• General case: 50,000 • For MS with ‘c’ coverage <1million: 25,000 • For MS with national pop <1million: 10,000 • Isolated areas (cf criterion 3): 5,000

Source: Summarised from RAG 2014-20, para 168.

The national populations and the coverage of non-predefined ‘c areas are given in Table 11. This suggests that only Cyprus and Luxembourg qualify for the 10,000 population minimum under Criteria 1 and 5; and that Denmark, Hungary, Portugal and Finland qualify for the 50,000 and 25,000 population minima under Criteria 1 and 5 respectively.

Table 11: Non-predefined ‘c’ areas and national population

	Non predefined ‘c’ population(‘ 000s)	National population (000s)
DK	460	5546
DE	11774	81766
IE	2386	4475
EL	4959	11312
ES	14670	46074
FR	14086	64823
IT	2873	60477
CY	415	831
LU	41	508
HU	658	9994
NL	1245	16603
AT	2258	8392
PT	793	10639
FI	103	5362
UK	14027	62257

Source: Eurostat and EPRC calculations from RAG 2014-20.

3.2.2 Building blocks for investment aid (non-predefined 'c' areas)

The geographic unit of analysis – or building block - is specified as local administrative unit 2 (LAU2) – see Table 12.[120]

Table 12: Geographical units – EU definitions

	NUTS 2		NUTS 3		LAU 1		LAU 2	
BE	Provincies / Provinces	11	Arrondissementen / Arrondissements	44	-		Gemeenten / Communes	589
DK	Regioner	5	Landsdeler	11	Kommuner	99	Sogne	2143
DE	Regierungs-bezirke	38	Kreise	412	Verwaltungsge-meinschaften	1481	Gemeinden	12066
IE	Regions	2	Regional Authority Regions	8	Counties, Cities	34	Electoral Districts	3441
ES	Comunidades y ciudades Autonomas	19	Provincias + islas + Ceuta, Melilla	59	-		Municipios	8116
FR	Régions + DOM	26	Départements + DOM	100	Cantons de rattachement	3785	Communes	36680
IT	Regioni	21	Provincie	110	-		Comuni	8094
CY	-	1	-	1	Επαρχίες (Eparchies)	6	Dimoi, koinotites	615
LU	-	1	-	1	Cantons	13	Communes	116
HU	Tervezési-statisztikai régiók	7	Megyék + Budapest	20	Statisztikai kistérségek	174	Települések	3154
NL	Provincies	12	COROP regio's	40	-		Gemeenten	418
AT	Bundesländer	9	Gruppen von politischen Bezirken	35	-		Gemeinden	2357
PT	Comissaoes de Coordenaçao regional + Regioes auto.	7	Grupos de Con-celhos	30	Concelhos - Munícipios	308	Freguesias	4260
FI	Suuralueet / Storområden	5	Maakunnat / Landskap	19	Seutukunnat / Ekonomiska regioner	70	Kunnat / Kommuner	336
SE	Riksområden	8	Län	21	-		Kommuner	290
UK	Counties (some grouped); Inner and Outer London; Groups of unitary authorities	37	Upper tier authorities or groups of lower tier authorities (unitary authorities or districts)	139	Lower tier auths individual unitary auths; Individual unitary auths or LECs (or parts); Districts	380	Wards (or parts thereof)	10310

Source: Eurostat

An important issue is the notion of 'contiguity', which is an explicit requirement of Criteria 1 and 3-5, and implicit in Criterion 2. The notion of contiguous areas refers to whole LAU2 areas or to a group of whole LAU2 areas. A group of LAU2 areas is considered to be contiguous if each of those areas in the group shares an administrative border with another area in the group. However, *parts* of LAU2 may be designated, provided that the population is at least 50 percent of the minimum population required under the criterion applicable. Under Criterion 1, for example, in the general case, this appears designed to preclude the inclusion of an area comprising a population of 150,000 of which 120,000 in one LAU2 and the remaining 30,000 in parts of adjoining LAU2. In contrast with the provisions on population minima outlined in Table 12, this 'anti leopard skin' clause represents a significant tightening of existing provisions. For 2007-13 a number of countries designated areas on

[120] RAG 2014-20, para 169.

the basis of units below LAU2, and while these maps were accepted, it is also known that such approaches were not always considered by the Commission to be ‘within the spirit’ of RAG 2007-13.

3.2.3 Assisted areas for operating aid

It is important to note that the above discussion relates to area designation for investment aid, which accounts for most schemes. RAG 2014-20 also allows for the possibility of operating aid being compatible:

> ….”if it aims to reduce certain specific difficulties faced by SMEs in particularly disadvantaged areas falling within the scope of Article 107(3)(a) of the Treaty, or to compensate for additional costs to pursue an economic activity in an outermost region or to prevent or reduce depopulation in very sparsely populated areas”.[121]

Apart from the Outermost regions, which are defined in the TFEU, the targeting of operating aid schemes is determined on the basis of separate maps from that for investment aid and is not linked to the population ceilings. RAG 2014-20 makes specific reference to the eligibility of ‘very sparsely populated’ regions for operating aid. These are defined as

> “NUTS 2 regions with less than 8 inhabitants per km^2 or parts of such NUTS 2 regions designated by the Member States concerned in accordance with paragraph 162 of these guidelines”[122]

The basic definition is unchanged from RAG 2007-13.[123] However, there would appear to be a typographical error regarding flexibility in this provision since paragraph 162 is not really relevant to the coverage of sparsely-populated areas. It may be that the reference is intended to be to paragraph 161, which would have entailed a material change to the definition of very sparsely populated areas that was not been signalled elsewhere in the reform discussions. On the other hand, all indications are that no change was intended. This is reflected in the approval of the Norwegian assisted areas maps for the social security discussed above.

[121] RAG 2014-20, para 16.

[122] RAG 2014-20, para 20(y).

[123] RAG 2007-13, para 80.

4. AREA DESIGNATION

After the adoption of RAG 2014-20, regional aid control moved into a new phase, focused, in the first instance, on the development of assisted area maps; these determine the eligible areas and associated intensities for GBER-based measures, as well as investment aid schemes and individual and *ad hoc* awards that fall outside the GBER and have to be assessed on the basis of the RAG itself. Maps for operating aid schemes are not subject to a population ceiling; the scope of eligible areas for operating aid in sparsely-populated regions is defined on a case-by-case basis while for OMRs eligibility is determined by Treaty status.

For a number of Member States, devising an assisted areas map is little more than a formality. If the entire country is eligible for regional aid (Bulgaria, Latvia, Lithuania, Estonia, Greece, Poland, Slovenia, Romania, Malta), or if the eligible population is entirely composed of 'a' regions (the Czech and Slovak Republics), there is no significant scope for domestic discretion beyond proposing aid intensities; the maximum rates are anyway determined by RAG 2014-20.

In contrast, for many countries – those where non-predefined 'c' areas predominate - the process of selecting those areas can be a complex process involving the reconciliation of competing domestic demands with the constraints of RAG 2014-20.

For *all* countries, the notification of a regional aid map is an essential prerequisite for providing investment aid to large firms, or taking advantage of the SME aid intensities under the GBER, whether support is offered on the basis of an aid scheme or is *ad hoc*; importantly, the approved maps form an integral part of RAG 2014-20,[124] as under RAG 2007-13. By mid-September 2014 the Commission or the EFTA Surveillance Authority, as appropriate, had approved the maps of all 28 EU Member States, Norway and Iceland.

The timescale of the approval process is illustrated in Table 13. The duration given here should be treated with caution – it may be misleading as there may have been *informal* discussions prior to formal notification which speed up the process. Also, the Commission tends to approve maps in batches so that formal approval may be delayed, even though agreement has already been reached. Nevertheless, it is notable how quickly the maps have been approved. For example, almost all the 2000-6 maps took longer to approve than any of the maps in this round; the 2000-6 maps took between five and 16 months to approve, with the formal investigative procedure being opened for four out of six maps. The 2007-13 maps took considerably less time, reflecting the relaxation of some of the area designation criteria, but some took up to a year to agree.

[124] RAG 2014-20, para 175.

Table 13: Map submission and approval

	Notification	Approval	Duration	Case number
Iceland	04 April 2014	24 April 2014	20	75228
Norway (Investment aid)	31 January 2014	26 February 2014	26	75008
Estonia	15 April 2014	21 May 2014	36	SA.38621
Latvia	25 February 2014	09 April 2014	43	SA.38385
Croatia	28 April 2014	11 June 2014	44	SA.38668
Romania	20 February 2014	09 April 2014	48	SA.38364
Finland	20 February 2014	09 April 2014	48	SA.38359
Malta	14 March 2014	07 May 2014	54	SA.38468
Ireland	26 March 2014	21 May 2014	56	SA.38509
Cyprus	28 May 2014	23 July 2014	56	SA.38814
Lithuania	26 March 2014	21 May 2014	56	SA.38510
Greece	11 March 2014	07 May 2014	57	SA.38450
Bulgaria	28 April 2014	25 June 2014	58	SA.38667
Luxembourg	14 April 2014	11 June 2014	58	SA.38615
Netherlands	18 July 2014	16 September 2014	60	SA.39108
Spain	17 March 2014	21 May 2014	65	SA.38472
Portugal	07 April 2014	11 June 2014	65	SA.38571
Slovenia	20 December 2013	11 March 2014	81	SA.38060
Italy	19 June 2014	16 September 2014	89	SA.38930
Norway (Social security)	13 March 2014	18 June 2014	97	75581
Sweden	18 December 2013	27 March 2014	99	SA.37985
Denmark	27 January 2014	07 May 2014	100	SA.38247
France	16 January 2014	07 May 2014	111	SA.38182
Slovakia	03 October 2013	22 January 2014	111	SA.37447
Hungary	13 November 2013	11 March 2014	118	SA.37718
Poland	11 October 2013	20 February 2014	132	SA.37485
Czech Republic	23 September 2013	04 February 2014	134	SA.37553
United Kingdom	06 January 2014	21 May 2014	135	SA.38113
Belgium	09 April 2014	16 September 2014	160	SA.38577
Germany	30 September 2013	11 March 2014	162	SA.37423
Austria	26 November 2013	21 May 2014	176	SA.37825

Source: Compiled from Commission and ESA decisions.

