

# European State Aid Law

Handbook

von

Dr. Martin Heidenhain

1. Auflage

European State Aid Law – Heidenhain

schnell und portofrei erhältlich bei [beck-shop.de](http://beck-shop.de) DIE FACHBUCHHANDLUNG

Thematische Gliederung:

Europäisches Wirtschaftsrecht



Verlag C.H. Beck München 2010

Verlag C.H. Beck im Internet:

[www.beck.de](http://www.beck.de)

ISBN 978 3 406 57884 7

## Table of Contents

|  |    |
|--|----|
| <b>Chapter 1. General Principles</b> .....                                       | 1  |
| <b>§ 1 Basic Outline of State Aid Law</b> .....                                  | 1  |
| A. Prohibition of State Aid .....  | 1  |
| I. Basis for the Prohibition .....   | 1  |
| II. Authority of the Commission .....  | 3  |
| III. Authority of the Council .....  | 4  |
| IV. Authority of the Community Courts .....                                      | 4  |
| V. Goals of Aid Regulation .....   | 4  |
| B. Scope of State Aid Prohibition .....  | 5  |
| I. Substantive Scope .....   | 5  |
| II. Geographic Scope .....   | 5  |
| III. ECSC Treaty .....   | 6  |
| IV. Euratom Treaty .....   | 6  |
| C. Volume of Aid being Granted .....   | 6  |
| <b>§ 2 Development of State Aid Law</b> .....                                    | 8  |
| A. General .....   | 8  |
| B. Acts of the Commission .....  | 9  |
| I. Communications, Guidelines, Frameworks, Regulations .....                     | 9  |
| 1. Procedure .....   | 9  |
| 2. Block Exemption Regulations .....   | 9  |
| 3. Horizontal aid .....  | 9  |
| 4. Regional aid .....  | 10 |
| 5. Sectoral aid .....  | 11 |
| II. Statistical Data .....   | 11 |
| III. Transparency of the Commission's Activities .....                           | 11 |
| C. Acts of the Council .....   | 12 |
| <b>Chapter 2. The Concept of State Aid</b> .....                                 | 13 |
| <b>§ 3 General Principles</b> .....  | 13 |
| A. Demarcation of Jurisdictions .....  | 13 |
| B. Elements of State Aid .....   | 14 |
| C. Interpreting the Elements .....   | 15 |
| D. Grantors of Aid .....   | 18 |
| E. Aid Recipients .....  | 19 |
| F. Types of Aid .....  | 19 |
| G. Compensation for the Discharge of Services of General Economic Interest ..... | 20 |
| H. <i>De minimis</i> aid .....   | 20 |
| I. Derogatory Provisions of the Treaty .....                                     | 21 |
| <b>§ 4 The Concept of State Aid</b> .....  | 22 |
| A. Granting of an Economic Advantage .....                                       | 23 |
| I. Economic Advantages .....   | 23 |
| 1. Principle of fair market value .....  | 23 |
| 2. Proof of fair market value .....  | 26 |
| II. Relief from Economic Burdens .....   | 27 |
| III. Indirect Advantages .....   | 29 |
| IV. Parafiscal Duties .....  | 31 |
| V. Other State Measures .....  | 32 |
| VI. Date of Grant .....  | 33 |
| B. Transfer of State Resources .....   | 33 |
| I. General .....   | 33 |
| II. Requirement of State Resources .....   | 34 |
| 1. State resources .....   | 34 |

Table of Contents

|  |    |
|--|----|
| 2. Attribution to the State .....  | 34 |
| 3. State control .....   | 36 |
| 4. Resources of private undertakings .....   | 37 |
| 5. PreussenElektra .....   | 38 |
| III. Requirement of Transfer of Resources .....  | 40 |
| C. Favoring of Certain Undertakings or the Production of Certain Goods .....   | 43 |
| I. Undertakings .....  | 44 |
| II. The Production of Certain Goods .....  | 44 |
| III. Specific Measures .....   | 45 |
| IV. Advantages Inherent in the System .....  | 48 |
| V. Tax Law Measures .....  | 49 |
| VI. Broad Interpretation .....   | 49 |
| D. Distortion of Competition .....   | 49 |
| I. Distortion of Competition .....   | 50 |
| II. Relevant Market .....  | 53 |
| 1. Concept of State aid .....  | 53 |
| 2. Approval of State aid .....   | 53 |
| E. Adverse Effects on Trade between Member States .....  | 54 |
| I. Trade between Member States .....   | 55 |
| II. Adverse Effect on Trade .....  | 55 |
| III. Irrefutable Presumptions .....  | 56 |
| IV. Alignment of Competitive Conditions .....  | 57 |
| V. Trade with non-Member States .....  | 58 |
| VI. Local Matters .....  | 58 |
| VII. Perceptible Effect .....  | 59 |
| § 5 <i>De Minimis</i> Aid .....  | 61 |
| A. The Commission's <i>de minimis</i> Policy .....   | 61 |
| B. The <i>de minimis</i> Regulation .....  | 62 |
| I. Legal Basis of the <i>de minimis</i> Regulation .....   | 62 |
| II. Procedure to Adopt the <i>de minimis</i> Regulation .....  | 62 |
| III. Scope of the <i>de minimis</i> Regulation .....   | 62 |
| 1. Substantive scope .....   | 62 |
| 2. Sectoral Scope .....  | 63 |
| 3. Temporal scope .....  | 64 |
| IV. Conditions for the Classification as <i>de minimis</i> Aid .....   | 66 |
| V. Monitoring .....  | 70 |
| VI. Legal Consequences of a Classification as <i>de-minimis</i> -Aid .....   | 70 |
| § 6 State Investments of Capital .....   | 73 |
| A. The "Private Investor Test" as Standard of Review for State Investments of Capital .....  | 73 |
| I. Basic Principles .....  | 73 |
| II. Commission Communications and Decisions .....  | 77 |
| 1. Equity Holdings Communication .....   | 77 |
| a) First group of cases: Acquisition of all or part of the assets of an existing firm without the investment of additional capital ..... | 77 |
| b) Second group of cases: Capital investments not involving State aid .....  | 77 |
| aa) Founding of a new enterprise .....   | 78 |
| bb) Provision of fresh capital to public undertakings: .....   | 78 |
| cc) Capital increases involving the simultaneous participation of the State and private shareholders .....                               | 78 |
| dd) Strategic or high-risk investments .....   | 80 |
| c) Third group of cases: Capital investments constituting State aid ... ..   | 81 |
| aa) Unreasonably low profitability prospects; no adequate means of self-financing .....  | 81 |
| bb) Only temporary participation of the State .....  | 81 |
| cc) Founding of rescue companies for unprofitable businesses .....   | 81 |

