

## 17<sup>th</sup> GCLC ANNUAL CONFERENCE

### ***THE TRANSFORMATION OF EU COMPETITION LAW: NEXT GENERATION ISSUES***

**25-26 March 2022  
COLLEGE OF EUROPE, BRUGES**

#### Panel 5 - The transformation of State aid law and policy: modernisation relaunched and the link with crisis management

*Should we adapt the centralised enforcement system in the new era?*

# Outline

- Where are we coming from?
- What is the true recent “revolution”?
- Recent illustrations confirming the initial wisdom of 1957:
  - a supranational, independent, exclusive authority: the European Commission
  - this is *consubstantial* to State aid control
  - *ousia* (Ancient Greek: οὐσία): the *essence* or *substance*.

# Where are we coming from?

# History

## European History

□ Peace    ■ War

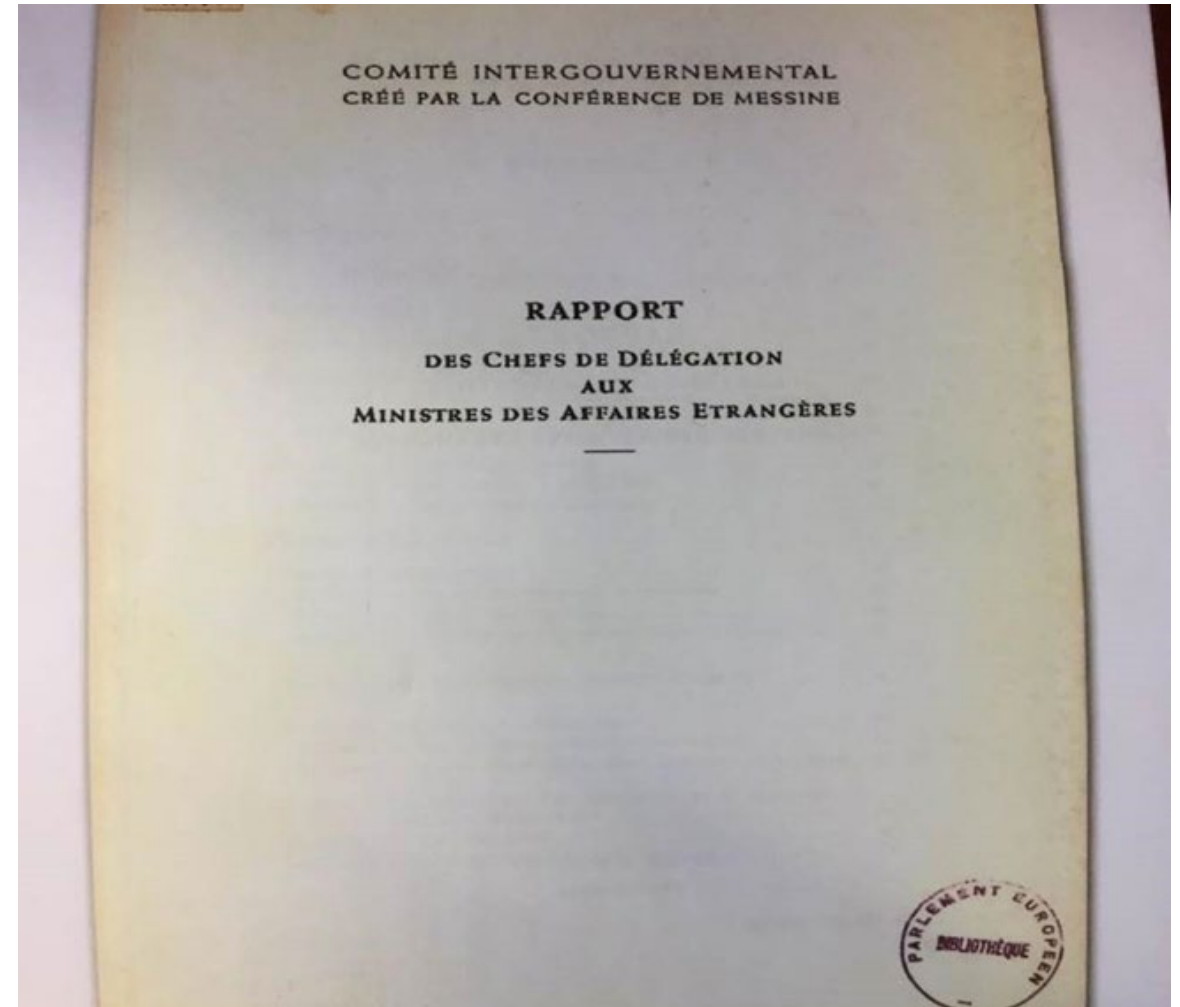


Bosnia  
Ukraine...