4.1 Arrangements for area designation

Historically, countries have differed widely in their approaches to designating assisted areas, reflecting institutional structures and responsibilities, administrative conventions relating to consultation on certain issues and the perceived sensitivity of the process.

Austria, ***France*** and ***Italy*** adopted a similar approach to areas designation insofar as the ‘c’ area population quota was divided *ex ante* between the regions and the task of selecting the eligible areas delegated to that level.

However, in *France* the process was essentially *deconcentrated* rather than *devolved.* At the national level the lead was taken by DATAR (as it then was) which allocated the population quotas as outlined below and drafted the *circulaires* to the *Préfets,* the government representative in the region, indicating how the designation process was to be managed. The main responsibility for designation lay with the *Préfets*, who were charged with consulting with Regional Councils and local partners. This is the same process as was used in 2007-13, but more emphasis was placed on consultation at the subnational level in 2014-20 than previously. In a first stage, 98 percent of the available population quota was shared between the regions (the rest being retained to enable any unforeseen issues to be

dealt with, as well as a small reserve). Of this, 75 percent was shared between the regions with Transition status under Cohesion policy on the basis of three criteria:

- unemployment rate
- household income
- proportion of young people not in education, employment or training

The remaining 25 percent was shared between regions without Transition status on the basis of:

- unemployment rate
- sectoral criteria – notably the dominance of a particular industry in decline
- share of innovative firms (a positive criterion)

Following the decision on the population distribution maps were devised by the *préfets* then 'aggregated up' into a national map by DATAR.

In *Austria* the population quota was divided between the *Länder*. The *Land* governments then had the main responsibility for defining the eligible areas, though ÖROK administers a common database of indicators to which the *Länder* have access.

In ***Italy*** the designation of the 'c' areas for 2007-13 had been complex and controversial, leading to the Italian map being one of the last to be approved. The reasons for this were that constitutional reforms had devolved economic development responsibilities to the regions; as a result, the emphasis was on reaching agreement between the regions. This was extremely difficult, largely owing to the very small 'c' area population quota accorded to Italy – just 3.9 percent of the national population, of which most (2.9 percent) was accounted for by Sardegna which, as an economic development area, had an *a priori* claim on 'c' status.

For 2014-20, as before, the process involved a mix of 'technocratic' and political discussions within the CINSEDO (the Conference of Regions and Autonomous Provinces), within the working group chaired by the Ministry for Territorial Cohesion, which also led and oversaw the negotiations of RAG 2014-20. The first stage of the process was to reach political agreement on the method to divide the population between the regions. The result of this process was that, in the first instance, 10 percent of the quota was set aside for areas eligible on the basis of Criterion 5 only. The remaining 90 percent of non-predefined 'c' population was divided between the regions as follows:

- 50 percent on the basis of the share of eligible population in the total population of each province
- 50 percent on the basis of how many of the five criteria were fulfilled by each province

On the basis of the population quotas calculated, each region put forward its own map proposals based on the criteria in RAG 2014-20. The Department for Development and Economic Cohesion then aggregated up the regional proposals, along with the justifications for the use of Criterion 5, for notification to the Commission.

In ***Germany***, as in previous periods, area designation was led by the Federal Ministry of Economy and Technology which coordinated proposals and secured domestic agreement. The main domestic forums where the proposals were discussed were the GRW ('Regional Joint Task') Coordination

Committee at political level, and the GRW Sub-Committee at technical level. Overall the process was largely technocratic but the most sensitive decisions were taken at a political level. In both cases, the process was lengthy and involved extensive discussions, negotiations and trade-offs between the federal authorities and representatives of all the *Länder*. Technical decisions are made by the GRW Sub-Committee which is composed of federal and *Land* civil servants and chaired by a senior civil servant from the Federal Ministry for the Economy and Technology. Political decisions are either taken by the GRW Coordination Committee (made up of federal and *Land* Economics Ministers, and chaired by the Federal Minister for the Economy and Technology) or by the domestic Group of Ministers for the Economy (*Wirtschaftsministerkonferenz*) – which is made up of the relevant ministers of each *Land* and the relevant federal minister – sometimes separated into ministers for the eastern and western *Länder* respectively. In practice, preparations for the 2014-20 assisted areas map had been underway well before the adoption of RAG 2014-20, which determined the final population coverage available. Domestic preparations and the pre-existence of 'well-oiled' machinery for area designation enabled the German authorities to adopt an assisted area map and notify it to the Commission by end September 2013.

In the ***United Kingdom***, as in the past, an extensive public consultation process took place.[125] The Department for Business Innovation and Skills (BIS), acting on behalf of the UK Government, coordinated the consultation exercise with the devolved administrations for Scotland and Wales and submitted the UK 2014-20 assisted areas map to the Commission for approval. Northern Ireland was not included in this process and it was agreed at the outset that Northern Ireland would retain 100 percent assisted area status 'for at least the medium term'.[126] The first stage consultation document outlined the requirements of RAG 2014-20 and sought responses on two issues: a set of proposed 'common principles' for drawing up the 2014-20 assisted areas map; and so-called 'local intelligence' that could be considered alongside economic data and policy considerations. The main targets of the process were: the Local Enterprise Partnerships in England; and local authorities in England, Scotland and Wales, all of whom were alerted to the consultation. These bodies were encouraged to collaborate to identify cross boundary issues. In addition, the consultation document was sent to a number of national stakeholders (eg. business organisations and planning associations), but was also open to the general public. The first stage closed on 30 September 2013. The second stage document, comprising the draft assisted areas map was put out to consultation in December 2013, and closed for comments in early February 2014.[127] The Welsh and Scottish governments had an important role to play in the gathering of local intelligence, coordinating the development of the draft maps presented at Stage 2 and refining the map in the light of the second round of consultation. However, the Stage 1 consultation document had not indicated whether this would be done on the basis of devolved population ceilings, similar to the process in France, Italy and Austria. In practice, however, the maps for England, Scotland and Wales were developed separately within population quotas based on coverage in 2007-13 – in other words, the previous shares of coverage in England, Scotland and Wales were maintained.

[125] Department for Business Innovation & Skills (2013) *2014-20 Assisted Areas Map: Consultation stage 1: Common Principles and Local Intelligence*.

[126] HM government and Northern Ireland Executive (2013) *Building a Prosperous and United Community* (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206979/Building_a_Prosperous_and_United_Community.pdf.

[127] Department for Business Innovation & Skills (2013) *2014-20 Assisted Areas Map: Consultation stage 2: draft assisted areas map and government response to Stage 1,* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267159/bis-13-962-2014-to-2020-assisted-areas-map-consultation-stage-2-draft-assisted-areas-map-and-government-response-to-stage-1.pdf

The area designation process was far more centralised in the remaining EoRPA partner countries. In ***Finland***, ***Sweden, Norway,*** and ***the Netherlands,*** area designation is largely undertaken as a technocratic exercise within the ministries responsible for regional policy, though this is not to say that there is no external consultation or political input, but the mechanisms for this are less formal and the role of external input is lower key.

