

Table of Contents

Preface	xxix
List of Abbreviations	xxxi
Chapter 1	
Article 107(1) TFEU: Aim and Scope	1
§1.01 Aim of Article 107 TFEU	1
[A] Undistorted Competition	1
[B] Protection of Individual Rights	3
[C] Free Trade Between Member States	3
§1.02 State Aids and the Concepts of Discrimination and Distortion of Competition	4
[A] Territorial Scope of State Aids	4
[1] Domestic and Foreign Undertakings	4
[2] Article 18 TFEU	5
[B] Comparison to Other Undertakings in the Same Member State	5
§1.03 Scope of Article 107(1) TFEU	7
[A] Wide Interpretation of Article 107(1) TFEU	7
[1] Aid in Any Form Whatsoever	7
[2] Irrelevant Distinctions	8
[3] Areas under National Jurisdiction	9
[B] Aids and Subsidies	9
[C] Article 107(1) TFEU and Wto-Agreements	12
[D] Benefits Outside the Scope of Article 107(1) TFEU	12
§1.04 Article 107 TFEU and State Measures	13
[A] Concept of State Aid	13
[B] Concept of a Member State	14
[C] National State Aid Legislation	14

§1.05	Conditions for Categorizing a National Measure as State Aid	15
	[A] Conditions Required by Article 107(1) TFEU	15
	[B] Cumulative Character	17
§1.06	Article 107 TFEU and Other Treaty Provisions	18
	[A] General Principles	18
	[B] Separable and Inseparable Elements of State Aid Measures	20
	[C] Free Movement of Goods	21
	[1] Articles 28 and 110 TFEU	21
	[2] Articles 34, 35 and 37 TFEU	24
	[D] Common Agricultural Policy	26
	[1] Scope of Articles 107-109 TFEU	26
	[2] Existence of Common Market Organizations	26
	[3] Regulation 1184/2006	28
	[E] Competition Rules	28
	[1] Articles 101 and 102 TFEU	28
	[2] Article 106 TFEU	29
	[F] Property Ownership (Article 345 TFEU)	31
	[G] Internal Security (Article 346 TFEU)	33
	[H] Other TFEU Articles	34
	[I] General Principles of Union Law	35
Chapter 2		
	Prohibition of Article 107(1) TFEU	37
§2.01	Scope and Effect of Article 107(1) TFEU	37
	[A] Prohibition of Aid Incompatible with the Internal Market	37
	[1] Scope of Article 107(1) TFEU	37
	[2] Relation Between Article 107(1) and Article 107(2-3) TFEU	38
	[B] Absence of Direct Effect	39
§2.02	Application of Article 107(1) TFEU by the Commission	40
	[A] Supervisory Task of the Commission	40
	[B] Exclusive Competence of the Commission	41
	[C] Assessment by the Commission	42
	[D] Burden of Proof	44
§2.03	Court Review of the Application of Article 107(1) TFEU	46
	[A] No Substitution of Functions	46
	[B] Intensity of the Review	47
	[C] Comprehensive Review	49
	[1] Meaning	49
	[2] Limits	50
	[D] Limited Review	52
	[E] Evidence	54
	[F] Moment of the Assessment	55

§2.04	Member States and Article 107(1) TFEU	56
	[A] Sincere Cooperation	56
	[B] General Obligations	57
§2.05	National Courts and Article 107(1) TFEU	58
	[A] Division of Jurisdiction	58
	[B] Preliminary Ruling Procedure	59
Chapter 3		
	Concept of State Aid	61
§3.01	Classification under Article 107(1) TFEU	61
	[A] Objective Nature of the Concept of State Aid	61
	[B] Irrelevant Factors for the Classification under Article 107(1) TFEU	62
§3.02	Effects of State Aid	63
	[A] Effects on Competition	63
	[B] Multiple State Aid Measures	65
§3.03	Aims and Causes of State Aids	66
	[A] Irrelevance of the Objectives of State Aids	66
	[B] Economic Objectives	68
	[1] Macroeconomic Objectives	68
	[2] Other Economic Objectives	69
	[C] Social Objectives	70
	[D] Environmental and Health Objectives	71
§3.04	Existence of Other Illegal State Aids	73
Chapter 4		
	Undertakings	75
§4.01	Concept of Undertaking	75
	[A] Scope of Article 107(1) TFEU	75
	[B] Economic Activities of Undertakings	76
	[C] Classification as Economic Activities	78
§4.02	Entities Engaged in Economic Activities	80
	[A] Public Undertakings	80
	[B] Public Bodies Engaged in Economic Activities	80
	[C] Shareholding	81
	[D] Public Infrastructure	82
	[E] Other Economic Activities	84
§4.03	Non-economic Activities	84
	[A] Economic and Non-economic Activities	84
	[B] Exercise of Public Powers	85
	[C] Exercise of Public Powers and Economic Activities	86
	[1] Distinction	86
	[2] Mixed Entities	86
	[D] Activities of a Social Nature	88

§4.04	Beneficiaries	89
	[A] Actual Beneficiaries	89
	[B] Direct and Indirect Beneficiaries	90
	[C] Economic Units	92
	[1] Concept	92
	[2] Holdings	92
	[3] Small- and Medium-Sized Enterprises	93

