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THE FUTURE OF EU STATE AID LAW

CONSOLIDATION AND EXPANSION

EDITED BY

JUAN JORGE PIERNAS LÓPEZ

LEIGH HANCHER

LUCA RUBINI

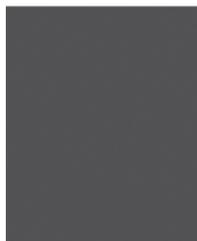
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© EU LAW LIVE S.L.
María de Molina 41, 28006
Madrid (Spain)
<http://www.eulawlive.com>
E-mail: info@eulawlive.com

© Editorial Comares, S.L.
Polígono Juncaril, C/ Baza, parcela 208
18220 Albolote (Granada)
<http://www.comares.com>
E-mail: libreriacomares@comares.com

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Preface

The goal of this book is to present State aid law and policy with an analysis which does not follow the traditional approach of the now numerous publications in the field. While some chapters necessarily focus on the well-known problematic categories – such as the political economy (Buts and Robins) of State aid control, the nature of the definition of an aid (see De Cecco, Hancher, Cortese), the compatibility assessment (Buendia-Sierra) or the institutional and constitutional aspects and enforcement (Caranta, De Cecco, Cyndecka, Pastor-Merchante), taxation (Szudoczky) and services of general economic interest (Hogan, Jaeger) – other chapters are devoted to new emerging themes that are shaping the area, such as the ‘extension’ of EU state aid law beyond the territorial constraints of the EU (Rubini, Biondi and Kotsonis, Piernas-López), State aid control in times of recurring crises (Ferri, Kyriazis), impact assessment (Barbu-O’Connor, Derenne, Hofmann, Klotz, Vallindas), State aid and activism in relation to the climate crisis (Kleis-Walravens and Delarue), State aid and gender (Finckenberg-Broman and Broman).

The terms of references given to the various contributors can be summarised as follows: “think outside the box! Provide a fresh assessment of State aid law and policy. Look at the future”. As editors, we are extremely pleased to have managed to put together an impressive group of experts and have been encouraged by the authors’ willingness to push the boundaries and advance the knowledge in this topical area, going beyond obvious perspectives. State aid is the quintessential laboratory where key paradigms and ideas revolving around the market, public policy and state intervention continue to be re-shaped. The law – in both its skeletal form of the Treaty of Rome provisions and its secondary legislation rich and evolving progeny – has continuously adapted to societal changes and to the evolution of the EU’s economic goals, and, increasingly, even beyond the EU. Member States appear to have acquiesced to a transfer of considerable competences to the EU level (largely made possible by a very broad and controversial – construction of the requirements of distortion on competition and effect on trade). This ensures a level playing field with the internal market, but also assists the pursuit of virtuous public policies in view of legitimate horizontal objectives (and, when necessary, allows governments to resist the undue pressure of domestic special interests). It is not far from reality to say that EU State aid is moving from a system of ‘subsidy control’ to a more complex system of ‘subsidy governance’ which increasingly raises key constitutional questions that the EU Courts need to address, whether through their review of actions for annulment

against Commission decisions or through preliminary rulings. Nevertheless, as we see with the recent Covid crisis and now the energy crisis, the Commission makes numerous concessions in its various temporary crises frameworks. Large volumes of aid are declared compatible with a minimum of scrutiny with the result that the wealthier Member States can devote large sums to safeguarding their industry and indeed their consumers.

The beauty and fascination of State aid law and policy is the continuous interplay between key principles such as the role of the market, the notion of ‘compensatory justification’ and the balancing between negative and positive effects in the light of the changing socio-economic conditions. State aid control has been, and still is, the most unique feature of EU competition (and internal market) policy – a policy area which may offer lessons extending beyond the EU’s boundaries to the various initiatives aiming at regulating the state intervention in the economy at the plurilateral or global level. This propensity to function as a ‘standard’ can be seen in various manifestations, such as the trade agreements concluded by the EU (including the ‘special’ one with the UK – and which is currently generating one of the first examples of ‘domestic’ systems of subsidy control) or in the unilateral remedies that the EU is contemplating adopting to tackle ‘foreign subsidisation’. The potential of EU regulation in shaping the concept of ‘competitive neutrality’ is also clear.

Given the natural fluidity and pliability of the notion of State aid, State aid control has shown an inherent capacity to increase its remit to new areas of public policy. A prominent example is clearly taxation, one of the most common forms of State aid granted by the Member States, with the Commission showing its willingness to use State aid tools to the full to deal with tax avoidance practices (this is how the ‘tax rulings’ investigations should be read). Another example is the renewed awareness, especially heightened during the recent financial, economic and health crises, to appropriately consider the gender impact of State aid measures to further foster gender equality as part of the compatibility assessment.

The expansion of EU State aid control has also led to questioning whether the objectives pursued by the granting of State aid remain those pursued by the Member States, as originally foreseen by the Treaties, or whether the promotion of ‘horizontal’ objectives and of ‘good aid’ have led to supplanting those objectives with EU-sponsored ones, a debate that has already reached the Court of Justice in the *Hinkley Point* Case. Similarly, the application of the *Matra* case-law, or of the principle of non-discrimination in this context, raise wider questions as to the rightful scope of application of the State aid rules and, more generally, as to the rationale and purpose of these rules.