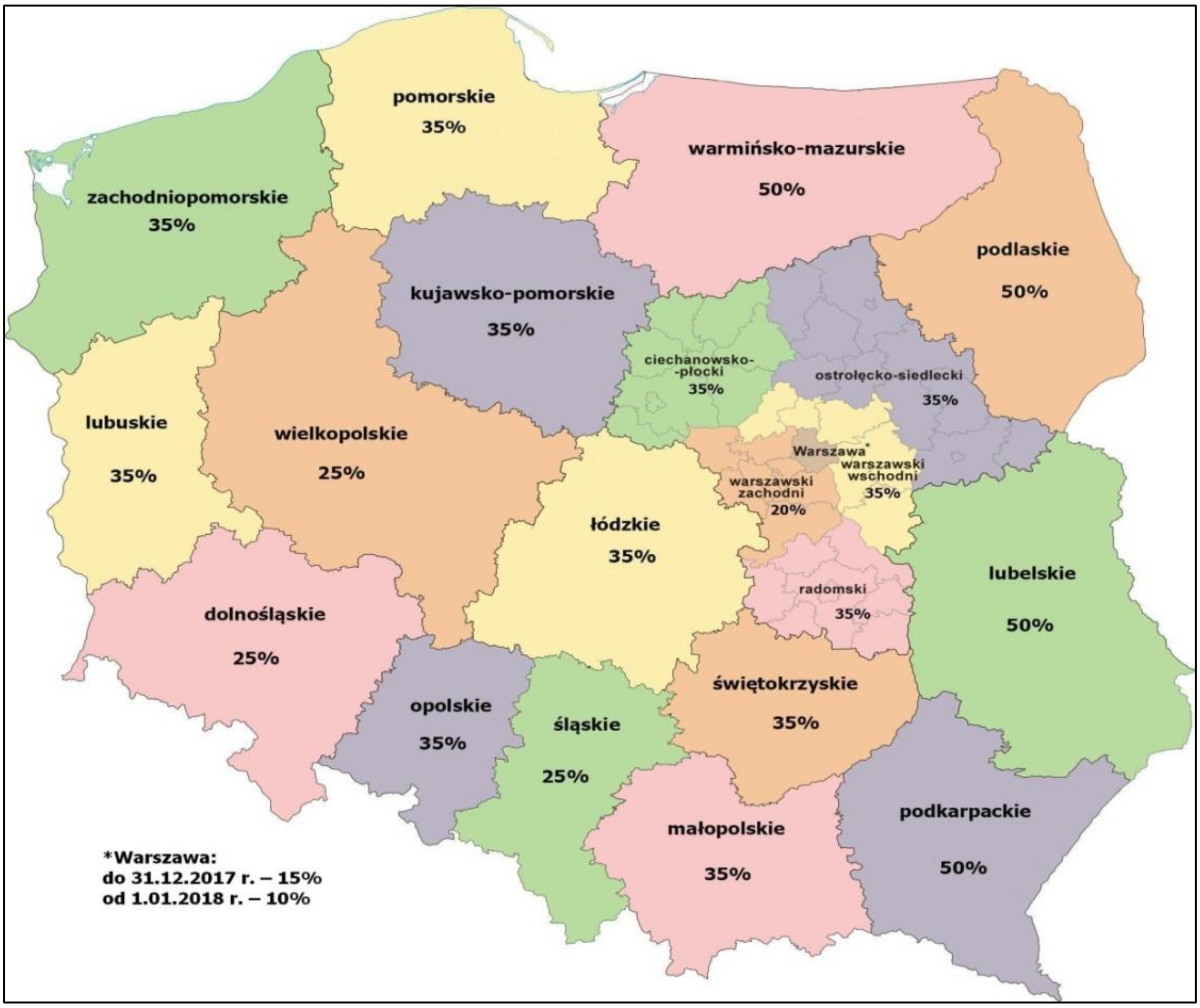
In the *Netherlands* there is no longer a regional aid scheme at the national level (the IPR was abolished in 2011), which diminishes the importance of an assisted areas map in general, though it can still be used as the basis for policies operated at the subnational level. Drafting the map is the responsibility for the Ministry of Economic Affairs (MEZ) and is mainly a technocratic exercise, though the provinces were consulted about the proposed map.[128] The overall aim had been to focus on the same areas as in 2007-13; in the event, however, the province of Limburg had ceased to meet the criteria, delaying the submission of the map.

In *Finland*, *Sweden* and *Norway* the initial task of drawing up the map falls to policymakers in the relevant ministries, following which it is subject to political discussions. In Norway, for example, where the 2014-20 map was long under discussion internally, policymakers drew up three alternative scenarios for each map (the investment aid map and the map of very sparsely populated areas where the social security concession applies). The different options used different indicators and weightings, but ultimately the choice was a political one. Importantly, all three countries rely exclusively (Norway and Sweden) or almost exclusively (Finland) on the predefined sparsely populated areas for coverage. The new provisions on the non-transferability of this population to areas *not* meeting the population density criterion were an important constraint notably in Sweden.

In ***Poland***, area designation *per se* is not required as the whole country remains eligible either as 'a' regions or predefined 'c' areas. Nevertheless, as noted, a map had to be formally submitted, though the parameters for this were effectively determined by RAG 2014-20, largely eliminating domestic discretion.

[128] Letter from the Secretary of State for Ecconomic Affairs: http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2014/06/25/kamerbrief-voorstel-regionale-steunkaart-2014-2020.html

Figure 3: Assisted Areas in Poland 2014-20

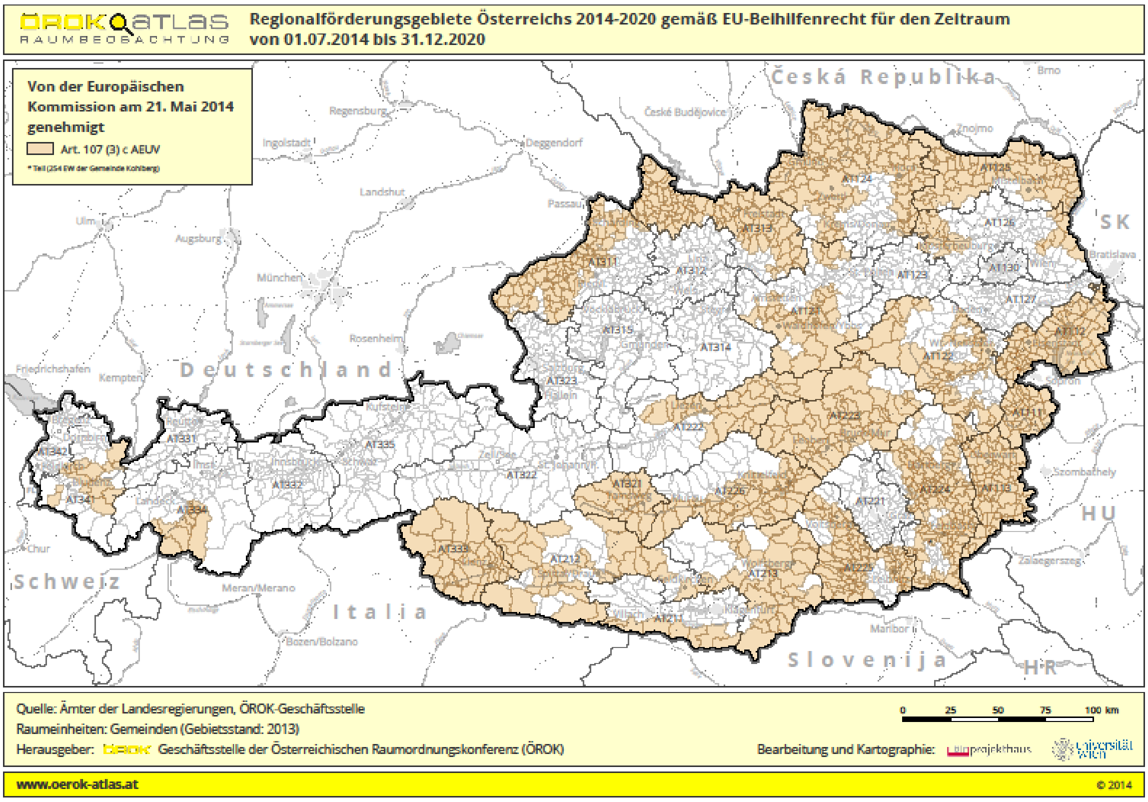


4.2 Approaches to assisted area maps

Member States adopt diverse area designation strategies to reconcile Commission constraints with domestic considerations. These considerations comprise a mix of policy options such as indigenous or inward investment, areas of need or opportunity – and political issues, such as the perceived equitable distribution of assisted areas between regions and the sensitivity of de-designating some areas, while according assisted area status to others for the first time. In the past, and rather more prosaically, an important factor was often the ease with which the map could be approved by the Commission, sometimes leading to rather pragmatic, as opposed to strictly policy-oriented, approaches to area designation.

In ***Austria*** and ***Italy*** the national assisted areas maps are essentially the sum of regional choices since, on the basis of the population quota, proposals are the prerogative of the regional level, subject to the constraints of the RAG. In *Italy,* the principal focus of regional policy is on the south, the *Mezzogiorno.* Coverage of the 'c' areas is modest, at around 5 percent of the national population. This small quota, coupled with the need to reconcile regional priorities with the constraints on building blocks is the driver of outcomes rather than an overarching national strategic approach.