Major conflicts of original EU members

# Spaak Report (1)

- State economic operator v State regulator
- European integration
  - 1955 *Messina* – 1956 *IG Conference*
  - 1956 [Spaak Report](#)
    - Completion of the ‘common market’
    - Two types of competition distortions
      - Artificial advantages granted by Member States
      - Discrepancies in national legislation and regulations
    - Preventing Member States from engaging in
      - Subsidies race
      - Export aid
      - Protectionism



# Spaak Report (2)

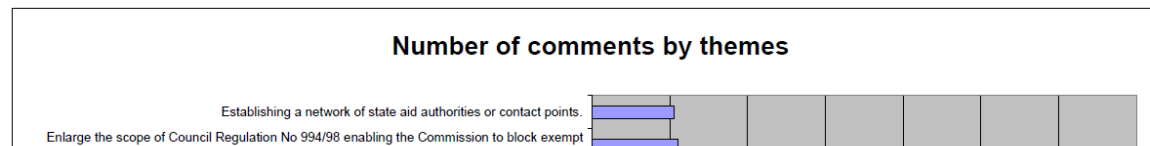
- page 16 : « *Le deuxième fait, c'est l'intervention étendue des Etats en vue de favoriser les entreprises de leur nationalité. Il faut donc discerner les aides utiles à l'intérêt général et à l'expansion de la production de celles qui ont pour objet et pour effet de fausser la concurrence* ».
- page 57 : « *Une des garanties essentielles qui doivent être données aux entreprises, c'est que le jeu ne risque pas d'être faussé par les avantages artificiels dont bénéficieraient leurs concurrents. Les aides accordées par les Etats doivent donc être examinées de très près, indépendamment de la forme extérieure qu'elles revêtent*».
- page 58 : « *Le discernement entre les diverses formes d'aides, suivant leur effet économique et leur opportunité pour la réalisation progressive et sans heurts du marché commun, doit être confié à la Commission européenne à laquelle elles devront être notifiées par l'Etat intéressé, mais qui pourra aussi entreprendre l'examen approprié sur la base des informations qu'elle se procurera elle-même ou sur demande d'un autre Etat* ».

# The EU system

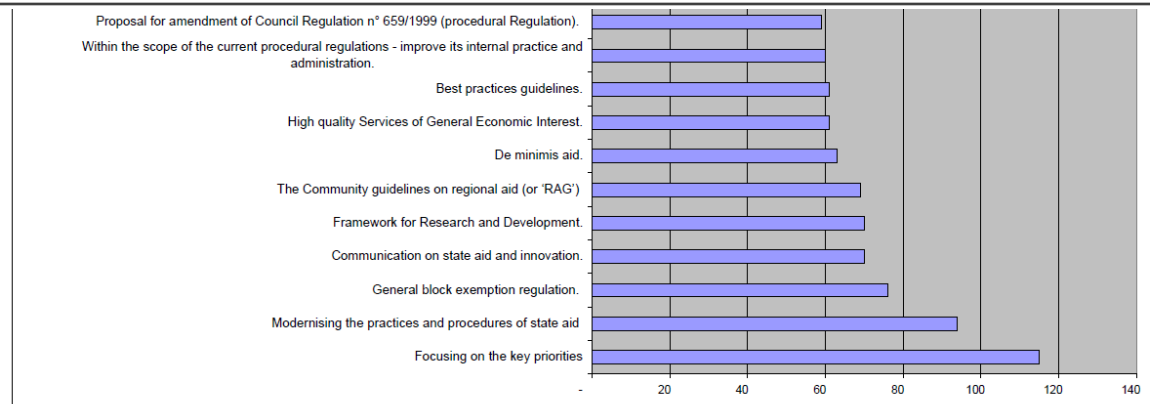
- Supranational independent authority to control State aid granted by Member States
- *Ex ante* control (Article 108(3) TFEU)
- State aid control is part of competition policy: competition between Member States *and* competition between undertakings
- EU market integration: central objective (link with internal market)
- Public policy objectives of Member States v distortion of competition
  - Negative spill-overs on other Member States
  - Undermines functioning of internal market
  - Need for a balance: rationale for the EU State aid control
    - Economic gravitation (obstacles to trade linked to potential of trading)
    - Propensity of trading partners to subsidise (relative budgets, “national champions”)
    - Market failures (efficiency)