Chapter 5

	Advantage for Undertakings	95
§5.01	Presence or Absence of an Advantage	95
§5.02	Assessment of Whether a Measure Constitutes an Advantage	96
	[A] Real Advantage	96
	[B] Context	97
	[C] Irrelevant Circumstances	98
	[D] Transfer of Assets	99
§5.03	Mitigation of Charges Normally Included in the Undertaking's Budget	99
	[A] Concept	99
	[B] Costs	101
	[C] Special Advantages	102
§5.04	Criterion of Normal Market Conditions	102
§5.05	State Measures not Entailing an Advantage for Undertakings	106
	[A] Abnormal Charges	107
	[B] Social Security Measures	107
	[C] Government Declarations	108
	[D] Other Cases	109

Chapter 6

	Test of a Private Operator in a Market Economy	111
§6.01	Concept and Function of the Private Investor Test	111
	[A] Aim of the Private Investor Test	111
	[B] Conditions in Which the Private Investor Test Is Satisfied	113
§6.02	Scope of the Private Investor Test	114
	[A] Nature of State Action	114
	[1] Exercise of Public Authority	114
	[2] Private Investor Activities	116
	[B] Differences Between Public and Private Investors	119
	[1] General Principles	119
	[2] Different Considerations	121
§6.03	Application of the Private Investor Test by the Commission	123
	[A] Moment of the Assessment	123
	[B] Global Assessment	124
	[C] Prior Economic Evaluation	125

	[D] Burden of Proof	127
	[1] Duty of the Member State	127
	[2] Duty of the Commission	130
§6.04	Comparison Between Private and Public Investment Conduct	133
	[A] Direct and Indirect Public Investments	133
	[B] Context of the Investment	134
	[C] Public and Private Investments	135
	[D] Multiple Interventions	137
§6.05	Profile of the Hypothetical Private Investor	138
	[A] Size and Form of the Investment	138
	[B] Type and Size of the Private Investor	139
	[C] Conduct of an Informed Private Investor	140
§6.06	Considerations Relevant to the Hypothetical Private Investor	142
	[A] Long Term-Profitability	142
	[1] Obtaining Return	142
	[2] Public Policy Considerations	143
	[3] National Brand Image	144
	[B] Criterion of a Return on Investments	146
	[1] Justification	146
	[2] Use of an Average Return	147
	[3] Analytical Function	148
	[4] Relevant and Irrelevant Factors for the Calculation of the Return on Investments	149
	[5] Temporary Difficulties	151
§6.07	Position of the Beneficiary of the Public Investment	152
	[A] Financial Position	152
	[B] Assessment of the Financial Position	153
	[C] Restructuring Plan	154
	[D] Future Privatization	155
§6.08	Investments Not Satisfying the Private Investor Test	156
§6.09	Private Creditor Test	158
	[A] General Principles	159
	[1] Function and Scope	159
	[2] Advantages	160
	[3] Burden of Proof	161
	[B] Differences Between Private and Public Creditors	161
	[C] Conduct of a Hypothetical Private Creditor	162
	[1] General Principles Concerning Private Creditor Conduct	162
	[2] Undertakings in Difficulties	164
	[3] Volume of Debt	166
	[4] Burden of Proof	167
§6.10	Privatization of Public Undertakings	168
§6.11	Court Review	170

Chapter 7

Requirement of Selectivity	175
§7.01 Meaning and Significance	175
[A] Concept	175
[B] Relation to Other Elements of State Aid	177
[C] Irrelevance of the Objective of a Selective Measure	178
§7.02 Assessment of Selectivity	179
[A] Reference Framework	179
[B] Within a Member State	182
[C] Identification of the Beneficiaries	183
[1] Individual Aid and Aid Schemes	183
[2] Beneficiaries and Other Undertakings	184
§7.03 Forms of Selectivity	185
[A] General Measures Are Not Selective	185
[1] Genuine General Measures	185
[2] Semi-general Measures	186
[3] Discretionary Application of a General Measure	187
[B] Selectivity and the Scope of a Measure	189
[1] Material Scope	189
[2] Personnel Scope	189
[3] Geographical Scope	190
[4] Temporal Scope	191
[5] Sectoral Measures	191
§7.04 Selectivity and Infra-State Measures	193
[A] Selectivity and the Territorial Scope of Infra-State Measures	193
[B] Determination of the Reference Framework	195
[C] Exercise of Sufficiently Autonomous Powers	196
§7.05 Selective Measures as Part of a General System	199
[A] General Principles	199
[B] Scope of the Justification	202
[C] Objective of Differentiating Measures	204
[D] Review and Burden of Proof	206

Chapter 8

Aid Granted by the State or Through State Resources	209
§8.01 Origin of the Aid	209
[A] Aid Financed from Public Resources	209
[B] Source of the Aid	210
[C] Effect on the State Budget	212
§8.02 State Resources	214
[A] Meaning of State Resources	214
[1] Aid of Public Origin	214
[2] Co-financing from Private Sources	214
[B] Degree of Control over State Resources	215