In relation to this last point, the proliferation of tests to apply the cumulative conditions set out in Article 107(1) TFEU may lead to an excessive focus on the validity or otherwise of the tests themselves rather than on the very rationale and purpose of the state aid discipline. One cannot deny the strain that is increasing put on this tool, and the risk that it is used for goals very different from those for what it was originally intended. It is therefore suggested, as we venture into uncharted waters (Next-Generation Funds, extraterritorial application,

Temporary Frameworks related to the Covid-19 pandemic and the situation in Ukraine, geopolitical tensions, Brexit, foreign subsidies...), and face economic and social challenges of a magnitude not yet seen, to undertake a type of *Back to the Future*, exercise, and to put back the different trends identified in this book into the context of the role of the State aid rules within the original Treaty architecture. This role has evolved, in line with the evolution of the internal market, but in our view, it should remain closely connected to the avoidance of distortions of competition created by the selective intervention of Member States in the market, favouring certain undertakings or sectors through financial means.

Juan Jorge Piernas López, Leigh Hancher and Luca Rubini

Contributors List

Ciara Barbu-O'Connor, Jacques Derenne, Michael Hofmann, Robert Klotz and Dimitris Vallindas, experts, as Sheppard Mullin's lawyers, of a consortium which was mandated by the European Commission to draft the Fitness Check external studies.

Andrea Biondi, Professor of EU Law and Director of the Centre of European Law at King's College London.

Morgan M. Broman, Researcher at Queensland University of Technology.

José Luis Buendía Sierra, Visiting Professor at King's College London.

Caroline Buts, Professor at the Faculty of Social Sciences and Solvay Business School of the Vrije Universiteit Brussel.

Roberto Caranta, Professor of Administrative Law at the University of Turin.

Bernardo Cortese, Full Professor of EU Law at the University of Padova.

Malgorzata Cyndecka, Associate Professor at the University of Bergen focused on State Aid and Data Protection Regulation.

Francesco De Cecco, Lecturer in Law at the University of Newcastle.

Juliette Delarue, Environmental Democracy lawyer and former State Aid Lead at ClientEarth.

Delia Ferri, Professor of Law at the School of Law and Criminology of Maynooth University.

Pamela Finckenberg-Broman, Research Scientist at CSIRO's Data 61.

Leigh Hancher, Professor of European Law, University of Tilburg, the Netherlands; Part-time Professor responsible for EU Energy Law and Policy, Florence School of Regulation, European University Institute, Italy, Professor of Energy Markets Law at University of Bergen, Norway and Senior Advisor at Baker Botts, Brussels, Belgium.

Gerard Hogan, Judge of the Supreme Court of Ireland and Advocate General at the Court of Justice of the European Union (2018-2021).

Thomas Jaeger, Chair in European Law at Vienna University.

Maria Kleis Walravens, European Head of Energy Systems and State Aid Expert at ClientEarth.

Totis Kotsonis, Head of Subsidies, Procurement and Trade at Pinsent Masons LLP.

Dimitrios Kyriazis, Member of the Associate Researchers Group at the European Banking Institute and Research Fellow in Law at the New College of the Humanities.

Fernando Pastor-Merchant, Associate Professor at the IE University and Pérez-Llorca IE Chair of Commercial Law.

Juan Jorge Piernas López, Jean Monnet Chair and Senior Lecturer of International and European Union Law at University of Murcia.

Nicole Robins, Partner and Head of the State Aid team at Oxera's Brussels Office.

Luca Rubini, Senior Research Fellow in International and EU Law at the University of Turin.

Rita Szudoczky, Associate Professor at Vienna University of Economics and Business.

State aid control has been and still is the most unique feature of EU competition policy – a policy area which may offer lessons extending beyond the EU’s boundaries to the various initiatives aiming at regulating the State intervention in the economy at the plurilateral or global level. The goal of this book is to present an analysis of State aid law and policy which does not follow the traditional approach of the now numerous publications in the field. Some chapters necessarily focus on well-known problematic categories – such as the political economy of State aid control (Buts and Robins), the nature of the definition of aid (see De Cecco, Hancher, Cortese), the compatibility assessment (Buendia-Sierra), or the institutional and constitutional aspects and enforcement (Caranta, De Cecco, Cyndecka, Pastor-Merchante), taxation (Szudoczky), and services of general economic interest (Hogan, Jaeger). Other chapters are devoted to new emerging themes that are shaping the area, such as the ‘extension’ of EU State aid law beyond the territorial constraints of the EU (Rubini, Biondi and Kotsonis, Piernas López), State aid control in times of recurring crises (Ferri, Kyriazis), impact assessment (Barbu-O’Connor, Derenne, Hofmann, Klotz, Vallindas), State aid and activism in relation to the climate crisis (Kleis-Walravens and Delarue), State aid and gender (Finckenberg-Broman and Broman). The terms of references given to the various contributors can be summarised as follows: ‘think outside the box! Provide a fresh assessment of State aid law and policy. Look at the future.’ The book shows that the role of the State aid rules within the Treaty architecture has evolved, in line with the evolution of the internal market, yet in the editors’ view, this role should remain closely connected to the avoidance of distortions of competition created by the selective intervention of Member States in the market, favouring certain undertakings or sectors through financial means.

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