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# THE FUTURE OF EU STATE AID LAW

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CONSOLIDATION AND EXPANSION

EDITED BY

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JUAN JORGE PIERNAS LÓPEZ

LEIGH HANCHER

LUCA RUBINI

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# THE FUTURE OF EU STATE AID LAW

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CONSOLIDATION AND EXPANSION

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## CONTENTS

  
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<b>PREFACE</b> .....	p. vii
<i>Juan Jorge Piernas López, Leigh Hancher and Luca Rubini</i>	
<b>CONTRIBUTORS LIST</b> .....	p. xi
 <b>Part I - THE STATE AID ESSENTIALS</b>	
 <b>CHAPTER 1.</b> The Political Economy of State Aid .....	p. 3
<i>Caroline Buts and Nicole Robins</i>	
 <b>CHAPTER 2.</b> A Constitutional View of State Aid .....	p. 25
<i>Francesco De Cecco</i>	
 <b>CHAPTER 3.</b> <i>Quo Vadis</i> notion of aid? .....	p. 41
<i>Leigh Hancher</i>	
 <b>CHAPTER 4.</b> <i>Quo Vadis</i> Compatibility? .....	p. 57
<i>José Luis Buendía Sierra</i>	
 <b>CHAPTER 5.</b> Bringing State aid cases to courts: the need to rethink standing .....	p. 71
<i>Roberto Caranta</i>	
 <b>CHAPTER 6.</b> Impact assessment .....	p. 85
<i>Ciara Barbu-O'Connor, Jacques Derenne, Michael Hofmann, Robert Klotz and Dimitris Vallindas</i>	
 <b>CHAPTER 7.</b> State aid conditionality and misuse of aid.....	p. 101
<i>Malgorzata Cyndecka</i>	

## Part II - LEVELLING (UP): EXTENDING EU STATE AID'S LAW REACH

<b>CHAPTER 8.</b> Transcending territoriality: Expanding EU State aid control through consensus and coercion .....	p. 119
<i>Luca Rubini</i>	
<b>CHAPTER 9.</b> The Principle of Competitive Neutrality and the External Reach of EU State Aid Law and Policy .....	p. 135
<i>Juan Jorge Piernas López</i>	
<b>CHAPTER 10.</b> The new UK subsidy control system .....	p. 149
<i>Andrea Biondi and Totis Kotsonis</i>	

## Part III – THEMATIC ISSUES

<b>CHAPTER 11.</b> State Aid Control in Times of Crisis: The COVID-19 Pandemic .....	p. 165
<i>Delia Ferri</i>	
<b>CHAPTER 12.</b> State aid control in times of crisis: the financial crisis, the missteps and the way forward .....	p. 181
<i>Dimitrios Kyriazis</i>	
<b>CHAPTER 13.</b> The future of private enforcement in State aid law .....	p. 203
<i>Fernando Pastor-Merchant</i>	
<b>CHAPTER 14.</b> Examining the wider considerations underpinning State aid and Article 107 TFEU: from BUPA to Hinkley Point .....	p. 215
<i>Gerard Hogan</i>	
<b>CHAPTER 15.</b> Effects on Trade and EU State Aid Law: Reality or Chimera? .....	p. 223
<i>Bernardo Cortese</i>	
<b>CHAPTER 16.</b> How environmental NGOs are using State aid law to make systemic change....	p. 241
<i>Maria Kleis Walravens and Juliette Delarue</i>	
<b>CHAPTER 17.</b> Closing gaps between gender equality in law v practice - A gender perspective to State aid law and policy .....	p. 253
<i>Pamela Finckenberg-Broman and Morgan M. Broman</i>	
<b>CHAPTER 18.</b> The Future of Fiscal State Aid .....	p. 273
<i>Rita Szudoczky</i>	
<b>CHAPTER 19.</b> The Future of Services of General Interest in the EU .....	p. 287
<i>Thomas Jaeger</i>	

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## Preface

**T**he 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**



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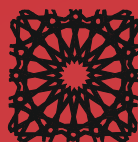
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State aid control has been and still is the most unique feature of EU competition policy – a policy area which may offer lessons extending beyond the EU’s boundaries to the various initiatives aiming at regulating the State intervention in the economy 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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