

# From *ex ante* to *ex post* control



***KULeuven – ULg – Département LNE***

Staatsteun: de rechtspositie van steunverlenende overheden  
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Unpacking Complexity  
Unfolding Opportunity



# Outline

- *Ex ante* control: origin and *raison d'être*
- Concept issue: *ex ante* v *ex post* control
- State aid modernisation impact
- Can we "trust" Member States?
- Various obligations
  - de minimis
  - GBER (and specific frameworks, guidelines)
  - existing aid



## ***Ex ante* control: origin and *raison d'être***

- 1956 Spaak Report
- Article 108(3) TFEU
  - Commission
  - National courts
- Article 109 TFEU
  - Block exemption regulation: exception
  - *de minimis* regulation (validity?)

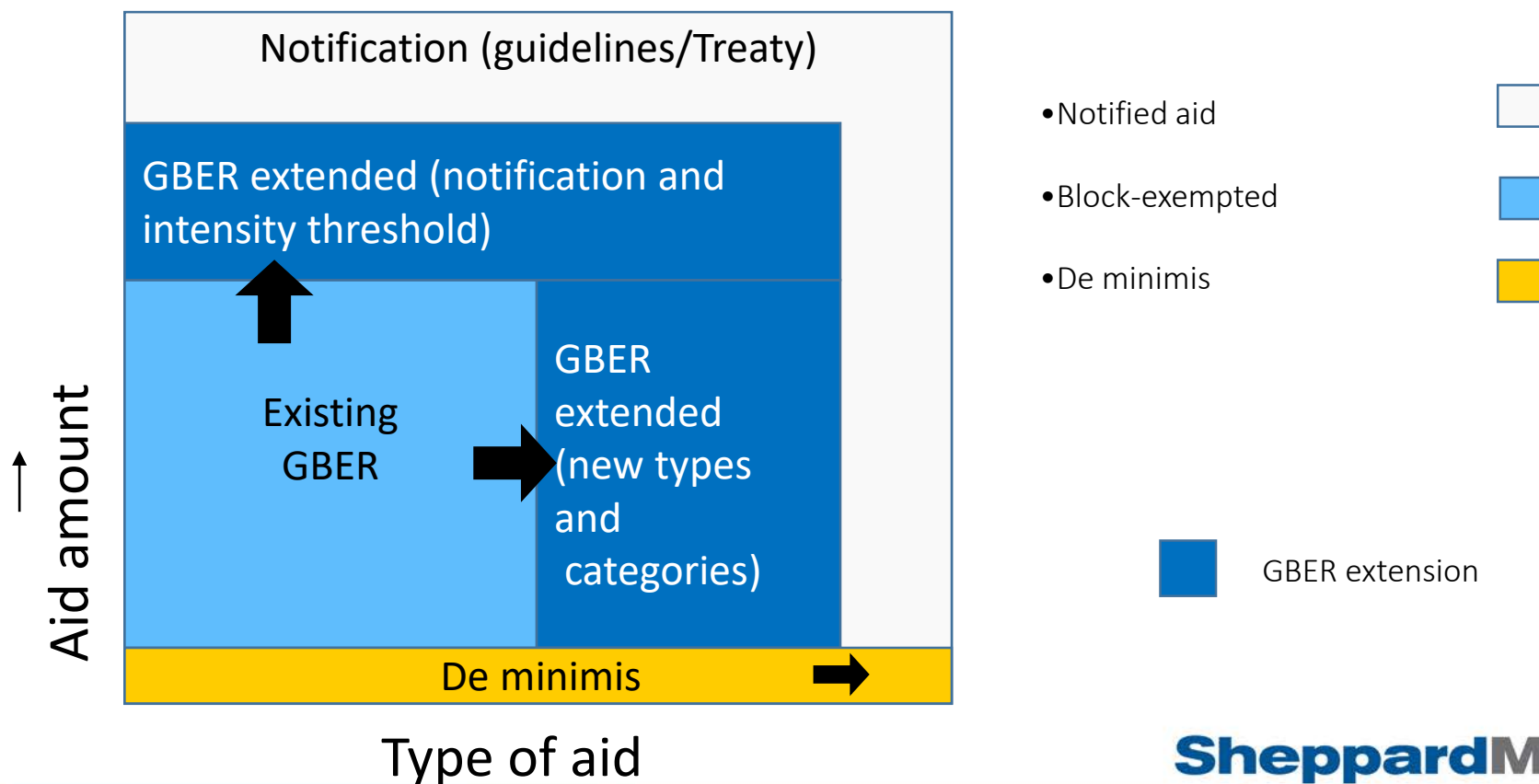


# Concept issue

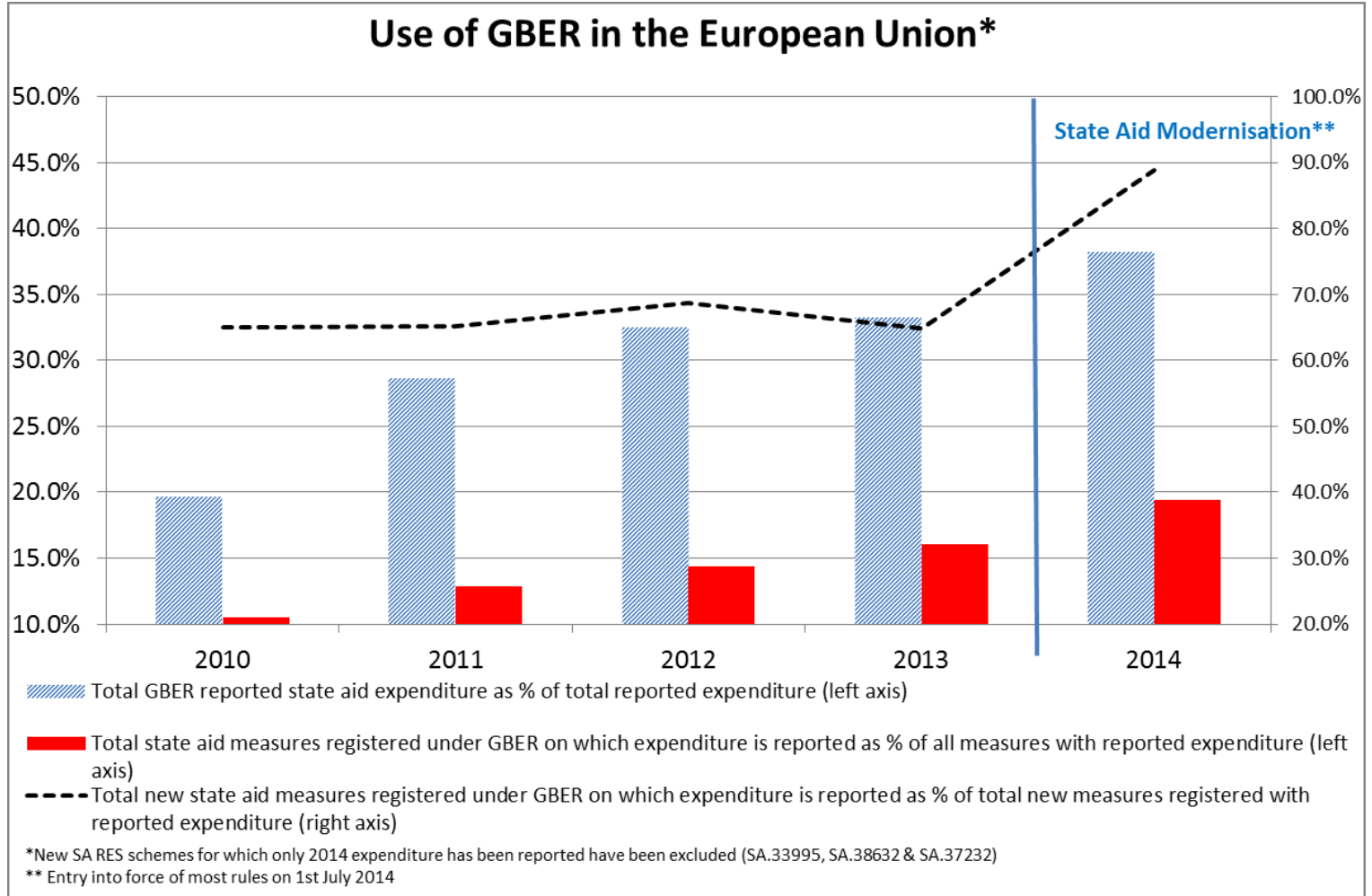
## *ex ante* v *ex post* control

- From supratational control to trust MS behaviour
- Proactivity (if MS notifies...) v reactivity
- Preemptive remedy v "too late" remedy
- Different resources actually required?
- Different types of information provided
- However, risk of harm different
  - *ex post* control within a predetermined exemption framework
  - national courts & Commission's powers

