

Book Review

European Union Law of State Aid

By Kelyn Bacon QC

Oxford University Press, Oxford 2017, Third Edition, 704 pp.,

ISBN: 9780198787365

Reviewed by **Marlene Wimmer-Nistelberger***

In 2014, the European Commission (Commission) changed the EU state aid rules with the publication of its amended General Block Exemption Regulation¹ and its respective guidelines² quite significantly. In line with its ‘more economic approach’, which is also used in other areas of EU competition law, the Commission gave greater responsibility to the Member States by providing a system of self-assessment. The Commission thereby aimed to prioritise enforcement activities, simplification and transparency in this area.³ The last edition of the “European Union Law of State Aid” was published in 2013, and since then the need for an updated edition has been evident. The new edition of this book includes two additional chapters and extensive revisions of the previous edition.

Similar to the second edition, the authors of the book are experienced practitioners in the area of EU competition law. This book focuses on the main aspects of respective areas of EU state aid law in a clear manner from

* Marlene Wimmer-Nistelberger did her master’s degree in law at the University of Vienna (Austria) and is currently an LLM student at Queen Mary University of London. She has been working as a trainee lawyer for a renowned international law firm for two years and has published several articles and contributed to various book chapters in public procurement and EU state aid law.

¹ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1 (‘GBER’).

² Commission, ‘State Aid Legislation > Horizontal Rules’ (European Commission, 2 July 2014) <http://ec.europa.eu/competition/state_aid/legislation/horizontal.html#rescue> accessed on 6.07.2017.

³ Recital 3 GBER.

the view of a practitioner. It therefore has a deeper engagement in practice, using case law extensively. *Dupont*⁴, in his book review of the 2009 edition of this book, criticised the lack of references and discussions of academic commentary. Although Part I, chapter 1 “Introduction to State Aid Law and Policy” now includes a richer citation of academic articles, this book still mainly focuses on legislation, guidelines and case law. However, this does not seem to decrease the usefulness of this book as the cited case law constitutes an excellent basis for research on academic discussion in relation to the various covered topics as well.

The structure of the book has not changed extensively compared to the second edition. It is still divided into three parts: Part I - General Rules, Part II - Specific Types of Aid and Part III – Enforcement and Remedies. Moreover, each part is divided into chapters and sub-chapters. In the beginning of each chapter there exist structure of the sub-chapters, an overview of the main legislation, guidelines and policy documents, which provides the reader with a broader overview.

The first part starts with a short introduction about state aid law and policy in general and about its themes and aims. Furthermore, the first part examines the notion and the compatibility of aid.⁵ This chapter on the notion of aid and its conditions is comprehensive, including analysis of a huge amount of case law; by so doing, this chapter constitutes the basis of the whole EU state aid law. On this basis, it deserves specific attention. Later, the book deals systematically with the compatibility of aid and explains the differences between automatic compatibility under Art 107(2) TFEU and the discretionary compatibility under Art 107(3) TFEU. Furthermore, it briefly assesses services of general economic interest under Art 106(2) TFEU by explaining the relationship between the *Altmark* decision and Art 106 TFEU and describing SGEI package⁶ and then concludes by explaining the

⁴ Pierre-Emmanuel Dupont, ‘Book Review: Kelyn Bacon (ed), *European Community Law of State Aid*, Oxford: Oxford University Press, 2009, ISBN 978-0-19-954301-4 (hardback), xc + 572 p.’ [2010] 21 *European Business Law Review* 885, 887.

⁵ and now covers the awaited Notice on the notion of aid: Commission, ‘Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union’ [2016] OJ C 262/1.

⁶ Kelyn Bacon QC, *European Union Law of State Aid* (3rd edn, OUP 2017), p 110 et seq; for more information on the SGEI package see Commission, ‘Legislation > Services of General Economic Interest (SGEI)’ (European Commission, 1 October 2012) <http://ec.europa.eu/competition/state_aid/legislation/sgei.html> accessed on 2.08.2017.

authorisation by the Council.⁷ The fourth chapter of this part deals with international agreements such as the EEA agreement, accession to the EU, WTO, and the relationship between EU state aid law and international investment treaties. One should agree with *Bacon* who points out in her preface to the third edition⁸ that this chapter might be of particular relevance to the UK due to its forthcoming exit from the European Union.

Part II starts with an overview of the scope and common conditions of the 2014 GBER and its monitoring provisions. This chapter is new as the previous edition of this book was published prior to the new GBER and its respective guidelines. Moreover, it is especially welcome since the GBER is at the heart of the EU state aid rules, with the aim to simplify the applicability of rules.

