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From internal market to  
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Juan Jorge Piernas López

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The Concept of State Aid Under EU Law

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# The Concept of State Aid Under EU Law

*From internal market to competition and beyond*

JUAN JORGE PIERNAS LÓPEZ

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## *Foreword*

This book is a unique attempt to trace the evolution of State aid policy through the analysis of its central and crucial element, the concept of State aid itself. It combines a fine and thoughtful legal discussion of carefully selected judgments with a wide historical perspective.

Other scholars have described the development of European policies over time or discussed changing features of the case-law of the Court of Justice in its different periods. Here, these accounts are verified and refined through the magnifying glass of a sharp legal analysis. The concept of State aid represents an ideal topic for such an enquiry, because of its importance for the economic constitution of the European Union and because of the abundance of interesting judgments covering more than fifty years. A clear perception of the policy context, an accurate statement of the arguments and a meticulous dissection of the formulas used by the Court cast a new light both on the technical choices of the judges and on their broader policy implications.

The analysis shows that, case after case, the contours of a notion consistently described as objective have been progressively defined, rectified or altered by the Court of Justice. While such a pattern is relatively frequent, indeed inevitable, whenever judges are called upon to apply unspecified legal concepts, the concept of State aid is specially suited for judicial creativity. First, the European treaties provide for strong, centralised control on certain forms of State intervention in the economy while leaving considerable latitude for determining the precise scope of such a mechanism, precisely through the definition of State aid. Second, the peculiar nature and role of State aid control, at the crossroads between internal market rules and competition policy, provides ample space for different conceptions of its aims and of its purview. Third, the various constituent elements of the notion – advantage, selectivity, State origin, distortion of competition, effect on trade – lend themselves to a variety of readings and to an even greater number of combinations and permutations. The Court of Justice has largely taken advantage of these opportunities, in a long series of judgments extending or reducing the concept of State aid from time to time by different techniques. Successive judgments have also expressed different views of the relationship of State aid control with other treaty provisions and policies, or of its encroachment upon the powers of Member States, particularly in the area of taxation. This book provides a critical assessment of these interventions, without hesitating to condemn some of them or to anticipate that certain interpretations are bound to be reversed in the future.

According to the author, the Luxembourg judges have often reacted to the Commission's attempts to use the instrument of State aid control at the service of more general policy aims and priorities. One may wonder whether these

impulsions, through the adoption of State aid decisions or through the submission of observations in references from national courts for a preliminary ruling, have always been conscious and consistent, in other words whether the Commission has indeed pursued a coherent adjudicatory and judicial strategy. But undeniably, the two institutions have entertained over the years a rich and fruitful dialogue, with phases of substantial agreement and occasional episodes of divergence. The positions expressed by the Member States and by private litigants, the activity of national courts and the academic debate have provided further input and have also influenced the outcome of individual cases, thus contributing to the progressive refinement of the concept of aid by the Luxembourg judges.

This fascinating account of the various avatars of the concept of State aid constitutes an apt reminder that, here more than in other areas, the case-law is not frozen. Further developments will inevitably retouch or even reverse certain principles that are considered as established. Such a humbling lesson is particularly important at a time when the Commission has for the first time endeavoured to put forward an interpretative notice on the notion of State aid, still to be finalised. The Commission's intention is to increase clarity by distilling the teachings of the Court or, in their absence, the orientations resulting from its own practice. Whether the notice, once adopted, will also contribute to the stability of the case-law, remains to be seen. In any event, such a piece of work must be periodically revisited and adapted, if it is to remain useful and to perform its function of guidance for stakeholders and practitioners.

Drawing on his significant and multiple experiences, Juan Jorge Piernas López has thus provided not only a remarkable scholarly achievement, with an insightful assessment of law and practice over many decades, but also a salutary reminder of the evolutionary nature of economic law and of its constant links with public policy objectives.

Vittorio Di Bucci\*

\* Member of the Legal Service of the European Commission since 1991. Director, head of the State Aid and Antidumping Team from 2010 to 2015. Any opinions expressed are personal and do not necessarily reflect the views of the European Commission.

## *Series Editors' Preface*

The law relating to State aid has been central to the European Economic Community (EEC) from its very inception. This centrality reflects the underlying policy of preventing attainment of a single market from being hindered through aid, in its multiple forms, being given by states to their own undertakings. A very considerable body of case law has developed over the years, matched by an attendant body of scholarship grappling with the core precepts used by the courts. The sophisticated legal literature has more recently been complemented by works that seek to take a broader perspective on the law relating to State aid. This monograph by Piernas López comes in the latter category.

The book takes a dynamic approach to State aid, tracing its historical routes to mercantilism, followed by an analysis of the travaux préparatoires insofar as they relate to this topic. The author advances three interesting theses, which provide the cornerstone for the subsequent analysis.

