State aid control in the modernisation era: Moving towards a differentiated administrative integration?

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Abstract
Despite contentions that state aid control is an instance of direct execution, the State Aid Modernisation (SAM) package has largely dispersed responsibility for giving effect to the common legal framework across national administrations. In this setup, the effectiveness of state aid law is confronted with asymmetric capacities, diffuse application of complex rules and difficulty in keeping dispersed powers under control. This article combines selected evidence on the operation of state aid control with a multidisciplinary analysis of the functioning of integration mechanisms in the European administrative space. The aim is to examine the potential effects of SAM. It contends that, while the reform has strengthened the Commission’s dominance, the instruments of administrative integration might fail to secure adequate capacities and implementation performances at national level, due to constitutional constraints and opposing forces. This effect, it is argued, could be divisive, and risks undermining the integrity of the internal market.

1 | INTRODUCTION

In the aftermath of the financial and economic crisis, state aid control has been largely deployed to spur economic growth and steer national expenditures towards policy-specific objectives. Yet, unlike the general

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To address the financial crisis in 2008, the Commission deployed state aid enforcement for two different purposes. First, it used state aid control particularly to safeguard the level playing field in the EU banking sector, in view of massive aid measures taken independently by different national governments to bail out their domestic credit institutions. Second, in 2012 it launched the State aid Modernisation (SAM) strategy in an effort to speed up provisions of ‘good aid’ measures and promote economic growth. The latter initiative forms the core of the present study. On state aid measures in relation to the banking crisis, see F.-C. Laprévote, J. Gray and F. De Cocco (eds), Research Handbook on State Aid in the Banking Sector (Edward Elgar Publishing, 2017); J. Piernas López, The Concept of State Aid Under EU Law: From Internal Market to Competition and Beyond (Oxford University Press, 2015).
centralisation of administrative functions envisioned in most EU-wide responses to the crisis, state aid control has moved in an opposite direction.² The Commission's State Aid Modernisation (SAM) package has further decentralised responsibilities connected to state aid control to national administrations.³ The Commission's aim is to focus its own enforcement on cases with the largest impact on the internal market while speeding up less-problematic provisions, in line with the "Doing Less More Efficiently" scenario of the White Paper on the Future of Europe (EU)⁴ – to focus Union's limited resources on delivering more and faster on big issues, while doing less on small ones.

An inevitable yet less discussed dilemma of this transformed setup is managing the structural problems that could result. Since an increasing number of administrative activities are being distributed across national authorities, state aid control risks becoming vulnerable to typical challenges of decentralised implementation of EU law,⁵ particularly asymmetric national implementation capacities, diffuse application of complex rules and difficulty in keeping dispersed administrative powers under control. These challenges are particularly urgent if one considers that, being made of rules of negative integration and impinging upon sovereign prerogative, state aid control may entail high political costs,⁶ and the previously centralised system already suffered from the Commission's weak monitoring and awareness-raising on domestic compliance.⁷

To tackle these structural problems, the Commission has supplemented the initial model of regulatory integration and power-checking⁸ with administrative integration and management strategies.⁹ These range from administrative rulemaking and networking to assist implementation activities and create consistent rule application, to strengthened bilateral partnerships and conditionality arrangements to build up Member State capacities.¹⁰

This article reflects on the potential effects of the Commission's SAM design. It does so by addressing the research question: 'to what extent are the administrative integration instruments created by SAM capable of

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²In general, scholarship has identified centralisation of control powers to the EU administration as a clear trend in EU post-crisis reforms. See M. Scholten, ‘Mind the Trend! Enforcement of EU law has been moving to "Brussels"’, (2017) 9 Journal of European Public Policy 1348–1366; H. Hofmann, ‘European administration: Nature and developments of a legal and political space’, in C. Harlow, P. Leino and G. della Cananea (eds), Research Handbook on EU Administrative Law (Edward Elgar Publishing, 2017), 33.

³Commission of the European Union, ‘Communication on State Aid Modernisation’, COM (2012) 0209 final. For an analysis, see C. Micheau, ‘Evolution of State Aid Rules: Conceptions, Challenges, and Outcomes’, in H. Hofmann and C. Micheau (eds) State Aid Law of the European Union (Oxford University Press, 2016); C. Quigley Q.C., ‘The European Commission’s Programme for State Aid Modernization’, (2013) 1 Maastricht Journal of European and Comparative Law 35–55.

⁴Commission of the European Union (2017), ‘White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025’; COM (2017) 2025 final 1–33. For a reflection on it, see B. De Witte, ‘The Future of Variable Geometry in a post-Brexit European Union’, (2017) 2 Maastricht Journal of European and Comparative Law 153.

⁵E. Chiti, ‘Is EU Administrative Law Failing in some of its Crucial Tasks?’ (2017) 5 European Law Journal 578 ff.; E. Versluis, ‘Even Rules, Uneven Practices: Opening the “Black Box” of EU Law in Action’, (2007) 30 West European Politics 50–67.

⁶M. Blauberger, ‘Compliance with Rules of Negative Integration: European State Aid Control in the New Member States’, (2009) 7 Journal of European Public Policy 1039.

⁷See European Court of Auditors, ‘Do the Commission’s procedures ensure effective management of state aid control?’ (Publications Office of the European Union, 2011).

⁸J. Weiler, M. Cappelletti and M. Seccombe, Integration through Law, Europe and the American Federal Experience (De Gruyter, 1985).

⁹Administrative integration and management strategies are used in this study to emphasise the same issue, namely how national and EU administrations work together to give effect to EU law. Yet, each notion focuses on different aspects of this issue. Administrative integration emphasises especially the organisations and procedures through which EU and national administrations cooperate to implement EU provisions (on this see, among others, H. Hofmann and A. Türk, ‘The Development of Integrated Administration in the EU and its Consequences’, (2007) 2 European Law Journal 253; S. Cassese, ‘European Administrative Proceedings’, (2004) 68 Law and Contemporary Problems 21–36; E. Chiti, ‘The Administrative Implementation of European Union law: A Taxonomy and its Implications’, in H. Hofmann and A. Türk (eds) Legal Challenges in EU Administrative Law: Towards an Integrated Administration (Edward Elgar Publishing, 2009), 9–33). Management strategies are analysed in compliance studies to understand how the strategies based on the problem-solving approach (as opposed to enforcement) may generate compliance with supranational norms (on this see J. Tallberg, ‘Paths to Compliance: Enforcement, Management, and the European Union’, (2002) 3 International Organization 609 ff; T. Börzel and E. Heidbreder, ‘Enforcement and Compliance’, in C. Harlow, P. Leino and G. della Cananea (eds), Research Handbook on EU Administrative Law (Edward Elgar Publishing, 2017), 241).

¹⁰See the speech of the Commissioner at the High-Level Forum on State Aid Modernisation 2016, ‘The EU state aid rules: Working together for fair competition’ (Brussels, 3 June 2016), available at https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/eu-state-aid-rules-working-together-fair-competition_en.
addressing the structural problems arising from the decentralised architecture of state aid control? This question is all the more pressing because, while the Commission has yet to provide an empirical evaluation of SAM, the reform is nonetheless fully in place and proposals to extend its scope are on the table. Given the wide ambitions and early phase of the reform, the article provides an initial overview of the operation of state aid control after SAM. This is achieved here by combining general knowledge on the effects of mechanisms of integration in EU law implementation derived from adjacent literatures – EU administrative law, EU governance and EU compliance – with a critical analysis of relevant legal sources, official documents and selected examples in the area of state aid.

After this introduction, the remainder of this article is organised as follows. Section two explains the main characteristics of the transformed organisational model of state aid control and the potential structural problems arising from it. Sections three and four evaluate the tools of administrative integration created with SAM and reflect on their expected effects in curbing the structural problems emerging from the reorganisation. The main argument is that, while the reform has extended the Commission’s supranational dominance thanks to the close links it establishes with national state aid experts, its instruments of administrative integration might fail to secure adequate capacities, uniform implementation and coherent accountability mechanisms across the administrations involved, as constitutional constraints and conflicting forces might limit their effects. This raises concerns about the integrity of the internal market following SAM.

2 SHARING RESPONSIBILITIES FOR STATE AID CONTROL AND THE EMERGING STRUCTURAL TENSIONS

Traditional scholarly narratives address state aid control as an instance of direct execution, that is, a model whereby the Commission implements EU rules through its own structures. This classification stems from the distribution of competences laid down in the EU treaties. Pursuant to Article 108 of the Treaty on the Functioning of the European Union (TFEU), the Commission retains exclusive competence to decide whether national aid measures are compatible with the internal market. Member States are requested to block provisions until completion of a centralised assessment of their compatibility. Due to the Commission’s key position, much scholarly work has focused on the characteristics of EU-level enforcement, on application of administrative rulemaking to limit the Commission’s discretion, and on the effects thereof on domestic obedience.

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11On 7 January 2019, the Commission launched, in line with its Better Regulation Guidelines, an evaluation of the rules adopted as part of SAM to assess whether they are fit for purpose and have delivered, in order to take a final decision on whether to further prolong them or possibly update them in the future.

12See on the recent possibility of extending SAM rules to the provision of European Structural and Investment (ESI) funds the speech of Director-General Laitenberger of the Directorate-General on Competition (DG Comp), ‘European and national funding working together: How EU state aid rules can contribute’ (Brussels, 19 June 2018) available at http://ec.europa.eu/competition/speeches/text/sp2018_09_en.pdf.

13P. Craig, EU Administrative Law (Oxford University Press, 2012, 2nd edn), 27; J. Ziller, ‘Les Concepts d’administration Directe, d’Administration Indirecte et de co-Administration et les Fonduements du Droit Administratif Européen: Introduction’, in J.-B. Auby and J. Duthell de la Rochère (eds) Droit Administratif Européen (Bruylant, 2007), 332–334; G. della Cananea, ‘The European Union’s Mixed Administrative Proceedings’, (2004) 68 Law and Contemporary Problems 210; S. Kadelbach, ‘European Administrative Law and the Law of a Europeanized Administration’, in C. Joerges and R. Dehousse (eds) Good Governance in Europe’s Integrated Market (Oxford University Press, 2002), 170–171.

14The centralised control procedure on state aid is regulated by Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for application of Article 108 TFEU, OJ L 248, 9. The Commission can investigate measures notified by Member States (notified aid) or measures implemented without the Commission’s formal prior approval (non-notified or unlawful aid). In addition, due to the recognised direct effect of the standstill obligation set in Article 108 TFEU, private parties affected by the unlawful execution of state aid may claim damages, recovery and injunctive measures from national courts that thus share with the Commission the power to enforce the notion of state aid set in Article 107 TFEU.

15A. Sinnaeve and P.J. Slot, ‘The New Regulation on State Aid Procedures’, (1999) 36 Common Market Law Review 1153; H. Hofmann, ‘Administrative Governance in State Aid Policy’, in H. Hofmann and A. Türk (eds), EU Administrative Governance (Edward Elgar Publishing, 2006) 185–214.

16M. Cini, ‘The Soft Law Approach: Commission Rule-Making in the EU’s State Aid Regime’, (2001) 2 Journal of European Public Policy 192–207; O. Stefan, Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union (Kluwer, 2013); M. Blauburger, ‘Of “Good” and “Bad” Subsidies: European State Aid Control through Soft and Hard Law’, (2009) 4 West European Politics 719–737; H. Hofmann, ‘Negotiated and Non-Negotiated Administrative Rule-Making: the Example of EC Competition Policy’ (2006) 1 Common Market Law Review 153–178.

17M. Blauburger, ‘Compliance with Rules of Negative Integration’, supra n 6; J. Hölscher, N. Nulsch and J. Stephan, ‘State Aid in the New EU Member States’, (2017) 4 Journal of Common Market Studies 779.
This narrow focus on direct execution is understandable, yet has limitations. Albeit receiving little serious consideration, national administrations have played a role in state aid control since its creation. State aid rules require Member States to identify measures that might infringe on the treaties and to design subsidies such that they comply with the supranational framework. National administrations must also exercise implementing activities strictu sensu, including eligibility checks on aid beneficiaries. Finally, they must guarantee ex post control and recover unlawful provisions pursuant to internal administrative procedures regulated by EU law.

This picture has grown in complexity over time. Based on experience gained in specific fields, the Commission has started a decentralisation process with room for enhanced responsibility of national administrations. With adoption of Council Regulation No 994/98, domestic authorities began directly implementing certain types of horizontal aid, provided that the conditions set in group exemption regulations are fulfilled. In performing this task, national administrations are still subject to Commission control, although via a softer ex post monitoring that checks the conformity of a subset of provisions per country.

The SAM strategy builds on this design choice to introduce an even more ambitious reorganisation. Within an unchanged constitutional framework, it has enhanced possibilities for Member States to grant state aid directly under the general block exemption regulation (GBER). Thus, domestic institutions today implement over 90% of new aid measures without the Commission’s prior approval. Centralised enforcement, instead, is limited to those cases most liable to distort competition. Also, national administrations have been given a number of new implementation tasks with SAM, including transparency and ex post evaluation obligations. The goals of the reform are to address the Commission’s chronic lack of resources, to strengthen the quality of its scrutiny on the most distortive measures and to combat the crisis by promoting faster decisions on growth-oriented measures.