Table of Contents

|  |     |
|--|-----|
| dd) Disproportionate State participation in a mixed public-private enterprise; investments exceeding the net asset value of the beneficiary enterprise ..... | 81  |
| d) Fourth group of cases: Other cases / grounds for a presumption of State aid .....   | 82  |
| 2. Communication on public undertakings .....  | 82  |
| a) General principles of interpretation .....  | 83  |
| aa) Broad spectrum of approaches to evaluation .....   | 83  |
| bb) Relevant point in time for evaluation .....  | 83  |
| cc) Difference in the assessment of majority and minority stakes ..  | 83  |
| dd) Appropriate return on investment .....   | 84  |
| ee) Differentiation between first-time and repeated investments ..   | 87  |
| ff) Strategic investment motives .....   | 87  |
| gg) The investor's need for information .....  | 89  |
| b) Evaluation of particular types of investment .....  | 89  |
| aa) Equity investments .....   | 89  |
| (1) Earning power .....  | 90  |
| (2) Financial indicators .....   | 91  |
| (3) Market situation .....   | 91  |
| (4) Cost of restructuring compared to the cost of liquidation  | 93  |
| bb) Debt investments .....   | 94  |
| 3. Summary .....   | 95  |
| B. Special Questions, Problem Cases .....  | 95  |
| I. The Appropriate Scope for the State's Economic Activity, Rationality of Private Investors' Market Behaviour .....   | 96  |
| II. Investments in Profitable Enterprises .....  | 97  |
| III. Definition of the Private Investor to be Used as a Standard of Comparison   | 98  |
| IV. Calculation of the Average Return in the Industry (Cost of Capital) .....  | 99  |
| 1. Cost of equity .....  | 99  |
| 2. Cost of debt .....  | 101 |
| V. Calculating the State Aid Component of State Capital Investments .....  | 101 |
| 1. State aid component of an equity investment .....   | 101 |
| 2. State aid component of a debt investment .....  | 101 |
| VI. Limited Judicial Review .....  | 102 |
| § 7 State Liabilities .....  | 104 |
| A. State Guarantees .....  | 104 |
| I. Outline of the Problem .....  | 104 |
| II. Compatibility of State Guarantees with Article 87 EC .....   | 105 |
| 1. State guarantees as State aid .....   | 105 |
| a) Individual guarantees .....   | 105 |
| b) Individual guarantees for SMEs .....  | 108 |
| c) Guarantee schemes .....   | 108 |
| d) Guarantee schemes for SMEs .....  | 109 |
| e) Requirement of a case-by-case analysis .....  | 109 |
| 2. Aid beneficiary .....   | 109 |
| a) Aid benefiting the borrower enterprise .....  | 109 |
| b) Aid benefiting the lender bank .....  | 109 |
| 3. Calculating the element of State aid .....  | 111 |
| a) Ad hoc guarantees .....   | 111 |
| b) Guarantee schemes .....   | 111 |
| c) Guarantees and guarantee schemes for SMEs .....   | 112 |
| III. Legal Consequences of the Formal or Substantive Unlawfulness of State Guarantees pursuant to Community Law .....  | 112 |
| 1. Formally unlawful State guarantees (Article 88(3) third sentence EC) .  | 112 |
| a) Decision-making powers of the Commission .....  | 113 |
| b) Decision-making powers of the national courts .....   | 113 |
| c) Competitors .....   | 115 |
| 2. Substantively unlawful State guarantees (Article 87(1) EC) .....  | 115 |
| B. Liabilities with Respect to the Obligations of Public Credit Institutions .....   | 116 |

Table of Contents

|            |   |     |
|------------|---|-----|
| § 8        | Taxes and Duties .....  | 118 |
|            | A. Introduction .....   | 118 |
|            | B. Economic Benefit .....   | 120 |
|            | C. By the State or Through State Resources .....  | 120 |
|            | D. Selectivity .....  | 122 |
|            | I. General Provisions and Exceptions .....  | 123 |
|            | 1. Exceptions .....   | 123 |
|            | 2. Examples .....   | 123 |
|            | 3. Geographic selections .....  | 126 |
|            | II. Justification through the Nature or Internal Structure of the Tax System ...            | 127 |
|            | 1. Concept .....  | 127 |
|            | 2. Individual cases .....   | 129 |
|            | E. Distortion of Competition .....  | 130 |
| § 9        | Public Funding of Infrastructure, Sales of Public Land and Buildings .....                  | 131 |
|            | A. Public Funding of Infrastructure .....   | 131 |
|            | I. State Managed Infrastructures .....  | 131 |
|            | II. Public or Private Operators .....   | 132 |
|            | III. Public Private Partnerships .....  | 133 |
|            | IV. Obligations of General Economic Interest .....  | 134 |
|            | V. Development of Real Estate .....   | 134 |
|            | B. Sales of Public Land and Buildings .....   | 134 |
|            | I. Commission Communication .....   | 134 |
|            | 1. General area of application .....  | 134 |
|            | 2. Sale through an unconditional bidding procedure .....                                    | 135 |
|            | 3. Sale without an unconditional bidding procedure .....                                    | 136 |
|            | 4. Notification, complaints .....   | 137 |
|            | 5. Conditions of sale .....   | 137 |
|            | II. Practice of the Commission .....  | 138 |
|            | 1. Freedom of the participants .....  | 138 |
|            | 2. Unconditional bidding procedure .....  | 138 |
|            | 3. Independent evaluation .....   | 138 |
|            | 4. Principles of appraisal .....  | 140 |
|            | 5. Special sale conditions .....  | 141 |
|            | 6. Distortion of competition, adverse effect on intra-Community trade ..                    | 141 |
| Chapter 3. | Compatibility of State Aid with the Common Market pursuant to Article 87(2) EC .            | 143 |
| § 10       | Significance of Exemptions .....  | 143 |
| § 11       | State Aids of a Social Character to Individual Consumers – Article 87(2)(a) EC ...          | 145 |
| § 12       | State Aids for Natural Disasters and Exceptional Occurrences –<br>Article 87(2)(b) EC ..... | 147 |
| § 13       | State Aid Based on the Division of Germany – Article 87(2)(c) EC .....                      | 150 |
| Chapter 4. | Compatibility of State Aid pursuant to Article 87(3) EC .....                               | 151 |
| § 14       | General Principles .....  | 151 |
|            | A. Introduction .....   | 152 |
|            | I. Prohibition of State Aid Applies neither Absolutely nor Unconditionally ..               | 152 |
|            | II. Discretion of and Limitations on the Commission in the Approval of Aid .                | 152 |
|            | III. The Nuts and Bolts of the Approval Procedure: The Commission’s Pub-<br>lications ..... | 155 |
|            | B. Community Frameworks, Guidelines and Communications .....                                | 155 |
|            | I. Introduction .....   | 155 |
|            | 1. Inventory of Commission publications .....   | 155 |
|            | 2. Substantive contents of the Commission’s publications .....                              | 158 |
|            | 3. Lack of clear basis in Community law .....   | 159 |
|            | 4. Systematization of the Commission’s publications .....                                   | 160 |
|            | II. Force of Law .....  | 161 |
|            | III. Basis of Authority .....   | 164 |
|            | IV. Binding Effect .....  | 166 |
|            | V. Promulgation and Interpretation .....  | 169 |

Table of Contents

|   |     |
|---|-----|
| VI. Legal Remedies .....  | 170 |
| C. Block Exemption Regulations (BERs) .....   | 171 |
| I. Authority of the Commission .....  | 171 |
| II. Force of Law and Binding Effect .....   | 172 |
| III. Effect of Exemption .....  | 174 |
| IV. Basis of Authority .....  | 175 |
| V. Promulgation Procedure .....   | 175 |
| VI. Oversight Procedure .....   | 176 |
| VII. Qualification Risk and Right to ad hoc Notification .....  | 176 |
| VIII. Requirements for the Substantive Content of BERs .....  | 177 |
| IX. Principles for the Interpretation of BERs .....   | 178 |
| X. Legal Remedies against BERs .....  | 179 |
| XI. Changes Introduced by the General Block Exemption Regulation .....  | 179 |
| D. The Commission's ad hoc Rulings .....  | 180 |
| § 15 State Aid pursuant to Article 87(3)(a) and (c) EC – Promotion of Areas with<br>Abnormally Low Standard of Living or Serious Underemployment, Promotion of<br>Certain Economic Areas – Regional Aid .....   | 183 |
| A. Background .....   | 183 |
| I. Introduction .....   | 183 |
| II. Guidelines and Frameworks .....   | 184 |
| III. Relation to European Regional Promotion .....  | 185 |
| B. Guidelines on National Regional Aid .....  | 186 |
| I. Scope of Application .....   | 186 |
| II. Forms of Aid .....  | 186 |
| 1. Fundamental principle: Investment aid .....  | 186 |
| 2. Operating aid .....  | 188 |
| 3. Aid for newly created small enterprises .....  | 188 |
| III. Assisted Regions, Population Ceilings, Regional Aid Maps .....   | 189 |
| 1. Determination of a Community assisted regions population ceiling ....  | 189 |
| 2. Determination of eligible national population coverage .....   | 190 |
| 3. Determination of the assisted regions, regional aid maps .....   | 191 |
| IV. Maximum Permissible Aid Intensity .....   | 191 |
| 1. General principles .....   | 191 |
| 2. “Theoretical” maximum limits in regions pursuant to Article 87(3)(a)<br>EC .....   | 192 |
| 3. “Theoretical” maximum limits in regions pursuant to Article 87(3)(c)<br>EC .....   | 192 |
| 4. Bonuses for small and medium-sized enterprises .....   | 193 |
| 5. Cumulated ceilings .....   | 193 |
| V. Additional Requirements .....  | 193 |
| C. General Block Exemption Regulation .....   | 194 |
| D. Special Provisions for Large Investment Projects .....   | 195 |
| I. History .....  | 195 |
| II. Provisions for Large Investment Projects pursuant to the Guidelines for<br>2007–2013 .....  | 195 |
| 1. Scope of application .....   | 195 |
| 2. Maximum aid intensity, aid ceilings .....  | 195 |
| 3. Notification .....   | 197 |
| 4. In-depth assessment under Article 88(2) EC .....   | 197 |
| § 16 State Aid pursuant to Article 87(3)(b) EC-Aid to Promote the Execution of an<br>Important Project of Common European Interest or to Remedy a Serious<br>Disturbance in the Economy of a Member State ..... | 199 |
| A. Introduction .....   | 199 |
| B. Aid to Promote the Execution of an Important Project of Common European<br>Interest .....  | 200 |
| I. Principles .....   | 200 |
| II. Practical Application .....   | 200 |
| C. Aid to Remedy a Serious Disturbance in the Economy of a Member State .....   | 202 |