# State aid action plan (SAAP) 2005

- Independent authorities in the Member States - controversy

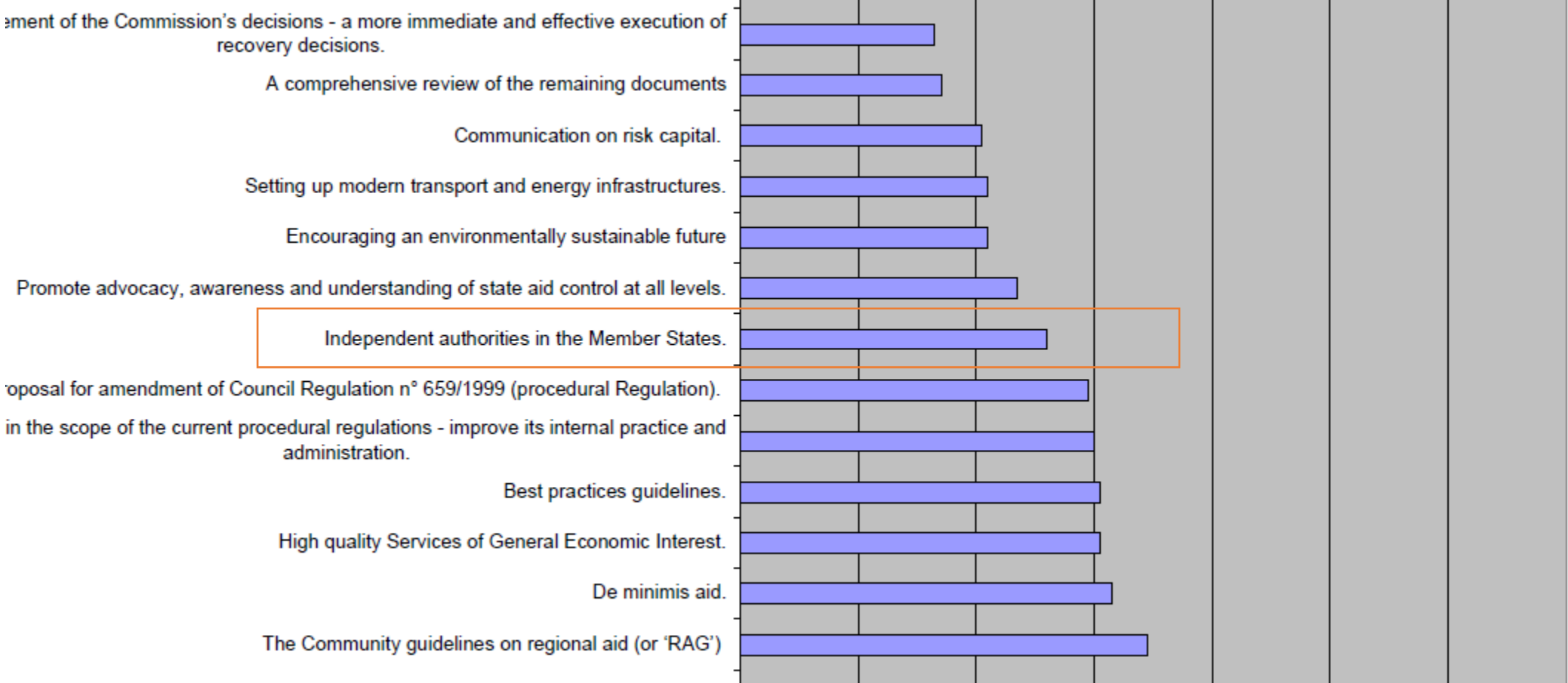


*In this context, the Commission will examine whether **independent authorities** in Member States could play a role as regards facilitating the task of the Commission in terms of state aid enforcement (detection and provisional recovery of illegal aid, execution of recovery decisions).*