Essentially, then, SAM represents a remarkable enhancement of national implementation tasks in the area of state aid. Yet, this reorganisation has left untouched the Commission’s exclusive power of control on domestic provisions, including those granted under the GBER. As such, the architecture of state aid control now displays some

18For a rare comprehensive academic analysis of national implementation instruments, see P. Nemitz (ed), The Effective Application of EU State Aid Procedures: The Role of National Law and Practice (Kluwer, 2007).  
19The aid grantors shall, among others, check whether the recipient of an aid declared unlawful had repaid it, in light of the ‘Deggendorf’ case (Case C-188/92, TWD Textilwerke Deggendorf GmbH v Germany, ECLI:EU:C:1994:90).  
20Art 16 Reg 1589/2015.  
21On this instrument see A. Sinnaeve, ‘Block Exemptions for State Aid: More Scope for State Aid Control by Member States and Competitors,’ (2001) 38 Common Market Law Review 1479.  
22The DG for Competition carries out ex post monitoring (Art 10–12 Reg 2015/1589) in two phases: a check of the formal conformity of the national legal basis with the supranational framework, followed by an evaluation of the implementation of the scheme for a limited number of beneficiaries (3 to 5 depending on the scheme).

23According to SAM, ‘the objectives of modernisation of state aid control are therefore threefold: (i) to foster sustainable, smart and inclusive growth in a competitive internal market; (ii) to focus Commission ex ante scrutiny on cases with the biggest impact on internal market whilst strengthening the Member States cooperation in state aid enforcement; (iii) to streamline the rules and provide for faster decisions’ (see Commission ‘Communication’, supra n 3, point 3).  
24Comm Reg 651/2014.  
25According to the 2018 State Aid Scoreboard (available at http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html), ‘since 2015, more than 96% of new measures for which expenditure has been reported for the first time fell under the General Block Exemption Regulation’, representing ‘about 82% of all measures were block exempted in 2017’ or, in terms of total spending per Member State, ‘about 48% of their total spending’.  
26Since 1 July 2016, the Commission has requested Member States to publish on a central website all their state aid measures and the names of beneficiaries who receive more than €500,000. See Art 9 Reg 2015/1589. Another important innovation of SAM is the possibility to make evaluations of aid schemes, meaning Member States shall provide evidence on both the direct impact of the aid on its beneficiaries and on its indirect impacts, positive and negative, as well as on the proportionality and appropriateness of the aid measure. See Art 12(2a), Comm Reg 651/2014.  
27In the latest 2018 State aid Scoreboard, the Commission claims that SAM has largely delivered on these objectives. Based on the state aid expenditure data reported by Member States, the Commission highlights that 94% of total state aid spending in 2017 was allocated to horizontal objectives of common interest and that the estimated average duration before possible implementation decreased from about 3.3 months before SAM to about 2.8 months over the period 2016–2017.
peculiarities that distinguish it from other sectors of EU administration. More specifically, unlike the adjacent field of competition law, the Commission retains overall responsibility for administrative functions. This means that, like the Single Supervisory Mechanism (SSM) established by post-crisis EU-wide reform, state aid control is still operated in a model of direct administration. Yet, by extending national institutions’ implementation tasks and requiring increased national institutional capacity, SAM goes in an apparently opposite direction to the SSM and other reforms introduced after the crisis.

The resulting organisational arrangement is thus characterised by a co-existence of two opposing forces – one towards centralisation of control, and another towards dispersal of responsibilities. As these two forces may be driven by conflicting interests and pull in opposite directions, their co-existence might generate tensions around the common goal of giving effect to EU rules. Following Chiti’s analysis of the structural problems affecting the EU administrative system, we may single out three aspects of the administrative architecture of state aid control where such tensions could be particularly problematic.

First, SAM places a high premium on domestic implementation mechanisms to ensure effectiveness of state aid law, but this goal may be jeopardised by largely heterogeneous and asymmetric structures at national level. In many areas of EU law, scholarship has linked uneven implementation of supranational rules with domestic procedural limitations and asymmetries, as well as political unwillingness. These risks appear particularly acute in the field of state aid. The high level of incompatibility experienced under the previously centralised control has been attributed to Member States’ lack of capacity, poor cooperation and the extraordinary variation of domestic structures. In a model that brings further decentralisation, this problem is presumed to play an even greater part. This urges the Commission to develop effective mechanisms to shape adequate implementation capacity across domestic administrations. Yet, any pragmatic solutions in this regard must accommodate two opposing needs. First, under the principle of national institutional autonomy, domestic authorities can self-organise their own administrative practices and structures as they see fit. Second, implementation activities are dispersed across a vast polycentric network that includes public and private bodies. These features distinguish state aid control from other fields, such as competition law and the SSM, where decentralised tasks are exercised by clearly identifiable national institutions displaying some level of

28For a recent analysis of the decentralisation of competition law enforcement in the EU and the asymmetric effects thereof, see O. Brooks, ‘Struggling with Article 101(3) TFEU: Diverging Approaches of The Commission, EU Courts, and Five Competition Authorities’ (2019) 56 Common Market Law Review 121–156.
29Direct administration refers specifically to the model where one administration is given responsibility for the administrative function in an area of EU law. See on the characteristics and functioning of the SSM, E. Chiti and F. Recine, ‘The Single Supervisory Mechanism in Action: Institutional Adjustment and the Reinforcement of the ECB Position’, (2018) 1 European Public Law 24 101.
30See supra n 2.
31See E. Chiti, ‘Is EU Administrative Law Failing in Some of its Crucial Tasks?’, supra n 5. For Chiti, EU administrative law is failing to accomplish its main tasks necessary to ensure a stable functioning of the EU polity due to a number of structural problems. In the present paper, the argument is made that while these structural problems were also present in the model of state aid control prior to SAM, they become even more evident and urgent to resolve after the reform due to the redistribution of administrative activities occurring with the reform and the high level of interdependence across administrations that is needed to give effect to the supranational rules in the field. Therefore, Chiti’s analysis is deployed here to emphasise the role of the instruments of integration created with SAM to address the structural problems mentioned.
32On the general elements that explain correct or incorrect implementation of EU law by national administrations, see, among the many studies, E. Versluis, ‘Even Rules, Uneven Practices’, supra n 5; O. Treib, ‘Implementing and Complying with EU Governance Outputs’, (2014) 1 Living Reviews in European Governance 9; E. Mastenbroek, ‘EU Compliance: Still a ‘Black Hole’?’, (2005) 6 Journal of European Public Policy 1103–1120.
33See the analysis on the Commission’s procedure by the European Court of Auditors before implementation of SAM: ‘Do the Commission’s procedures ensure effective management’, supra n 7. See on the possibilities of political clashes that can emerge in the area of state aid, the examples referred to in M. Blauberger, ‘State Aid Control from a Political Science Perspective’, in E. Szyszczak (ed), Research Handbook on European State Aid Law (Edward Elgar Publishing, 2011), 35–38.
34H. Hofmann, G. Rowe and A. Türk, Administrative Law and Policy of the European Union (Oxford University Press, 2011), 12; A. Ibáñez, The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits (Hart Publishing, 1999); S. Kadelbach, ‘Good governance’, supra n 13, 168–206; C. Harlow and R. Rawlings, Process and Procedure in EU administration (Hart Publishing, 2014), 13–14.
35Since state aid rules apply to measures granted by subnational institutions (see Case C-248/84 Germany v Commission, ECLI:EU:C:1987:437, para 17) or by undertakings whose resources and decisions are influenced by public actors (see Case C-83/98 P France v Ladbroke Racing and Commission ECLI:EU: C:2000:248, para 50; C-482/99 France v Commission ECLI:EU:C:2002:294, para 37).
homogeneity in key organisational elements. In this structure, promoting adequate implementation structures is not only constitutionally problematic, but also challenging in practice.

Second, application of state aid law raises complex issues of interpretation, a feature that can provide breeding ground for instability and inconsistency of national behaviours. A typical instance is the notion of state aid set out in Article 107(1) TFEU. As the notion represents, for the most part, an objective concept, national administrations and the Commission can apply it to specific measures, but the EU courts are responsible for its interpretation. The problem is that, despite being an essential step in defining whether state aid law applies, such interpretation has become subject to endless variations, due to the formulation of Article 107(1) TFEU as a rule of negative integration. Since the notion prohibits national measures that distort competition based on their expected effects on the internal market, its interpretation becomes dependent on the characteristics of the relevant domestic activity and the evolution of the relevant market conditions. This complexity, which is exacerbated by a lack of homogeneity in terms of subsidy measures across Member States, suggests that, in the new decentralised architecture emerging from SAM, there is a need to ensure that national administrations can deal with this interpretative complexity effectively.

Third, accountability is crucial to keep the exercise of administrative powers under control, but requires reconsideration after SAM. As traditionally understood, state aid control relies predominantly on a system of inter-administrative accountability through which the Commission checks any provision made at the Member State level. Domestic courts, parliaments and state aid experts alike may act as tools for account-holding in the polycentric web of aid grantors, assisted by fire-alarm devices such as citizens and competitors. So far, however, these internal arrangements have displayed large variance in resources, powers and institutions, as well as in intensity and effectiveness. For instance, few countries have in place systems of mandatory control on domestic measures, while others use non-binding checks, voluntary self-assessment or ex post controls. Yet, SAM increases the relevance of this broader accountability system. To compensate for its increasing focus on the most impactful cases, the Commission has expressed the intention to expand domestic tools of control and use state aid law as a mechanism to enhance the legitimacy of domestic expenses. The process started with SAM thus urges the design of a coherent accountability system that provides for effective and complementary structures of control to ensure the proper and legitimate exercise of powers across the administrative machinery.

36 See for instance on the characteristics of national administrations involved in the SSM and their independence, E. Chiti and F. Recine, 'The Single Supervisor Mechanism in Action', supra n 29, 112–114.
37 On the complex interpretation of state aid law, see A. Biondi and E. Righini, 'An evolutionary theory of state aid control', in A. Arnell and D. Chalmers (eds) The Oxford Handbook of European Union Law (Oxford University Press, 2015).
38 For instance, after the landmark Flughafen Leipzig-Halle Case (Case C-288/11P Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission, ECLI:EU:C:2012:821) the general Court extended the application of state aid law to the construction of infrastructures. See on this issue, H. Hofmann and C. Micheau (eds), State aid law, supra n 3. On the complex judicial interpretation of Article 107 TFEU, A. Biondi, 'State Aid is Falling Down, Falling Down: An Analysis of the Case Law on the Notion of Aid' (2013) 6 Common Market Law Review 1719–1743.
39 Case C-487/06 P British Aggregates v Commission, ECLI:EU:C:2008:757, para 114; Case C-83/98 P France v Ladbroke Racing and Commission, ECLI:EU:C:1997:531, para 25.
40 A. Biondi and E. Righini, 'An evolutionary theory', supra n 37; J. Piemás López, The Concept of State Aid, supra n 1, 18–38.
41 See especially the technical note ‘Results, trends and observations regarding EU28 - State Aid expenditure reports for 2017’ that accompanied the 2018 State Aid Scoreboard (available at http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html).
42 The notion of accountability in this analysis differs from the one developed by Chiti. While Chiti refers to the concept of ‘accountability regime’ to include also its function of legitimising the EU administrative system, the analysis here is limited to the ex post facto accountability of administrative activities. The reason for this is because the current analysis intends to study the machinery of control that emerges as a result of the decentralisation started with SAM, and specifically the possibility that accountability gaps might develop in the administrative architecture. As such, this analysis builds upon the ‘retrospective’ categorisation of accountability as composed of three main elements: (i) giving an account, in a narrow sense of narration; (ii) questioning and debating the issues; and (iii) evaluating or passing judgment (see Harlow and Rawlings, ‘Promoting Accountability in Multilevel Governance: a Network Approach’, (2007) 4 European Law Journal 542, 545).
43 H. Hofmann and A. Türk, ‘The Development of Integrated Administration in the EU’, supra n 9, 260.
44 While few countries have a system of mandatory compatibility opinions (eg, see the functions of the Latvian State Aid Control Department of the Ministry of Finance http://www.fm.gov.lv/en/s/state_aid/), others have a model of mandatory assessment (eg, see powers of the State Aid Monitoring Office in Hungary based on the Hungarian Government Decree 37/2011) or voluntary assessment (eg, see the role of the State Aid Section of the Irish Ministry for Business, Enterprise and Innovation https://dbei.gov.ie/en/What-We-Do/EU-Internal-Market/EU-State-Aid-Rules/).
In sum, despite being an essential part of the European economic constitution, state aid control appears vulnerable to structural problems that may endanger its effective functioning. Ultimately, each of these structural problems can be traced back to the unusually fragmented nature of the architecture, as administrative responsibilities are dispersed across a multiplicity of loosely coupled actors displaying dissimilar mechanisms and capacities. While fragmentation has been always endemic in state aid, SAM's further decentralisation of tasks and limitation of ex post control make it more evident and urgent. This representation highlights the need for the Commission to develop effective mechanisms of administrative integration in order to avoid management deficits and, ultimately, incompliance. Specific structures and processes are required that allow all relevant national and supranational administrations to cooperate closely and coordinate their activities to pursue the shared goal of giving effect to the common legal framework.