Table of Contents

|      |  |     |
|------|--|-----|
| I.   | Principles .....   | 202 |
| II.  | Practical Application prior to the Financial Markets Crisis .....  | 203 |
| III. | The Financial Markets Crisis 2008/2009 .....   | 203 |
|      | 1. The beginning: Application of rescuing and restructuring guidelines ..  | 203 |
|      | 2. Application of Article 87(3)(b) EC .....  | 204 |
|      | 3. State aid to financial institutions .....   | 205 |
|      | a) Authorisation of aid measures under the Commission's commu-<br>nications .....  | 205 |
|      | b) The Member States' schemes and ad-hoc measures in support of<br>financial institutions .....  | 207 |
|      | c) Distinction between fundamentally sound banks and banks suffer-<br>ing from endogenous problems .....   | 207 |
|      | 4. State aid to the real economy .....   | 207 |
| § 17 | <b>State Aid pursuant to Article 87(3)(c) EC – Aid to Facilitate the Development of<br/>Certain Economic Activities or Certain Economic Areas – Horizontal Aid</b> ..... | 209 |
| A.   | Rescue and Restructuring Aid .....   | 211 |
|      | I. Community Guidelines on State Aid for Rescuing and Restructuring Firms<br>in Difficulty – Self-binding Regulations of the Commission .....                            | 212 |
|      | II. Scope of Application .....   | 214 |
|      | 1. Substantive scope of application .....  | 214 |
|      | a) Objective of the aid .....  | 214 |
|      | b) Form of the aid .....   | 215 |
|      | 2. Scope of application with respect to economic sectors .....   | 215 |
|      | 3. Period of effect .....  | 216 |
|      | III. Definition of Terms and General Requirements for Approval .....   | 216 |
|      | 1. Firm in difficulty .....  | 216 |
|      | a) Operational criteria .....  | 217 |
|      | b) Symptoms .....  | 217 |
|      | c) Enterprises in insolvency .....   | 218 |
|      | d) Newly founded enterprises .....   | 218 |
|      | e) Firms tied into larger business groups .....  | 218 |
|      | f) Private investor test for firms in difficulty .....   | 219 |
|      | 2. Principle of “one time, last time” .....  | 219 |
|      | 3. Recipients of previous unlawful aids .....  | 221 |
|      | 4. Other Treaty provisions .....   | 221 |
|      | IV. Rescue Aid .....   | 221 |
|      | 1. Definition of terms .....   | 221 |
|      | 2. Conditions for the authorization of rescue aid .....  | 222 |
|      | a) Form .....  | 222 |
|      | b) Objective .....   | 222 |
|      | c) Terms and conditions .....  | 222 |
|      | aa) Maximum amount .....   | 222 |
|      | bb) Interest rate .....  | 223 |
|      | cc) Reporting obligation .....   | 223 |
|      | dd) Duration .....   | 223 |
|      | d) Approval on the grounds of serious social difficulties .....  | 224 |
|      | e) Avoidance of spill-over effects .....   | 224 |
|      | 3. Procedure .....   | 224 |
|      | a) Information required in connection with the notification of rescue<br>aid .....   | 224 |
|      | b) Simplified procedure .....  | 224 |
|      | 4. Monitoring and sanctions .....  | 224 |
|      | V. Restructuring Aid .....   | 225 |
|      | 1. Definition of terms .....   | 225 |
|      | 2. Conditions for the authorization of restructuring aid .....   | 226 |
|      | a) Restructuring plan .....  | 226 |
|      | aa) Objective of the restructuring plan .....  | 226 |
|      | bb) Content of the restructuring plan .....  | 227 |

Table of Contents

|  |     |
|--|-----|
| cc) Form .....   | 228 |
| dd) Prematurely disbursed restructuring aid .....  | 229 |
| ee) SMEs .....   | 229 |
| b) Avoidance of undue distortions of competition .....   | 229 |
| aa) Reduction of market presence .....   | 229 |
| bb) Exceptions .....   | 232 |
| cc) Basis for review .....   | 233 |
| c) Limitation of aid to the minimum .....  | 234 |
| aa) Avoidance of surplus cash .....  | 234 |
| bb) Subsidiarity .....   | 234 |
| cc) Proof .....  | 236 |
| 3. Information required in connection with the notification of restructuring aid .....         | 236 |
| 4. Conditions and requirements .....   | 236 |
| 5. Implementation of and amendments to the restructuring plan .....                            | 237 |
| 6. Monitoring and annual report .....  | 238 |
| VI. Aid to Cover the Social Costs of Restructuring .....                                       | 238 |
| 1. Definition .....  | 239 |
| 2. Requirements for approval .....   | 239 |
| B. Research, Development, and Innovation Aid .....   | 240 |
| I. General Principles .....  | 240 |
| II. Community Framework on State Aid for Research, Development, and Innovation .....           | 242 |
| III. Compatibility of Research and Development Aid pursuant to Article 87(3)(c) EC .....       | 243 |
| 1. Research categories .....   | 243 |
| 2. Aid intensity, eligible costs and form of the aid .....                                     | 245 |
| 3. Supplements .....   | 248 |
| IV. Compatibility of Innovation Aid pursuant to Article 87(3)(c) EC .....                      | 249 |
| 1. Aid for young, innovative enterprises .....   | 250 |
| 2. Aid for process and operational innovation in the service sector .....                      | 252 |
| 3. Aid for innovation advisory and innovation support services .....                           | 252 |
| 4. Aid for the secondment of highly qualified personnel .....                                  | 253 |
| 5. Aid for innovation clusters .....   | 254 |
| V. Incentive Effect and Necessity of the Aid .....   | 255 |
| VI. Detailed Assessment of the Compatibility of Aid .....                                      | 257 |
| 1. Measures requiring detailed assessment .....  | 257 |
| 2. Balancing test .....  | 257 |
| 3. Opening of a formal investigation procedure .....   | 260 |
| VII. Compatibility of Aid pursuant to Article 87(3)(b) EC .....                                | 261 |
| VIII. Inclusion of Research Institutions and Innovation Intermediaries .....                   | 262 |
| 1. Research institutions and innovation intermediaries as recipients of State aid .....        | 263 |
| 2. Indirect State aid to enterprises through State-financed public research institutions ..... | 264 |
| IX. Notification, Reporting and Monitoring of R&D&I Aids .....                                 | 266 |
| X. Cumulation .....  | 268 |
| C. Aid for Environmental Protection .....  | 268 |
| I. General Principles .....  | 269 |
| II. Community Guidelines on State Aid for Environmental Protection .....                       | 270 |
| III. Compatibility of Aid pursuant to Article 87(3)(c) EC .....                                | 271 |
| 1. Overview of aid eligible for approval .....   | 271 |
| 2. Investment aid .....  | 273 |
| a) Factual preconditions of aid .....  | 273 |
| b) Supplements .....   | 275 |
| c) Investments and costs eligible for aid .....  | 276 |
| 3. Operating aid .....   | 278 |
| 4. Aid for remediation of contaminated sites .....   | 279 |