	[1] Permanent Public Control	215
	[2] Compulsory Charges	217
§8.03	Aid from the Public Sector	218
	[A] Public or Private Bodies Established by the State	218
	[B] Intermediate Bodies	221
	[C] Bodies under Control of the State	222
§8.04	Imputability of Aid to the State	224
	[A] Meaning of Imputability to the State	224
	[B] Public Undertakings	226
	[1] Involvement of the State	226
	[2] Assessment	227
	[3] Legal Form and Autonomy	231
	[4] Statutory Limitations	232
§8.05	Measures Not Financed from State Resources	232
	[A] Scope of Article 107(1) TFEU	232
	[B] Purchase Obligations Imposed on Undertakings	233
	[C] Price Fixing Measures	234
	[D] Measures of Social Policy	235
	[E] Financial Measures by the European Union	236
Chapter 9		
	Intra-Union Trade and Competition	239
§9.01	Aid Liable to Affect Trade and to Distort Competition	239
	[A] Concept	239
	[B] Relation Between Intra-Union Trade and Competition	240
§9.02	Effect of Aid on Trade and Competition	241
	[A] Real or Potential Effect	241
	[1] General Principles	241
	[2] Irrelevance of Damages	243
	[3] Lawful Aid	243
	[4] Unlawful Aid	245
	[B] Method of Assessment	245
	[1] Contextual Approach	245
	[2] Market Analysis	246
	[3] Foreseeable Effects	248
	[4] Relevant Market	248
§9.03	Economic Effects of State Aid	249
	[A] Strengthening of the Competitive Position in Intra-Union Trade	249
	[B] Reduction of Costs	252
	[C] Degree of Competition	253
	[D] Overcapacity	255
§9.04	Involvement in Intra-Union Trade	256
	[A] Local or Regional Character of Trade	256
	[B] Potential Effect on Imports and Exports	258

§9.05	Absence of Quantitative Thresholds	262
[A]	No <i>De Minimis</i> Rule	262
[1]	General Principles	262
[2]	Amount of the Aid	262
[3]	Structure of the Market	264
[B]	Power of the Commission to Apply <i>De Minimis</i> Rules	265
[1]	Aim of De Minimis Rules	265
[2]	Scope	266
Chapter 10		
	Direct Taxation and the State Aid Provisions	269
§10.01	General Principles	269
[A]	Article 107 TFEU and Direct Taxation	269
[B]	Division of Powers	270
[1]	Competence of Member States	270
[2]	Powers of the Commission	272
§10.02	Tax Rulings	273
[A]	Position under Article 107(1) TFEU	273
[B]	Assessment	273
[C]	Individual Aid or Aid Schemes	274
§10.03	Direct Taxation and a Selective Advantage for Undertakings	275
[A]	Notion of a Selective Advantage	275
[B]	General Tax Measures	276
[C]	Selective Tax Measures	278
[1]	Certain Undertakings	278
[2]	Discretionary Tax Measures	279
§10.04	Reference Framework or ‘Normal’ Tax Regime	281
[A]	Function	281
[B]	Concept	283
§10.05	Differentiations Justified by the Overall Structure of a Tax System	285
[A]	General Principles	285
[B]	Burden of Proof	286
[C]	Differentiations Unrelated to the Overall Structure of a Tax System	288
§10.06	Disguised Selective Tax Measures	290
[A]	Scope of the Differentiating Criteria	290
[B]	Tax Derogations and Separate Tax Measures	292
[1]	Effect of Favouring Certain Undertakings	292
[2]	Derogations Leading to Different Treatment	293
[3]	Separate Tax Measures Leading to a Different Treatment	295
§10.07	Taxation and the Condition of State Ressources	296
[A]	Tax Measures Involving a Transfer of State Resources	296

[B]	Tax Measures Not Involving a Transfer of State Resources	297
§10.08	Taxation and Intra-Union Trade and Competition	299
§10.09	Taxation of Integrated Undertakings	300
[A]	Transfer Pricing and Arm's-Length Principle	300
[1]	Criterion of Market Forces	300
[2]	Arm's-Length Principle	302
[B]	Profit Allocation	305
[1]	Authorized OECD Approach	305
[2]	Arm's-Length Principle	305
Chapter 11		
	Taxes for the Financing of State Aids	309
§11.01	Relation Between State Aids and Their Financing	309
[A]	General Principles	309
[B]	Integral Assessment of State Aids and Their Financing	311
§11.02	The Concept of Taxes as an Integral Part of the Aid Measure	313
[A]	The Requirement of a Hypothecation	313
[B]	Tax Exemptions	315
§11.03	Consequences of the Applicability of Article 107(1) TFEU	316
[A]	Obligation to Notify	316
[B]	Unlawful Taxes	317
[C]	Unlawful Tax Exemptions and Payment of Taxes	318
§11.04	Self-Financed Aid Measures	320
Chapter 12		
	Forms of State Aid	323
§12.01	Operating Aid	323
[A]	Concept	323
[B]	Position under Article 107 TFEU	324
[C]	Aids Having the Character of Operating Aid	325
[1]	Rescue Aid	325
[2]	Investment Aid	327
[3]	Other Forms of Operating Aid	328
§12.02	Subsidized Loans and Measures to Reduce Interest Charges	329
§12.03	Public Guarantees	331
[A]	Extent of the Advantage	331
[B]	Guarantees for Insolvent Undertakings	332
[C]	Transfer of State Resources	332
[D]	Implied Guarantees	334
§12.04	Public Investment in the Capital of Undertakings	335
§12.05	Exemptions from Taxes And Levies	337
§12.06	Preferential Tariffs	340
§12.07	Obligations to Purchase	342
§12.08	Sale of State Assets	343