Figure 4: Assisted Areas in Austria 2014-20

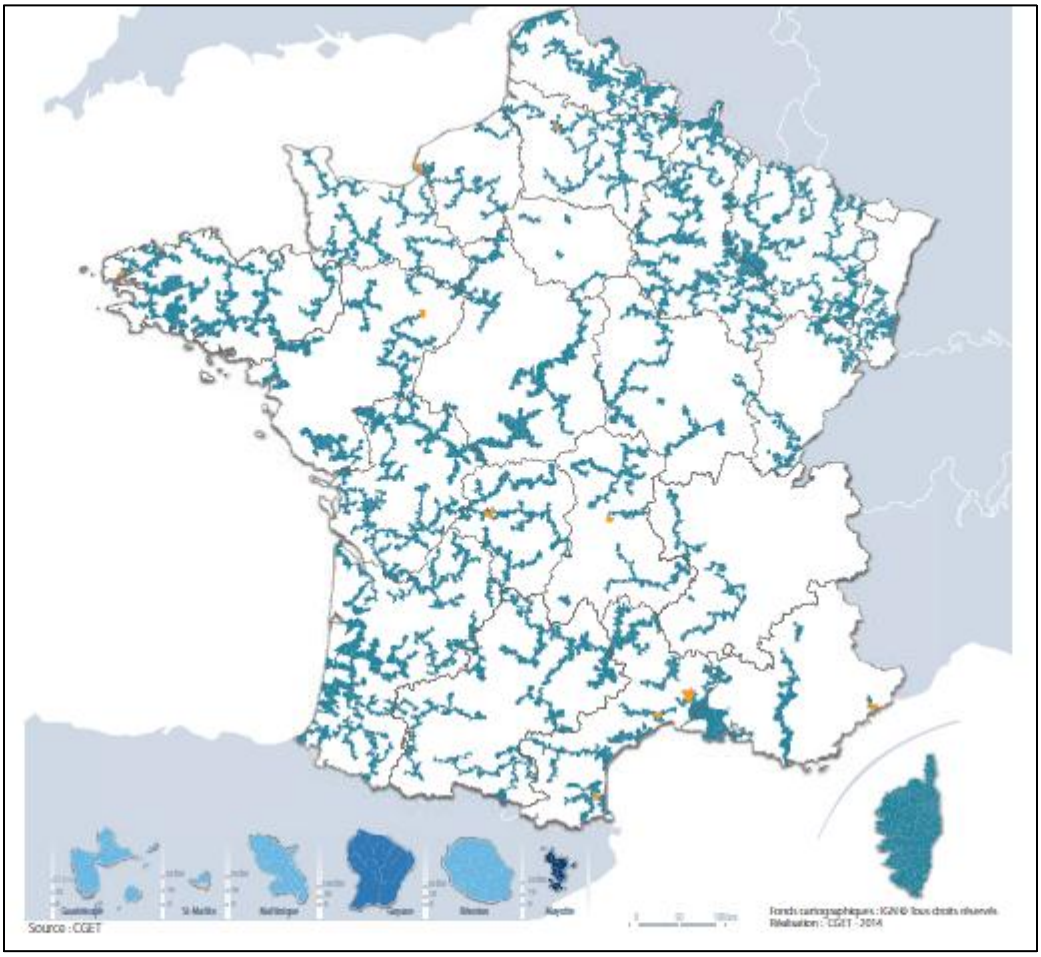


Source: ÖROK, http://www.oerok.gv.at/eu-regionalpolitik/regionales-eu-beihilfenrecht/periode-2014-2020.html (accessed 17 July 2014).

Austria has a more generous 'c' population quota than Italy (and higher than in 2007-13), but reflecting the federal structure and arrangements for area designation, outcomes echo *Land* level priorities coupled with political negotiations, rather than a national approach *per se*. Nevertheless, the national dimension is important in the context of the provision of common data and the political negotiations needed to achieve consensus, and there are some specific concerns relating to the definition and inclusion of mountain areas that were addressed by national authorities with the Commission.

In France, a more explicit policy steer was given by DATAR which outlines two objectives in the instructions to the *Préfets*. First, that the map should contribute to the attraction of mobile investment, typically by large firms; and second that it should support the development of SMEs through the higher aid intensities applicable in the designated areas. However, given the extent to which the drafting of the map was decentralised, it is difficult to discern how these objectives were taken into account on the ground.

Figure 5: Assisted Areas in France 2014-20



In ***Germany*** the philosophy underpinning the map is based on national perceptions of economic disadvantage, but with some political adjustments a) to ensure that agreement can be reached among all *Länder* and the federal level and b) to maintain 'buy-in' to the GRW from as many *Länder* as possible (notably the western *Länder*). This rationale is unchanged compared to the past. The GRW Sub-Committee agreed the following principles for the regional aid map and process in 2014-20:

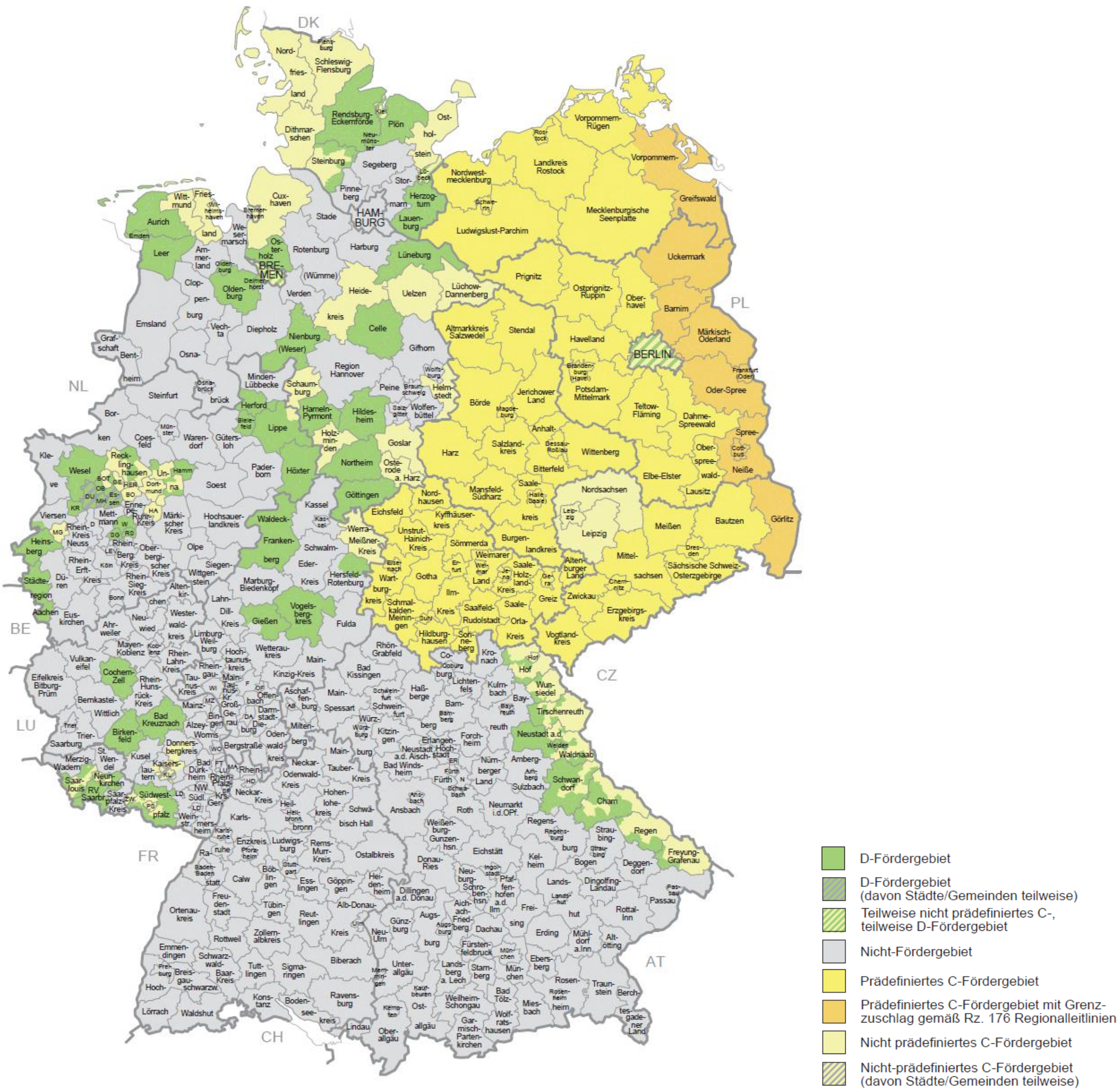
- The goal of the GRW is to strengthen growth in structurally weak areas, to create permanent competitive jobs and to support regions undergoing structural change.
- The GRW system benefits from ensuring that as wide as possible a number of *Länder* have designated areas.
- Area designation is on the basis of objective, consistent and economic criteria.
- GRW funding should be focused on structurally weak areas.
- Area designation should be transparent and comprehensible.

As in 2007-13, the map is based on 258 domestic 'labour market areas' (*Arbeitsmarktregionen*). In many cases, these areas are identical to NUTS 3 regions; there are also, however, numerous exceptions, particularly in urban areas (because the labour market areas are akin to travel-to-work-areas). Reflecting the principles outlined above, all German regions were ranked on the basis of a

composite indicator, made up of four sub-indicators, the first two of which are significantly more important in terms of weighting, namely:

- the annual average unemployment rate in 2009-12 (45 percent weighting)
- the annual gross wage per employee paying social insurance in 2010 (40 percent weighting)
- the employment forecast for 2011-18 (7.5 percent weighting)
- an infrastructure indicator at 30 September 2012 (7.5 percent weighting)

Figure 6: Assisted Areas in Germany 2014



Source: Federal Ministry for Economic Affairs and Energy

In broad terms, these are the same indicators used for designating areas in 2007-13. In essence, areas are included in the map in order of the ranking until the population quota is exhausted, but

further adjustments were made to deal with specific issues. Moreover, in addition to designating areas covered by the EU regional aid map, the same methods and ranking are used for designating domestic 'D' areas which are eligible for specific funding for SME aid. The German approach can be regarded as one of continuity, albeit within the context of a significant reduction in assisted area coverage.

In the ***United Kingdom*** the approach adopted for 2014-20 was more 'bottom up' and less metrics-based than its predecessor. In particular, it sought to make more use of locally provided economic intelligence than in the past; for 2007-13, the basis for the map was essentially the previous map, partly reflecting the cutbacks in coverage which had to be absorbed. The consultation document set out a number of common principles on which it intended to draw in drafting the assisted areas map. These were cast in terms of assessing both economic *opportunity* and *need*.