Table of Contents

|       |  |     |
|-------|--|-----|
| 5.    | Aid for the relocation of undertakings .....   | 280 |
| 6.    | Aid involved in tradable environmental certificates .....  | 281 |
| IV.   | Incentive Effect and Necessity of Aid .....  | 285 |
| V.    | Aid in the Form of Reductions of or Exemptions from Environmental Taxes .....  | 285 |
| VI.   | Detailed Assessment of the Compatibility of Aid .....  | 290 |
| 1.    | Measures subject to detailed assessment .....  | 290 |
| 2.    | Balancing test .....   | 291 |
| 3.    | Opening of a formal investigation procedure .....  | 292 |
| VII.  | Compatibility of Aid pursuant to Article 87(3)(b) EC .....   | 292 |
| VIII. | Notification, Reporting, and Monitoring of Environmental Aid .....   | 293 |
| IX.   | Cumulation .....   | 294 |
| X.    | “Stranded Costs” in the Electricity Sector .....   | 294 |
| D.    | Export Aid .....   | 296 |
| I.    | Overview .....   | 296 |
| II.   | Export Aid .....   | 297 |
| III.  | Internationalisation Aid .....   | 298 |
| IV.   | Aid in the Field of Export-Credit Insurances .....   | 299 |
| E.    | State Aid and Risk Capital Measures .....  | 302 |
| I.    | Introduction .....   | 302 |
| II.   | Main Legal Instruments .....   | 303 |
| 1.    | General Block Exemption Regulation .....   | 303 |
| a)    | Introduction .....   | 303 |
| b)    | Scope, definitions, individual thresholds and the essential rules regarding risk capital .....                         | 304 |
| aa)   | Scope .....  | 304 |
| bb)   | Definitions .....  | 304 |
| cc)   | Conditions for exemption .....   | 305 |
| c)    | Cumulation .....   | 306 |
| 2.    | Guidelines on Risk Capital Investments 2006 .....  | 306 |
| a)    | Scope .....  | 306 |
| b)    | Definitions .....  | 307 |
| c)    | Structure of the Guidelines .....  | 308 |
| d)    | Assessment of the compatibility under Article 87(1) EC .....   | 308 |
| aa)   | Aid to investors .....   | 308 |
| bb)   | Aid to an investment fund, investment vehicle or manager .....   | 309 |
| cc)   | Aid to the enterprises .....   | 309 |
| dd)   | <i>De minimis</i> amounts .....  | 309 |
| e)    | Assessment of the compatibility under Article 87(3) EC .....   | 310 |
| aa)   | Form of aid .....  | 310 |
| bb)   | Conditions for compatibility .....   | 310 |
| (1)   | Section 4.3.1 – Maximum level of investment tranches .....   | 311 |
| (2)   | Section 4.3.2 – Restriction to seed, start-up and expansion financing .....  | 311 |
| (3)   | Section 4.3.3 – Prevalence of equity and quasi-equity investment instruments .....                                     | 311 |
| (4)   | Section 4.3.4 – Participation by private investors .....   | 311 |
| (5)   | Section 4.3.5 – Profit-driven character of investment decisions .....  | 311 |
| (6)   | Section 4.3.6 – Commercial management .....  | 311 |
| f)    | Compatibility of risk capital aid measures subject to a detailed assessment .....                                      | 312 |
| g)    | Cumulation .....   | 312 |
| h)    | Reporting and monitoring .....   | 313 |
| 3.    | Debt investment instruments .....  | 313 |
| § 18  | State Aid pursuant to Article 87(3) EC – Support of Certain Economic Activities or Economic Areas – Sectoral Aid ..... | 314 |
| A.    | General .....  | 316 |
| I.    | Objectives of Sectoral Aid – Principles and Criteria .....   | 317 |

Table of Contents

|      |   |     |
|------|---|-----|
| 1.   | General principles for the review of planned aid grants .....   | 318 |
| 2.   | Objectives of sectoral aid .....  | 320 |
| II.  | Sectors Subject to Special Regulations .....  | 320 |
| 1.   | Sensitive sectors .....   | 320 |
| 2.   | Other sectors with special regulations .....  | 321 |
| III. | Commission Practice and Communications in Sectors without Special Regulations .....   | 323 |
| IV.  | Regulatory Instruments Governing Sectoral Aid .....   | 326 |
| 1.   | Guidelines and Community frameworks .....   | 326 |
| 2.   | Regulations and directives .....  | 330 |
| V.   | Administrative Discretion in Decision Making .....  | 331 |
| VI.  | Sector Reports .....  | 333 |
| VII. | State Aid Action Plan and Horizontal Aid Policies .....   | 333 |
| B.   | Aid in the Transport Sector .....   | 335 |
| I.   | General .....   | 335 |
| II.  | Inland Transport (Transportation of Goods or Passengers by Rail, Road or Inland Waterway) .....   | 337 |
| 1.   | General principles .....  | 337 |
| 2.   | Applicable provisions .....   | 338 |
| a)   | General provisions – Regulations 1370/2007 and 1192/69 concerning State aid in rail, road, and inland waterway transport .....          | 338 |
| b)   | Road transport .....  | 339 |
| c)   | Rail transport .....  | 340 |
| aa)  | Directive 91/440/EEC: .....   | 340 |
| bb)  | First Railway Package: .....  | 341 |
| cc)  | Second Railway Package: .....   | 341 |
| dd)  | Third Railway Package: .....  | 342 |
| d)   | Inland waterway transport .....   | 342 |
| e)   | Intermodal transport .....  | 344 |
| 3.   | Application in practice .....   | 344 |
| a)   | Requirements for compatibility under Article 73 EC .....  | 344 |
| b)   | Road Transport .....  | 345 |
| c)   | Rail transport .....  | 346 |
| d)   | Inland waterway transport .....   | 347 |
| e)   | Intermodal transport .....  | 347 |
| 4.   | Current and future developments .....   | 348 |
| III. | Maritime Transport .....  | 348 |
| 1.   | General principles .....  | 348 |
| 2.   | Community guidelines on State aid to maritime transport 2004 .....  | 350 |
| a)   | Scope .....   | 350 |
| b)   | Objectives .....  | 350 |
| c)   | Guidelines for evaluation .....   | 351 |
| d)   | Monitoring .....  | 354 |
| 3.   | Application in practice .....   | 355 |
| 4.   | Future developments .....   | 356 |
| a)   | The “Marco Polo” Program .....  | 356 |
| b)   | The “NAIADES” Program .....   | 357 |
| c)   | Sea ports .....   | 357 |
| IV.  | Air Transport .....   | 358 |
| 1.   | General Principles .....  | 358 |
| 2.   | Applicable provisions – Guidelines for the air transport sector 1994 and Guidelines for the development of regional airports 2005 ..... | 359 |
| a)   | Scope of application .....  | 360 |
| b)   | Instructions and guidelines for evaluation .....  | 361 |
| 3.   | Application in practice .....   | 363 |
| a)   | Restructuring measures for State airlines .....   | 364 |
| b)   | Subsidization of low-cost airlines .....  | 365 |
| c)   | Rescue aid .....  | 366 |