§12.09	Undertakings Placed under Special Administration	348
§12.10	Measures Relating to Debts to Public Authorities	349
§12.11	Other Measures	351
Chapter 13		
	Aid for the Financing of Public Services	355
§13.01	Relation Between Article 106(2) TFEU and Articles 107 and 108 TFEU	355
[A]	Aim of Article 106(2) TFEU	355
[B]	Article 106(2) TFEU and the Scope of Articles 107 and 108 TFEU	357
[C]	Notification	358
[D]	Article 106(2) TFEU and the Compatibility of State Aids	359
[E]	Discretion of the Commission	360
§13.02	Aid for Public Services Which Is Not Caught by Article 107(1) TFEU	362
[A]	Altmark Conditions	362
[1]	General Principles	362
[2]	Aim of the Altmark Case Law	365
[3]	Scope of the Altmark Case Law	367
[4]	Service of General Economic Interest	368
[B]	First Altmark Condition	369
[1]	An Act of Public Authority Imposing the Public Service Obligation	369
[2]	Discretion of Member States to Define a Service of General Economic Interest	371
[3]	Limits	373
[4]	Public Interest	374
[5]	Concept of Universal Service	376
[6]	Compulsory Nature	376
[C]	Second Altmark Condition	378
[D]	Third Altmark Condition	379
[E]	Fourth Altmark Condition	383
[F]	Cumulative Character of the Altmark Conditions	384
Chapter 14		
	Compatible State Aids (Article 107(2) and (3) TFEU)	387
§14.01	General Principles	387
[A]	Derogations from Article 107(1) TFEU	387
[B]	Narrow Interpretation of Article 107(2) and (3) TFEU	388
[C]	Article 107(2) and (3) TFEU and Other Provisions of the TFEU	390
[D]	Burden of Proof	390

[E]	Duty of the Member States to Cooperate with the Commission	391
§14.02	Aid Compatible with the Internal Market (Article 107(2) TFEU)	391
[A]	Aid Having a Social Character Granted to Individual Consumers (Article 107(2)(a) TFEU)	392
[B]	Aid to Make Good the Damage Caused by Natural Disasters or Exceptional Circumstances (Article 107(2)(b) TFEU)	393
[C]	Aid in Relation to the Division of Germany (Article 107(2)(c) TFEU)	394
§14.03	Aid Which May Be Considered to Be Compatible with the Internal Market (Article 107(3) TFEU)	397
[A]	General Principles	397
[1]	Character as a Derogation from Article 107(1) TFEU	397
[2]	Exhaustive Character	398
[3]	Aid Notified and Not Notified	399
[4]	Proportionality Requirement: Scope	400
[5]	Proportionality Requirement: Assessment	402
[B]	Application of Article 107(3) TFEU by the Commission	404
[1]	Exclusive Competence of the Commission	404
[2]	Discretion of the Commission	405
[3]	Assessment in a Union Context	406
[4]	Individual Approach	408
[5]	Court Review	409
[6]	General Criteria for the Assessment of the Compatibility of Aid	411
[C]	Article 107(3)(a) TFEU: Abnormal Low Standard of Living or Serious Underemployment	414
[D]	Article 107(3)(b) TFEU: Project of Common European Interest or Remedying a Serious Disturbance in the Economy of a Member State	416
[1]	General Principles	416
[2]	Common European Interest	416
[3]	Serious Disturbance	417
[E]	Article 107(3)(c) TFEU: Development of Certain Economic Activities or of Certain Economic Areas	420
§14.04	Regional Aids	424
[A]	General Conditions	424
[B]	Union Average and National Average	425
[C]	Ad Hoc Aid	427
[D]	Sectoral Impact of Regional Aids	428
§14.05	Restructuring Aids	430
[A]	Concept	430

[B]	Restructuring or Dismantling of a Company in Difficulties	431
[C]	The Requirement of a Restructuring Plan	432
[D]	The Viability Test	438
[E]	Criterion of Inducement	439
[F]	Individual Character of Restructuring Plans	440
[G]	Reduction of Capacity and Related Conditions	441
[H]	The Amount of Restructuring Aid	443
§14.06	Other Forms of Aid	445
[A]	Sectoral Aids	445
[B]	Operating Aid	445
[C]	Investment Aid	447
[D]	Environmental Aid	449
§14.07	Article 107(3)(e) TFEU: Derogation by the Council	450
[A]	Scope of Derogating Rules	450
[B]	Narrow Interpretation of Derogating Rules	451
Chapter 15		
	Guidelines of the Commission	455
§15.01	Concept and Legal Character	455
[A]	Self-Imposed Limitation of Discretion	455
[B]	Legal Character	457
	[1] Relation to Primary and Secondary EU Law	457
	[2] Legal Effects	458
§15.02	Power of the Commission to Issue and Apply Guidelines	459
[A]	Issuing of Guidelines	460
[B]	Application of Guidelines	461
[C]	Obligation of the Commission to Apply Its Guidelines	462
§15.03	Rules of Interpretation	465
[A]	Uniform Interpretation	465
[B]	Other Rules	466
§15.04	Court Review	467
[A]	Review of the Issuing of Guidelines	467
[B]	Review of the Application of Guidelines	467
Chapter 16		
	Supervision of State Aids (Article 108 TFEU)	469
§16.01	General Features	469
[A]	Aim of the Procedure of Article 108 TFEU	469
[B]	Legal Nature of the Procedure under Article 108 TFEU	471
[C]	Council Regulation 2015/1589	472
§16.02	Administrative Procedure	473
[A]	Stages of the Administrative Procedure	473
[B]	Parties Involved in the Administrative Procedure	475
	[1] Member States	475