The consultation asked respondents for their views on these principles, as well as seeking a better understanding of the geography of local economic opportunity by tapping into local knowledge and taking account of local priorities. In preparing the draft map, the Government took account of:

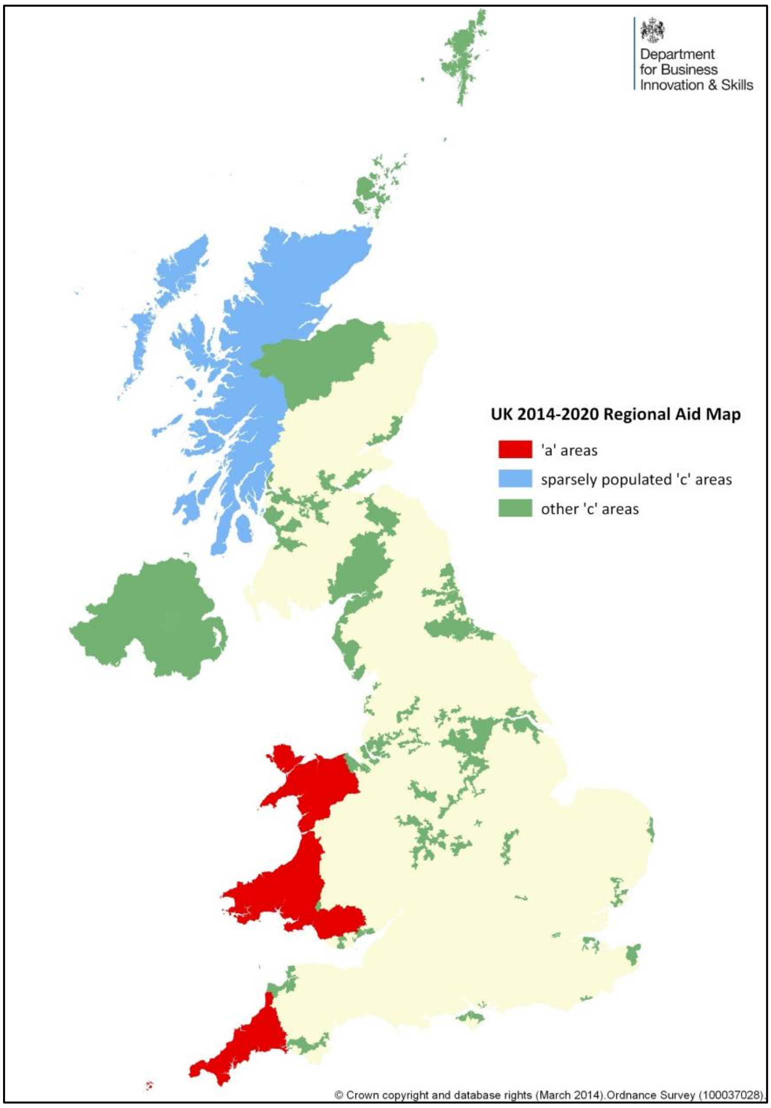
- responses to Stage 1 of the consultation;
- national economic datasets;
- commercial and economic intelligence;
- Government strategy and policies e.g. the UK Industrial Policy and the location and nature of Enterprise Zones;
- views of key national teams responsible for policies supported by regional aid;
- regional economic plans and priorities were also considered in Scotland and Wales;
- the metrics used in considering potential areas for inclusion on the map, which were:
  - employment rate excluding full time students - compared across Great Britain (2011 census data);
  - skills levels (the proportion below Level 2);
  - working age benefit claimant count rate - compared across Great Britain (May 2013 DWP data);
  - proportion of employment in manufacturing, taken from the 2012 Inter-Departmental Business Register.

An area qualifying under RAG Criteria 1, 2, 3 or 5 was eligible for inclusion on the draft assisted areas map 2014-2020 if it met at least one of the following:

1. More than one standard deviation away from the mean for at least one metric (in the direction that suggests inclusion);
2. More than half a standard deviation away for at least two metrics (in the direction that suggests inclusion); or
3. Above average for all four metrics (again, 'above' is used, but this is to mean in the direction supporting inclusion).

However, meeting one of these criteria was not conclusive as to whether that an area would be added to the map; when making the selection, the Government sought wards that contained economic opportunities that could be unlocked by regional aid to support growth in less advantaged economies.

Figure 7: Assisted Areas in the United Kingdom 2014-20

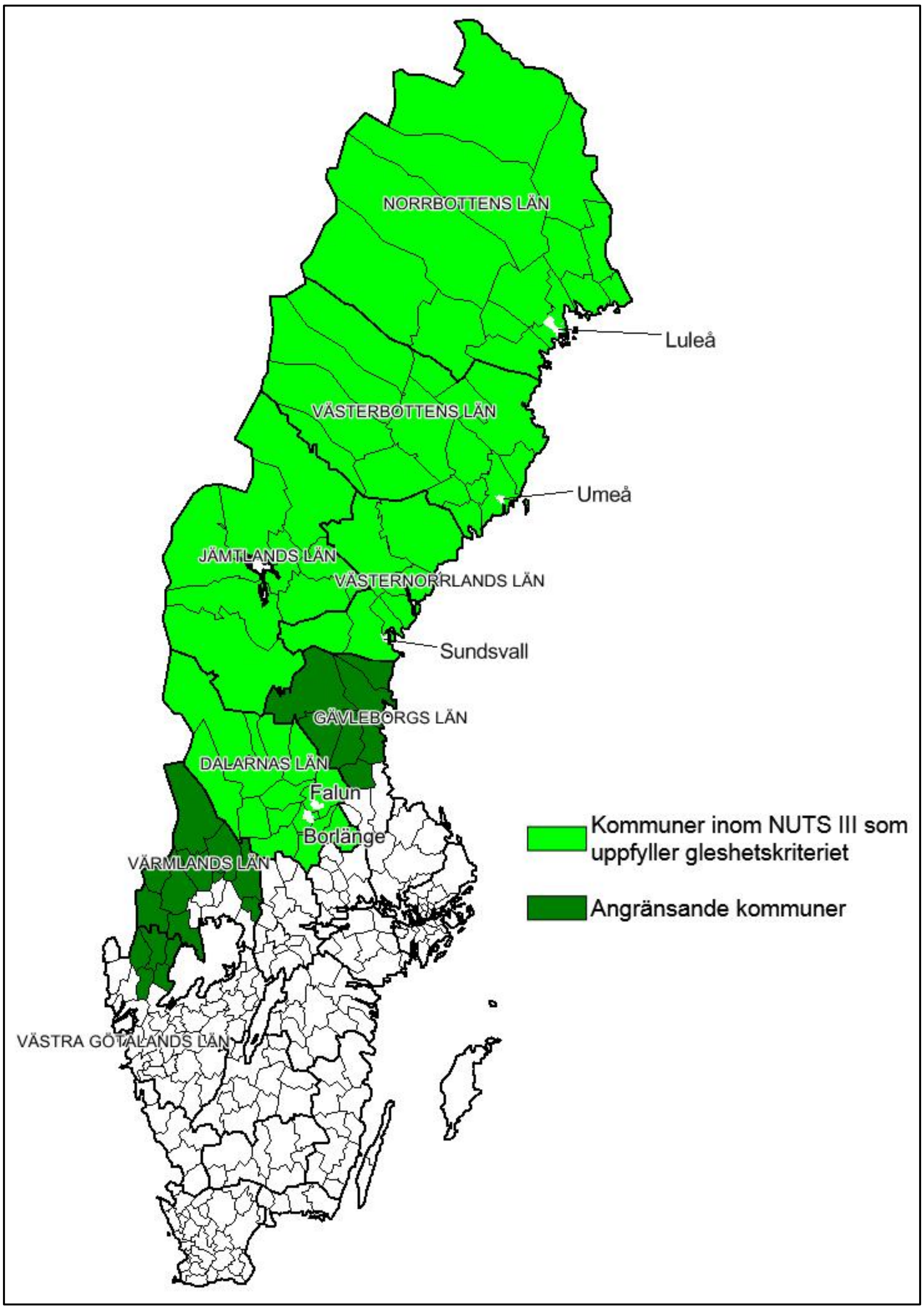


For the ***Netherlands*** there were three principal considerations in drafting the new map:[129] continuity with the existing map (in principle 31 percent of the Dutch population falls within areas that meet the criteria, but the population ceiling is 7.5 percent); special support for Groningen in the context of a package of measures to address the negative effects of gas extraction in the region as well as structural changes resulting from major plant closures (eg the chemical firm Aldal); and specific concerns with areas along parts of the German and Belgian borders, particularly at the scale of cross-border differences in household income and unemployment. Moreover, Germany is perceived to have generous regional aid instruments that could potentially disadvantage Dutch firms. The capacity to address this last point was constrained by the fact that Limburg, parts of which have long been included in the Dutch assisted areas map, did not meet the GDP or unemployment criteria in the RAG. However, it underpinned the designation of Achterhoek, on the German border, and Groot-Rijnmond (close to Rotterdam), which although not on the Belgian border, provides the scope for investment opportunities linked to port and waterway infrastructure and potentially the development of a cluster of activity associated with the chemical industry and the reduction of emissions.

[129] Letter from the Secretary of State for Ecconomic Affairs: http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2014/06/25/kamerbrief-voorstel-regionale-steunkaart-2014-2020.html

In ***Finland*** and ***Sweden*** approaches to area designation were more tightly constrained than before owing to the 'non-transferability' of the population associated with pre-defined areas. In 2007-13 both Sweden and Finland had used the possibility of deploying this population elsewhere in order to address national priorities outside the strict limits of the sparsely-populated areas – although the sparsely-populated areas remained the main focus of policy, not least because they qualified on a number of other indicators of disadvantage.