The first is that the legal concept of aid has evolved not primarily because of different interpretations of the economic foundations of this concept, but rather as a result of the policy priorities of the European Commission over time, combined with difficulties encountered by the Commission in enforcing the State aid rules. Drawing on the work of political scientists, the author identifies four periods in the evolution of State aid policy: the first period, from 1958 to the early 1970s; the second period, from the early 1970s to the mid-1980s; the third from the mid-1980s to the mid-1990s; and the final period being the mid-1990s to the present.

The first thesis is complemented by the second, whereby the author contends that the evolution of the concept of aid has also been influenced by the evolution of the European Court of Justice's (ECJ) case law and that it tracks the way in which the ECJ has dealt with other areas of economic law, such as the free movement of goods and competition.

The third thesis flows from the first two, in that the author contends that the concept of aid analysed in the preceding manner is helpful in understanding decisions in seminal cases. The cases are integrated into an analysis of how the judgments fit with the main policy initiatives of the Commission and the general jurisprudence of the Court during the period in which the case was laid down.

The law relating to State aid will doubtless continue to occupy the time of the Commission and generate legal challenges before the EU courts. This work will enrich our understanding of this concept and the way in which it has evolved over time.

Paul Craig and Gráinne de Búrca





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## *List of Abbreviations*

AG	Advocate General
BAA	British Aggregates Association
BEPS	Base Erosion and Profit Shifting
BIAC	Business and Advisory Committee (to the OECD)
BPOT	Business Property Occupation Tax
CFI	Court of First Instance
ECJ	European Court of Justice
ECOFIN	Economic and Financial Affairs Council
ECSC	European Coal and Steel Community
EDF	Electricité de France
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EMU	Economic and Monetary Union
EU	European Union
FDI	Foreign Direct Investment
FNE	Fonds National de L'Emploi
FT	France Télécom
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ITO	International Trade Organization
MEIP	Market Economy Investor Principle
OECD	Organisation for Economic Co-operation and Development
R&D	Research and Development
SAAP	State Aid Action Plan
SAM	State Aid Modernisation
SGEI	Services of General Economic Interest
SMEs	Small and Medium-size Enterprises
TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organization



# PART I



# 1

## Introduction

Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) provides that ‘Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.’ This article declares ‘any aid’ (or State aid, as it is usually called) *a priori* incompatible with the internal market. Article 107(1) TFEU does not define ‘aid’. The Court of Justice has clarified that this notion requires the following criteria to be met:

First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition.<sup>1</sup> The Court of Justice has also clarified that the advantage conferred must be selective as it has to favour ‘certain undertakings or the production of certain goods.’<sup>2</sup>

This article has not been modified since its introduction in the European Economic Community Treaty of 1957, save for the draftsman substituting the phrase ‘internal market’ in place of ‘common market’.

This book is concerned with the legal concept of State aid encapsulated in this provision. It was borne out of the concern that European institutions and practitioners alike refer to it as if this concept had been immune to the evolution experienced by the context in which it has been applied: the internal market. Indeed, while the evolution and even transformation of the Common Market from the early 1960s to the present is unanimously recognized, Commission decisions, court judgments, and textbooks explain the notion of aid today through a number of formulas mostly laid down by the Court of Justice in the 1960s and 1970s.<sup>3</sup> Similarly, other formulas concerning the notion of aid have appeared

<sup>1</sup> See in this regard, eg, C-280/00 *Altmark* [2003] ECR I-7747, para. 75.

<sup>2</sup> See, eg, C-409/00 *Spain v Commission* [2003] ECR I-1487.

<sup>3</sup> This is the case for the notion of aid (and advantage) laid down by the Court in 1961 in case C-30/59, *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*, [1961] ECR 1, for the notion of selectivity for which reference is usually made

more recently in the case law of the Court, such as the Market Economy Investor Principle or the concept of selectivity coined by the Court in the *Adria-Wien* judgment, yet no explanation is usually given as to the factors that led to the emergence of these more recent formulas, or what changes they brought with respect to the previous ones.

Against this seemingly static legal background, the literature of political science on State aid policy makes evident how dynamic the evolution of this policy has been. Political scientists show that the State aid policy has served different goals over time and that the development of this policy has been heavily influenced by the difficulties that the European Commission has encountered in enforcing the State aid rules due to the Member States' reluctance to make these rules effective.

Likewise, against this apparently unchanging legal background, some judges of the Court of Justice have identified a number of phases or periods in the case law of the Court based on its general approach during those periods. In other words, they have observed an evolution in the case law of the Court of Justice. Similarly, some authors have observed an evolution of the case law of the Court in relation to some important economic law provisions of the Treaty, such as the provisions on free movement of goods and competition provisions.