	[2]	Third Parties	476
	[3]	Position of the Recipient of State Aid	478
[C]		State Aid Procedure and General Principles of Law	479
	[1]	Charter of Fundamental Rights	479
	[2]	Sincere Cooperation	480
	[3]	Diligent and Impartial Examination	480
	[4]	Rights of Defence and Other Principles of Law	482
§16.03		State Aid Law and National Courts	484
	[A]	Division of Competences	484
	[B]	Classification as State Aid	486
	[C]	Compatibility of State Aids	488
	[D]	Force of Res Judicata and the Competence of the Commission	489
Chapter 17			
		Existing Aids and New Aids	491
§17.01		Notion of Existing Aid and New Aid	491
	[A]	Aid Existing Before the Entry into Force of the Treaties	491
	[B]	Pre-accession Aids	492
	[C]	Authorized Aid	493
	[D]	Conversion of New Aid into Existing Aid	495
	[E]	Evolution of the Internal Market	497
		[1] Absence of Liberalization	497
		[2] Concept	498
		[3] Legal Effect	498
		[4] Partial Liberalization of the Market	499
	[F]	Alterations to Existing Aid	500
		[1] Concept	500
		[2] New Aid	501
		[3] Notification	503
§17.02		Regime for Existing Aids	505
	[A]	Constant Review	505
	[B]	Formal Investigation Procedure	507
	[C]	Incompatibility Ex Nunc	508
	[D]	Powers of the Commission	509
		[1] Proposal on Appropriate Measures	509
		[2] Obligation of the Member State	511
		[3] Duty of the Commission	512
	[E]	Guidelines of the Commission	514
§17.03		Classification as Existing Aid or as New Aid	515
	[A]	Classification According to Objective Criteria	515
	[B]	Reclassification	516
	[C]	Opening of the Formal Investigation Procedure	518
		[1] Legal Consequences	518
		[2] Provisional Nature of the Classification	521

	[3] Procedural Requirements	521
§17.04	Misuse of Existing Aid	523
	[A] Concept	523
	[B] Powers of the Commission	524
Chapter 18		
	Aid Schemes	527
§18.01	Differences Between Aid Schemes and Individual Aid	527
	[A] Distinction	527
	[B] Definition of the Beneficiaries	528
	[1] Scope	528
	[2] No Implementing Measures	530
	[C] De Facto Existence of Aid Schemes	531
§18.02	Position of Aid Schemes under the State Aid Provisions	533
	[A] Article 107 TFEU	533
	[B] Obligation to Notify	534
	[C] Interpretation of Decisions Authorizing Aid Schemes	534
§18.03	Assessment by the Commission	535
	[A] Examination of the General Characteristics of the Aid Scheme	535
	[B] Examination of Aid Granted in Individual Cases	538
§18.04	Individual Aid Granted on the Basis of Approved Aid Schemes	541
	[A] Requirement to Notify or Not to Notify	541
	[B] Compatibility of Individual Aid with an Approved Aid Scheme	542
	[1] Procedure	542
	[2] Control of Compliance with the Aid Scheme	543
	[C] Existing Aid and New Aid	544
Chapter 19		
	Notification of Aid Plans	547
§19.01	General Principles of the Obligation to Notify	547
	[A] Aim and Nature of the Obligation to Notify	547
	[1] Review by the Commission of the Compatibility of Aid	547
	[2] Preventive Control of New Aid	548
	[3] Procedural Consequences	548
	[B] Time of Granting Aid	550
§19.02	Notification by the Member State	552
	[A] Obligation of the Member State	552
	[B] Concept of Notification by the Member State	553
	[C] Assessment of the Necessity to Notify Aid	554
	[D] Withdrawal of a Notification	555
§19.03	Scope of the Obligation to Notify	555
	[A] All Plans to Grant or Alter State Aid	555

[B]	Meaning of Plans to Grant or Alter Aid	557
[C]	Final Version of the Aid Plan	558
[D]	Method of Financing	559
§19.04	Derogations from the Obligation to Notify	560
[A]	Legal Basis	560
[B]	Aid Schemes	561
§19.05	Concept of Notification	562
[A]	Complete Notification	562
[B]	Requests for Additional Information	564
§19.06	Consequences of Notification	565
[A]	Suspension of the Implementation of Aid Plans	565
[B]	Unnotified Aid	567
[C]	Fixation of the Criteria for the Assessment of the Compatibility of Aid	568
[D]	Two-Month Period for the Preliminary Investigation Procedure	570
[1]	Start after Complete Notification	570
[2]	Additional Information	571
[3]	Pre-notification Procedure	572
§19.07	Infringement of the Obligation to Notify and National Courts	574
Chapter 20		
	Preliminary Investigation Procedure	575
§20.01	Aim	575
§20.02	Rights and Obligations of Member States and Individuals	577
[A]	Duty of Loyal Cooperation	577
[B]	Rights of Individuals	578
[1]	General Principle	578
[2]	No Right to Communication of Documents	579
[3]	No Right to Be Heard	579
§20.03	Duration of the Preliminary Investigation Procedure	581
[A]	Period of Two Months	581
[B]	Unnotified Aid	583
[C]	Negotiations During the Preliminary Investigation Procedure	584
[D]	Delay to Initiate the Formal Investigation Procedure	586
[E]	Extension of the Two-Month Period	587
§20.04	Expiry of the Two-Month Period	587
[A]	Decisions Taken after the Two-Month Period	587
[B]	Implementation of Notified Aid	588
[C]	Prior Notice to the Commission	590
[D]	Objections by the Commission Within Fifteen Working Days	591
[E]	Absence of Prior Notice	592
§20.05	Result of the Preliminary Investigation Procedure	592