With SAM, the Commission has demonstrated that it takes these concerns seriously. While leaving existing control processes almost unaffected, it has established several new tools of administrative integration to manage and coordinate the activities of national institutions. In addition to clarifying key concepts of state aid law and fostering problem-solving through administrative rulemaking and networking, the Commission has sought to directly influence domestic practices and capacities through enhanced partnerships and conditionality agreements with the Member States.

To better appreciate the meaning and implications of SAM, a more fine-grained perspective is thus required in the study of state aid control. Beyond the traditional focus on direct execution, we need to expand our scope to examine the mechanisms of administrative integration created to connect the decentralised and fragmented infrastructure into a European administrative space (EAS). The dilemma is whether these tools can effectively counter the structural problems that arise from SAM and ultimately ensure uniform application of rules across the whole architecture. This is the main challenge driving the following analysis.

3 | STRUCTURING ADMINISTRATIVE INTEGRATION FOR STATE AID CONTROL

This section discusses the functioning and potential effects of the mechanisms of administrative integration created with SAM. For this purpose, it adopts a twofold perspective. First, it clarifies the general characteristics and aims of each mechanism. In this sense, the Commission deploys with SAM a set of tools that makes use of different EU governance techniques to cope with potential pitfalls of decentralised implementation of state aid law. In addition to expanding the typical strategies of networking (through multilateral administrative networks) and convergence (through administrative rulemaking and strengthened partnerships), the reform introduces the stronger novel approach of conditionality (through the ex ante conditionalties on ESI funds). Second, the analysis provides an early assessment of the potential effects of the tools established with SAM. It does so by combining theoretical expectations about the impact of each instrument on national implementation of EU policies with initial results experienced in practice in the field of state aid. While acknowledging some important improvements, the analysis elaborates also

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45F. De Cecco, State Aid and the European Economic Constitution (Hart Publishing, 2013); J. Piernas López, The Concept of State Aid Under EU Law, supra n 1.

46In the present analysis, fragmentation is used to emphasise the plurality of actors, displaying a variety of organisational forms and practices, that, after SAM, exercise functions connected to state aid control. This understanding of the notion connects with the general observation of the large internal variation in the governance system giving effect to EU law, observed by different authors (see C. Harlow and R. Rawlings, Process and Procedure, supra n 34, 9–37). As such, fragmentation differs from the concept of decentralisation, and in the current analysis is used to clarify that SAM has led to more activities being exercised by Member States instead of by the Commission.

47L. Metcalfe, ‘Building Capacities for Integration: The Future Role of the Commission’, (1996) 2 Eipascope 1–11.

48By European Administrative Space (EAS), the present analysis points to the phenomenon whereby EU administrative functions are exercised by the deep interaction of national and EU administrations (see H. Hofmann, ‘European administration’, supra n 2, 22–23). As such, administrative integration is an essential connotation of the EAS, since it points to the condition in which both national and EU components interact in exercising such functions. Cooperation and coordination across each component are the procedural techniques to make this administrative integration work in the EAS (C. Harlow and R. Rawlings, Process and Procedure, supra n 34, 36–37).

49H. Hofmann, ‘European administration’, supra n 2; E. Heidbreder, ‘Strategies in Multilevel Policy Implementation: Moving beyond the Limited Focus on Compliance’, (2017) 9 Journal of European Public Policy 1367.
on the limitations of each tool for delivering the Commission's ambitions with SAM to build national capacities from above and limit its centralised control in the area.

### 3.1 The notice on the notion of state aid: the limits of steering domestic implementation through administrative rulemaking

As noted, Member States typically struggle to identify state aid measures in practice. A main reason for this is their difficulty of applying the complex and evolving interpretation of the key legal concepts forming the notion of aid.\(^\text{50}\) To address this concern, the Commission issued its Notice on the Notion of State Aid (the ‘Notice’) as part of SAM.\(^\text{51}\) This document aims to clarify the Commission’s understanding of Article 107(1) TFEU, with a view to contribute to an easier, more transparent and more consistent application of the notion of aid across the Union.\(^\text{52}\) Since the correct qualification of a national provision as state aid is the first step to check whether the rest of the legal framework applies, the Notice represents one of SAM’s cornerstones to build domestic compliance and limit the Commission’s centralised control.

In legal terms, the Notice is an act of administrative rulemaking in accordance with Article 288(4) TFEU. This tool has often been deployed as a technique of regulation by information, to explain how openly worded and vaguely formulated rules are to be implemented.\(^\text{53}\) Although this instrument lacks any direct binding force and legitimacy problems loom large,\(^\text{54}\) its advantages are several: coping with complex political realities,\(^\text{55}\) managing discretion and policy flexibility,\(^\text{56}\) ensuring increased predictability and unity of administrative practices and sharing information.\(^\text{57}\)

In light of these benefits, the field of state aid has long been replete with administrative rulemaking. Traditionally, the Commission has issued unilateral rules to explain possible exceptions to the state aid prohibition laid down in Article 107(2) and (3) TFUE.\(^\text{58}\) These provisions give the Commission the discretion to admit certain categories of aid based on their capacity to achieve objectives of ‘common interest’ in the internal market. In addition to shielding the Commission from political pressure and increasing time-effectiveness of its control,\(^\text{59}\) administrative rulemaking in that area generates important legal and practical effects. First, administrative rules that structure how the Commission will use its discretionary powers in individual cases produce binding effects when combined with general principles of law.\(^\text{60}\) As the Court of Justice clarified, the Commission may no longer derogate from them ‘under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the
protection of legitimate expectations. Second, given that the Commission binds itself to enforce such rules in its day-to-day control, national administrations are brought into compliance to pre-empt potential investigations.

Through this proxy, the Commission has thus promoted positive integration 'from above' on national state aid policies.

The Notice marks however a departure from this practice. It represents the first example of administrative rulemaking's use to clarify Article 107(1) TFEU, a provision on which the Commission enjoys little margin of discretion. This implies that the Notice represents for most an interpretative instrument pursuing mere informative purposes, as it clarifies the Commission's understanding of an objective concept that the Court of Justice alone can interpret. In practice, somewhat like the European Banking Authority (EBA) in the administrative mechanisms of the banking union, the Commission has used the Notice to carve itself a 'meta-regulatory' role in order to build domestic compliance and limit its centralised control from above.

When seen against the background of misunderstandings and errors that has characterised national implementation in the field, post-legislative guidance that explains the concepts inherent to Article 107(1) TFEU represents a major development. It merits mention in this regard that actors have generally welcomed the document as a much-needed novelty. The Commission recently observed that the rules had become more familiar across national institutions. This is partly attributable to the Notice which, thanks to its authoritative source, exerts powerful influence on the behaviour of national administrations.

In keeping with this, the document is discussed in a working group involving EU and national experts, and is shared on many national coordination bodies' websites.

Yet, the Notice raises two specific issues that seem to constrain the Commission's ambitions to limit its centralised control and steer domestic compliance from above.

Firstly, by developing new or inaccurate interpretations of the treaties, the Notice risks triggering troubling consequences for legal certainty. Given the aim to contribute to an easier, more transparent and more consistent legislative guidance that explains the concepts inherent to Article 107(1) TFEU represents a needed novelty. The Commission recently observed that the rules had become more familiar across national institutions. This is partly attributable to the Notice which, thanks to its authoritative source, exerts powerful influence on the behaviour of national administrations.

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61 Joined Cases C-189/02 P, C-202/02 P, from C-205/02 P to C-208/02 P and C-213/02 P Ravindustri A/S and others v Commission, ECLI:EU:C:2005:408, para 210; Case C-182/03, Belgium v Commission, ECLI:EU:C:2006:416, para 70.

62 M. Blauberger, 'From Negative to Positive Integration?,' supra n 58, 22–23.

63 Ibid, 17.

64 The Commission enjoys a limited margin of discretion only for those appraisals that are technical or complex in nature (Case C-487/06 P British Aggregates v Commission, ECLI:EU:C:2008:757, para 114). One such example is the complex economic assessment necessary to apply the market economy operator test. This test is essential to conclude whether a national measure fulfils the criterion of advantage involved in the notion of aid. See A. Caoimh and W. Sauter, 'Criterion of Advantage,' in H. Hofmann and C. Micheau (eds) State Aid Law of the European Union (Oxford University Press, 2016), 107–126.

65 On the concept of 'interpretative instruments' that perform the "post-law" function of interpreting EU law, see L. Senden and S. Prechal, 'Differentiation in and through,' supra n 55, 188–189.

66 Case C-487/06 P British Aggregates v Commission, ECLI:EU:C:2008:757, para 114; Case C-83/98 P France v Ladbroke Racing and Commission, ECLI:EU: C:1997:531, para 25. Obviously, this limit to the value of the notice may never detract from the fact that the binding treaties' provision that the Notice aims to explain (Article 107(1) TFEU) will in any case continue to produce legal effects.

67 See specifically the power of the EBA to issue guidelines and recommendations to orientate interpretation and application of the European Single Rulebook by national authorities (Art 16, Reg 1093/2010). See for an analysis on the connected legal problems E. Chiti, 'In the Aftermath of the Crisis: The EU Administrative System between Impediments and Momentum,' (2017) 48 Cambridge Yearbook of European Legal Studies 323–327.

68 Speech of Director-General Laitenberger of DG Comp, 'State aid modernisation: The benefits of working more closely together' (Brussels, 28 June 2017) available at http://ec.europa.eu/competition/speeches/text/sp2017_10_en.pdf.

69 See eg the research carried out within the Soft Law Research Network (SoLaR) by Stefan and Biondi (Stefan and Biondi, 'National Report on the UK: The Use of EU Soft Law by National Courts and Administration in the Field of EU Competition and State Aid Law' (2018), on file with the author). The authors claim that the Notice is identified as being the most used instrument by UK Department for Business, Energy and Industrial Strategy, and much the same importance is paid by UK courts.

70 Speech of Director-General Laitenberger of DG Comp, 'State aid modernisation,' supra n 68.

71 See, eg, the website of the Latvian State Aid Control Department of the Ministry of Finance (http://www.fm.gov.lv/en/s/state_aid/nozione_of_state_aid/), the Italian EU Affairs Department (http://www.politicheeuropee.gov.it/it/attivita/aiuti-di-stato/normativa-europea/comunicazione-sulla-nozione-di-aiuto-di-stato/) and the German Federal Ministry of Economics and Technology (https://www.bmwi.de/Redaktion/DE/Downloads/B/beihilfenkontrollpolitik-kom-mitteilung-beihilfebegriff.html).
fiscal aid granted through tax rulings falls under the scope of Article 107(1) TFEU. While this clarification is a welcome novelty in state aid investigations, it presents many uncertain points on which input from the Court of Justice is much needed.72 Similarly, for the purpose of limiting its own investigation to bigger cases, the Commission introduces an understanding of the constitutive element of the ‘effect on trade’ of an aid measure that appears in conflict with case law on similar issues in other fields of EU law.73

In addition to raising legitimacy concerns,74 this use of administrative rulemaking looks questionable owing to the consequences it may generate. Outside the limited part where the Commission develops its own discretion, the Notice lacks legal effects to be challenged by the Court of Justice.75 This means that the EU judges are precluded from direct scrutiny of the misleading understanding laid down in the Notice. Yet, the Court can always review the Commission’s individual decisions that enforce the Notice on national measures. The problematic consequences of this are plain to see. A Member State, that treats the Notice as authoritative and complies with it, may be told by the Court that it has acted in violation of the treaties. At the same time, other national administrations would need to pinpoint themselves the impact of the judgment on the wording of the Notice and, since this activity may entail a more or less difficult interpretative effort, they would be tempted to start notifying cases to the Commission for reasons of legal certainty. Ultimately, private recipients relying on implementation of the Notice may be ordered to repay their grants. In sum, a mechanism created to introduce legal certainty and reduce the Commission’s burden of investigation risks having the opposite outcomes. While these side effects have been somehow endemic to the Commission’s control on individual measures, the use of the Notice to interpret the notion of aid have definitely made them more urgent.76

At a more radical level, the question may be raised of whether a non-binding regulatory tool could be the most appropriate instrument to promote consistent understanding of a negative rule. As discussed earlier,77 interpretation of Article 107(1) TFEU is in constant and fast-paced evolution, depending on the provisions that national administrations intend to design. Yet, this need for a flexible interpretation feels at odds with the systematisation goal pursued by the Notice. The danger is that this document falls short of keeping up with possible variations of aid measures designed by Member States. Risks of developing inaccurate understandings of the treaties appear thus around the

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72Commission Notice on the Notion of State Aid, supra n 51, paras 169–174. On the numerous issues connected to the Commission’s understanding of the notion of aid in the field of taxation, see A. Biondi and O. Stefan, ‘The Notice on the Notion’, supra n 51, 56–58; P. Nicolaides, ‘A Critical Review of the Commission Notice’ supra n 51, 857–859.

73Commission Notice on the Notion of State Aid, supra n 51, paras 190–198. See A. Biondi and O. Stefan, ‘The Notice on the Notion’, supra n 51, 54–56.