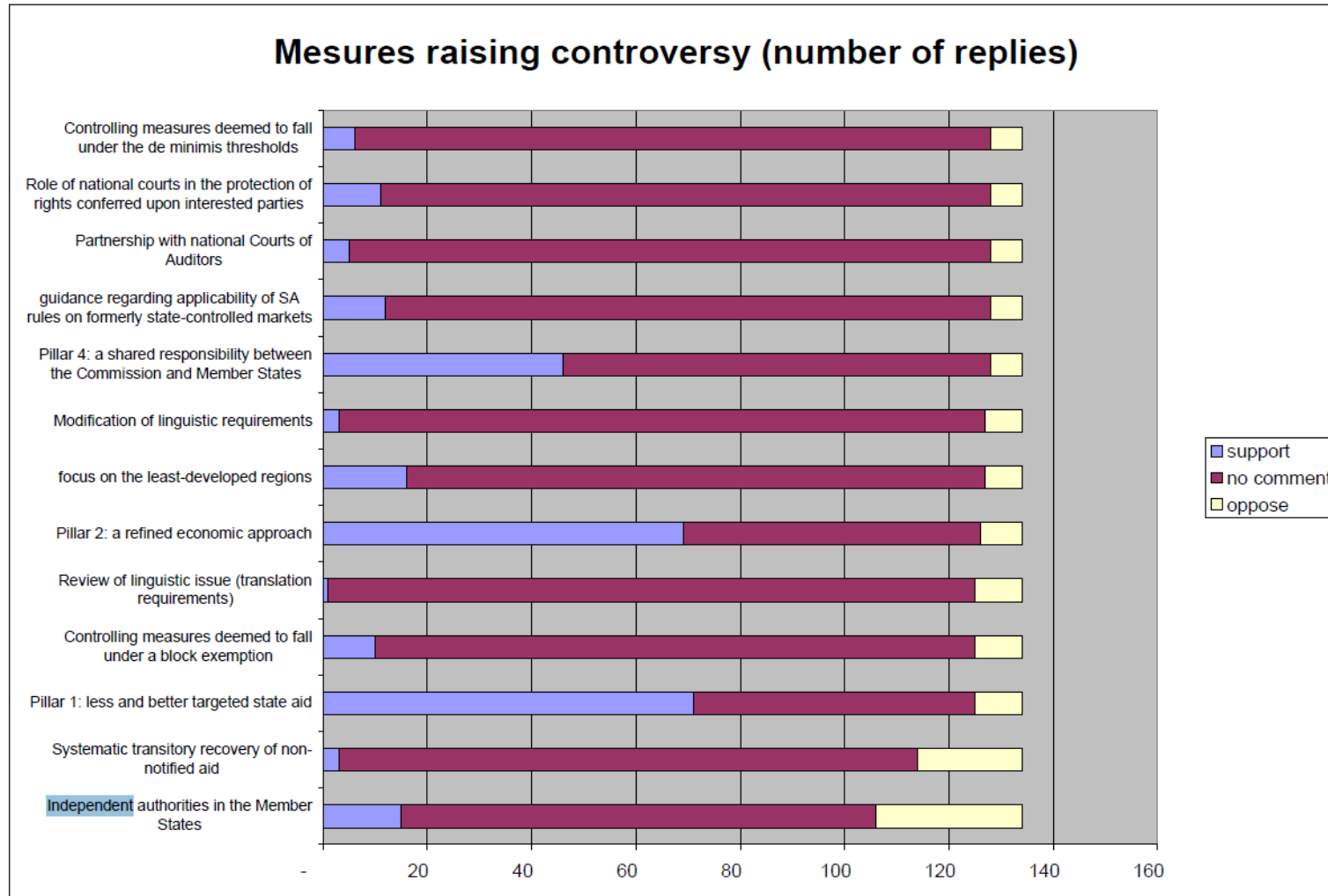
# State aid action plan (SAAP) 2005

- Independent authorities in the Member States - controversy



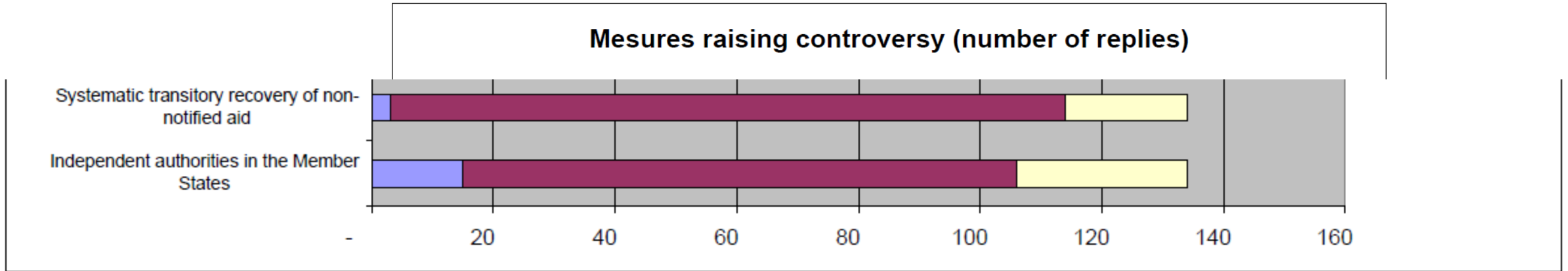
# SAAP 2005

## ■ Measures raising controversy:

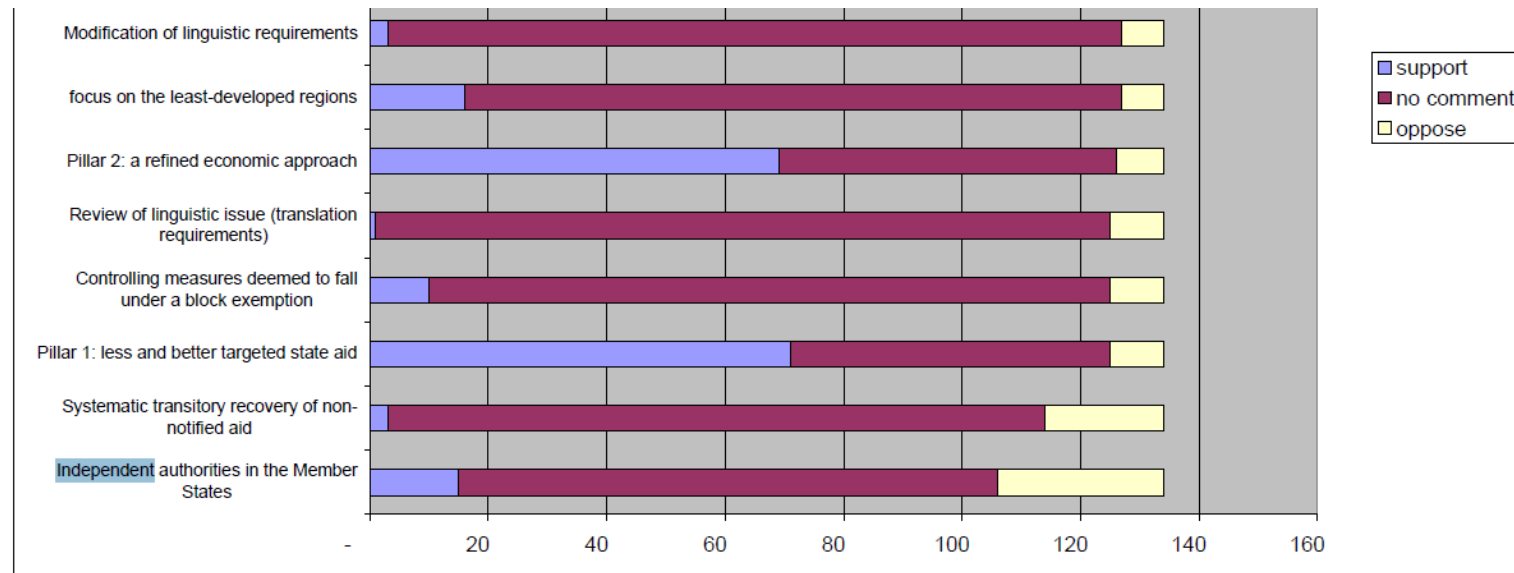


# SAAP 2005

- Measures raising controversy: general support ratio = -30%



15 in support, incl. 5 MS and 1 region  
 28 oppose, incl. 8 MS, 8 regions and  
 business associations



