

## BOOK REVIEWS

FRANCESCO DE CECCO, *STATE AID AND THE EUROPEAN ECONOMIC CONSTITUTION* (HART PUBLISHING 2012) 210PP. ISBN 9781849461054, £55.00

and

JUAN JORGE PIERNAS LÓPEZ, *THE CONCEPT OF STATE AID UNDER EU LAW - FROM INTERNAL MARKET TO COMPETITION AND BEYOND* (OXFORD UNIVERSITY PRESS 2015) 320PP. ISBN: 9780198748694, £60.00

by Jotte Mulder\*

It is fair to say that of all areas of EU internal market law, state aid rules have long been the least theorised. This may be changing. Recent years have seen some important contributions to the discussion of the EU state aid rules, in particular with respect to their wider function, meaning and constitutional status within the internal market. As a starting point it should be noted that the existing literature on the economic constitution tends, with notable exceptions, to focus primarily, if not exclusively, on the impact of free movement case law. In addition, as noted, competition law and, particularly, state aid law are mostly subject to specialised debates, often related to rather insulated approaches within those areas of law. The latter fact must be related to the ever-increasing specialisation within each area of internal market law, in particular the fact that competition and state aid rules are subject to a high degree of practitioners-led debates, whereas free movement tends to be mostly an academic affair. Free movement law is therefore relatively more often the subject of wider academic reflections, whereas competition and state aid are more inwardly focused and less often directly part of the wider constitutional narrative on the economic constitution of the Union. Both of

---

\* Assistant Professor at the Europa Institute of Utrecht University (PhD, European University Institute), e-mail: jotte.mulder@eui.eu.

the books discussed in this review recognise and posit that a narrative, which considers one of the salient constitutional questions to be that of the social effects of internal market law, has to include a thorough reflection on Union state aid law. This review discusses and briefly compares two important and enriching contributions to this narrative.

The first book that will be discussed is Francesco de Cecco's 'State Aid and the European Economic Constitution'. This is truly a pivotal contribution to the contextualisation of state aid rules within the wider academic narrative on the so-called economic constitution of the Union.

The book is divided into three parts. Part I develops the normative outlook with a discussion of the constitutional framework of the internal market and the nature of state aid law within that context. The emphasis is placed on the distinctive nature of state aid control which acts as 'a significant constraint on the Member States' freedom to stimulate regulatory competition' (p 55). In part II, de Cecco puts the issue of Member States' diverging roles as market participants and regulators centre-stage. How do the state aid rules respond to these different roles? Part III deals with two specific issues of particular importance in the current debate on the role of state aid: the issues of regional taxation and public service.

The question at the centre of de Cecco's book concerns the potential structurally distortive effects of economic integration on the fundamental structures of domestic societies. Of particular interest to de Cecco is the question how the Court of Justice of the European Union (the Court) and the General Court (the GC) have dealt with this balance in their *jurisprudence* in the field of state aid law. De Cecco forcefully argues that this is a question that is central to state aid law because its application influences sensitive questions that relate to the extent to which fiscal powers can be devolved from central governments to sub-national governments or how public services should be run. De Cecco's consistent and overarching question is how state aid law limits national regulatory autonomy and the extent to which this has prompted the Court to redefine the concept of state aid (p 135): 'These questions matter not only to state aid but also to the European economic constitution as a whole, as answers to them have profound

consequences on the way in which the EU legal order structures the relationship between market and nonmarket concerns.'

De Cecco sets out his normative perspective on this balance by submitting that 'the legitimacy of EU law rests on its ability to deliver a single market which does not undermine the capacity of Member States to pursue redistributive policies and to preserve the delicate balance between EU law supremacy and national concerns regarding their constitutional spaces' (p 2). Thus, the author argues that there is a constitutional space that belongs to the Member States that is potentially at risk in state aid law. Specifically, de Cecco aspires to demonstrate that the regulatory standards, which are introduced on the basis of the EU state aid rules may nudge public bodies towards actions that are exclusively justified on the grounds of their commercial self-interest. As such, de Cecco argues that public bodies may be 'confronted' with the requirement to satisfy a particular conception of self-interest that is modelled after values that might have been, up until that point, foreign to the public body (p 76). Thus, the self-interest of Member States as market participants may get in conflict with their role as 'public authorities or with policy objectives that embody the authority of the public mandate' (p 77).