This book tries to reconcile the legal and policy narratives described above in relation to the concept of aid. It argues that the study of the policy of State aid provides a more holistic understanding of the current legal concept of aid because this concept, despite its static appearance, has evolved and has done so mainly in line with the policy priorities of the European Commission in this field, but also as a result of the enforcement difficulties that the Commission has experienced in the application of these rules. Secondly, the book argues that the evolution of this concept has also been influenced by the evolution of the case law of the Court of Justice in different periods of the integration process. Indeed, the book argues that the concept of aid, as with other economic law provisions of the Treaty, is not *fixed or stable, but instead fluid*, and has been influenced by the political and economic context in which it has been applied.<sup>4</sup>

In order to show the validity of these claims, Part I (Chapters 1–3) of the book provides an analytical framework that includes an historical account of the origin of subsidy control in Europe, a review of the legislative history of today's Article 107 TFEU, and a study of the evolution of State aid policy. This framework is then

to the judgment in Joined Cases C-6/69 and C-11/69, *France v Commission*, [1969] ECR 523, and shortly after in 1974 in case 173/73, *Commission v Italy*, [1974] 703, for that of State resources in 1977 in case C-78/76, *Steinike & Weinlig v Federal Republic of Germany*, [1977] ECR 00595, or effect on trade in 1980 in case C-730/79, *Philip Morris v European Commission*, [1980] ECR 02671.

<sup>4</sup> We have borrowed the terminology of Gráinne de Búrca in De Burca, G., 'Unpacking the concept of discrimination in EC and international trade law', in Barnard, C., and Scott, J. (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing, 2002) 181 at 182, where she held that 'A common misapprehension is to assume that these concepts-protectionism, discrimination market access etc.—have relatively fixed or stable meaning... On the contrary, consideration of the development of the EC internal market... over time suggests that the concepts themselves are eminently fluid and that their construction is capable of changing as the economic and political context in which they are being interpreted alters.'

discussed in Part II (Chapters 4–7) in relation to the main formulas established by the Court concerning the concept of aid, which allows the reader a better understanding of why these formulas emerged and why they did so at a particular time in light of the policy and legal context in which they appeared. In so doing, the book places the legal concept of aid in the broader economic and political context in which it has been applied. Finally, Part III of the book reviews the main conclusions drawn from the two previous parts and includes a case study related to the State aids granted to the financial sector during the most recent crisis.

This book is thus concerned with providing the reader with a richer understanding of the current formulas that depict the concept of aid through the prism of policy and enforcement considerations. It is not aimed at devising an abstract test for the concept of aid or for any of its criteria. Nevertheless, by providing a closer look at the interests and reasons that underpinned the emergence of the formulas that are used to define the concept of aid, this book may offer some useful tools to help decide some cases in the future as it provides a number of elements by which to judge whether the application of a particular formula to the facts of a given case is justified in the light of the objectives that led to the adoption of the formula at issue. Finally, this chapter includes a brief review of the relevant literature, followed by a summary of the book's argument and chapter synopses.

## 1. Literature Review

Legal literature on the concept of State aid is by now abundant. Contributions tend to study the criteria included in this concept as it has been shaped by the case law of the Court of Justice. In this regard, most contributions discuss one or more of the criteria mentioned, namely: State resources, advantage, selectivity, distortion of competition, or effect on trade, often in response to a particular development in the case law of the Court of Justice.<sup>5</sup> Authors tend to emphasize the broad meaning that the Court of Justice has given to this concept, applicable to most forms of State intervention (ie fiscal, social, and monetary measures), and to underline the tension existing between the breadth of the concept, based on the effects of State intervention and not on the form it takes, and the decision of the Court to exclude regulatory measures from its scope.

<sup>5</sup> See, eg, Slotboom, M., 'State Aid in Community Law: A Broad or Narrow Definition?' (1995) *European Law Review* 289; Biondi, A., 'Some Reflections on the Notion of "State Resources" in European Community State Aid Law' (2007) *Fordham International Law Journal* 1426; Bacon, K., 'State Aids and General Measures' (1997) *Yearbook of European Law* 269; Bartosch, A., 'Is there a Need for a Rule of Reason in European State aid law?: Or How to Arrive at a Coherent Concept of Material Selectivity?' (2010) *Common Market Law Review* 729; Vesterndorf, B., 'A Further Comment on the New State Aid Concept as this Concept Continues to be Reshaped—Pearle—A Further Piece of the State Aid Puzzle?' (2005) *European State Aid Law Quarterly* 393; Baquero Cruz, J., and Castillo de la Torre, F., 'A Note on PreussenElektra' (2001) *European Law Review* 489; Miro, P., 'The Requirement of Selectivity in the Recent Case-law of the Court of Justice' (2012) *European State Aid Law Quarterly* 335.