## ■ Results of the comments against independent MS authorities:

1. The **independence** of such national authorities: there might be a conflict of interest (the State controls the State); political and public pressure against national surveillance authorities might be high.
2. This measure could **increase bureaucracy** and slow down procedures.
3. There is a risk of implementation standards varying from one MS to another because national authorities could monitor with differing levels of rigour, leading to **uneven application** of State aid controls.
4. There is a general concern about the legality and operation ability of a full **delegation** of responsibility to independent authorities in MS. The final responsibility should remain with the EC in order to avoid any legal uncertainty.
5. Creating such authorities would be at variance with the **principle of the institutional autonomy** of the MS.
6. **Comparison** with the **experience of accession MS**: this experience was different; it was limited in time and scope.

# Some comments in 2005 (1)

- *At a conference in Copenhagen in the late 1990s, when the State Aid Procedures Regulation came into force, the European Courts of Auditors themselves rejected the EC's suggestion that they should be entrusted with state aid control functions (Austria)*
- *The Dutch authorities remain supportive of a strong central role for the European Commission in the area of state aid control policy (The Netherlands)*
- *the Treaty rules provide for very specific powers for the EC, which cannot therefore be attributed to other bodies (Italy)*
- *[The MS] would not be aware of all the cases under discussions by the national authorities and are not equipped to monitor such activity (UK)*
- *the Commission [is] the competent authority in state aid matter according to the treaty, and [...] this competence cannot and must not be delegated to other authorities (Lux)*
- *[...] insist on the importance of the Commission's exclusive competence to assess aid schemes (DK)*

# Some comments in 2005 (2)

- *There is a clear conflict of interest when the state controls the state. State aid is very often awarded as the result of a political process. Political and public pressure against national surveillance authorities might be high. Any political or public pressure could be particularly high if the national authorities were to be entrusted with discretionary competence. A decentralisation [...] could lead to different practices in the 28 EEA Member States. There is not only the question of whether national authorities in fact are independent or not – the competitors of an undertaking suspected of having received illegal state aid and the public in general must also be able to have confidence in the independence of a national surveillance authority. (NOR)*
- *The government categorically rejects the Commission's proposal to establish independent state aid monitoring authorities in the Member States. An obligation under Community law to establish such authorities would neither make political sense nor be legally acceptable (GER).*