De Cecco proceeds by discussing this important constitutional balance, mostly, by critically assessing the case law of the European Courts. The authors' legal analysis is superbly eloquent and theoretical reflections are supported and consistently conjoined with analysis of case law, which makes the book a very pleasant read. In all of his critical evaluations of the case law, de Cecco coherently looks at the ability of the Court to deliver a legal infrastructure for market integration that does not compromise the wider 'non-market' values that may be embedded in national political and constitutional systems. De Cecco highlights strands of case law that are illustrative of a Court that is concerned with the creation of a legal space where Member States are free to pursue their public interests, a legal space that is in most instances successfully crafted by the Court. In his analysis, de Cecco highlights important strands of case law and diverging approaches to these fundamental constitutional questions by the GC and the Court. The

analysis of case law is largely novel and original, especially within the normative framework that is advanced by the author.

I have three minor reservations with regard to this exciting piece of scholarship. However, it should be noted that the following minor points do not, in any way, undermine the richness of de Cecco's work.

First, the normative perspective of de Cecco could have been combined with a more explicit acknowledgment of the central field of tension in which the EU state aid rules operate. De Cecco elaborates on some profound issues that arise when efficiency principles are installed within an administrative context that could also be based on trust, informal values, public spiritedness and so forth. However, the balance from the perspective of state aid is difficult because such amorphous elements of state-society-market relations are, from a state aid perspective, perceived as important factors contributing to intransparency and constitutive to relationships, which are likely to end up in granting covert advantages granted to some undertakings and not to others. The rigidity of the prudent private investor standard *leaving aside all social, regional-policy and sectoral considerations* is, at least partly, based on an idea of administrability and transparency in state aid matters. This balance between administrability on the one hand and a need for context-specificity on the other stands at the centre of state aid law but is not very clearly developed by the author.

Secondly, state aid policy and law underwent considerable changes. The most recent one is not accommodated by the author, namely modes of adaptation of the European *praxis* created by the economic and political emergency of the financial crisis. At the time of publication in 2012, the financial crisis had already had a strong impact on the application of state aid law in Europe. This would have opened a new front for the author to engage with and reflect upon in light of the economic constitution but, granted, could have required a slightly different orientation and shape of the book.

Thirdly, the author could have given some more attention to the importance of the policy dimension of the state aid rules. The Commission has issued an extensive collection of guidance papers, forms for notifications and

reporting, block exemption regulations, temporary rules, horizontal rules and sector-specific rules that Member States can rely on in their design of aid schemes or *ad hoc* individual aid actions. These documents all serve the purpose of minimising conflicts and streamlining, in procedural terms, the allocation of governmental aid mechanisms. In this sense a lot of the potential conflicts that are of concern from the perspective of state aid have been 'negotiated' and Member States have agreed to follow certain procedures on when they grant state aid in specific sectors.

This is important in light of the normative concerns expressed by the author because it is likely that the efforts of the Commission to nudge Member States towards the implementation of self-assessing 'evaluation communities' that structure and implement a very specific idea of governance has systemic effects. That is to say that there are likely to be policies or objectives that are not developed because Member States are already thinking only in terms of the smart regulation rationale of the Commission. Within this context, normative claims over the functioning of the state aid regime as a covert technocratic process that depoliticizes the formulation and pursuit of social objectives can be formulated on the basis of concerns about its democratic legitimacy and as an encroachment on the constitutional space for Member States to develop aid schemes. It matters whether policy objectives developed by Member States are to be defined within the technocratic domain of the proceduralised world of the state aid rules or whether they are allowed to take shape within 'normal politics' and the democratic arenas of the Member States. The question is therefore whether, in light of the normative concerns pursued by the author, his focus on case law was the most salient or he would have done better focussing on the silent encroachment of constitutional spaces by the European Commission. Granted, this could have easily required a completely different book and, as has been highlighted several times, the author has produced an outstanding piece of scholarship with his chosen focus in the field of EU state aid law.

Piernas' ambitions in 'The Concept of State Aid Under EU Law' are exactly to dissect the relationship between the policy of the Commission and the development of the essential legal categories of the EU state aid rules.

Thereby, Piernas shares the ambition of de Cecco to discuss EU state aid law 'in context'. Yet, where de Cecco reflects on EU state aid case law in the context of a constitutional perspective, Piernas discusses the development of case law in the context, mainly, of the policy sphere of the European Commission. Moreover, the author seeks to demonstrate a link between the policy initiatives of the European Commission and the development of EU state aid law in the case law of the Court. The book is set up so as to discuss leading cases in the field, which are coherently presented throughout the work. In his discussion of these cases, Piernas' recurring argument is that by focusing on the position of the Commission and developments in state aid policy, it is possible to provide a better understanding of the development of the case law. If only because of the novelty of this effort, the work is certainly a major and remarkable contribution to the field of state aid law. State aid law has not yet been approached on this basis and the coherent and consistent discussion of case law is in itself likely to set the book up as one of the important referential works for some time to come.