Table of Contents

|  |     |
|--|-----|
| d) Effects of the attacks of 11 September 2001 .....   | 366 |
| e) Airports .....  | 366 |
| C. Aid in the Automotive Sector .....  | 367 |
| I. Applicable Sectoral Regulations .....   | 367 |
| II. Legal Framework through 31 December 2001 .....   | 368 |
| III. Legal Framework since 1 January 2003 .....  | 370 |
| 1. Multisectoral regional aid framework for large investment projects .....                                    | 370 |
| a) Period of validity .....  | 371 |
| b) Scope of application .....  | 371 |
| c) Aid levels .....  | 373 |
| d) List of sectors .....   | 374 |
| 2. Guidelines on national regional aid for 2007–2013 .....   | 374 |
| a) Scope of application .....  | 374 |
| b) Form of aid .....   | 375 |
| c) Maximum aid intensity .....   | 375 |
| d) Large investment projects .....   | 376 |
| e) Notification and assessment .....   | 377 |
| f) In-depth assessment .....   | 378 |
| 3. Other aid .....   | 380 |
| 4. European automotive industry framework of 25 February 2009 .....  | 380 |
| D. Aid in the Shipbuilding Sector .....  | 382 |
| I. Framework on State Aid to Shipbuilding .....  | 382 |
| 1. Scope of application .....  | 382 |
| 2. Sectoral aid provisions .....   | 383 |
| a) Operating aid .....   | 383 |
| b) Export credits .....  | 384 |
| c) Development aid .....   | 384 |
| d) Aid for innovation .....  | 385 |
| e) Regional aid .....  | 385 |
| f) Closure aid .....   | 386 |
| 3. Application of horizontal aid provisions .....  | 386 |
| 4. Notification obligation and monitoring .....  | 386 |
| II. Application of Block Exemption Regulations .....   | 387 |
| III. Ship-Financing Guarantee Schemes .....  | 387 |
| IV. New Member States and Candidates for Accession .....   | 387 |
| E. Aid to the Steel Industry .....   | 388 |
| I. Introduction .....  | 388 |
| II. Aid Granted on or after 24 July 2002 .....   | 388 |
| 1. Substantive law .....   | 388 |
| a) Regional investment aid .....   | 388 |
| b) Rescue and restructuring aid .....  | 388 |
| c) Closure aid .....   | 389 |
| d) Other aid .....   | 390 |
| 2. Procedure .....   | 390 |
| III. Aid Granted prior to 24 July 2002 .....   | 390 |
| 1. ECSC .....  | 391 |
| 2. The Steel Aid Codes .....   | 391 |
| 3. Individual decisions .....  | 393 |
| 4. General State aid measures with effects in the steel sector .....   | 394 |
| F. Aid to the Coal Industry .....  | 395 |
| I. Introduction .....  | 395 |
| II. Rules on Aid Granted on or after 24 July 2002 – Council Regulation 1407/<br>2002 (“Coal Regulation”) ..... | 395 |
| 1. Substantive rules .....   | 395 |
| a) Scope of applicability – Definition of “Coal” .....   | 395 |
| b) Aid for the reduction of activity- Article 4 Coal Regulation .....  | 396 |
| c) Aid for accessing coal reserves – Article 5 Coal Regulation .....   | 397 |

Table of Contents

|   |     |
|---|-----|
| d) Operating aid – Article 5(3) Coal Regulation .....   | 397 |
| e) Inherited liabilities – Article 7 Coal Regulation .....  | 397 |
| 2. Procedure .....  | 398 |
| 3. Expiration .....   | 398 |
| III. Aid Granted prior to 24 July 2002 .....  | 398 |
| G. Aid in the Agricultural Sector .....   | 398 |
| I. Definition of the Agricultural Sector .....  | 398 |
| II. Specific Features of State Aid in the Agricultural Sector .....                                 | 399 |
| 1. State aid as an instrument to achieve the agricultural policy goals .....                        | 399 |
| 2. No direct application of Articles 87 to 89 EC .....  | 401 |
| 3. Important role of the Council .....  | 401 |
| 4. Specific structure of the market .....   | 402 |
| II. The specific aid instruments applicable to the agricultural sector .....                        | 402 |
| 1. Regulation 1535/2007 – Agricultural <i>de minimis</i> .....                                      | 403 |
| 2. The Agricultural Block Exemption Regulation .....  | 404 |
| a) Purpose and scope .....  | 404 |
| b) Procedure .....  | 404 |
| c) Categories of aid covered by the Block Exemption Regulation .....                                | 405 |
| 3. The Community Guidelines for State Aid in the Agriculture and<br>Forestry Sector 2007–2013 ..... | 405 |
| a) Purpose and scope .....  | 405 |
| b) Procedure .....  | 405 |
| c) General principles .....   | 406 |
| d) Categories of aid covered by the agricultural guidelines .....                                   | 406 |
| 4. Overview of the different types of aid and reference to the adequate<br>legal basis .....        | 406 |
| a) Aid for rural development .....  | 406 |
| b) Risk and crisis management .....   | 406 |
| c) Other types of aid .....   | 407 |
| d) Aid to forestry .....  | 408 |
| e) Table with an overview of the different types of aid .....                                       | 408 |
| § 19 State of Aid pursuant to Article 87(3)(d) EC .....   | 410 |
| § 20 Council Authority pursuant to Article 87(3)(e) EC and Article 88(2) EC .....                   | 414 |
| A. Council's Authority to Amend the Treaty .....  | 414 |
| B. Aid Approval by the Council pursuant to Article 88(2) sub-paras (3) and (4) EC .....             | 415 |
| Chapter 5. Block Exemption Regulation .....   | 419 |
| § 21 General Block Exemption Regulation .....   | 419 |
| A. General Background .....   | 420 |
| B. The General Block Exemption Regulation .....   | 421 |
| I. Legal Basis of the General Block Exemption Regulation .....                                      | 421 |
| II. Procedure to Adopt the General Block Exemption Regulation .....                                 | 421 |
| III. Substantive Requirements of Reg 994/1998 .....   | 422 |
| C. Presence of State Aid pursuant to Article 87(1) EC .....   | 422 |
| D. Common Conditions for Exemption under the GBER .....   | 422 |
| I. Scope of the GBER .....  | 422 |
| II. Definitions .....   | 424 |
| 1. General definitions .....  | 424 |
| 2. Specific conditions applicable to investment aid .....   | 424 |
| III. Formal Conditions for Exemption .....  | 425 |
| IV. Aid Intensity and Eligible Costs .....  | 426 |
| V. Concept of Transparent Aid .....   | 426 |
| VI. Individual Notification Thresholds .....  | 427 |
| VII. Cumulation .....   | 428 |
| VIII. Incentive Effect .....  | 429 |
| IX. Transparency, Monitoring and Annual Reporting .....   | 430 |
| 1. Transparency .....   | 430 |
| 2. Monitoring and annual reporting .....  | 431 |