74A slightly different understanding of the role of the Commission in issuing administrative rules is given by H. Hofmann, G. Rowe and A. Türk, Administrative Law and Policy, supra n 34, 543. According to the authors, while it is true that the ultimate responsibility to interpret EU law is of the EU Courts and it is up to the Member States to be informed of the changing content of this law, the Commission can use administrative rules to provide such information for efficiency gains, meaning to avoid incompleteness by Member States. While this argument may be valid in general, the author of this article takes the view that such perspective faces risks in the field of state aid. The Commission has indeed introduced through the Notice new interpretations that, besides going well beyond the boundaries of the notion of aid, are not adequately emphasised in the text of the Notice (apart from the general clause that ‘the primary reference for interpreting the Treaty is always the case law of the Union Courts’). This practice might raise implementation problems, especially for non-experts in the area, as it requires a deep knowledge of the field.

75Administrative rules can be challenged before the European Courts only under a few circumstances (see on this J. Scott, ‘In Legal Limbo’, supra n 53, 337–343; O. Stefan, ‘Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance’, (2014) 2 Maastricht Journal of European and Comparative Law 359–379; H. Hofmann, G. Rowe and A. Türk, Administrative Law and Policy, supra n 34, 571–579). They must constitute an act by an institution of the EU and be capable of generating necessary legal effects. The latter requisite is said to be fulfilled: i) if the administrative rule introduces supplementary obligations not mentioned in hard law provisions; ii) if the administrative rule is issued by an institution as a means of structuring its discretion; or iii) if the administrative rule becomes binding on a Member State as a result of negotiations coupled with Treaty obligations. The Notice fulfills the second instance, at least for the limited part of the notion of aid where the Commission has been recognized the power to carry out discretionary evaluations. Yet, it does not introduce additional obligations (requirement ii), given the clear aim to make more explicit existing obligations already interpreted by the Court. Also, it does not seem likely to bind Member States, because it has not been adopted under an explicit Treaty-based obligation of specific cooperation and Member States have not indicated their acceptance of the content (see on this the case Case C-311/94, Ussel-Vilet v. Minister van Economische Zaken, ECLI:EU:C:1996:383, paras 37–40).

76This risk looks concrete, as a number of cases involving the interpretation of these problematic aspects of the notion of aid are currently under the attention of the EU Courts (see Case T-760/15, Netherlands v Commission; Case T-755/15, Luxembourg v Commission and Luxembourg Ministry of Finance; Case T-759/15, Fiat Chrysler Finance Europe v Commission; Case T-892/16, Apple Sales International and Apple Operations Europe v Commission).

77See above at section n 2. On the effects of negative rules on legal certainty in the EU, see S. Schmidt, ‘Beyond Compliance: The Europeanization of Member States through Negative Integration and Legal Uncertainty’, (2008) 3 Journal of Comparative Policy Analysis 299–308.
corner, unless the Notice is constantly updated as a ‘living document’ – an onerous effort that the Commission has yet to promise.

Secondly, the Notice seems in danger of uneven application, depending on the actor that gives effect to it. As noted, non-binding administrative rules that explain how legal provisions should be intended and applied may still exert important practical influence on national administrations. This seems to hold true for the Notice too, due to its origin from the primary agent of enforcement in the Union and to the wide discussion and general acceptance during its adoption process. Yet, while significant practical effects can be reasonably expected, consistent application of the Notice at national level is not a foregone conclusion.

Previous research about how Member States’ implementation of supranational guidance seems to confirm this threat. Domestic application of non-binding instruments has been found to depend largely on external incentives, such as supranational enforcement or peer pressure. In the field of state aid, however, this force seems to be weak. Based on Expedia, post-legislative guidance such as the Notice lacks coercive force on national administrations, and national courts are not mandated to enforce it in their judgments either. This means that the Commission’s centralised control represents still the main strategy that could force Member States to ensure consistent application of the Notice. Yet, not only has the Commission’s control already proved limited in ensuring consistent implementation of supranational rules by national administrations in the field; but the Commission itself has created SAM and the Notice to avoid precisely this consequence, namely to be consistently involved in checking domestic application of the rules in order to focus on the most important cases. The risk is thus that domestic authorities could be free to either cherry-pick elements of the Notice they will follow in daily practice, based on their interests to comply and the political costs connected to the provision of state aid, or opportunistically use the guidance to back up interpretations of the Treaties that would most favour their needs.

Additionally, compliance with non-binding guidance has been found to differ across countries, as well as depending on the level of detail and complexity of the document. Yet, as shown earlier, Member States still largely differ in terms of compliance performances and type of measures granted in the field of state aid. Moreover, while the Notice has plenty of technical details, it principally aims to assist officials working for any granting authority, the majority being non-experts. Implementation of the Notice is thus unlikely to be uniform across administrations, especially if internal coordination and control are missing. As such, while created

78The author shares the same conclusion of A. Blondi and O. Stefan, ‘The Notice on the Notion’, supra n 51, 49.
79See in this sense K. Jacobsson, ‘Soft Regulation and the Subtle Transformation of States: the Case of EU Employment Policy’, (2004) 14 Journal of European Social Policy 359; M. Finnemore and S.J. Toope, ‘Alternatives to “Legialization”: Richer Views of Law and Politics’ (2001) 55 International Organization 749. On the process of consultation to adopt the Notice see http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html.
80On the limited studies in the field see E. Korkea-aho, ‘Watering Down the Court of Justice? The Dynamics between Network Implementation and Article 258 TFEU Litigation’, 5 European Law Journal 649–666; M. Maggetti and F. Gilardi, ‘Network Governance and the Domestic Adoption of Soft Rules’, (2014) 9 Journal of European Public Policy 1302–1306. An analysis on the implementation of EU soft law in Germany carried out within the Soft Law Research Network (SoLaR) seems to confirm this conclusion (see M. Hartlapp, ‘Soft Law Implementation in the EU Multilevel System: Legitimacy and Governance Efficiency Revisited’ (2018), available at https://www.solar-network.eu/other-publication/hartlapp-miriam-soft-law-implementation-in-the-eu-multilevel-system-legitimacy-and-governance-efficiency-revisited-2018/).
81Case C-226/11, Expedia Inc v Autorité de la concurrence and Others, ECLI:EU:C:2012:795, para 28.
82European Court of Auditors, ‘Do the Commission’s procedures’, supra n 7.
83See T. Devine and M. Eliantonio, ‘EU Soft Law in the Hands of National authorities: The Case Study of the UK Competition and Markets Authority’, (2018) 1 Review of European Administrative Law 72.
84M. Lopez-Santana, ‘The Domestic Implications of European soft law: framing and transmitting change in employment policy’, (2006) 4 Journal of European Social Policy 494–496; M. Hoboth and D. S. Martinsen, ‘Transgovernmental networks in the European Union: improving compliance effectively?’, (2013) 10 Journal of European Public Policy 1406–1424.
85I. Maher, ‘Functional and Normative delegation to Non-majoritarian Institutions: The Case of the European Competition Network’ (2009) 7 Comparative European Politics 425.
86See above the discussion in section 2.
87See, for instance, on the importance of creating state aid units to share expert knowledge and help in the design of aid schemes across the granting authorities the European Court of Auditors’ investigation of state aid control in EU cohesion policy: ‘More efforts needed to raise awareness of and enforce compliance with state aid rules in cohesion policy’, Special Report No 24/2016, 04/10/2016, points 17 and 72, available at https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=37906.
with the praiseworthy aim of contributing to a more consistent application of the notion of aid, the Notice’s effects cannot be evaluated based on assumed efficiency gains.\textsuperscript{88} Whereas its authoritative source is uncontested, it remains unclear whether this document could ensure uniform implementation of the notion of aid across the Union.

Given these limitations and risks, scope for legal uncertainty and uneven application may thus worryingly abound with the Notice. Both issues mentioned here, however, seem to undermine the capacity of the Commission to operate as executive centre to build compliance and limit its centralised control in the field of state aid.

3.2 Decentralised state aid implementation and the changed role of administrative networks

Administrative networks are structures intended to allow information exchange, mutual support and negotiation among executives.\textsuperscript{89} Since application of state aid law relies on activities exercised at both the EU and the national level, these mechanisms abound in the area. With SAM, however, their scope has changed. While typically used as forums for bilateral discussion on concrete cases,\textsuperscript{90} administrative networks serve now to seal a broader multilateral partnership across administrations. Depending on how each network combines the need for further transnational cooperation with the supranational involvement of the Commission, these systems can be ordered in two types of groups.\textsuperscript{91}

A first type is the administrative network that mixes supranationalism and transnationalism in the form of EU common systems.\textsuperscript{92} This is the case of the thematic working groups regularly organised by the Commission with national representatives. In these structures, the Commission, acting as executive centre, coordinates domestic implementation by sharing information and best practices with national state aid experts and by discussing with them application issues in sensitive areas (eg, transparency, state aid to energy and airports, taxation and infrastructure).

This mechanism of top-down integration is then complemented by visits and thematic workshops organised in each country, as well as multilateral platforms such as newsletters and databases providing informal guidance on abstract questions of interpretation.\textsuperscript{93} Once a year, the Commissioner considers major achievements in the area and traces future policy developments at the High Level Forum on SAM which gathers national politicians and top-ranking officials.\textsuperscript{94} In sum, rather than allowing cooperation in the exercise of centralised competences or for the coordination of

\textsuperscript{88}H. Hofmann, G. Rowe and A. Türk, Administrative Law and Policy, supra n 34, 543.

\textsuperscript{89}H. Hofmann and A. Türk, 'The Development of Integrated Administration', supra n 9, 258–261; E. Mastenbroek and D. Sindbjerg Martinsen, 'Filling the Gap in the European Administrative Space: The Role of Administrative Networks in EU Implementation and Enforcement', (2017) 3 Journal of European Public Policy 422–435.

\textsuperscript{90}H. Hofmann and A. Türk, 'The Development of Integrated Administration', supra n 9, 260; H. Hofmann and A. Türk, 'Policy implementation', in H. Hofmann and A. Türk (eds), EU Administrative Governance (Edward Elgar Publishing, 2006), 90–91.

\textsuperscript{91}These connotations have been identified by Chiti to provide a classification of different models of administrative integration in EU law implementation. As the implementation of supranational provisions has increasingly become a matter of cooperation across administrations, implementing arrangements of EU law always present a different combination of two elements: transnationalism, meaning of joint actions exercised by relevant national administrations, and supranationalism, when an EU body is involved in the process to promote the EU interest. See E. Chiti, 'The Administrative Implementation of European Union law', supra n 9, 9–33.

\textsuperscript{92}EU common systems are mechanisms of administrative integration that combine, in a functionally and structurally unitary administration, organisations and activities referring both to the EU and national levels of administrations. See on the notion, ibid 15.

\textsuperscript{93}For instance, in addition to the Weekly e-news update, the Commission has set up the eState aid WIKI, to facilitate informal exchanges on general state aid matters between the Commission’s services and the Member States. For a full list of activities carried out by the DG Comp and DG Regio to strengthen national administrations’ capacity to implement state aid law in the field of ESI funds, see the Commission’s common state aid action plan 2018–2022 ‘Strengthening Administrative Capacity for the Management of the Funds of Member States in the Field of State Aid’ (available at https://ec.europa.eu/regional_policy/sources/how/improving-investment/state-aid/stateaid_plan2018.pdf). For the activities carried out in the same field in the previous period see the Commission’s common state aid action plan 2017–2018 ‘Strengthening Administrative Capacity for the Management of the Funds of Member States in the Field of State Aid’ (available at http://ec.europa.eu/regional_policy/sources/how/improving-investment/state-aid/stateaid_plan2017.pdf).

\textsuperscript{94}See speech at the High-Level Forum on State Aid Modernisation by Margrethe Vestager, Commissioner for Competition, titled 'State aid and fair competition worldwide' 28 June 2017, available at https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/state-aid-and-fair-competition-worldwide_en.
distributed tasks.\textsuperscript{95} Top-down integration responds here to the Commission’s functional need to assist the exercise of all main national activities in the field.

A second type is the network to strengthen transnational cooperation across Member States. This is found in the SAM working group organised by national experts to share best practices and debate common problems related to internal state aid control. Being an area protected by national procedural autonomy, discussions are held among national authorities, with the Commission acting as mere participant.\textsuperscript{96}

This multifaceted system illustrates how networking is deployed after SAM to hold the fragmented architecture of state aid control together. This objective is being pursued by establishing close interactions between the Commission and domestic state aid experts. These latter share information and provide advice on the application of state aid rules to other domestic administrations through multilateral networks, newsletters, databases and meetings.\textsuperscript{97} Due to internal divisions of competences and specialised knowledge, they may also exercise accountability functions, to the extent that they could question and evaluate aid measures designed by other institutions, and at times even block certain provisions. In essence, they act as an essential linchpin between the supranational and national levels, by exercising functions similar to the Commission in each Member State, albeit without the same legal powers and effects.