Figure 8: Assisted Areas in Sweden 2014-20

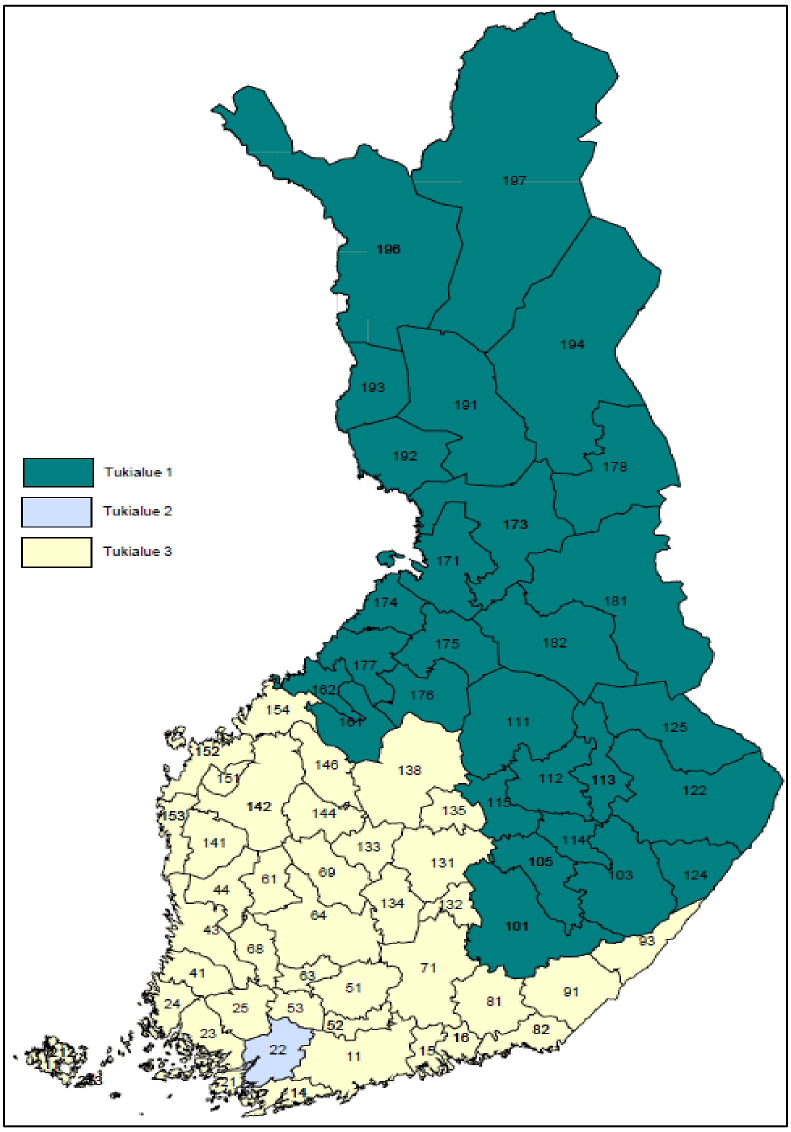


For the 2014-20 map *Sweden* could only designate areas that fulfil the sparsely-populated region criterion, a constraint that is somewhat at odds with recent regional economic developments in Sweden where the north has been performing comparatively well, largely due shifts in certain commodity markets, while there are pockets of difficulty in southern Sweden owing to the wider

economic downturn. Nevertheless, there is some flexibility in the RAG over the precise coverage of the areas. This was used to exclude some population centres (in Luleå, Umeå, Sundsvall, Falun and Borlänge) from the map in order to include areas adjacent to the NUTS 3 pre-defined regions which met the sparse population criterion.

Finland had somewhat more flexibility, since a small non-predefined population quota (1.85 percent of the population) was also allocated; however, this is significantly less than the 9.3 percent available in 2007-13.

Figure 9: Assisted Areas in Finland 2014-20



The ministerial working group on public administration and regional development undertook and assessment of the areas facing sudden structural changes. This was done on the basis of unemployment rates and trends. In addition, GDP per capita, which tends to fluctuate strongly, was taken into consideration. However, statistical analyses were only one component of the assessment, with the limited population quota the major consideration.[130] Salo was selected because of the

[130] Ministry of Employment and the Economy (2014) *Alueellisten valtiontukien suuntaviivojen mukaisten tukialueiden määrittely 2014 - 2020*

ongoing impact of the restructuring of Nokia. This has resulted in the highest number of job losses seen in Finland, but designation of the area was also viewed as a means of encouraging new investment, given the presence of a highly-skilled workforce. Salo accounts for 1.181 percent of the total population, leaving a 'reserve' of 35,356 inhabitants (0.669 percent). The decision on the eligibility of possible other areas will be made at a later stage, but is expected to be focused on areas suffering from sudden structural changes. The aid areas will be reviewed as part of the mid-term evaluation of the Regional Aid map for 2017-20.[131] The most significant change in the Finnish map concerns the former aid areas of Åland (Ålands landsbygd and Ålands skärgård). Over the period of 2010-12, unemployment in these areas was lowest in the country and GDP per capita the second highest in the country. Their continued inclusion in the map was not therefore considered justified.

In ***Norway*** the basis for area designation proposals was the peripherality index which takes account of a range of indicators grouped into geography, demography, economic development and living standards. The peripherality index was updated in 2013, the previous version dates from 2006. The criteria and weightings under the 2013 index are as follows:

Table 14: Norwegian 'district index' indicators 2013

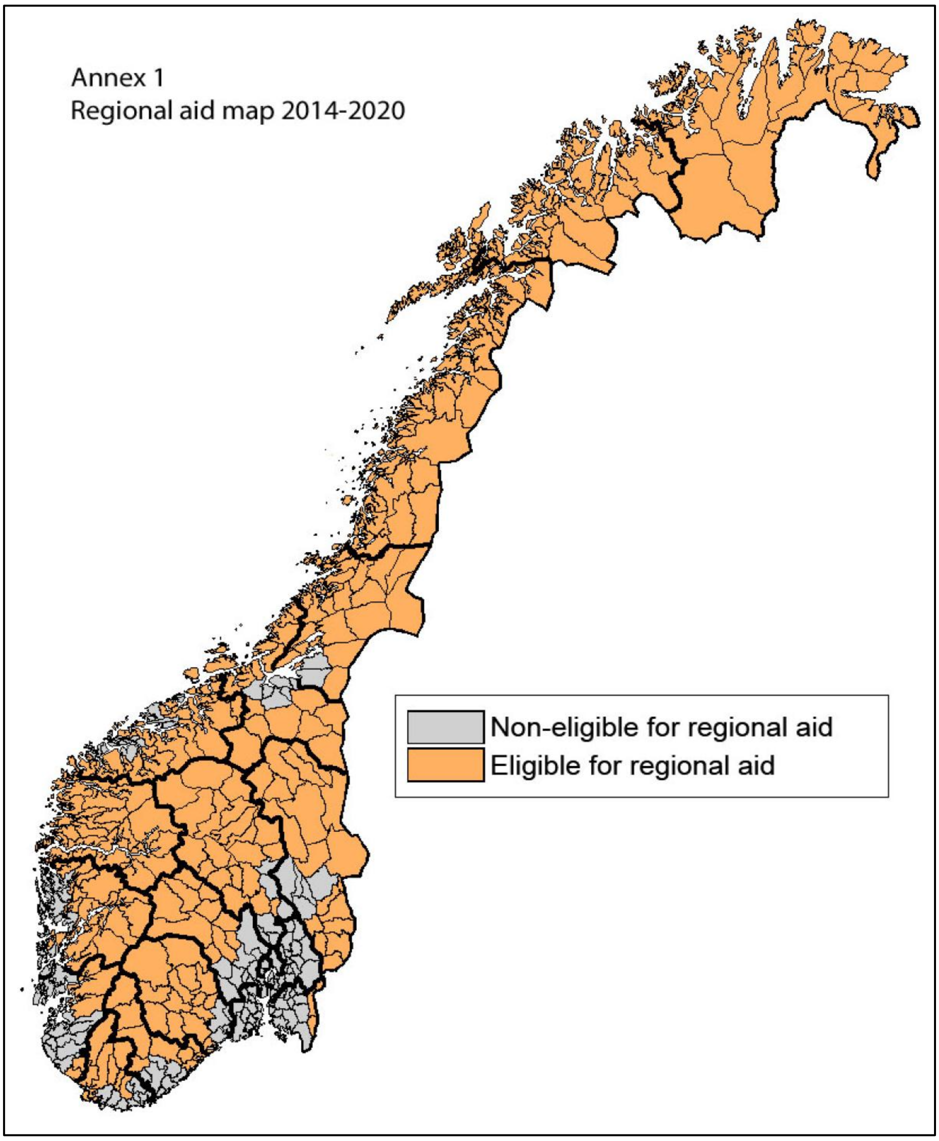
Indicator	Weighting (%)
Centrality (based on a composite indicator produced by NIBR)	20
Population	10
Travel time to Oslo	10
Population growth in last 10 years	20
Percentage of population >age 67	5
Percentage of women aged 20-39	5
Residence-based workforce participation rates	10
Employment growth in the last ten years	10
Income per taxpayer aged over 17	10

Source: Kommunal- og regionaldepartementet (2013) Distriktsindeksen 2013: http://www.regjeringen.no/upload/KRD/Vedlegg/REGA/distriktsindeks2013/Distriktsindeksen_2013_metode_data kilder_kvalitetssikring.pdf

The approach under the new index is not substantially different from its predecessor. The key changes (apart from updating the data) are that the new index measures employment participation rate on a residence rather than a workplace basis and that employment growth is considered over ten years, rather than five, as previously. The index was used as the basis for both the investment aid and the social security concession maps, the latter being less extensive in scope.