# State aid modernisation and the GBER

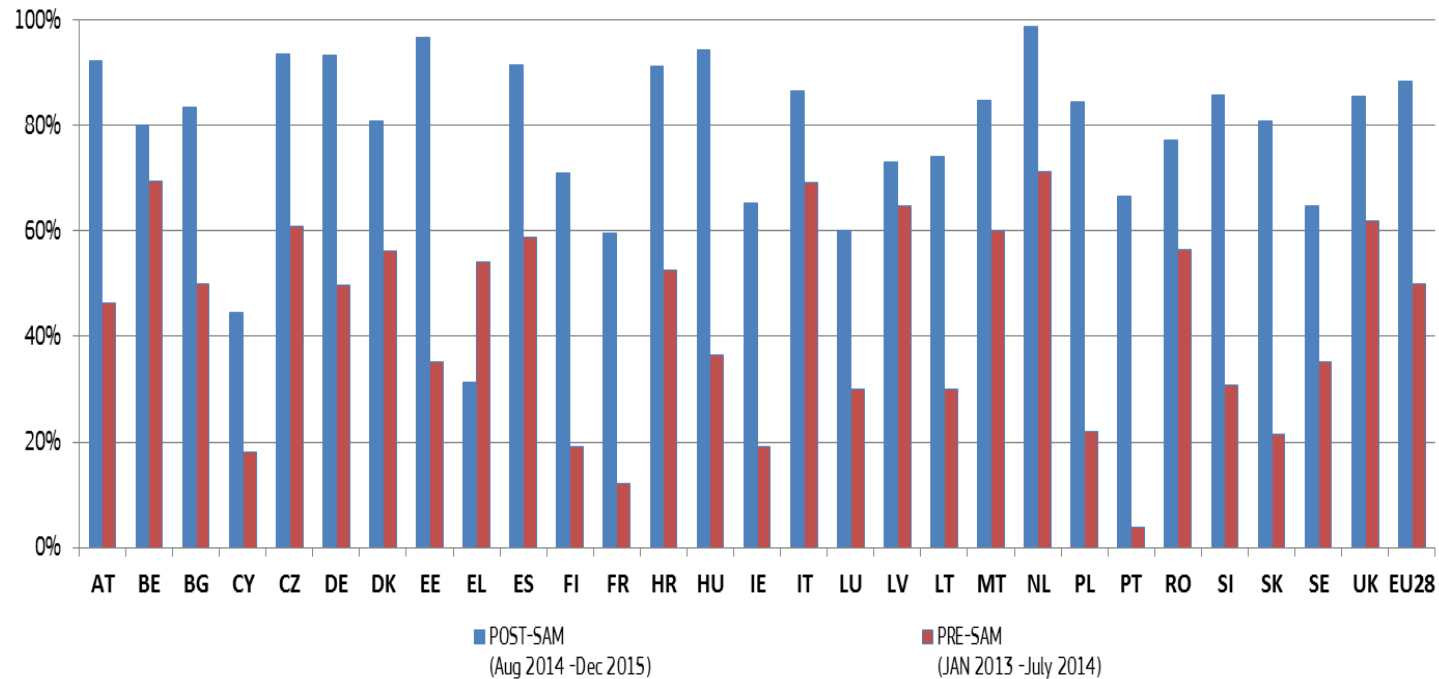


# Use of GBER



# Use of GBER per MS

Comparison of GBER uptake ratio before and after SAM



Source: N. Pesaresi "State aid: selected developments",  
UK State Aid Law Association Berlin Roundtable, 24 June 2016

# Statistics – from *ex ante* to *ex post*

- Before SAM
  - < 50% of measures and about 32% of spending under GBER
- After SAM
  - 90% of measures and about 45% of spending under GBER
  - Reduction of notifications :

|               | <b>2013</b> | <b>2014</b> | <b>2015</b> |
|---------------|-------------|-------------|-------------|
| Notifications | 578         | 332         | 192         |
| GBER          | 41.37%      | 70.14%      | 89.44 %     |

Press release, 15 March 2017: 95% of new aid measures

Source: DG COMP – 2016 State aid Scoreboard





# Can we "trust" Member States?

- Antitrust is not State aid - Reg. 1/2003 is not Reg. 2015/1589
- However,... State aid pathology rather endemic...
- State grantor – are sanctions for violations commensurate to the legal issues?
  - comp. "cartelists/fines/damages" and "States/(Art. 260)"
- Conflict of interest
  - Violation of Article 108(3)
  - Recovery obligation on MS
  - Limited private enforcement against MS
  - Politics and law
- SAM: trading off notification v transparency obligations

# Various obligations

|             | de minimis   | GBER  | existing aid (schemes)                             | existing aid (individual) |
|-------------|--|---|--|---------------------------|
| Publication | -  | Art. 9 website<br>Art. 11/Annex II (summary/text)<br>Annex III (on website >€500,000 as from 1.7.2016)<br>(C-493/14, <i>Dilly's Wellnesshotel</i> ) | -  | -                         |
| Recording   | 10 years for further questions   | Art. 16-21<br>Webgate<br>(1,700 aid measures in 19 MS on 15.3.2017)   | -  | -                         |
| Reporting   |  | Art. 11<br>Annual report  | Art. 26<br><i>Ex post</i> evaluation (>€150m/year) | Decision                  |
| Monitoring  | Art. 6<br>- beneficiary (unique obligation on beneficiary)<br>- Amount | Art. 12   | -  | -                         |



# Some loopholes in transparency

- Assymetrical Article 108(2) procedure
- Notifications
  - when possible
- *Amicus curiae* opinions
  - proposed in 2006 (State aid Study)

**Thank you for your attention!**

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