This networked structure has already yielded several practical results. For instance, following a Commission analysis of internal weaknesses, the French authorities requested its national court of auditors to study best practices of other Member States and assess domestic mechanisms and practices.\textsuperscript{98} Moreover, a checklist compiled by the central state aid unit of the United Kingdom (UK) is now being shared within numerous Member States to help domestic authorities assess state aid measures,\textsuperscript{99} and survey results show that the internal database deployed to exchange information was received very positively.\textsuperscript{100} The fact that working group meetings are held regularly and generally well-received confirms that this composite network structure is gaining significance and, in time, may generate a collective identity among specialised officers in the field.\textsuperscript{101}

Yet, network governance also faces difficulties that cast doubt on its overall effectiveness. A first problem relates to the practical effects of multilateral networks on shaping domestic capacity, as these instruments seem prone to centrifugal forces generated by opposing national interests. One should not forget that, while cooperating closely

\textsuperscript{95}A typical example of a common system created to allow the exercise of centralised competes is the Joint Supervisory Teams created in the SSM (see on this E. Chiti and F. Recine, ‘The Single Supervisory Mechanism in Action’, supra n 29, 109–112). An example of a common system created to coordinate the coordination of distributed tasks is the European Competition Network (see on this F. Cengiz (2010). ‘Multi-level Governance in Competition Policy: The European Competition Network’, (2010) 35 European Law Review 661).

\textsuperscript{96}Speech by Director-General Laitenberger of DG Comp, ‘State aid modernisation’, supra n 68. This working group has also a temporary mandate of 3 years which is renewable. Until now, the group has been led by Chairs from Finland, Sweden UK and France (see O. Simeon, ‘Il Common Understanding dal Punto di Vista della Commissione Europea’, (2017) Regioni.it 75).

\textsuperscript{97}See, for instance, the information shared on the topic across Italian regions (available at http://www.regioni.it/materie/ue-esteri/aiuti-di-stato/), or the guidelines distributed across French authorities to help implement state aid rules (https://www.economie.gouv.fr/daj/vademecum-aides-etat-edition-2016) or the agency Europa Decentral created in the Netherlands to assist municipal authorities in the area (http://europadecentraal.nl/english/state-aid/).

\textsuperscript{98}In 2015, the French Inspectorate-General for Finance (IGF) published an assessment of the domestic organisation in the area of state aid law. That analysis was conducted at the request of the French Prime Minister, who explicitly asked the IGF to carry out a comparison with other countries, including Germany, the UK and the Netherlands, as best practices highlighted by the EU Commission. The report is available at http://www.igf.finances.gouv.fr/files/live/sites/igf/files/contributed/IGF%20Internet-2-RapportsPublics/2015/2014-M-094.pdf.

\textsuperscript{99}See, eg, the state aid basic guide of the UK Department for Business, Energy and Industrial Strategy (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/443686/BIS-15-417-state-aid-the-basics-guide.pdf), the data sheet of the Italian Friuli Venezia Giulia Region (http://www.regione.fvg.it/rafvg/export/sites/default/RAFVG/fondi-europel-fvg-internazionale/aiuti-di-stato/allegati/SCHEDA_A_AIUTI_DISTATO_DEFINITIVA_2022015.pdf), and the set of different checklists developed by the Latvian government for use by the granting authorities in the drafting phase (http://www.fm.gov.lv/en/s/state_aid/).

\textsuperscript{100}According to the European Court of Auditors’ investigation on the state aid control in EU cohesion policy (More Efforts Needed, supra n 87, para 112) as of 30 June 2016, about 270 questions and answers had been posted.

\textsuperscript{101}According to the Commission’s common state aid action plan 2018–2022 ‘Strengthening Administrative Capacity for the Management’ ( supra n 93), ‘the general training for ESIF and the thematic seminars have been well received by the participants’ and ‘the quality of the training material and the speakers were considered very favourably by participants’, although the response rate to the survey on the quality of the events was allegedly low. See in this sense, for instance, also the announcement on the State Aid Working Group made by the Bulgarian authorities during their 2018 Presidency of the Council of the European Union, available at https://eu2018bg.bg/en/news/343.
with the Commission, state aid experts in most Member States are in ministerial departments and thus subordinate to their political principals.\(^\text{102}\) In many sectors of EU governance, this dual loyalty or ‘double-hattedness’ has generated tension over common commitments across network participants, undermining network effectiveness. This consequence emerges particularly in times of confrontation and conflict over the application of common policies. In the field of state aid, such conflictual dynamics are likely to arise.\(^\text{103}\) Given the high stakes often involved in the creation of aid measures, political representatives could be reluctant to build administrative capacity or comply with supranational rules.\(^\text{104}\) This puts national state aid experts in a delicate position: since they primarily serve their national principals, they are unlikely to either disclose internal issues in supranational networks or to force domestic application of knowledge developed therein.\(^\text{105}\) Unsurprisingly, effects on domestic capacity are still difficult to pin-point. As the Commission recently acknowledged, while well-equipped coordinating bodies were operative in some countries, others still lacked resources and expertise or had no influence on how state aid rules were executed.\(^\text{106}\)

To combat such centrifugal forces, scholarship on EU governance supports creation of reputational mechanisms – such as reporting obligations, review panels and scrutiny by peers.\(^\text{107}\) Although unambiguous and conclusive evidence of their effects is lacking,\(^\text{108}\) these network-level instruments may stimulate better coordination and achievement of common purposes across participants, in much the same fashion as ‘new governance methods’.\(^\text{109}\)

Yet, the working groups introduced with SAM do not make systematic use of any such mechanisms needed to trigger inter-administrative accountability. As their description confirms, the existing networks intend to circulate interpretative guidance, present best practices and generate collective knowledge on shared problems.\(^\text{110}\) While expert exchanges and feedback might at times occur, they take the form of advice or recommendations provided upon demand and in ad hoc meetings.\(^\text{111}\) Moreover, not only are the discussions confidential, but the most delicate issues of internal control are debated only at the transnational level. As such, while being a potentially effective method of exchanging information, pooling expertise and enhancing dialogue due to ‘professionalisation’ and other normative

\(^{102}\) The organisational type of competition authority is adopted in the following member states: CY, CZ, DNK, HU, LT, PL, PT, RO, SLO, SK. For the other countries, internal coordination is entrusted to different ministries. For an overview of the national contact points see http://ec.europa.eu/competition/state_aid/overview/contacts.html.

\(^{103}\) See supra n 33.

\(^{104}\) M. Egeberg and J. Trondal, ‘National Agencies in the European Administrative Space: Government Driven, Commission Driven or Networked?’ (2009) 4 Public Administration 779, 781.

\(^{105}\) See in this sense the conclusions of Smismans’ case study on implementation of occupational and safety standards in Member States, where national administrations have been found to be cautious in sharing information with the Commission (S. Smismans, ‘Towards a New Community Strategy on Health and Safety at Work? Caught in the Institutional Web of Soft Procedures’ (2003) 19 International Journal of Comparative Labour Law and Industrial Relations 70).

\(^{106}\) Speech of Director-General Laitenberger of DG Comp, ‘State aid modernisation’, supra n 68.

\(^{107}\) See especially in this sense M. Maggetti and F. Giglardi, ‘Network Governance’, supra n 80.

\(^{108}\) R. Kelemen and A. Tarrant, ‘The Political Foundations of the Eurocracy’, (2011) 5 West European Politics 922–947; M. Thatcher and D. Coen (2008) ‘Reshaping European Regulatory Space: an Evolutionary Analysis’, (2008) 4 Western European Politics 806–836. Some authors showed also that networks involving EU and national administrations is likely to produce uneven outcomes across Member States (see M. Martens, ‘Administrative Integration through the Back Door? The Role and Influence of the European Commission in Transgovernmental Networks within the Environmental Policy Field’, (2008) 5 European Integration 635–651; M. Hobolt and D. S. Martinsen, ‘Transgovernmental Networks in the European Union’, supra n 84, 1406–1424).

\(^{109}\) New modes of governance are those mechanisms which depart from the traditional ‘Community method’ of regulation through legislation and rely instead on voluntary performance standards to reach policy goals (see among the vast literature on the topic J. Scott and D. Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the European Union’, (2002) 1 European Law Journal 1–18). An example of new mode of governance is the open method of coordination (OMC), a governance instrument that operates through Member States agreeing on common targets and guidelines, and which relies on regular monitoring of progress to compare Member States’ efforts to meet those targets. On the lack of conclusive evidence on OMC’s effects see C. de la Porte and P. Pochet, ‘Why and How (still) Study the Open Method of Co-ordination (OMC)?’, (2012) 22 Journal of European Social Policy 340–344.

\(^{110}\) According to the Commission’s common state aid action plan 2017–2018 ‘Strengthening Administrative Capacity for the Management’ (supra n 93), visits, seminars and exchanges organised by the Commission involve presentation either of how rules should be intended on specific topics or on good practices already implemented in other Member States.

\(^{111}\) Ibid
pressures created across peers. A second problem relates to the extended effects of the multilateral networks within individual Member States. Indeed, SAM networks rely on domestic experts’ capacities to diffuse the knowledge developed to other national administrations and steer their administrative behaviours. The Commission’s exclusive competences, however, may seriously hamper such capacity. This risk is particularly notable regarding domestic experts’ support-giving and account-giving roles.

Firstly, since the Commission’s exclusive competence means that only its centralised control may give legal certainty on how rules are to be applied, national state aid experts might find it difficult to support activities and solve complex implementation issues faced by other ‘generalist’ officials. Knowledge developed in supranational networks and transferred through national state aid experts offer mere guidance on the most desirable course of action on general issues, but it provides no conclusive solutions. A recent study on how municipal authorities perceived state aid law in the Netherlands uncovered this effect and the associated risks. In a country where internal controls are limited and rules-awareness is unevenly distributed, subnational grantors indicated that, when faced with implementation issues, they often withdrew provisions or sought advice outside the coordination bodies in the domestic arena. This problem appears common across countries, as the Commission recently acknowledged the persistence of disparities in knowledge between central and local government levels, regardless of whether or not a country was centralised.

Secondly, due to the centralised architecture and exclusive powers of the Commission, national state aid experts might fail to block allegedly unlawful provisions if other authorities dispute their understanding of state aid rules. The largely discussed Vent De Colère case offers a fitting example. Despite the advice of other national actors and a first preliminary ruling of the Court of Justice, the French Ministry of Environment long refused to execute state aid law correctly, until several additional EU courts and national judicial decisions imposed it to recover illegal state aid. This case, like political blockages in other countries, demonstrates that national administrations cannot resolve episodes of faulty implementation with steering and persuasion alone.

In essence, both limitations show that the correct functioning of the network governance created with SAM places a high premium on inter-administrative coordination and cooperation. However, these cannot be taken for granted, due to constitutional constraints and the likely interference of opposing forces. In light of these limitations, a word of caution seems warranted on the generalised effect of multilateral networks to fill the implementation gap in the field of state aid.

112I, Maher, ‘Functional and Normative Delegation to Non‐Majoritarian Institutions: The case of the European Competition Network’, (2009) 7 Comparative European Politics 414, 428; C. Scott, ‘Accountability in the Regulatory State’, (2000) 1 Journal of Law and Society 38–40.
113See the report for the Dutch Ministry for the Interior and Europa Decentraal by P. Zwaan, ‘Onbekend maakt onbemind? Een verkenning van de toepassing van EU‐staatssteunregels door Nederlandse gemeenten’ (2018), available at https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2018/06/01/onbekend‐maakt‐onbemind/Onbekend‐maakt‐onbemind‐FINAL.pdf. For a brief summary of the report in English see https://www.ru.nl/nsm/imr/ourresearch/projects/selected‐projects/municipal‐struggle‐european‐state‐aid‐rules/.
114Speech of Director‐General Laitenberger of DG Comp, ‘State aid modernisation’, supra n 68.
115The cases involved the qualification of levies imposed on electricity consumers through ministerial orders to compensate for the extra costs incurred by electricity distributors as state aid to producers of electricity from renewable resources and especially wind farms. The French Council of State in 2014 invalidated a first ministerial order after the Court of Justice (Case C‐262/12 Vent De Colère and Others, ECLI:EU:C:2013:851), to which a preliminary question was referred, concluded that the French support for the production of electricity from offshore wind installations involved state aid within the meaning of EU rules. A similar case on an analogous non‐notified measure was later referred to the Court of Justice by the Versailles Court of Appeal. By an order dated 15 March 2017 (C‐515/16 Enedis, ECLI:EU:C:2017:217), the Court of Justice considered that the measure at issue was the same as the one that gave rise to the Case C‐262/12. By analogy, it concluded that Article 107(1) of TFEU must be interpreted as meaning that a mechanism for offsetting the additional costs imposed on undertakings because of an obligation to purchase electricity produced by power plants using solar radiative energy at a higher price than the market price that is financed by final consumers of electricity in the national territory, constitutes an intervention through state resources.
116See in this sense the well‐known internal discussion connected to the aid provided by the Land of Saxony to Volkswagen. E. Thielemann, ‘Institutional limits of a “Europe with the Regions”: EC State‐Aid Control meets German Federalism’, (1999) 6 Journal of European Public Policy 399–418.
117E. Mastenbroek and D. Sindbjerg Martinsen, ‘Filling the Gap in the European Administrative Space’, supra n 89.
3.3 | Emergence of bilateral partnerships to strengthen domestic state aid control

As in other branches of EU law, execution of state aid law imposes great demands on internal coordination and capacity. With SAM, the Commission has concluded bilateral strengthened partnerships with national authorities to address this point.\(^\text{118}\) This tool of EU governance is generally used to agree on solutions to country-specific needs linked to implementation of EU law.\(^\text{119}\) By involving local stakeholders in a deliberative process that safeguards subsidiarity and national procedural autonomy, the instrument is presumed to garner a higher degree of acceptability within national authorities. At the same time, it enables the Commission to reinforce its position as executive centre and to target structural problems.