[131] http://www.tem.fi/alueiden_kehittaminen/tiedotteet_alueiden_kehittaminen?89522_m=113283 (accessed 10 April 2014)

Figure 10: Assisted Areas in Norway 2014-20 (Investment Aid)



5. STATE AID, REGIONAL POLICY AND INFRASTRUCTURE

In the wake of the so-called *Leipzig-Halle* case the relationship between funding of infrastructure and the State aid rules is changing.[132] Historically, public funding of general infrastructure was either considered to be within the 'public remit' or if non-discriminatory access was granted to all potential users, was not considered to involve State aid.[133] The Commission's reappraisal of the position following *Leipzig-Halle* extends the reach of the State aid rules into different areas of infrastructure support and creates significant uncertainty. In particular, a precise definition of what transactions qualify as State aid remains elusive, while the development of rules on what types of infrastructure aid are compatible with the Treaty is far from complete.

These changes have had particular resonance for regional policy in Germany where specific instruments aimed at supporting infrastructure in the weaker regions have long been a feature of the regional policy package, but have not hitherto, been regarded as State aid. However, the Commission's stance has wide-ranging implications for economic development policies more generally (at national and subnational levels) as well as for European Structural and Investment Funds which must, of course, also be State aid compliant.

5.1 What is a State aid?

A critical issue in matters of State aid compliance is that a concrete definition remains elusive: "the European Court has not yet provided a consistent and comprehensive interpretation of the conditions for State aid".[134]

The notion of what constitutes a State aid is clearly fundamental to being able discipline it, but the Treaty presents domestic policymakers with a conundrum insofar as it contains no precise definition of what is subject to control. It has been argued that this was probably deliberate[135] – if Member States knew the exact scope of the notion of aid, they could easily devise measures which would not satisfy all of the requirements, and the absence of an exact definition allows the Commission and the Courts to interpret the notion in a wide and flexible way. It is plausible to believe that such a view prevailed when the Treaties were written, but it is questionable whether the authors of the Treaty envisaged the extensive scope of the definition which has emerged. The growing complexity of public-private relations, together with the wider range of activities now open to competition could hardly have been foreseen either. Nevertheless, the definitional issue is crucial since it determines whether or not a given measure[136] requires to be notified to the Commission. As a result, domestic policymakers must make some *a priori* assessment of whether a measure involves aid in order to decide what steps to take to ensure compliance.

[132] C-288/11 P, *Freistaat Sachsen and others v European Commission (Leipzig Halle)* *http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=131967&occ=first&dir=&cid=17784*

[133] DG Competition (2011) Note to DG Regio (unpublished), see: http://www.esfondi.lv/upload/00-vadlinijas/Note_on_State_aid_for_infrastructure_projects.pdf (accessed March 2014).

[134] Bacon, K (2013) European Union Law of State Aid, Second edition, Oxford University Press, p20.

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

[136] The term 'measure' is used in a neutral sense to refer to an intervention that may or may not involve State aid.

In 2014 the Commission sought, for the first time, systematically to clarify the concept of State aid. This took the form of a draft notice[137] which was subject to consultation; this closed on 31 March 2014. For the most part the document is a compilation of existing case law – since the ultimate arbiter is the European Court - but it also refers to the 'decisional practice' of the Commission. It remains to be seen whether the document is actually finalised – there are questions over the status of the document and while some Member States responded positively to the consultation and attempts at clarification, this was not universal.

Article 107(1) establishes a basic, though not unqualified, prohibition of State aid:

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

The process of deciding whether a measure is caught by Article 107(1) can usefully be broken down into two stages:

- First, the State aid rules only apply where the beneficiaries are *undertakings*; an undertaking is an entity engaged in an economic activity.
- Second, a measure only constitutes State aid if *all* the criteria in the State aid 'test' are met.

The key issue in the present context has been the concept of economic activity.

5.2 Undertakings and economic activity

In order to qualify as aid, the recipient of the advantage conferred must be an ***undertaking***. The notion of *undertaking* is neutral as to ownership, legal status and financing. The term undertaking is not defined in EU law, but it is established that it may be public or private, voluntary, charitable or not-for-profit, involve a group of organisations or a public-private partnership or a self-employed individual; the key is not the *status* of the organisation, but rather that it must be engaged in an *economic activity* in order for Article 107(1) to apply.

Economic activity is broadly defined as 'any activity consisting in offering goods or services on a given market'.[138] There is no definitive list of economic activities, but 'non-economic' activities include those related to State prerogatives and public safety such as passports, police, armed forces, air and maritime traffic control, as well as the organisation of public education and compulsory social security contributions.

Historically, public funding of general infrastructure was not considered to involve State aid if non-discriminatory access was granted to all potential users of the infrastructure. For a long time, public

[137] European Commission (2014) Draft Commission Notice on the notion of State aid pursuant to Article 107(1)TFEU, see http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html

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

funding of ports and airports was considered to fall within the ‘public remit’ rather than being an ‘economic activity’. This was reflected in the 1994 Aviation aid guidelines, which stated that:[139]

> “The construction of [*sic*] enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aids.”

5.3 The evolution of EU rules on aid for infrastructure

The Commission’s interpretation of ‘economic activities’ changed following the General Court’s ruling in *Aéroports de Paris.*[140] In this case the Court held that:

> “The provision of airport facilities to airlines and the various service providers by a public corporation, in return for a fee at a rate freely fixed by the latter, and the management of those facilities are *economic activities*, and although those activities are carried out on publicly-owned property, they do not for that reason form part of the exercise of a task conferred by public law.” [emphasis added]

The *Aéroports de Paris* case was not concerned with State aid, but the ruling nevertheless effectively invalidated the principle that had been set out in the 1994 Aviation aid guidelines quoted above – that infrastructure projects could not be controlled by the State aid rules. As a result, the Commission began to consider the presence of State aid for *operators* of airport infrastructure (who may be public or private). This in turn was reflected in the 2005 Guidelines on the financing of airports,[141] which stated that:

> “the provision of airport infrastructure to an operator by a Member State (including local or regional authorities) not acting as a private investor… or the granting of public subsidies intended to finance infrastructure can give that airport operator an economic advantage over its competitors and must therefore be notified and examined in the light of the rules on State aid.”

The European Court of Justice ruling in *Leipzig-Halle*[142] builds on this logic and links the construction of infrastructure to its later exploitation: if the subsequent use of the infrastructure constitutes an economic activity, then the funding of the construction may entail State aid. Importantly, the Commission has made clear its view that:[143]

> “it cannot be denied anymore that the financing of *any type of infrastructure* (excluding infrastructure related to security, safety, etc.) that is later commercially exploited is State aid relevant.” [emphasis in original].

This means that only infrastructure that is not commercially exploited and is built in the interest of the general public is excluded from the application of the State aid rules. Examples include public roads

[139] Application of Article 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector, OJEC C350/5, 10 December 1994.

[140] Case T-128/98 Aéroports de Paris v European Commission: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998TJ0128:EN:HTML, confirmed on appeal in C-82/01 P: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001CJ0082:EN:HTML

[141] Community Guidelines on Financing of Airports and Start-Up Aid to Airlines Departing from Regional Airports, OJ C312/1 of 9 December 2005, see: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:312:0001:0014:EN:PDF (accessed March 2014).

[142] C-288/11 P, *Freistaat Sachsen and others v European Commission (Leipzig Halle)* http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=131967&occ=first&dir=&cid=17784 (accessed March 2014).

[143] DG Competition (2011) *op cit.*

(other than toll roads / roads operated by a concessionaire) or public parks and playgrounds. In addition, case law has confirmed that infrastructure related to national security, safety, air traffic control, meteorological services all fall within the public remit. Notwithstanding these exclusions, it is evident that there are few types of infrastructure funding that fall clearly outside the scope of the State aid rules, though the precise contours of the public remit have yet to emerge.

5.4 The need for clarification

Following the shift in its thinking in the aftermath of *Leipzig-Halle*, the Commission provided some initial guidance to Member States in the form of 'analytical grids'.[144] These outline the key issues associated with (i) determining the presence of State aid and (ii) identifying the circumstances in which aid can be found to be compatible. A 'general' analytical grid is complemented by sector specific grids concerning the following: airport infrastructures; broadband infrastructures; culture – such as the construction of multipurpose arenas, museums, film studios, cinemas and renovation of historical monuments; port infrastructure; research development and innovation; and water services.