Table of Contents

|  |            |
|--|------------|
| E. Specific Conditions for Exemption for the Different Categories of Aid .....           | 432        |
| I. Regional Aid .....  | 432        |
| 1. Regional investment aid .....   | 432        |
| 2. Aid for newly created small enterprises .....   | 433        |
| II. SME Aid .....  | 433        |
| 1. Introduction .....  | 433        |
| 2. SME definition .....  | 433        |
| 3. Compatibility criteria of SME aid .....   | 434        |
| a) SME investment aid .....  | 434        |
| b) Aid for female entrepreneurship .....   | 434        |
| c) SME aid for consultancy services and participation in fairs .....                     | 435        |
| aa) Aid for consultancy in favour of SMEs .....  | 435        |
| bb) Aid for SME participation in fairs .....   | 436        |
| d) Risk capital aid .....  | 436        |
| III. Aid for Environmental Protection .....  | 437        |
| 1. Introduction .....  | 437        |
| 2. Definitions .....   | 437        |
| 3. Compatibility criteria for aid for environmental protection .....                     | 437        |
| a) Aid for environmental protection except in the form of tax reductions .....           | 437        |
| b) Aid in the form of reductions in environmental taxes .....                            | 438        |
| IV. Aid for Research and Development and Innovation .....                                | 439        |
| 1. Introduction .....  | 439        |
| 2. Definition of R&D&I .....   | 439        |
| 3. Compatibility criteria of R&D&I aid .....   | 439        |
| a) R&D project aid .....   | 439        |
| b) Innovation aid .....  | 439        |
| V. Training Aid .....  | 439        |
| 1. Introduction .....  | 439        |
| 2. General and specific training .....   | 440        |
| 3. Compatibility criteria of training aid .....  | 441        |
| a) Permissible aid intensities and bonuses .....   | 441        |
| b) Eligible costs .....  | 441        |
| VI. Aid for Employment .....   | 442        |
| 1. Introduction .....  | 442        |
| 2. Compatibility criteria of employment aid .....  | 443        |
| a) Employment aid for job creation .....   | 443        |
| b) Aid for disadvantaged and disabled workers .....                                      | 443        |
| aa) Aid for the recruitment of disadvantaged workers in the form of wage subsidies ..... | 443        |
| bb) Aid for the employment of disabled workers in the form of wage subsidies .....       | 443        |
| cc) Aid for compensating the additional costs of employing disabled workers .....        | 444        |
| E. Final and Transitional Provisions of the GBER .....                                   | 444        |
| F. Notification of Aid under the GBER .....  | 445        |
| <b>Chapter 6. Public Undertakings .....</b>  | <b>447</b> |
| § 22 <b>General Principles .....</b>   | <b>447</b> |
| A. The Concept of a Public Undertaking .....   | 447        |
| B. Community Law Framework .....   | 449        |
| C. Public Undertakings and EC State Aid Control .....                                    | 450        |
| § 23 <b>Transparency Directive .....</b>   | <b>453</b> |
| A. Purpose and Development .....   | 453        |
| B. Member States' Duties under the Transparency Directive .....                          | 455        |
| I. Transparency Requirements of Public Undertakings .....                                | 455        |
| II. Transparency Requirements of Public Undertakings in the Manufacturing Sector .....   | 456        |
| III. Public or Private Undertakings Required to Maintain Separate Accounts ..            | 457        |

Table of Contents

|   |   |     |
|---|---|-----|
| § 24  | <b>Financing Public Undertakings</b> .....  | 459 |
|   | A. Presentation of the Problem .....  | 459 |
|   | B. Need for Public Authorities and Public Undertakings to Have a Wide Discretion<br>in Their Investment Decisions .....   | 460 |
|   | C. Conclusion .....   | 461 |
| § 25  | <b>Cross-Subsidisation</b> .....  | 462 |
|   | A. Introduction .....   | 462 |
|   | B. Cross-Subsidy Analysis from an Economic Perspective .....  | 464 |
|   | C. Cross-Subsidisation and State Aid .....  | 466 |
|   | I. Application of Article 87 EC to Internal Transactions .....  | 466 |
|   | II. Cross-Subsidisation Analysis in a Group of Companies and the Limits to<br>the Application of the MEIP .....           | 467 |
|   | III. Cross-Subsidisation and Overcompensation of Public Services .....  | 470 |
| § 26  | <b>Privatisation</b> .....  | 471 |
|   | A. Introduction .....   | 471 |
|   | B. State Aid in the Context of Privatisation .....  | 473 |
|   | I. Privatisations not Involving Aid .....   | 474 |
|   | 1. Stock exchange flotation .....   | 474 |
|   | 2. Competitive tender .....   | 475 |
|   | a) Open, transparent and non-discriminatory tender .....  | 475 |
|   | b) Unconditional tender .....   | 478 |
|   | c) Highest bid .....  | 482 |
|   | d) Sufficient time and information .....  | 484 |
|   | e) Consequences of procedural flaws .....   | 485 |
|   | II. Privatisations that Require Notification .....  | 486 |
|   | 1. List of indicators provided for in the report .....  | 486 |
|   | 2. Privatisations Following an Expert Evaluation .....  | 487 |
|   | III. Negative Purchase Price .....  | 490 |
| § 27  | <b>Relation to Article 295 EC</b> .....   | 493 |
|   | A. The Principle of Neutrality as Laid Down in Article 295 EC .....   | 493 |
|   | B. State Aid Law as a Trigger for Privatisation .....   | 494 |
|   | I. Inciting Privatisations through a Rigid Interpretation of the MEIP .....   | 494 |
|   | II. Conditioning Approval under Article 87(3)(c) EC upon the Privatisation of<br>the Aid Recipient .....                  | 495 |
|   | III. Concluding Remarks .....   | 498 |
| <b>Chapter 7. Services of General Economic Interest</b> ..... |   | 499 |
| § 28  | <b>Services of General Economic Interest</b> .....  | 499 |
|   | A. Introduction and Overview of the Community Acquis .....  | 500 |
|   | B. Services of General Economic Interest in the EC Treaty .....   | 505 |
|   | C. Services of General Interest Outside the Scope of the Competition Rules .....  | 506 |
|   | I. Economic versus Non-Economic Services of General Interest .....  | 507 |
|   | II. SGEIs without Effect on Trade between Member States .....   | 509 |
|   | D. The Discharging of Public Service Obligations: Article 87(1) EC and the<br>Altmark Jurisprudence .....                 | 511 |
|   | I. The Judicature Prior to <i>Altmark</i> .....   | 512 |
|   | II. The <i>Altmark</i> Judgement .....  | 515 |
|   | III. The Practical Application of the <i>Altmark</i> Criteria .....   | 517 |
|   | 1. The ECJ judicature following <i>Altmark</i> .....  | 517 |
|   | 2. CFI and Commission practice .....  | 519 |
|   | 3. The BUPA judgement .....   | 522 |
|   | IV. The Relationship between <i>Altmark</i> and Article 86(2) EC .....  | 526 |
|   | V. Establishing the Right Amount of Compensation .....  | 527 |
|   | 1. Public procurement procedure .....   | 527 |
|   | 2. Amount of compensation in the absence of a tendering procedure:<br>Analysis of the cost of a typical undertaking ..... | 529 |
|   | VI. Inter-Temporal Application of the Altmark Test .....  | 532 |

Table of Contents

|   |            |
|---|------------|
| E. The Derogation Provided for in Article 86(2) EC .....  | 533        |
| I. The Commission's SGEI Package .....  | 534        |
| 1. The SGEI decision .....  | 535        |
| a) Scope of application and thresholds .....  | 535        |
| b) Conditions for exemption .....   | 536        |
| 2. The SGEI Framework .....   | 537        |
| a) Scope of application .....   | 537        |
| b) Conditions for exemption .....   | 538        |
| II. The Conditions of Article 86(2) EC in the Case Law .....  | 539        |
| 1. Defining a general economic interest .....   | 540        |
| 2. Entrustment .....  | 543        |
| 3. Proportionality .....  | 545        |
| a) Proportionality and obstruction test .....   | 545        |
| b) Community interest .....   | 548        |
| <b>§ 29 Sector Specific Rules .....</b>   | <b>549</b> |
| A. Introduction .....   | 550        |
| B. Telecommunications Services .....  | 550        |
| C. Postal Services .....  | 551        |
| D. Energy .....   | 552        |
| E. Transport .....  | 554        |
| I. Public Service Obligations in Inland Transport .....   | 554        |
| II. Public Service Obligations in Maritime Transport .....  | 556        |
| III. Public Service Obligations in Air Transport .....  | 558        |
| F. Public Service Broadcasting .....  | 559        |
| I. Introduction .....   | 559        |
| II. Broadcasting Communication of the Commission .....  | 562        |
| 1. The State aid character of funding of public service broadcasters .....  | 562        |
| 2. Distinction between existing and new State aid .....   | 564        |
| 3. Assessment of State funding of public service broadcasters under<br>Article 86(2) EC .....   | 566        |
| a) Public service remit .....   | 567        |
| b) Entrustment .....  | 568        |
| c) Proportionality of the funding .....   | 569        |
| aa) Choice of funding .....   | 569        |
| bb) Transparency requirements .....   | 569        |
| cc) Amount of compensation permissible and proportionality .....  | 570        |
| 4. Diversification of public broadcasting services and new services .....   | 571        |
| 5. Assessment of State funding of public service broadcasters under<br>Article 87(3)(d) EC .....  | 572        |
| III. Outlook .....  | 572        |
| <b>Chapter 8. Procedures before the Commission, Council Regulation 659/1999 .....</b>   | <b>573</b> |
| <b>§ 30 General Principles .....</b>  | <b>573</b> |
| A. Basics of the Procedure .....  | 574        |
| B. Procedural Principles up until the Promulgation of br/Council Regulation 659/<br>1999, and their ongoing Validity br/after the Regulation's Entry into Force ..... | 576        |
| C. Council Regulation 659/1999 .....  | 578        |
| I. Legislative History of Regulation 659/1999 .....   | 578        |
| II. Scope of Application of Regulation 659/1999 .....   | 579        |
| III. Implementing Rules for Regulation 659/1999 .....   | 580        |
| IV. Structure of Regulation 659/1999 .....  | 581        |
| V. Definitions .....  | 581        |
| 1. Aid .....  | 581        |
| 2. Existing aid .....   | 582        |
| 3. New aid .....  | 586        |
| 4. Aid scheme and individual aid .....  | 587        |
| 5. Unlawful aid .....   | 588        |
| 6. Misuse of aid .....  | 588        |
| 7. Interested parties .....   | 589        |