The Commission has signed formal non-binding agreements – ‘common understandings’ – with the central coordination bodies of Italy, Romania and Bulgaria, among others.\(^\text{120}\) Though normally entailing opaque forms of elite negotiation, the document signed with the Italian authorities was published, likely in an effort by the national government to show commitment and gain legitimacy.\(^\text{121}\) As such, it provides precious evidence of the expected effects of this strategy.\(^\text{122}\)

A closer look at the Commission’s common understanding with Italy suggests its potential value as an addition to the Commission’s toolbox. First, following the observation that efficient coordination and a high level of expertise have prevented implementation mistakes and delays in other countries, the Italian Department of European Affairs (DPE) is assigned a general coordinating role in the state aid field.\(^\text{123}\) As such, this body now supervises the completeness of all notifications and communications passed on to the Commission and provides advice and training to all aid grantors. In this pivotal position, DPE is assisted by the Commission’s introduction of a new formal step in its electronic notification system.\(^\text{124}\) Second, the common understanding presents a checklist to help domestic authorities identify potential state aid components in national provisions. This incorporates elements of procedures deployed in the UK and the Italian Friuli Region.\(^\text{125}\) Third, to complement the existing network of national state aid contact points,\(^\text{126}\) each regional authority and national ministry is urged to set up a distinct body to assess the preparation of aid measures with some degree of independence from the granting administration.\(^\text{127}\)

The arrangement thus conveys the Commission’s clear normative idea that an effective setup for state aid control would

\(^{118}\)According to a presentation made by an official of the Commission in 2017, the Commission has concluded structured dialogue with 3 Member States, tailor-made cooperation with 9 of them and a case-driven cooperation with Czech Republic (see http://www.uohs.cz/download/Konference_a_seminare/Konference-VP_kveten-2017/Da-Costa-Graca-SAM-after-3-years-final.pptx); While most of these partnerships are mainly focused on cases (oftentimes to co-define on which cases the Commission will give the priority in its investigation), the peculiarity of the partnership concluded with the Italian authorities is that the agreement was especially aimed at structuring internal administrative capacity.

\(^{119}\)See C. Harlow and R. Rawlings, Process and Procedure, supra n 34, 173-179.

\(^{120}\)Speech by Margrethe Vestager, Commissioner for Competition, at High Level Forum of Member States, 18 December 2014, available at https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/speech-high-level-forum-member-states-margrethe-vestager-commissioner-competition-18-december-2014.en.

\(^{121}\)This represents an educated guess of the author in light of Italy’s history of suffering duplication of roles at the central level and the fact that, during the same period of the common understanding, the country was involved in complex negotiations with the Commission to address the recent banking crisis and comply with the ex ante conditionalities. On the complex task of ensuring coordination in the implementation of EU law in Italy see G. Della Cananea, ‘Italy’, in H. Kassim, B. G. Peters, V. Wright (eds) The National Co-ordination of EU Policy: The Domestic Level (Oxford University Press, 2000) 99. Specifically, in the field of state aid, see C. Schepisi, ‘The Effective Application of State Aid Procedures in Italy’, in P. Nemitz (ed), The Effective Application of EU State Aid Procedures: The Role of National Law and Practice (Kluwer, 2007) 261.

\(^{122}\)See the common understanding on strengthening the institutional setup for state aid control in Italy published in the Commission’s website, http://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/speech-high-level-forum-member-states-margrethe-vestager-commissioner-competition-18-december-2014.en.

\(^{123}\)See the common understanding on strengthening the institutional setup for state aid control in Italy published in the Commission’s website, supra n 122, 3–4.

\(^{124}\)See checklist that, pursuant to Article 45 of Italian law n. 234/2012, each national administration must pass on to the DPE when notifying a measure, http://www.politicheeuropee.gov.it/media/3406/common-understanding_scheda.pdf.

\(^{125}\)Art 55 Italian Law 234/2012.

\(^{126}\)See checklist that, pursuant to Article 45 of Italian law n. 234/2012, each national administration must pass on to the DPE when notifying a measure, http://www.politicheeuropee.gov.it/media/3406/common-understanding_scheda.pdf.
should consist of a polycentric network of national state aid experts that assist and monitor any potential focus of domestic incompliance.\(^{128}\)

Despite these positive effects, however, questions arise as to whether this tool is sufficient to build in-house capacity and control implementation at the national level. A first problem is that the goal to strengthen internal capacity might face national resistance and constitutional constraints. Being deployed to influence an area covered by national procedural autonomy, partnership agreements aimed at building domestic capacities depend on the goodwill and voluntary cooperation of national authorities. As empirical evidence corroborates, these factors vary widely across Member States.\(^{129}\) Although the possibility is open to all countries, and compliance performance suggests that many Member States do face serious implementation issues,\(^{130}\) partnership agreements have been concluded only with a few authorities prepared to accept the Commission’s assistance. Moreover, as domestic constitutions usually protect the right to self-organise of national and subnational administrations, the arrangement may fall short in influencing each individual grantor within the signatory Member State. For instance, although capable of providing aid, the national parliament, private bodies and municipal authorities are not mentioned in the partnership agreement signed with the DPE\(^{131}\) as much as the newly established Agency for the Territorial Cohesion, which is entrusted to coordinate implementation of EU cohesion policy.\(^{132}\) Similarly, a recent study of the effects of the common understanding signed with the Italian authorities points to still-asymmetric resources, expertise and practices to implement state aid law across regional authorities and national ministries.\(^{133}\) Because state aid rules have a wide scope that potentially cuts across any domestic provision of public money, these limitations could hamper the effects of strengthened partnership in structuring domestic capacity.

A second problem is that, due to the Commission’s exclusive competence, the domestic polycentric network of national state aid experts might have limited practical influence in controlling rules application at the domestic level. In the Italian system, this weakness is particularly evident. The DPE recently observed that, while all regional and national administrations ultimately set up internal capacity to implement the rules, the functioning of the arrangement was watered-down by the reluctance of some granting authorities to submit measures to the control of their own bodies.\(^{134}\) At the same time, inter-administrative checks at the national level might also be weak. For example, until recently, the Italian Ministry of Cultural Heritage and Activities and Tourism considered provisions to cultural activities as no-aid, even though they may entail the exercise of an economic activity and, as such, fall within state aid rules.\(^{135}\) To combat the ministry’s persistent refusal to notify, some regions – which, according to the internal constitutional arrangement, are allowed to grant aid in a policy field pursuant to a national statute\(^{136}\) – had no other option than to notify these measures to the Commission on the ministry’s behalf. While this choice ultimately allowed

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\(^{128}\)This overall idea also strongly emerges in the Commission’s common state aid action plan 2017–2018 ‘Strengthening Administrative Capacity for the Management’ ( supra n 93), where the Commission concludes that ‘well functional information dissemination systems, networking, working groups are essential to ensure compliance with State aid rules and procedures’.

\(^{129}\)On the effects of compliance-promoting instruments in other areas of EU law, see the report to the European Parliament on the topic of Ballesteros et al., Tools for Ensuring Implementation and Application of EU Law and Evaluation of the Effectiveness (EP, 2013) 33–34.

\(^{130}\)According to the latest update of DG Comp on the number of pending recovery cases (until 1 March 2018), Italy ranked first among EU countries (with 23 cases). However, other Member States not directly addressed by the Commission also seem to display internal implementation issues, such as Spain (17), France (11) or Belgium (5). The same conclusion may be drawn, in the field of ESI funds, from the European Court of Auditors’ investigation of state aid across regional authorities and national ministries.\(^{133}\) Because state aid rules have a wide scope that potentially cuts across any domestic provision of public money, these limitations could hamper the effects of strengthened partnership in structuring domestic capacity.

\(^{131}\)On measures of the Parliament and state aid see the recent analysis by the National Anti-Corruption Authority in Italy on some measures introduced with the Budget Bill 2018 (Art 1, sub 1087 of Italian Law 205/2017) available at: http://www.anticorruzione.it/portal/public/classic/AttivitaAutorita/AttriDellAutorita/_Atto?ca=7211.

\(^{132}\)Art 10 Italian Law Decree 101/2013.

\(^{133}\)P. Grizzo and E. Prosperi, ‘L’Attuazione del Common Understanding negli Ordinamenti Regionali’, (2017) Regioni.it 83.

\(^{134}\)See the Note of the Prime Minister’s Office of 21 February 2018.

\(^{135}\)See in this regard the Commission Notice on the Notion of State Aid, supra n 51, paras 33–37. See also the note of the Ministry of Cultural Heritage and Activities and Tourism on the meeting between the then-Minister and the EU Commissioner for Competition (available at http://www.beniculturali.it/mbac/export/MBAC/site-MBAC/Contenti/mbacUniti/Comunicati/visualizza_asset.html_1351979340.html).

\(^{136}\)Article 117, para 2 It Const. See the position paper of the Conference of Italian Regions, 6 June 2012, available at http://ec.europa.eu/competition/consultations/2012_state_aid_films/italian_regions_it.pdf.
the subsidy to be granted, it shows that duplication of control at the national level could fail to secure correct rule application and that the Commission could end up acting as an external mediator in domestic clashes. This is not necessarily a positive development in view of the Commission’s limited resources and the goals of SAM. Since the polycentric control system set out in the agreement with the Italian authorities is shared with other countries, its widespread promotion as best practice in domestic state aid control appears problematic at best.

3.4 Ex ante conditionalities for ESI funds: Modelling domestic state aid control from the back door

As in many post-crisis EU reforms, the Commission has tried to enhance domestic capacities in state aid through a more intrusive mechanism of administrative integration. To improve the effectiveness and efficiency of EU structural and investment funds (ESI funds), a type of subsidy that may entail application of state aid rules, the 2013 budget reform imposed the conditionality principle on their use. Accordingly, payment of ESI funds is subject to a massive package of spending requirements — or ex ante conditionalities — which national authorities must fulfil. Since state aid law has been the largest source of mistakes, Member States are now requested to give evidence that national authorities have sufficient administrative capacity to execute state aid rules, as well as measures in place for staff training, information dissemination and effective application of the legal framework.

The logic of conditionality is not new in the EU legal system, nor is it novel for state aid control. During the enlargement process, conditionality served as a proxy to expand the acquis to Central and Eastern European countries and to induce them to adjust their administrative structures for EU membership, also in regard to state aid control. The new ESI funding rules, however, relaunch spending conditionalities as a stand-alone governance tool to address structural deficiencies in implementation of EU policies connected to ESI funds. By requiring Member States to demonstrate administrative capacity under the threat of funding de-commitment, the Commission has deployed this tool as tin-opener to directly influence Member States’ executive activities. At the same time, the principle of partnership, entailing that all actors must cooperate to make the policy work, brings the benefit of negotiation and better-targeted solutions. Insofar as conditionalities combine the soft techniques of framework goals and deliberation with a stronger contractual logic, they seem to add a coercive edge to the mechanisms of integration discussed above.

Given these characteristics, ex ante conditionalities look set to enhance the effectiveness of state aid control in the area of ESI funding. Although the threat of funding de-commitment has yet to be tested, the partnership agreements do encourage transparency on the institutional capacities available for internal state aid control. In addition, Member States that lag in this regard have been pushed to elaborate institutional changes to catch up with others.

137A. Sinnaeve, 'State Aid Procedures: Developments since the Entry into Force of the Procedural Regulation' (2007) 44 Common Market Law Review 965, 980.
138Point 21, Reg 1303/2013.
139Article 19, Reg 1303/2013.
140See European Court of Auditors’ investigation of state aid control in EU cohesion policy (More Efforts Needed, supra n 87, paras 32–51).
141See ‘Guidance Fiche: Guidance on ex ante Conditionalities for the European Structural and Investment Funds. Part II’, 376–382 (http://ec.europa.eu/regional_policy/sources/docgener/informat/2014/eac_guidance_esif_part2_en.pdf).
142C. Harlow and R. Rawlings, Process and Procedure, supra n 34, 229–236; R. Bieber and F. Maiani, ‘Enhancing Centralized Enforcement of EU Law: Pandora’s Toolbox?’ (2014), 51 Common Market Law Review 1080; V. Vitti, ‘Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality’ (2017) Cambridge Yearbook of European Legal Studies 116–143.
143M. Cremona, ‘State Aid Control: Substance and Procedure in the Europe Agreements and the Stabilisation and Association Agreements’ (2003) 3 European Law Journal 265–287.
144M. Botta and G. Schwellnus, ‘Enforcing State Aid Rules in EU Candidate Countries: A Qualitative Comparative Analysis of the Direct and Indirect Effects of Conditionality’, (2015) 3 Journal of European Public Policy 22 335–352.
145C. Harlow and R. Rawlings, Process and Procedure, supra n 34, 230–234.
146See the European Court of Auditors’ investigation on the state aid control in EU cohesion policy (More Efforts Needed, supra n 87, paras 108–129).
In practice, the ex ante conditionalities appear to have extended to all institutions providing ESI funds a model of administrative governance entailing dispersed capacities and effective structures similar to those furthered in the strengthened partnerships seen above.\textsuperscript{147}

The challenge, however, is to verify to what extent an interfering tool like spending conditionality can influence the architecture of state aid control. In this regard, it may be noted that practical issues and constitutional constraints will likely impose limitations on their effectiveness.