For practical purposes, however, the guidance provided by the grids is rather limited and they anyway have no legal status – they explicitly "do not prejudge possible developments in the enforcement practice". At the same time, in some of the areas noted, specific guidelines already apply but have been subject to review (broadband, airports, for example). In addition, some aspects of support for infrastructure are implicated in horizontal measures including the RAG and the GBER, which extends the exemption to sports infrastructure, multipurpose venues and local infrastructures. Notwithstanding these various developments, some significant uncertainties remain. In particular, for a number of areas, it is unclear in what precise circumstances the funding of infrastructure has State aid implications: [145]

> "(t)he classification as an activity falling within the exercise of public powers or as an economic activity must be carried out separately for each activity engaged in by a given entity."

In addition, where a measure *does* involve State aid there is no overarching framework under which to determine the compatibility or otherwise of that aid; the coverage of existing sector or activity-specific frameworks is only partial. Importantly, this matters not just for the future, but also for the past since the Commission will have to apply the Leipzig-Halle reasoning in investigating potentially unlawful aid.

5.5 Regional infrastructure measures in Germany

In Germany, the main instrument of domestic regional policy, the Regional Joint Task (*Gemeinschaftsaufgabe zur Verbesserung der regionalen Infrastruktur*, GRW), provides funding for

[144] Letter to Member States 1 August 2012: http://www.kr-kralovehradecky.cz/assets/kraj-volene-organy/obce/metodicka-pomoc-obcim/LetterRespectofStateaidrules_cdfd5ace396c4aeeba58e96f7a1c14a1.pdf (accessed March 2014) to which the analytical grids are appended, see: http://www.esfondi.lv/upload/00-vadlinijas/EK_ieteikumi_valsts_atbalsta_noteiksanai_(infrastructure_Analytical_Grid).pdf (accessed March 2014). Note that these documents appear not to be available centrally from the Commission (eg. on the DG COMP website), but have been uploaded onto the web by some managing authorities.

[145] Joined cases T-455/08 *Flughafen Leipzig Halle GmbH and Mitteldeutsche Flughafen AG v Commission* and T-443/08 *Freistaat Sachsen and Land Sachsen v Commission*: http://curia.europa.eu/juris/document/document.jsf?text=&docid=81849&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=118156

local business-oriented infrastructure (*kommunale wirtschaftsnahe Infrastruktur*), in addition to direct investment aid to individual firms and other types of regional development support, including bottom-up initiatives. In March 2013 the German authorities notified a series of legal frameworks for GRW business-oriented infrastructure measures. The German authorities are seeking to continue to use the GRW to provide the following forms of infrastructure funding in Article 107(3)(c) areas in 2014-20 (all of which have been funded in 2007-13 and in previous periods):

- the development and upgrading of industrial and business parks;
- the construction or extension of transport connections between commercial enterprises or business parks and inter/national transport networks;
- the construction or extension of energy and water supply lines and distribution systems;
- the construction or extension of communication links (to connect to the existing network or the nearest junction), notably broadband, in areas where there is not competition between multiple suppliers or where commercial enterprises do not supply infrastructure;
- the construction or extension of plants for treating or disposing of waste water and waste;
- the development of business parks for tourism, as well as public tourism facilities;
- the construction or extension of facilities for vocational training, further education and re-training;
- the construction or extension for business centres which provide space and common services for small firms for up to five years (or exceptionally for eight years).

The treatment of the various measures has varied. The Commission has concluded that the following do not involve State aid: [146]

- The development and upgrading of industrial and business parks
- The construction or extension of transport connections between commercial enterprises or business parks and inter/national transport networks;
- The construction or extension of energy and water supply lines and distribution systems.

The background to and rationale for this decision are outlined in Box 1.

[146] European Commission (2014) *Decision SA.36346 (2013/N) - Germany – GRW land development scheme for industrial and commercial use*, Brussels, 27.03.2014, C(2014) 1811 final

Box 1: Commission decision on GRW scheme for industrial and business parks

The purpose of the scheme is to make the land ready to build on, including decontamination in line with the 'polluter pays' principle and ensure connections to utilities and transport networks. Eligible costs are, in particular: groundwork for making land ready to build; construction costs for street, street lighting, anti-noise barriers and landscaping; connection costs for water, electricity, gas and sewage; environmental protection and decontamination, subject to the polluter-pays principle; removal of existing buildings (eg old factories, military installations). The measure does not concern funding the construction of buildings or other structure, nor the management or administration of land or buildings, but only making the terrain ready to build on.

The direct recipients of funds are generally local authorities or associations thereof, but can be not-for-profit bodies and joint-ventures with commercial enterprises where the majority share is held by local authorities or not-for-profit bodies. The direct recipients of the funds – the bodies implementing the projects – are normally the owners of the land. The implementation of the projects can be entrusted to developers through an open, transparent and non-discriminatory tender process; the developers may not use the land themselves. The Commission considered the potential for aid at three main levels:

- Bodies implementing the projects:
  - *Land development by local authorities:* here the Commission concluded that the development the revitalisation of public land by local authorities *is not an economic activity*, but 'part of their public tasks, namely the provision and supervision of land in line with local urban and spatial development plans.' The resources involved were therefore an intrastate transfer and did not involve State aid.
  - *Land development by other entities:* in this instance no intrastate transfer is involved, but the obligation to refund any possible profits from the subsequent sale of land excludes the possibility of an *advantage.*
  - *Land development where the body responsible for implementation is not the owner of the land:* the owner has to pass on all the benefits from the development, including any increase in value of the land, which excludes the possibility of an advantage to the land owner, who is therefore not an aid beneficiary.
- Developers: are engaged in an economic activity, but would always be selected through an open, transparent and non-discriminatory public procurement procedure, and therefore not gain an *advantage.*
- Purchasers of the land: the land must be sold in accordance with the Commission's Communication on land sales,[147] thus providing sufficient safeguards that the land is sold at a market price and the purchaser does not gain an advantage.

The Commission also found that the financing of specifically-listed non-income generating tourist facilities and local income generating tourist facilities did not constitute State aid within the meaning of Article 107(1) and issued a 'comfort letter' to this effect.[148] There will now be a multi-stage procedure for tourism infrastructure, differentiating between a) non-income generating infrastructure, b) infrastructure with no supra-regional impact, and c) larger projects which will have to be notified individually. In fact, tourism infrastructure was the most problematic area.

As to the other types of infrastructure, the German authorities have retracted their notifications, on the understanding that these will not be regarded as State aid, provided that some changes are made to the GRW Coordination Framework conditions (these changes have been duly made), for example:

- Some additional limits have been put on the types of spending allowed for training infrastructure;
- The types of spending for communications infrastructure has been further limited i.e. there will no longer be any funding for 'grey areas'.

[147] Commission Communication on State aid elements in sales of land and buildings by public authorities, OJEC No C209/3 of 10 July 1997, see: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y0710(01)&from=EN

[148] European Commission (2014) *State aid SA.37755 — (2013 PN) - GRW — kommunale wirtschaftsnahe Infrastruktur — 1) Tourismus,* Brussels, 24/04/2014, COMP F3/JP/MR/ sj/D(2014)44379

Discussions with the Commission on the implications of Leipzig-Halle will now continue outside the framework of the GRW. However, the German authorities have been surprised that the Commission does not seem to have any methods or criteria for dealing with this issue. Instead, in summer 2014, the Commission began assessing individually notified cases.

6. DISCUSSION ISSUES

This paper has provided an overview of the key changes resulting from the adoption of RAG and GBER 2014-20, a review of EoRPA partners' assisted area maps for the new period and a consideration of some recent developments in the definition of State aid, with particular reference to infrastructure. The new RAG and GBER are significant milestones in the evolution of regional aid control and give rise to a number of practical and more philosophical issues and questions. At the same time, wider definitional questions over the evolving scope of State aid cast uncertainty over the legality of measures that have traditionally been part of the regional policy armoury, most notably in the field of infrastructure. Against this background, the following questions are posed as starting point for discussion.

(i) How much of a constraint are the new rules on support to large firms in 'c' areas?

The Commission's original intention had been to exclude large firms from eligibility for regional in 'c' areas. This objective was ultimately watered down, enabling certain types of investment by large firms to be aided. How far will this possibility be used? Are the definitions sufficiently clear to operationalise? Will this take the form of GBER-based aid or notification? If the latter, what concerns are there about the compatibility assessment?

(ii) What is the relevance of the assisted area map in the new context?

Historically, the negotiation of the assisted area maps has been one of the most contentious aspects of the regional aid relations between the Commission and the Member States. The 2014-20 maps have been negotiated comparatively swiftly and painlessly. Is this just the result of time pressures, the need to adopt the maps and the higher population ceilings, or has the Commission become less excised over coverage now that support for large firms in 'c' areas is limited? How useful is the map of 'c' areas considered to be for domestic policy – will the higher rates for SMEs be exploited?

(iii) To what extent are domestic policymakers concerned at the lack of 'hard edges' in the definition of State aid?

The Leipzig-Halle case has caused considerable uncertainty about the scope for public authorities to invest in infrastructure without infringing the State aid rules. To what extent are policymakers content with the current situation? Is the Commission attempt to clarify the 'notion of aid' in a notice helpful? Does the widening of the GBER diminish the need for distinguishing between the definition of State aid and compatibility?

(iv) Are the provisions on evaluation to be feared or welcomed?

The RAG and GBER both contain provisions related to the evaluation of certain aid measures, particularly large ones. DG Competition's staff working paper implies a degree of homogeneity over the approaches to be taken to evaluating regional aid measures. Is this appropriate? To what extent should the effectiveness of a measure (as opposed to its competition effects) be a concern of the Commission? How might new requirements for evaluation affect policy?