There is also a significant body of literature that has analysed the concept of State aid in relation to a particular form of State intervention in the economy. In this regard, the application of the concept of State aid to tax measures is one of the most studied topics.<sup>6</sup> Similarly, the relationship between the concept of State aid and social measures<sup>7</sup> or between this concept and State participation in the economy has also been examined in detail.<sup>8</sup> In the same vein, many contributions have covered the relationship between the concept of State aid and the financing of public services, particularly since the adoption by the Court of Justice and the General Court of a number of contradictory rulings relating to these services in the early 2000s.<sup>9</sup>

More recently, and this time due to a policy initiative by the European Commission (the so-called State Aid Action Plan (SAAP)), the concept of State aid has been the subject of several studies from an economic perspective. Papers, articles, and books studying the economic rationale of the granting and control of subsidies, as well as the economic foundations (or lack thereof) of some of the legal interpretations of the criteria included in the concept of State aid, have appeared in considerable volume.<sup>10</sup> They have enriched a discussion that has been for a long time predominantly occupied by legal narratives.

<sup>6</sup> See, eg, Quigley, C., 'General Taxation and State Aid', in Biondi, A., Eeckhout, P., and Flynn, J. (eds), *The Law of State Aid in the European Union* (OUP, 2004) 207; Schön, W., 'Taxation and State Aid Law in the European Union' (1999) *Common Market Law Review* 910; Bacon, K., 'Differential Taxes, State Aids and the Lunn Poly Case' (1999) *European Competition Law Review* 384; Bourgeois, J.H.J., 'State Aids, Taxation Measures and Specificity. Some Thoughts', in Dony, M., and De Walsche, A. (eds), *Mélanges en hommage à Michel Waelbroeck*, Vol 2 (Bruylant, 1999) 765; Di Bucci, V., 'Direct Taxation'—State Aid in Form of Fiscal Measures', in Rydelski, M.S. (ed.), *The EC State Aid Regime: Distortive Effects of State Aid on Competition and Trade* (Cameron May, 2006) 73; Nicolaides, P., 'Fiscal State Aid in the EU: The Limits of Tax Autonomy' (2004) *World Competition* 365; Nicolaides, P., 'Fiscal Aid in the EC: A Critical Review of Current Practice' (2001) *World Competition* 319.

<sup>7</sup> Biondi, A., and Rubini, L., 'Aims, Effects and Justifications: EC State Aid Law and Its Impact on National Social Policies', in Dougan, M., and Spaventa, E. (eds), *Social Welfare and EU Law* (Hart Publishing, 2005) 79; Davies, P., 'Market Integration and Social Policy in the Court of Justice' (1995) *Industrial Law Journal* 49; Atanasiu, I., 'EC State Aid Policy with Respect to Soft Budgetary Constraints: Tax and Social Security Contribution Payment Arrears' (2005) *European State Aid Law Quarterly* 597.

<sup>8</sup> See, eg, Abate, A., 'Privatisations et dérèglementations en droit communautaire' in *EC State Aid law—Le Droit des Aides d'État dans la CE, Liber Amicorum Francisco Santaolalla Gadea* (Kluwer Law International, 2008) 239; Atanasiu, I., 'Chronopost II: The Application of the Market Economy Investor Principle in Reserved Sectors' (2008) *European State Aid Law Quarterly* 571; Khan, N., and Borchardt, K.D., 'The Private Market Investor Principle: Reality Check or Distorting Mirror?' in *EC State Aid law/Le droit des aides d'État dans le CE: liber amicorum Francisco Santaolalla Gadea* (Wolters Kluwer Nederland 2008) 109; Anestis, P., and Mavroghenis, S., 'The Market Investor Test', in Rydelski, M.S. (ed.), *The EC State Aid Regime: Distortive Effects of State Aid on Competition and Trade* (Cameron May, 2006) 109.

<sup>9</sup> See, eg, Szyszczak, E., 'Financing Services of General Economic Interest' (2004) *Modern Law Review* 982; Biondi, A., 'Justifying State Aid: The Financing of Services of General Economic Interest', in Tridimas, T., and Nebbia P. (eds), *European Union Law for the Twenty-First Century*, Vol. II (Hart Publishing, 2004); Bovis, C.H., 'Financing Services of General Interest in the EU: How do Public Procurement and State Aids Interact to Demarcate between Market Forces and Protection' (2005) *European Law Journal* 79.

<sup>10</sup> See, eg, Crocioni, P., 'Can State Aid Policy Become more Economic-Friendly?' (2006) *World Competition*, 89; Neven, D., and Verouden, V., 'Towards a More Refined Economic Approach in State