# SAM 2012

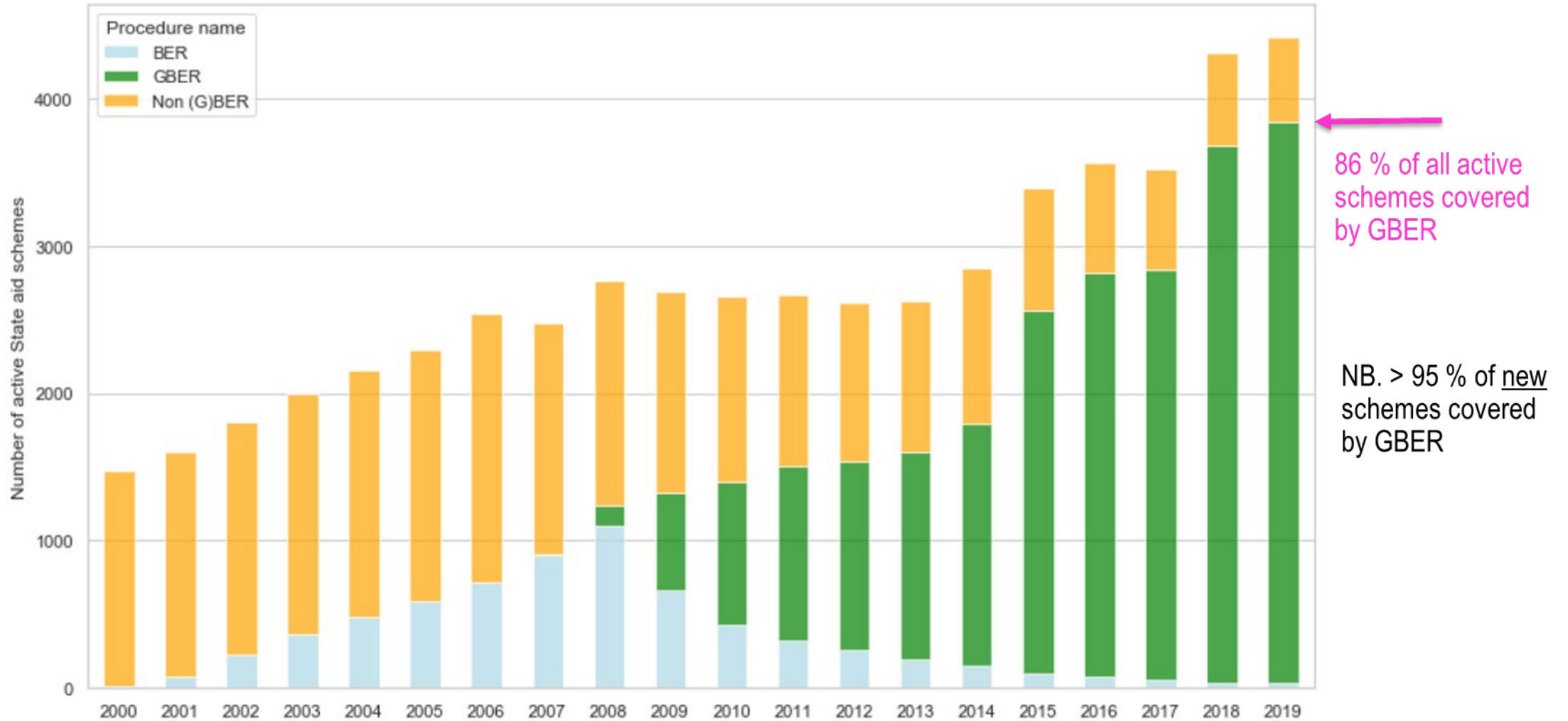
- The idea of independent national authorities was abandoned