[A]	Possible Results	592
[B]	Decisions of the Commission Not to Raise Objections	596
	[1] General Principles	596
	[2] Conditions	596
	[3] Publication	597
	[4] Legal Effect	598
§20.06	Initiation of the Formal Investigation Procedure	599
[A]	Obligation to Initiate the Formal Investigation Procedure	599
[B]	Notion of Serious Difficulties	602
	[1] Assessment	602
	[2] Exclusive Character	603
	[3] Absence of Discretion	604
	[4] Objective Character	605
[C]	Court Review	608
	[1] General Principles	608
	[2] Burden of Proof	609
	[3] Review Not Limited to Manifest Errors of Assessment	611
	[4] Information Available	613
	[5] Insufficient Information	615
§20.07	Existence or Absence of Serious Difficulties	615
[A]	Factors Indicating the Existence of Serious Difficulties	615
	[1] Duration	615
	[2] Requests for Additional Information	617
	[3] Incomplete Assessment	619
	[4] Complaints	621
[B]	Absence of Serious Difficulties	622
	[1] Duration of the Preliminary Procedure	622
	[2] Discussions Between the Commission and the Member State	624
	[3] Other Factors	625
Chapter 21		
Formal Investigation Procedure		627
§21.01	General Features	627
[A]	Aim	627
[B]	Function	629
[C]	Distinction from the Preliminary Investigation Procedure	630
[D]	Procedure Between the Commission and the Member State	631
§21.02	Notice to the Parties Concerned to Submit Their Comments	632
[A]	Notion of Parties Concerned	632
	[1] Interests	632
	[2] Undetermined Group	633
	[3] Actual and Potential Competitors	634

[B]	Obligation to Give Notice	635
[C]	Purpose of the Notice to the Parties Concerned	636
[D]	Form of the Notice the Parties Concerned	638
	[1] Communication in the Official Journal	638
	[2] Uninformed Parties	639
§21.03	Opening of the Formal Investigation Procedure	640
[A]	Legal Nature of the Opening Decision	640
[B]	Contents of the Opening Decision	641
	[1] Enabling an Effective Participation	641
	[2] Identification of the Beneficiary of the Aid	645
	[3] Responsibility of Parties Concerned to Inform the Commission	646
	[4] Deadlines for the Submission of Information	648
[C]	Legal Effect of the Opening of the Formal Investigation Procedure	649
[D]	Provisional Nature of the Assessments in the Opening Decision	652
[E]	Court Review	654
§21.04	Position of Parties Concerned in the Formal Investigation Procedure	655
[A]	Scope of the Rights of Defence	655
	[1] Rights of Defence and the Right to Submit Observations	655
	[2] Position of Beneficiaries of Aid	658
[B]	Scope and Limits of the Rights of Interested Parties	659
	[1] General Principles	659
	[2] Interested Parties as a Source of Information	662
[C]	Access to Information	663
[D]	Infringements of the Right of Member States to Be Heard	665
	[1] Violation of an Essential Procedural Requirement	665
	[2] Minor Irregularities	666
§21.05	Duration of the Formal Investigation Procedure	668
[A]	Reasonable Period	668
[B]	Indicative Period of Eighteen Months	669
§21.06	Scope of the Investigation	672
[A]	Information by the Member States	672
[B]	Previous Decisions on State Aid	673
[C]	Involvement of Experts	676
§21.07	Closure of the Formal Investigation Procedure	677
[A]	Final Decisions and Their Legal Effects	677
[B]	Addressees of Final Decisions	679
[C]	Relation to the Decision Initiating the Formal Investigation Procedure	680
	[1] Initial and Final Position	680

[2]	Changes During the Formal Investigation Procedure	681
[D]	Conditional Decisions	683
[E]	Corrective Decisions	685
[F]	Compliance	686
§21.08	Reopening of the Formal Investigation Procedure	686
§21.09	Revocation of a Decision	688
Chapter 22		
	Unlawful Aid	691
§22.01	Prohibition of Article 108(3), Last Sentence, TFEU	691
[A]	Aim and Significance	691
[B]	Scope of the Prohibition	693
[1]	All Forms of New State Aid	693
[2]	Duration of the Prohibition	694
§22.02	Concept of Unlawful Aid	695
[A]	Aid Granted in Infringement of Article 108(3) TFEU	695
[B]	Unlawful Aid and Incompatible Aid	696
[C]	Unlawful Aid Declared Compatible	698
§22.03	Investigation of Unlawful Aid by the Commission	698
[A]	Preliminary Investigation	698
[1]	Non-applicability of the Two Months Period	698
[2]	No Conversion into Existing Aid	700
[3]	Parties Concerned	700
[B]	Formal Investigation Procedure	701
§22.04	Powers of the Commission with Respect to Unlawful Aid	703
[A]	Decisions to Abolish or to Alter Incompatible Aid	703
[B]	Information Injunction	704
[1]	Scope of the Information to Be Provided	704
[2]	Failure to Comply with an Information Injunction	706
[3]	Absence of an Information Injunction	709
[C]	Suspension Injunction	710
[D]	Provisional Recovery Injunctions	711
[E]	Reference to the EU Courts	712
§22.05	Involvement of National Courts	713
[A]	Direct Effect of Article 108(3), Last Sentence, TFEU	713
[B]	Available Remedies	715
[C]	Division of Competencies Between the Commission and National Courts	716
[1]	General Principles	716
[2]	Assessment of the Compatibility of Aid	718
[3]	Protection of the Rights of Persons Concerned	719
[D]	Duty of National Courts under Article 108(3), Last Sentence, TFEU	720
[1]	Duty to Take All Necessary Measures	720