Subsequently, specific types of aid are discussed. This review only highlights those with important changes. As a starting point, the book deals with regional aid⁹ and explains the applicability of the GBER and the revised framework along the new 2014-2020 Regional Aid Guidelines. Then, it discusses SME and risk finance aid¹⁰ which may be covered by the GBER (see Section 2 and 3 of the GBER). The new version also includes the Guidelines on State aid to promote risk finance investments and short-term export-credit insurance which are covered by the Communication¹¹ and are in effect from 1.1.2013 until 31.12.2018. This Communication replaces the former Communication which became invalid on 31.12.2013.

Furthermore, chapter 8 on research, development and innovation¹² has been updated extensively in order to include new rules, granting Member States more leeway in relation to the implementation of R&D&I projects, i.e. increased thresholds in the GBER.¹³ Moreover, the chapters on energy and environmental aid¹⁴ have been merged into one, which is reasonable, since

⁷ *Ibid*, p 91.

⁸ *Ibid*, viii, ix.

⁹ *Bacon* (n 6), p 161 et seq; see also Section 1 GBER.

¹⁰ *Ibid*, p 181 et seq.

¹¹ Commission, 'Communication on the application of Articles 107 and 108 of the Treaty on the Functioning of European Union to short-term export-credit insurance' [2012] OJ C392/1.

¹² *Bacon* (n 6), p 199.

¹³ See e.g. Commission, 'R&D&I state aid rules Frequently asked questions' <http://ec.europa.eu/competition/state_aid/modernisation/rdi_framework_faq_en.pdf> accessed on 8.08.2017.

¹⁴ *Ibid*, p 223 et seq.

the new Guidelines on State aid for environmental protection and energy 2014-2020 deal with both of these areas together.

In addition, the new edition is concerned even more extensively with rescue and restructuring aid,¹⁵ which has become very important in the European Union since the financial crisis. The chapter now has new sub-chapters, such as authorisation criteria and procedural issues and explains the changes in the legal framework.¹⁶ Finally, chapter 12, “transport”, has been amended to also cover the new aviation guidelines which came into force in April 2014 that include aid to specific types of airlines and airports.¹⁷

In addition to the widely rewritten and revised chapters mentioned above, the new edition has two new chapters that deal with issues now included in the new GBER.¹⁸ These new chapters discuss disaster aid¹⁹ and cultural, heritage, sport and local infrastructure.²⁰

Part III still is about enforcement and remedies and was written by *Bacon* herself. Similar to the previous edition, it provides a good overview of the supervision by the Commission and enforcement by European and national courts. These chapters remain more or less untouched, although the relevant cited case law and legal framework²¹ have been updated. Nevertheless, chapter 18 now gives credit to the increasing significance of the European Ombudsman, whose role should not be underestimated as the Ombudsman – according to *Bacon* – has so far decided 39 state aid cases by September 2016.²² Moreover, this chapter now discusses the Commission’s power to carry out sector inquiries in the area of state aid law which were included in the 2013 revision of the Procedural Regulation.²³

There are not many reference books in the field of EU state aid law that are as comprehensive and easy to read as *Bacon’s* “European Union Law of State

¹⁵ *Ibid*, p 349 et seq.

¹⁶ Commission, ‘Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty’ [2014] OJ C249/1.

¹⁷ Commission, ‘Guidelines on State aid to airports and airlines’ [2014] OJ C99/3.

¹⁸ See Recital 1 GBER.

¹⁹ *Bacon* (n 6), p 255 et seq.

²⁰ *Ibid*, p 341 et seq.

²¹ e.g. Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) [2015] OJ L 248/9.

²² *Bacon* (n 6), p 497.

²³ *Ibid*, p 495.

Aid”. Therefore, there is no doubt that it would be of great use to practitioners. However, the main issue remains that a reference book in an area with such a high volatility of provisions may be outdated within a very short period. Although this recent edition provides the legal framework and case law as of September 2016 it is already not entirely up to date as the following example demonstrates: The Commission already extended the scope of the GBER to ports and airports as a result of two public consultations as of May 2017.²⁴ Nevertheless, the main changes due to the revised edition of the GBER and the respective guidelines and policy documents are included in this third edition and therefore, it can be deemed mostly up to date.

²⁴ Commission, ‘State aid: Commission simplifies rules for public investment in ports and airports, culture and the outermost regions’ (European Commission, 17 May 2017) <http://europa.eu/rapid/press-release_IP-17-1341_en.htm> accessed on 4.08.2017.