The basic set up of the Piernas' book is as follows: in the first part, EU state aid law is discussed in perspective. Then, four separate chapters discuss the different elements of article 107(1) TFEU. The notions of advantage and selectivity are covered in chapters 4 and 5. The requirement that state aid has to be granted 'by the State or through State resources' is addressed in chapter 6. The effect on trade and distortion of competition conditions are discussed in chapter 7. Finally, in part III Piernas discusses, as a separate case study, the effects of the financial crisis on the state aid concept and he offers a synthesis of the evolution of the concept of state aid in four distinctive periods.

Piernas demonstrates interesting links in the development of state aid concepts within a very strong policy-driven context. This is particularly revealing and interesting in the development of the concept of selectivity, where Piernas manages to unveil clear linkages between Commission policy and interpretations and developments in the case law (p 103 and further). However, Piernas' suggestion of a strong link between the policy preference and developments in the case law of the Court is not always equally convincing, if only simply because of a number of rulings that appear to directly oppose policy preferences of the Commission. One can point for

example to the unwillingness of the Court to support an expansive notion of aid (*PreussenElektra*)<sup>1</sup>, which is clearly a policy preference for the Commission, or to the margin of appreciation that is granted by the Court to Member States in the pursuit of services of general economic interest, which the Commission would rather have linked to a stricter market failure rationale. Or one can point to the case law of the Court that accommodates the objectives pursued for the purpose of determining whether a State acts in its capacity as shareholder or regulator (*Adria-Wien Pipeline/EDF*)<sup>2</sup>, which the Commission fundamentally disagrees with.

As such, there are some important and, in my view, desirable differences of policy preferences of the Commission and evolution of state aid concepts in the case law. These differences can be easily explained and justified. Whereas the Commission pursues effective enforcement, the Court is concerned with wider constitutional concerns that include the safeguarding of that constitutional space and balance, which is of such concern in de Cecco's contribution. Instead, Piernas does not pay much attention to such differences (e.g. p 170), based on the fundamentally different role of the Court vis-à-vis the Commission, or occasionally brushes these divergences away as 'mistakes' from the Court (e.g. p 95). Therefore, in the same way as de Cecco's work could have benefitted from more linkages between the case law and the effects of the Commission's policy dimension, Piernas' work could have benefitted from a slightly more theoretical reflection that could have positioned the Court as a constitutional actor within the internal market. A constitutional actor whose sole concern is *not* just the effective enforcement of the Union state aid rules.

Moreover, the contextual approach adopted by Piernas could have profited from a slightly wider (societal) contextual approach than 'merely' taking into account the dimension of the Commission's policy preferences. It would have been interesting to, for example, include some 'external' societal developments in chapter 3 'the evolution of European State Aid Policy' and to establish potential connections between processes of privatisation and

---

<sup>1</sup> Case C-379/98, ECLI:EU:C:2001:160, *PreussenElektra*.

<sup>2</sup> Case C-143/99, ECLI:EU:C:2001:598, *Adria-Wien Pipeline* and Case C-124/10 P, ECLI:EU:C:2012:318, *Commission v. EDF*.

liberalisation on the evolution of the concept of state aid. These societal processes have led to new forms of regulatory intervention and the gradual process by which the role of the state as a direct provider of public services has disappeared and has led to the creation of 'new regulatory tools' that are aimed at safeguarding the public interest on the basis of terms set by new public management reforms. These developments coincided with the adoption of the market economy investor principle. One of the key features of these reforms has been to *not* make any distinctions between the public and the private sector when it comes to how the public sector is managed: separating commercial activity from non-commercial activity and emphasizing financial reporting and accountability. It is interesting to think about how these developments have influenced Union state aid law. For example, on the basis of the state aid rules the relationship between the state and the provider of public services in many of these regulatory bonds has to be based on the behavioural standard of the prudent investor in every action that brings forth an advantage or, alternatively, to notify the state aid. This has led to a new reality for authorities pursuing regulatory intervention in the market. Although the Court recognises explicitly that the private investor principle has to be excluded in the event that the state acts as a public authority, since such situations can never compare to those of a private investor in a market economy, the new regulatory tools and implementation of principles of new public management make it increasingly obscure to understand what public authority actually entails outside of the traditional functions that have always been strongly associated with state authority (police, public health, public security).

This last comment could have easily required a completely different book and, as has been highlighted at the start, Piernas has produced an important piece of scholarship with a clear added value, perhaps even because of his focus on the impact of the Commission's policy on the development of Union state aid law.

In summary, both books contribute in their own original ways to a further understanding of state aid law *in context*. De Cecco reflects on state aid law in a broader constitutional context. Piernas reflects on state aid law in a wider

institutional context. The authors should be applauded and both books are highly recommended readings for scholars, students and practitioners alike.