	[2]	Suspension and Recovery of Unlawful Aid	725
	[3]	Recovery of Unlawful Aid Declared Compatible	727
	[4]	Reimbursement of Illegal Taxes	729
	[5]	Compensation of Damages	730
	[6]	Interests to Be Taken into Account	731
§22.06		Unlawful Aid and Legitimate Expectations	732
	[A]	Non-compliance with the Procedure of Article 108 TFEU	732
	[B]	Absence of Notification	735
	[C]	Absence of Approval by the Commission	736
	[D]	Annulment of a Decision Approving Aid	737
Chapter 23			
		Recovery of Unlawful Aid	739
§23.01		Aim	739
	[A]	Elimination of the Distortion of Competition	739
	[B]	Re-establishment of the Previous Situation	740
	[1]	Consequence of Unlawful Aid	740
	[2]	Concept and Scope of Recovery	742
	[3]	Irrelevant Factors	743
§23.02		Decisions of the Commission to Recover Incompatible Aid	744
	[A]	Powers of the Commission	744
	[B]	Discretion of the Commission	746
	[C]	Compatibility with the Principle of Proportionality	748
§23.03		Obligation to Recover Incompatible Aid	750
	[A]	Unconditional Nature of Recovery Decisions	750
	[B]	Implementation by National Authorities	752
	[1]	Direct Effect of Article 108(3) TFEU for National Authorities	752
	[2]	Implementation of Recovery Decisions	752
	[C]	General Conditions for the Implementation of Recovery Decisions	754
	[D]	Implementation According to National Law	755
	[E]	Principles of Equality and Effectiveness	757
	[F]	Involvement of National Courts	759
§23.04		Determination of the Amount to Be Recovered	765
	[A]	Duties of the Commission and the Member State	765
	[1]	Calculation by the Member State	765
	[2]	Calculation by the Commission	768
	[B]	Recovery of the Full Amount of the Unlawful Aid	769
	[C]	Taking into Account of Tax Implications	771
	[D]	Recovery of Interest	771
	[1]	Obligation to Recover Interest	771
	[2]	Interest Advantages	773
	[3]	Period to Be Taken into Account	773

[E]	Measures to Obtain Recovery of Illegal Aid	775
[1]	Capital Contributions and Loans	775
[2]	Tax Reductions	776
[3]	Other Forms Than Cash Payments	777
[4]	Preferential Prices	778
§23.05	Recovery of Incompatible Aid and the Recipient	779
[A]	Recovery from the Actual Recipient of the Aid	779
[1]	Condition of Actual Use	779
[2]	Transfer of Companies Having Benefited from State Aid	782
[3]	Measures to Circumvent Recovery	784
[B]	Irrelevance of Possible Consequences for the Recipient of Unlawful Aid	788
[C]	Absence of Legitimate Expectations	790
[1]	General Principles	790
[2]	Exceptional Circumstances	792
[3]	Irrelevant Circumstances	795
[4]	Legitimate Expectations Invoked by the Member State	798
§23.06	Non-compliance with a Decision to Recover State Aid	799
[A]	Reference to the Court	799
[B]	Absolute Impossibility	800
[1]	Concept	800
[2]	Absence of Absolute Impossibility	805
[3]	Duty of Loyal Cooperation with the Commission	807
[4]	Decisions Not to Recover Unlawful Aid	809
[5]	Limitation	811
Chapter 24		
	Statement of Reasons of State Aid Decisions	817
§24.01	General Principles	817
[A]	Concept and Significance	817
[B]	Statement of Reasons and Operative Part of the Decision	820
[C]	Distinction Between Statement of Reasons and Substantive Legality	821
§24.02	Extent of the Duty to State Reasons	824
[A]	Interests of Third Parties	824
[B]	Degree of Precision	826
[1]	Minimum Requirements	826
[2]	Scope	827
[C]	Decision-Making Practice of the Commission	829
[1]	Previous Decisions	829
[2]	Policy Changes	830
[D]	Explanations Given Ex Post Facto	831
[E]	Professional Secrecy	833