## 2. “Revolution”: from ex ante to ex post?

# More GBER, less notifications, less ex ante

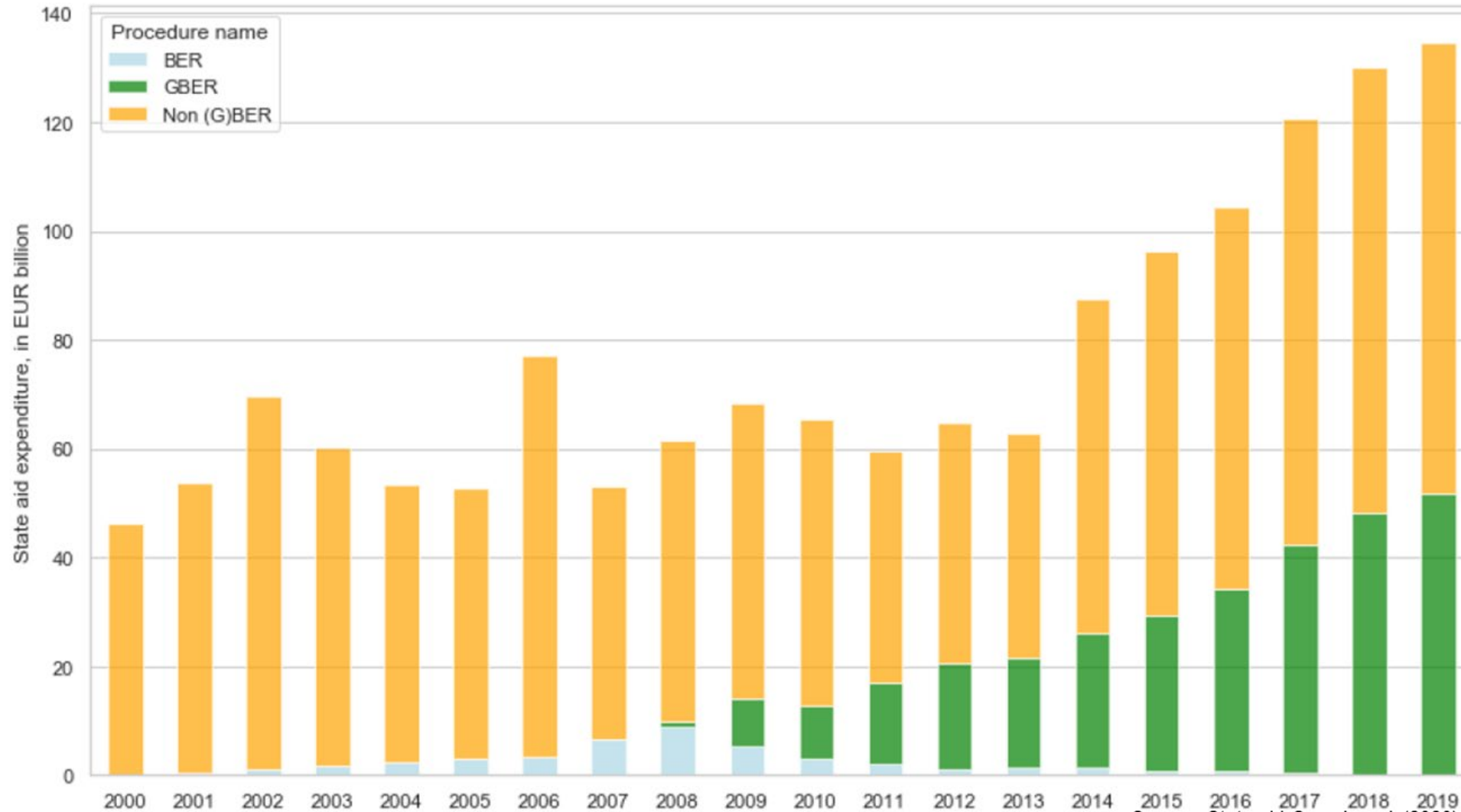
- Before SAM
  - < 50% of measures and about 32% of spending under GBER
- After SAM
  - +95% of (new) measures and about 65% of spending under GBER
  - drastic reduction of notifications (from 578 in 2003 to ~150 in 2019 before Covid)
- State aid control became “ex post control” in most of the cases, but not for the most serious ones
- GBER can be regarded as collective “ex ante” control
- However, GBER “rigidifies” State aid actions

# Progressive extension of GBER (1)



Source: State aid Scoreboard (2020)

# Progressive extension of GBER (2)



Source: State aid Scoreboard (2020)

← approx. 36 % of aid amount covered by GBER

# 3. Recent events confirmed the vision and wisdom of the Founding Fathers in 1957

- Financial crisis, Covid-19 crisis and Ukraine war crisis
  - Neelie Kroes and Ministers of Finance in October 2008
  - need for centralised EU vision, coordinated actions
  - adjusted procedures and rules but strong ex ante control
  - “avoid a jungle without a level playing field” (N. Kroes, 2008)
- *ab absurdo*: Brexit (TCA and UK Subsidy Bill)
  - CMA (“independent body” under the TCA, Subsidy Control Unit under the CMA) & devolved administrations
  - judicial review (apart from decisions contained in primary legislation of the devolved or Westminster parliaments)
- Foreign subsidies proposal – consultation/final proposal
  - Module 1 - some MS: sharing responsibilities MS/Commission based on thresholds; majority of other EU stakeholders: Commission exclusively responsible; if shared enforcement responsibilities, strong leadership by the Commission.
  - Module 2 - majority of EU stakeholders: exclusive Commission power.
  - Module 3 - MS: Commission should have exclusive powers for assessing whether a foreign subsidy is distortive, in the interest of consistency and legal certainty.
  - Results: prior, suspensive, mandatory notification to the Commission, ex officio investigation powers exclusive to the Commission, exclusive powers to the Commission with a view to imposing effective remedies or to prohibiting the relevant business actions.

# Conclusions – Way forward

- No decentralisation (contrary to the *essence* of State aid control), but:
- More resources for DG COMP, more powers (similar to antitrust), improved Procedural Regulation (blocked by MS)
- Better national enforcement (progress made but still efforts to be made)
- Harmonised procedures for national enforcement (see antitrust damages directive – and State aid?)
- More deterrence on Member States and beneficiaries (unlawful aid)
- More prevention and detections tools (independent national State aid commissioners with preventive powers against unlawful aid, in particular by legislator)