Table of Contents

|      |  |     |
|------|--|-----|
|      | D. Internal Administrative Organization of the Commission in the Area of State Aid Control .....         | 589 |
| § 31 | <b>Procedure regarding Notified Aid</b> .....  | 591 |
|      | A. Notification and Standstill Requirement .....   | 591 |
|      | I. Content .....   | 591 |
|      | II. Exceptions .....   | 595 |
|      | III. Special Notification Obligations .....  | 597 |
|      | IV. Formal Requirements .....  | 598 |
|      | V. Withdrawal of a Notification .....  | 600 |
|      | VI. Standstill Requirement .....   | 601 |
|      | B. Preliminary Examination Procedure .....   | 602 |
|      | I. Purpose and Subject of the Preliminary Examination Procedure .....                                    | 602 |
|      | II. Duration of the Preliminary Examination Procedure .....  | 604 |
|      | III. Consequences of Expiry of the Two-Month Period .....  | 607 |
|      | IV. Decisions after the Preliminary Examination Procedure .....  | 610 |
|      | C. Formal Investigation Procedure .....  | 614 |
|      | I. Purpose and Subject of the Formal Investigation Procedure .....                                       | 614 |
|      | II. Duration of the Formal Investigation Procedure .....   | 620 |
|      | III. Decisions after the Formal Investigation Procedure .....  | 622 |
|      | D. Revocation of a Decision .....  | 625 |
| § 32 | <b>Procedure regarding Unlawful Aid</b> .....  | 628 |
|      | A. General .....   | 628 |
|      | B. Initiation of a Procedure .....   | 629 |
|      | C. Preliminary Examination Procedure .....   | 630 |
|      | I. Injunctions .....   | 630 |
|      | 1. General principles .....  | 630 |
|      | 2. Information injunction .....  | 631 |
|      | 3. Suspension injunction .....   | 632 |
|      | 4. Provisional recovery injunction .....   | 633 |
|      | II. No Time Limits .....   | 636 |
|      | III. Decisions after the Preliminary Examination Procedure .....   | 637 |
|      | D. Formal Investigation Procedure .....  | 638 |
|      | I. General Principles .....  | 638 |
|      | II. Recovery .....   | 641 |
|      | 1. Principle of recovery for all negative decisions with respect to unlawful aid .....                   | 641 |
|      | 2. Exceptions .....  | 642 |
|      | a) General principles of Community law .....   | 642 |
|      | b) Limitation period .....   | 647 |
|      | 3. Determination of the amount to be recovered .....   | 650 |
|      | 4. Determination of the aid beneficiary, i. e. of the enterprise from which aid is to be recovered ..... | 655 |
|      | 5. Implementation of the recovery decision .....   | 660 |
| § 33 | <b>Procedure regarding Misuse of Aid</b> .....   | 669 |
| § 34 | <b>Procedure regarding Existing Aid Schemes</b> .....  | 672 |
|      | A. Scope of Application of the Procedure pursuant to Article 88(1) EC .....                              | 672 |
|      | B. Cooperation pursuant to Article 88(1) EC (Article 17 Reg 659/1999) .....                              | 675 |
|      | C. Proposal for Appropriate Measures (Article 18 Reg 659/1999) .....                                     | 676 |
|      | D. Legal Consequences of a Proposal for Appropriate Measures (Article 19 Reg 659/1999) .....             | 678 |
| § 35 | <b>Rights of Interested Parties</b> .....  | 682 |
|      | A. General Principles .....  | 682 |
|      | B. Participation in the Formal Investigation Procedure (Article 20(1) Reg 659/1999) .....                | 683 |
|      | C. Right to File a Complaint (Article 20(2) Reg 659/1999) .....  | 684 |
|      | D. Rights to Information (Article 20(3) Reg 659/1999) .....  | 689 |
| § 36 | <b>Monitoring by the Commission</b> .....  | 691 |
|      | A. General Monitoring Powers of the Commission .....   | 691 |
|      | B. Annual Reports (Article 21 Reg 659/1999) .....  | 692 |



Table of Contents

|  |  |     |
|--|--|-----|
|  | C. On-site Monitoring Visits (Article 22 Reg 659/1999)   | 694 |
|  | D. Non-compliance with Decisions and Judgments (Article 23 Reg 659/1999)   | 696 |
| § 37   | <b>Common Provisions</b>   | 699 |
|  | A. Professional Secrecy (Article 24 Reg 659/1999)  | 699 |
|  | B. Addressee of Decisions (Article 25 Reg 659/1999)  | 700 |
|  | C. Publication of Decisions (Article 26 Reg 659/1999)  | 701 |
|  | D. Implementing Provisions (Arts. 27–29 Reg 659/1999)  | 704 |
|  | E. Entry into Force (Article 30 Reg 659/1999)  | 704 |
| <b>Chapter 9. Procedures before Community Courts</b> |  | 707 |
| § 38   | <b>Introduction</b>  | 707 |
|  | A. General   | 707 |
|  | B. Legal Basis   | 708 |
|  | C. Scope of the Present Summary  | 708 |
| § 39   | <b>Legal Remedies for the Member State Granting Aid and other State Bodies</b>   | 709 |
|  | A. Legal Remedies to Challenge Decisions Closing the Formal Investigation Procedure  | 709 |
|  | I. The Member State Granting Aid   | 709 |
|  | II. Other State Bodies   | 710 |
|  | 1. Legal entity  | 710 |
|  | 2. Locus standi  | 710 |
|  | a) Direct concern  | 710 |
|  | b) Individual concern  | 710 |
|  | c) Regional government agency's immanent concern in judicial review  | 711 |
|  | B. Legal Remedies against Decisions to Open a Formal Investigation Procedure   | 712 |
|  | I. Is the Decision to Open a Formal Investigation Procedure exempt from Judicial Review?   | 712 |
|  | 1. Principle: Decision unreviewable, because merely a preliminary measure  | 712 |
|  | 2. Exception: Classification as new aid (to which the standstill clause is applicable)   | 712 |
|  | II. Standing (locus standi)  | 714 |
|  | C. Legal Remedies against Provisional Orders pursuant to Article 11 of Reg 659/1999 and Orders for Disclosure pursuant to Article 10(3) Reg 659/1999 | 714 |
|  | D. Legal Remedies against Measures Concerning "Existing Aid"   | 715 |
|  | I. Opening of a Procedure and Appropriate Measures   | 715 |
|  | II. Formal Investigation Procedure   | 715 |
|  | E. Action for Failure to Act   | 716 |
| § 40   | <b>Legal Remedies for Aid Recipients</b>   | 717 |
|  | A. Legal Remedies against Final Decisions at the Conclusion of a Formal Investigation Procedure  | 717 |
|  | I. Locus Standi  | 717 |
|  | 1. Direct concern  | 718 |
|  | a) Decision on individual aid  | 718 |
|  | b) Decision on a general aid scheme  | 718 |
|  | 2. Individual concern  | 719 |
|  | a) Decision on individual aid  | 719 |
|  | b) Decision on a general aid scheme  | 719 |
|  | II. Sufficient Legal Interest  | 722 |
|  | B. Legal Remedies against Decisions to open a Formal Investigation Procedure   | 723 |
|  | I. Legal Consequences of the Decision to Open a Formal Investigation Procedure   | 723 |
|  | II. Locus Standi and Sufficient Legal Interest   | 724 |
|  | C. Legal Remedies against Provisional Orders pursuant to Article 11 Reg 659/1999   | 724 |
|  | D. Legal Remedies concerning Measures on "Existing Aid"  | 724 |
|  | I. Proposal of Appropriate Measures  | 724 |
|  | II. Agreement to Appropriate Measures  | 724 |