First, empirical evidence shows that, like softer governance instruments, execution of conditionality depends on cooperation by Member States and adequate checks by the Commission.\textsuperscript{148} Both elements, however, might be missing. Some national and subnational institutions have been remiss in duly fulfilling their commitments to the Commission,\textsuperscript{149} also due to the substantial investments of time and resources required, which are not easy to secure in a context of austerity.\textsuperscript{150} At the same time, the EU Court of Auditors recently noted that, as compliance with the ex ante conditionalities was based on self-assessment by Member States and the Commission had been ineffective in assessing the information provided, national administrations displaying severe problems in application of state aid law had not been duly addressed.\textsuperscript{151}

Second, questions arise regarding the scope of the conditionalities. A relatively small share of domestic aid grantors is required to exhibit their administrative capacity in order to grant ESI funds. In some countries, such as Italy, the Netherlands and Portugal, these operate only in ESI funding.\textsuperscript{152} The problem is that constitutional constraints may also limit the effects of the conditionality instruments. While their constitutionality has yet to be tested, there is a tendency towards restrictive interpretation of conditions. When imposed by the EU institutions, a sufficiently direct link must be shown between the extended use of conditionality as a generalised governance tool to strengthen the condition itself and the measure to be funded.\textsuperscript{153} In this regard, it may be noted that the use of conditionality for ESI funding is legally based on Article 317 TFEU. Pursuant to that provision, the Commission is directly responsible for implementation of the budget, and it executes this responsibility in accordance with rules adopted by the EU Parliament. As such, the Commission appears legitimised in imposing conditions linked to ESI funding. As observed by Craig, administrative resource allocation and legislative choices indeed have marked impact on the effectiveness of cohesion policy.\textsuperscript{154} Yet, outside the realm of ESI funds, generalised use of conditions seems legally dubious. Conditionalities, after all, raise suspicion of excessive intrusion in spheres protected by the principle

\textsuperscript{147} European Commission, The Implementation of the Provisions in Relation to the Ex-Ante Conditionalities During the Programming Phase of the European Structural and Investment (ESI) Funds (2016) Final Report, 41.

\textsuperscript{148} See in this sense the discussions held during the EU High Level Group meeting on post-2020 reform of shared management of ESI funds (available at: https://ec.europa.eu/futurium/en/content/seventh-meeting-high-level-group-focus-post-2020). The Commission and other stakeholders acknowledged that conditionalities have been interpreted and implemented by Member States as formal check list, with marginal policy outputs. In a similar fashion, while carrying out an external audit on compliance with state aid rules in cohesion policy, the European Court of Auditors (‘More Efforts Needed’, supra n 87, paras 101–105) concluded that the Commission should have made a more active and effective use of available information to target countries that, albeit formally fulfilling all conditionalities in the field, displayed most problems in the implementation of state aid law. Academic work on the practical effects of conditionalities supports this conclusion. Comparing the compliance record of Eastern European countries with state aid law before and after accession to the EU, Blauberger (‘Compliance with Rule of Negative Integration’, supra n 6, 1035–1043) found that accession conditionality alone is weak to force Member States into compliance, while external incentive structures in the form of Commission’s constant control are necessary to change the national behaviour in the area. These results confirmed the more general findings of Schimmelfennig and Sedelmeier (F. Schimmelfennig and U. Sedelmeier, ‘Governance by Conditional: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe’, (2004) 4 Journal of European Public Policy 661–679), who conclude that conditionality is likely to foster mere formal compliance to EU policies rather than behavioural rule adoption.

\textsuperscript{149} Ibid, 26–27.

\textsuperscript{150} Ibid, 9–10.

\textsuperscript{151} See the European Court of Auditors’ investigation of state aid control in EU cohesion policy (‘More Efforts Needed’, supra n 87, paras 101–105).

\textsuperscript{152} While in Italy the managing authorities are the regional institutions established in the constitution, in the Netherlands and in Portugal they comprise respectively only 5 and 11 authorities created ad hoc to grant cohesion funds.

\textsuperscript{153} Case C-385/13 P, Italian République v European Commission, ECLI:EU:C:2014:2350, para 84. See on this V. Viță, ‘Revisiting the dominant discourse’, supra n 142, 137–139.

\textsuperscript{154} P. Craig, ‘Shared Administration, Disbursement of Community Funds and the Regulatory State’, in H. Hofmann and A. Turk (eds), Legal Challenges in EU Administrative Law: Towards an Integrated Administration (Edward Elgar Publishing, 2009), 36–38.
of national administrative autonomy. As often recognised by the EU institutions, the Commission has no competence in local execution of state aid law, since this falls within the exclusive responsibilities of the Member States. Moreover, outside ESI funding, no same sufficient link is identifiable between the conditions imposed and measures financed, due to lack of EU co-funding.

Therefore, while the Commission has tried to introduce intrusive administrative conditions impinging on state aid law, it has done so via the back door of ESI funding and has faced numerous limitations.

4 | TOWARDS A MULTI-SPEED STATE AID CONTROL: WILL THE CENTRE HOLD?

The thrust of the argument in the previous section is that the institutional configuration of state aid control changes pursuant to SAM. To allow the Commission to focus on bigger cases, the centralised architecture, based on hierarchical control and integration through law, has been supplemented by a complex web of mechanisms of administrative integration aiming to support rules application, develop capacity and structure coherent mechanisms of control. State aid thus seems akin to other fields of EU law where implementation is characterised by intense cooperation across EU and national actors. Yet, this analysis would also suggest that, in response to the structural problems emerging from the reorganisation process, SAM may be conducive to two deeper and apparently conflicting implications: increased supranational influence and emergence of a multi-speed administrative space.

4.1 | Divide et impera: Extended supranational influence across a decentralised architecture

Based on the above-discussed elements, the Commission appears with SAM to have extended its influence in the area of state aid. Its primary function as rule enforcer has been extended to include managerial tasks. These serve to integrate the dense network of domestic actors that now have broader responsibility for state aid control. In this new role, the Commission promotes policy discussion and information sharing to solve implementation problems. To create common understandings of key legal concepts and reduce centralised control, it uses administrative rulemaking beyond the traditional purpose of streamlining the exercise of its discretionary powers. Finally, by bargaining commitments of different intensity, it plays a decisive role in structuring the in-house capacity and control mechanisms of Member States, once areas considered outside its influence.

This leading role has been facilitated by the close cooperation created with national state aid experts. By establishing relatively tight connections and regular contacts, the Commission has de facto co-opted them as agents to ensure even implementation of EU rules throughout the decentralised and fragmented architecture. As a consequence, civil servants specialised in state aid law can nowadays be identified in all Member States. Albeit without the same legal powers and effects, they appear in principle capable of supplementing the Commission in each national system. In this role, in addition to implementing the supranational rules, they channel information, support and at times supervise behaviours of other authorities.

Overall, this has spurred emergence of a transnational epistemic community of state aid experts. Through their constant interaction, the Commission and Member States are developing a common mentality on how state aid rules

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155 M. Vaerini and R. Bieber, ‘Implementation and Compliance as Stimulus of New Governance Structures in the Accession Countries’, in G. Bermann and K. Pistor (eds) Law and Governance in an Enlarged European Union (Hart Publishing, 2004) 387–413.

156 J. Trondal and B. Peters, ‘The Rise of European Administrative Space: Lessons Learned’, (2013) 2 Journal of European Public Policy, 295; E. G. Heidbreder, ‘Structuring the European Administrative Space. Policy Instruments of Multi-level Administration’, (2011) 5 Journal of European Public Policy 709.

157 See list of EU and national state aid contact points: http://ec.europa.eu/competition/state_aid/overview/contacts.html.

158 According to Haas, ‘Epistemic Communities and International Policy Coordination’, (1992) 46 International Organization 3, an epistemic community is made up of experts sharing sets of normative and principled beliefs as well as causal beliefs and objective notions of validity, and belonging to a common policy enterprise. For an analysis of the role of an epistemic community in competition policies, see F. van Woeren and M. Draho, ‘Courts and Epistemic Communities in the Convergence of Competition Policies’, (2002) 9 Journal of European Public Policy 913, 928–934; F. Cengiz (2010), ‘Multi-level Governance in Competition Policy, supra n 95, 661.
should be executed across the EU. Furthermore, each is becoming more aware of how others operate. This effect—at least on paper—should help prevent and target implementation problems, as well as stimulate learning. Finally, this epistemic community appears to have penetrated beneath the surface of the central administration to reach local actors. Staff dealing with state aid policy in numerous Member States indeed maintain intense communication through a web of horizontal and vertical connections involving networks, newsletters, databases and informal contacts.

In practice, then, a long chain of integrated administrative structures seems to be emerging. These form an essential backbone to enable the new architecture to work. Yet, this structure is not based on a ‘flat hierarchy’. Rather, it resembles an administrative pyramid with a clearly distinguishable top. Given the exclusive competence retained in this area, the Commission has a clear interest in operating as the infrastructure’s main facilitator, in stimulating collective learning and in assisting implementation of EU rules, as well as in combining these activities with its traditional binding powers and the new conditionality approach.

To offset the structural problems that the reorganisation of state aid control may generate, a balance seems to have been found in a strengthened role for the Commission as executive centre in the area. This runs somewhat counter to the policy design pursued by SAM. As noted earlier, an initial goal of the package was to re-orient the Commission’s control to the most relevant cases. Somewhat counterintuitively, the new architecture has produced more Commission interference in national activities in the field. Unsurprisingly, this evolution has increased the administrative burden and added internal complexities at the Commission level. Yet, when considered in light of the field’s rigid division of competences, it materialises as an extraordinary coup by the Commission, almost tantamount to the consequences produced by the modernisation of EU antitrust law.

4.2 Administrative integration running amok and risks to the integrity of the internal market

The SAM package seems nonetheless to struggle in holding the whole administrative architecture together. Conflicitive forces and constitutional restraints risk limiting cooperation and coordination between national and EU administrations to address the abovementioned structural problems emerging from SAM. In such circumstances, a multi-speed administrative space seems to be emerging. That is, different levels of integration may be observed across the administrations involved in application of state aid law.

The idea of a multi-speed – or flexible or variable geometry – EU was recently relaunched as a possible EU future scenario. Roughly speaking, this means that the Union would embrace greater differentiation between Member States in degree of integration. In EU policymaking, this implies that Member States could opt out of common policies, select areas for enhanced cooperation and conclude international conventions with a restricted group of countries. A slightly analogous process is observable in the after-crisis reforms of the EU administration.

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159 The example of the Notice on the notion of aid discussed in section 3.1 is an illustrative one in this sense.
160 S. Wilks, ‘Agency escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?’, (2005) 3 Governance 431, 437–447; E. Versluis and E. Tarr ‘Improving Compliance with European Union Law via Agencies: The Case of the European Railway Agency’, (2013) 2 Journal of Common Market Studies 316.
161 See supra n 97.
162 As stressed by Director-General Laitenberger of DG Comp, ‘State aid modernisation’, supra n 68, the Commission is now involved in ‘assist[ing] the implementation at national level, especially by clarifying the implications of the rules and working towards consistent application,’ and also in ‘facilitat[ing] the exchange of best practices’.
163 S. Wilks, ‘Agency Escape’, supra n 160, 437.
164 See ‘White paper’, supra n 4, 20–21.
165 For an overview, see B. de Witte, ‘Five Years after the Lisbon Treaty’s Entry into Force: Variable Geometry Running Wild?’, (2015) 1 Maastricht Journal of European and Comparative Law 3; B. de Witte, A. Ott and E. Vos (eds) Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law (Edward Elgar Publishing, 2017); B. de Witte, D. Hanf and E. Vos (eds), The Many Faces of Differentiation in EU Law (Intersentia, 2001); G. de Búrca and J. Scott, Constitutional Change in the EU: From Uniformity to Flexibility (Hart Publishing, 2000).
example, in the SSM different administrative arrangements are emerging applicable to different groups of countries, beyond the cross-sectoral variation of administrative techniques typical of the EU administrative system.\footnote{166See in this sense E. Chiti, ‘In the Aftermath of the Crisis’, supra n 67, 318–322; C. Harlow and R. Rawlings, Process and Procedure, supra n 34, 292–294.}

In the field of state aid, a similar pattern of variable integration seems to be emerging, as the remits of some of the mechanisms described above allow links with only a subset of the actors involved in state aid law implementation. In addition, however, a multi-speed administrative space seems to arise from the uneven effects that the linking tools established with SAM could generate across the whole fragmented architecture. The potential consequence is twofold. Although beneficial for targeting specific problems and circumventing constitutional limitations, administrative integration at variable geometry might endanger the correct operation of state aid control by furthering development of inadequate implementation structures, different understandings of rules and malfunctioning accountability systems. Let us discuss each instance of differentiated integration and its effects on the post-SAM decentralised activities of state aid control.