[F]	Consequences of Insufficient Reasoning	833
§24.03	Statement of Reasons and Article 107 TFEU	834
[A]	Existence of State Aid	834
[B]	Trade and Competition	835
[C]	Compatible and Incompatible Aid	838
[1]	General Rules	838
[2]	Restructuring Issues	840
[D]	Existing Aid	841
§24.04	Decisions Relating to the Formal Investigation Procedure	841
[A]	Decisions Not to Initiate the Formal Investigation Procedure	841
[B]	Decisions to Initiate the Formal Investigation Procedure	842
[C]	Decisions Closing the Formal Investigation Procedure	844
[D]	Decisions to Reject a Complaint	844
[E]	Decisions Ordering the Recovery of Unlawful Aid	845
[1]	No Specific Reasoning	845
[2]	Amounts to Be Recovered	846
Chapter 25		
	Proceedings Brought by the Commission Against a Member State	849
§25.01	Relation Between Articles 258-259 TFEU and Article 108(2) TFEU	849
§25.02	Time Limits	851
§25.03	Burden of Proof	851
§25.04	Defence Available to a Member State	852
§25.05	Conservatory Measures	854
Chapter 26		
	Judicial Protection: General Issues	855
§26.01	Reviewable Acts	855
[A]	Acts Not Producing Legal Effects	855
[1]	Criteria	855
[2]	Preparatory Acts	856
[3]	Letters and Other Acts	857
[B]	Decisions Not to Initiate the Formal Investigation Procedure	858
[C]	Decisions to Open the Formal Investigation Procedure	860
[1]	General Principles	860
[2]	New Aid or Existing Aid	861
[3]	Interim Relief	863
[D]	Decisions Closing the Formal Investigation Procedure	864
[E]	Refusal to Bring Proceedings Before the Court of Justice	866
[F]	Classification as Existing Aid	867
[G]	Decisions Regarding Appropriate Measures	867
§26.02	Requirement of a Vested and Present Interest	868

	[A] Existence of an Interest	868
	[B] Absence of an Interest	869
§26.03	Time Limits	873
	[A] Expiry of the Time Limit	873
	[B] Publication of State Aid Decisions	874
	[C] Obtaining Knowledge of a State Aid Decision	875
§26.04	Private Actions for Annulment of State Aids Decisions	876
	[A] Subject Matter of Actions Against State Aid Decisions	876
	[B] Direct and Individual Concern	877
	[1] General Principles	877
	[2] Actual or Potential Recipient of the Aid	878
	[3] Recovery of Aid	879
	[4] Decisions on Aid Schemes Which Are Not of Individual Concern	880
	[5] Decisions on Aid Schemes Which Are of Individual Concern	882
	[6] Public Bodies Granting Aid	884
§26.05	A Regulatory Act Which Does Not Entail Implementing Measures	885
§26.06	<i>Locus Standi</i> of Trade Associations	887
	[A] Entitlement to Bring an Action	887
	[B] A Trade Association Acting in Place of Its Members	890
	[1] Members Having <i>Locus Standi</i>	890
	[2] Members Not Having <i>Locus Standi</i>	892
	[C] Conditions for Having Specific <i>Locus Standi</i>	894
	[1] Normal Exercise of Procedural Rights	894
	[2] Status as a Negotiator of the State Aid Measure	896
§26.07	Trade Unions and Their Members	898
§26.08	Article 263 TFEU and Article 267 TFEU	899
§26.09	Assessment of the Legality of State Aid Decisions	902
	[A] Scope of Legal Review	902
	[B] Information Available at the Time of Adoption	903
	[C] Failure to Provide Information	906
	[1] Information Not Submitted	906
	[2] Information Ex-Post	908
	[3] Decision-Making Practice	909
	[D] Legal Pleas	910
Chapter 27		
	Judicial Protection of Competitors	913
§27.01	Decisions Not to Initiate the Formal Investigation Procedure	913
	[A] Requirements for Standing	913
	[B] Meaning of a ‘Party Concerned’	916
	[1] Competing Undertakings	916
	[2] Burden of Proof	918

	[3] Absence of a Competitive Relationship	919
	[4] Tax Exemptions	920
[C]	Purpose of the Action	921
	[1] Compliance with the Procedural Guarantees of Article 108(2) TFEU	921
	[2] Admissible and Inadmissible Pleas	924
	[3] Challenging the Merits of the Decision of the Commission	928
§27.02	Decisions Closing the Formal Investigation Procedure	930
	[A] Requirement of Individual Concern	930
	[B] Requirement of a Special Competitive Relationship	934
	[1] Meaning	934
	[2] Purpose of the Criterion	936
	[3] Meaning of 'Substantially Affected'	937
	[4] Evidence	938
	[5] Market Structure	942
	[C] Participation in the Administrative Procedure	943
	[D] Non-participation in the Administrative Procedure	946
§27.03	Requirement of Direct Concern	947
Chapter 28		
	Complaints on State Aid	949
§28.01	Initiation of the Preliminary Investigation Procedure	949
§28.02	Treatment of Complaints	950
	[A] Diligent and Impartial Examination	950
	[B] Scope of the Examination	951
	[C] Available Information	951
	[D] Duration of the Procedure	953
	[1] Without Undue Delay	953
	[2] Reasonable Period	954
§28.03	Closure of the Preliminary Investigation Procedure	957
	[A] Provisional and Final Decisions	957
	[B] Legal Effect of the Rejection of a Complaint	958
§28.04	Judicial Protection	959
	[A] Reviewable Acts	959
	[B] Admissibility of Actions Against Decisions Rejecting a Complaint	961
	[1] Action for Annulment	961
	[2] Action for Failure to Act	961
Chapter 29		
	Derogations under Article 108(2) TFEU	965
§29.01	Power of the Council under Article 108(2) TFEU	965
	[A] Scope	965
	[B] Exceptional Nature	966

[1] Strict Interpretation	966
[2] Limited Control	966
[C] Limits	967
§29.02 Powers of the Commission	969
Appendix I: Articles 107-109 TFEU	971
Appendix II: 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) (Text with EEA relevance)	975