As indicated, the reform design pursued by the Commission requires adequate implementation instruments be internally developed. This means that although the principles of proportionality and national procedural autonomy allow accommodation of structural heterogeneity across domestic administrations, a minimum degree of uniformity must be ensured in implementation mechanisms throughout the relevant administrations. Yet, while being created for this purpose, the instruments of integration established with SAM face limitations in achieving this goal.

First, though they are both helpful to reinforce internal structures, as discussed, administrative networks, strengthened partnerships and spending conditionalities rely on voluntary and correct implementation by the EU administrations involved. This could however give way to lack of cooperation or incompliance of domestic actors, as well as to lack of adequate control by the Commission. Those risks are substantial, given the long chain of actors whose activities are needed to give effect to the supranational provisions after SAM. Because the Commission normally interacts with only one or a few national representatives, and the latter lack competences or capacity to build up the implementation structures of other aid grantors, some actors risk failing to shape adequate internal capacity.

Second, legal constraints could limit the scope of some of the tools created to tackle country-specific implementation problems. As noted, such invasive instruments as ex ante conditionalities can be applied only in the area of ESI funds. Of course, this reform may be beneficial to build up capacity in a sector where application of state aid law has traditionally been problematic. Yet, authorities involved in ESI funds represent a small share of the national executives tasked to implement state aid law, and the reform cannot be extended beyond this. Furthermore, strengthened partnerships to improve the domestic setup have been established with only a few Member States willing to cooperate more closely with the Commission. Yet, as discussed, figures on pending recovery decisions and Commission investigations suggest that other national authorities should also have been targeted by the Commission. Ultimately, a cluttered administrative infrastructure seems to be emerging with gaps whereby uneven application is a likely consequence.

Similarly, although created to generate common understanding of how state aid rules must be applied in concrete cases, we cannot take for granted widespread effects of the administrative networks and the Notice throughout the fragmented system. Due to the intricate division of competences, knowledge produced through these instruments is non-binding and requires always an interpretative effort to be implemented. This leaves uniform application of state aid rules reliant on goodwill and effective coordination across domestic administrations. These conditions could be weakened, however, by conflicting interests or lack of involvement. This possibility is confirmed by preliminary evidence: while ultimately accomplishing the goal that at least 90% of aid measures be granted by Member States directly, SAM seems to have made little progress in raising the level of compliance in state aid law across national administrations.\footnote{167Speech by Director-General Laitenberger of DG Comp, ‘State aid modernisation’, supra n 68.} An additional problem is generated by the ambiguous use of administrative rules made by the Commission to clarify the notion of aid. As the notion is in constant evolution and is interpreted in a rather intricate chain of control, the Commission’s ambition to use the Notice to assist domestic authorities and ensure uniform
application of rules could be weakened. Ultimately, different interpretations developed by the EU Courts or an imperfect application of national administrations might generate incompliance and negatively affect the legal certainty that private recipients need.

Finally, an analogous pattern may be emerging across the domestic actors established to supervise other actors in the area. Through partnership agreements, ex ante conditionalities and networks, the Commission has tried to establish a vast polycentric network of state aid experts that can supervise provisions granted by other domestic institutions. Yet, while definitely representing a step towards ensuring widespread checks on the application of rules, these instruments could fail to add up to a fully integrated accountability system. As demonstrated by the earlier-mentioned examples, national state aid experts might fail to apply supranational rules correctly themselves. Or they might fail to prevent other national administrations from misapplication, due to their lack of powers or limited capacities to address implementation failures. Either way, the integrated functioning of the EAS might be hampered, opening leeway for uneven application of rules.

The challenge here is that other systems of accountability can hardly fill these gaps. First, to refocus its centralised control on bigger cases pursuant to SAM’s ambitions, the Commission offers non-binding guidance to assist national actors in their exercise of domestic tasks.168 This has dubious legal value and effect, however, as it represents a mere prima facie assessment.169 Since Commission monitoring of national measures is also limited and horizontal accountability across Member States largely underexploited, there is a risk that inter-administrative control could overlook domestic incompliance. Second, private enforcement of state aid rules is generally perceived as ineffective, because national courts often lack expertise in the area and private parties face constraints in demonstrating whether state aid law was violated.170 Despite this, SAM has left this mechanism almost untouched. Third, due to a clear information imbalance, application of state aid law is hardly discussed in national and subnational parliaments.171 In addition, although transparency has been a hallmark of SAM and the newly established register is certainly a positive step, opacity persists in how state aid law is applied at the national level in the vast majority of countries, as hardly anyone outside the administration is aware of how rules are intended and implemented in concrete measures.172 The likely result is the emergence of uncoordinated structures to hold the fragmented administration to account.

On closer inspection, each instance of differentiated integration seems to relate to the ambiguous position enjoyed by the Commission in the structures created with SAM. Though acting as an equal partner with the Member States, the Commission retains exclusive competence to enforce Article 107 TFEU vis-à-vis national executives. This role duality might imply that both sides – the Commission and national authorities – can sometimes work with each other and other times work against each other. Clearly, when negligent or obstructive behaviours overwhelm national executives’ cooperative attitudes, orderly EAS operation will be hampered. The Commission’s centralised position and exclusive competence might prove double-edged, especially for the national state aid experts that are the essential linchpin making the whole infrastructure work. While close integration with the executive centre may afford these specialised officials a privileged position to influence their national peers, it may nevertheless reduce their effectiveness in addressing internal obstacles and incompliance, since it excludes the exercise of any binding

168Comfort letters’ are soft law instruments issued upon a request from national institutions where the Commission, instead of providing a full-blown assessment, gives its opinion about whether a national measure complies with state aid law and is compatible with the internal market, based on the information issued.

169According to the interpretation of the Court of Justice, comfort letters and the analyses therein constitute merely a factor that the national court may take into account when considering whether an agreement complies with competition rules. As such, they are not binding. See joined cases 253/78 and 1 to 3/79 Procureur de la République and others v Bruno Giry and Guerlain SA and others ECCLI:EU:C:1980:188, para13 and Case 99/79 Lancôme v Etos, ECCLI:EU:C:1980:193, para 11. The limited legal effect of comfort letters is also supported by O. Stefan, European Competition Soft Law; supra n 60, 484.

170See conclusions of study on national court cases in application of state aid law: T. Jestaedt, J. Derenne, and T. Ottervanger, Study on the Enforcement of State Aid Law at National Level (Luxembourg, Office for Official Publications of the European Communities, 2006), 29, 31-54. See also F. Pastor-Merchant, The Role of Competitors in the Enforcement of State Aid Law (Hart Publishing, 2016).

171J. Lever QC, ‘Some Procedural Conundrums in State Aids Law,’ in A. Biondi, P.Eeckhout and J. Flynn, The Law of State Aid in the European Union (Oxford University Press, 2004), 304; H. Hofmann, ‘Administrative governance,’ supra n 15, 202–204.

172See in this sense the conclusions of the survey requested on the issue of transparency by the DG for Competition: EU Commission DG for Communication (ed), Eurobarometer 448: Perception and Awareness about Transparency of State Aid, (Brussels, 2016).
power at the national level. At the same time, while not being formally invested with the legal responsibility to interpret Article 107 TFEU, the Commission de facto exercises it with SAM. This however might limit the cooperation between the various administrations involved, especially when such interpretation is reversed or additional national level activities are requested to implement it. The ultimate consequence could be a breakdown of integration in the EAS, in which national authorities could ‘take back control’ on state aid measures and aid recipients could ultimately be treated unevenly. These risks were already present in the previous centralised system. Nevertheless, the new decentralised structure appears to have accentuated them, due to the combined effects of extended national responsibilities and limited supranational control.

Granted, multi-speed mechanisms of administrative integration may be advantageous and sometimes even a constitutional imperative in the area of state aid control. Not only might they afford the flexibility needed to tackle chronic issues of flawed decentralised activities, they could also provide a smart way for the Commission to make a virtue of its own constitutional competences, which may differ in scope across the policy areas in which state aid rules apply. In addition, one should not forget that subsidiarity and proportionality requirements may make heterogeneity necessary. The essential question, however, is whether the system of integration is equipped to ensure that the fragmented architecture is capable of giving effect to the common legal framework. Looking at the resulting picture, some grounded fears might arise.

In sum, while this analysis constitutes a mere initial investigation of SAM’s effects and, as such, faces inevitable limitations, it nevertheless suggests that the reform choice is not uncontroversial. SAM combines centralised control with distribution of administrative tasks across a fragmented and decentralised architecture. Constitutional constraints, problematic use of instruments of integration and doubts about commitments to a common purpose may generate tensions that hamper cooperation and coordination in the EAS. SAM might therefore struggle to integrate the components into a coherent whole. The problem is that the final outcome could be divisive and put the integrity of the internal market at risk. Indeed, state aid law was created to check distortive aid provisions and ensure a level playing field throughout the EU internal market. However, if rules are intended and implemented differently across the Member States or any of their territorial spaces, the ultimate goal of ensuring internal market integrity will be frustrated. This consequence would contravene the overall constitutional framework of the EU.

5 | CONCLUSION

This study represents a preliminary investigation of the potential effects of the complex transformations introduced with SAM. It provides an overall initial assessment of the reform based on scholarly insights, relevant legal sources and documents, and a number of examples. Once each actor gains sufficient experience in operating under the new infrastructure, the current analysis could be combined with investigations of selected case studies or longitudinal analyses on the post-reform evolution of the field. Yet, despite these limitations, the study makes some interesting observations about the potential of SAM to address the structural problems emerging from the reform process.

173 Flexibility is intended here in its procedural dimension and pertains to the capacity of the instruments of integration to accommodate diversity in the administrative architecture, while subsidiarity focuses instead on the constitutional principle that allocates responsibilities at the most adequate governance level, thereby protecting national competences. As such, both concepts differ from the understanding of fragmentation explained supra n 46. See on the relationship between differentiation in EU and principles of law G.de Búrca, ‘Legal principles as an instrument of differentiation? The principles of proportionality and subsidiarity,’ in B. de Witte, D. Hanf and E. Vos (eds), The Many Faces, supra n 165, 131.

174 S. Weatherill, The Internal Market as a Legal Concept (Oxford University Press, 2017), 9. On the room for flexibility within the EU’s internal market ‘core’, see G.de Búrca, ‘Differentiation within the “Core”: The Case of the Internal Market’, in G. De Búrca, & J. Scott (eds), Constitutional Change in the EU from Uniformity to Flexibility (Oxford Hart Publishing, 2000) 133–171; N. Bernard, ‘Flexibility in the European Single Market’, in N. Barnard and J. Scott (eds) The Law of the Single European Market: Unpacking the Premises (Hart Publishing, 2002) 101–122; N. Skoutaris, ‘Territorial Differentiation in EU Law: Can Scotland and Northern Ireland Remain in the EU and/or the Single Market?’ (2017) 19 Cambridge Yearbook of European Legal Studies 287–310.

175 On this main goal and its evolution over time see J. Piernas López, The Concept of State Aid, supra n 1.
and affected by the tension between centralisation of control, on the one hand, and decentralisation and fragmenta-
tion of administrative tasks, on the other.

With SAM, the Commission has tried to effectively deal with these problems by establishing a number of instru-
ments of administrative integration. In addition to accommodating institutional diversity and constitutional auton-
omy, these instruments have been earmarked to influence domestic mechanisms, to ensure common understandings
of rules and to structure coherent accountability regimes. Pursuant to this strategy, the Commission appears to have
expanded its role as executive centre by closely integrating domestic state aid experts into its activities. Yet, the
resulting administrative space appears to exhibit a pattern of integration at variable speeds, due to legal limitations
and pressure exerted by opposing forces. Indeed, strengthened partnerships and conditionality arrangements have
influenced domestic governance in only a few cooperative Member States and in a few selected areas, and some-
times even here have failed to do so fully. Moreover, the use of soft instruments to secure uniform execution of
supranational rules may be hampered by national administrations’ lack of cooperation and by their unambiguous
use by the Commission. Finally, accountability structures have de facto multiplied under SAM, without however, pro-
viding definitive and coherent solutions outside the Commission’s centralised control. As a side effect of all these
struggles, integrity of the internal market and legal certainty are on the line, as the transformations triggered by
SAM struggle to ensure uniform and consistent implementation of state aid law. While these problems are just
starting to unfold, they will arguably emerge more strongly in the future. Responsibility for their resolution will ulti-
mately fall to the Commission, as the executive centre, possibly with contributions by national administrations.

Therefore, whereas with the decentralisation of tasks introduced with SAM, it may appear inevitable and logical
to focus Commission’s attention on big cases, the effects of the reform warrant careful consideration, as they
threaten to be divisive. Multi-speed integration across a fragmented administrative architecture risks unduly reinfor-
cing national political interests and protectionism. As this could threaten the EU internal market’s future, increased
attention is urgently needed for the impacts of the reformed administrative governance of state aid control.

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176 G. De Búrca, & J. Scott (eds), Constitutional Change in the EU, supra n 174.