Table of Contents

|   |            |
|---|------------|
| III. Formal Investigation Procedure and Final Decisions .....   | 725        |
| E. Action for Failure to Act .....  | 725        |
| F. Claims for Damages pursuant to Article 288(2) EC .....   | 725        |
| <b>§ 41 Legal Remedies for Competitors of the Aid Recipient .....</b>   | <b>727</b> |
| A. General .....  | 728        |
| B. Legal Remedies against Decisions Concluding a Preliminary Investigation .....  | 728        |
| I. Contestable Legal Act .....  | 728        |
| 1. Decision that no aid is present or that aid is compatible under Article 87(3) EC .....   | 728        |
| 2. Fiction of approval upon expiration of time limit pursuant to Article 4 Par. 6 Reg 659/1999 .....                                    | 729        |
| 3. Classification as existing aid .....   | 729        |
| II. Standing .....  | 730        |
| 1. Direct Concern .....   | 730        |
| a) Decision concerning individual aid .....   | 730        |
| b) Decision concerning a general aid scheme .....   | 730        |
| 2. Individual concern .....   | 731        |
| III. Sufficient Legal Interest .....  | 733        |
| C. Legal Remedies against a Decision Made at the Conclusion of the Formal Investigation Procedure .....                                 | 734        |
| I. Contestable Legal Act .....  | 734        |
| II. Standing .....  | 734        |
| 1. Direct concern .....   | 734        |
| 2. Individual concern .....   | 735        |
| a) The double test: "procedural involvement" and "substantive effect on market position" .....  | 735        |
| b) Procedural involvement necessary? .....  | 735        |
| c) "Substantive impact" .....   | 737        |
| III. Sufficient Legal Interest .....  | 738        |
| D. Action for Failure to Act .....  | 738        |
| I. Significance .....   | 738        |
| II. Admissibility and Standing .....  | 739        |
| III. Demand for Action .....  | 739        |
| IV. Time Period .....   | 739        |
| 1. General .....  | 739        |
| 2. Action by the Commission .....   | 740        |
| 3. Practical advice on procedure .....  | 740        |
| V. Special Case: Mooting of the Law Suit through Action by the Commission .....   | 740        |
| 1. Commission action before the filing of suit .....  | 740        |
| 2. Commission action after the filing of suit .....   | 741        |
| VI. Substantiation .....  | 741        |
| 1. Obligation to issue a decision concluding the preliminary investigation .....  | 741        |
| 2. Obligation to issue a decision concluding the formal investigation procedure .....   | 742        |
| 3. Obligation to open a formal investigation procedure with a view to the repeal of a decision pursuant to Article 9 Reg 659/1999 ..... | 742        |
| 4. Obligation to make a decision on the issuance of a provisional order pursuant to Article 11 Reg 659/1999 .....                       | 743        |
| VII. The Decision .....   | 743        |
| E. Legal Remedies against a Member State's Failure to Demand Repayment of Aid .....   | 743        |
| F. Legal Remedies concerning Measures on "Existing Aid" .....   | 744        |
| I. Proposal of Appropriate Measures .....   | 744        |
| II. Agreement to Appropriate Measures .....   | 744        |
| III. Formal Investigation Procedure .....   | 744        |
| IV. Conclusions .....   | 744        |
| G. Claims for Damages pursuant to Article 288(2) EC .....   | 745        |
| <b>§ 42 Legal Remedies for Other Third Parties .....</b>  | <b>746</b> |
| A. General .....  | 746        |

Table of Contents

|             |  |     |
|-------------|--|-----|
| I.          | Importance .....   | 746 |
| II.         | Case law on the Standing of Trade Associations .....   | 746 |
|             | 1. The association as advocate for the concerns of its members .....   | 747 |
|             | 2. Association representing its own concerns .....   | 747 |
| B.          | Individual Cases .....   | 748 |
| I.          | Industry and Trade Associations .....  | 749 |
|             | 1. Associations of aid recipients .....  | 749 |
|             | a) The association as advocate of the concerns of its members .....  | 749 |
|             | b) Individual concern of an association .....  | 750 |
|             | 2. Associations of competitors .....   | 750 |
|             | a) The association as advocate for the concerns of its members .....   | 750 |
|             | b) Independent concern of the association .....  | 750 |
| III.        | Miscellaneous .....  | 750 |
| § 43        | Scope of Judicial Review .....   | 752 |
| A.          | Relevant Point in Time for Assessment of the Factual and Legal Circumstances .....                                     | 752 |
| B.          | Substantive Allegations: Violation of the EC Treaty or of a Legal Provision to be Applied in its Implementation .....  | 752 |
| I.          | Legal Standards Applicable to Review .....   | 752 |
| II.         | Limitations on the Scope of Judicial Review in the Case Law .....  | 753 |
|             | 1. Limited review .....  | 753 |
|             | 2. The Commission's scope of discretion and judgment in approving State aid pursuant to Article 87(3) EC .....         | 753 |
|             | 3. Does the Commission enjoy discretionary authority in determining that a State measure qualifies as State aid? ..... | 755 |
| B.          | Procedural Grounds .....   | 758 |
|             | 1. Participation and hearing rights .....  | 758 |
|             | a) Violation of the Member State's right to participation and a fair hearing .....                                     | 759 |
|             | b) Violation of the procedural rights of other parties .....   | 760 |
|             | 2. Inadequate statement of reasons .....   | 761 |
| Chapter 10. | Proceedings before the National Courts .....   | 767 |
| § 44        | Proceedings before National Courts .....   | 767 |
| A.          | Introduction .....   | 768 |
| I.          | The Role of National Courts .....  | 768 |
| II.         | Commission Policy and Guidance to National Courts .....  | 768 |
| B.          | The Standstill Obligation (Article 88(3) last sentence EC) in National Court Proceedings .....                         | 770 |
| I.          | Situations Caught by the Standstill Obligation .....   | 770 |
|             | 1. State aid within the meaning of Article 87(1) EC .....  | 770 |
|             | 2. Notification requirement .....  | 771 |
|             | 3. Specific situations .....   | 772 |
|             | a) Retroactive implementation of State aid .....   | 772 |
|             | b) Subsequent annulment of Commission approval .....   | 773 |
| II.         | The Concept of Illegality .....  | 773 |
|             | 1. Illegality and incompatibility with the common market .....   | 773 |
|             | 2. Illegality and nullity of aid measures .....  | 774 |
| III.        | Remedies .....   | 774 |
|             | 1. Preventing the payment .....  | 775 |
|             | 2. Recovery of State aid .....   | 775 |
|             | 3. Recovery of interests .....   | 776 |
|             | 4. Damages .....   | 777 |
|             | 5. Interim measures .....  | 778 |
|             | 6. Avoidance; Reimbursement of financial burden .....  | 778 |
| IV.         | Standing to Invoke Article 88(3) Last Sentence EC .....  | 779 |
|             | 1. Legal standing .....  | 779 |
|             | 2. Standing issues in tax cases .....  | 780 |
|             | 3. Standing of the Member State granting the alleged aid? .....  | 781 |

Table of Contents

|  |            |
|--|------------|
| C. Enforcement of Commission Recovery Decisions by National Courts .....                                 | 781        |
| D. Incidental Challenges to Decisions Authorizing Aid .....  | 782        |
| <b>Chapter 11. Relation between State Aid Law and other Provisions of the Treaty .....</b>               | <b>785</b> |
| <b>§ 45 Relationship of Articles 87, 88 EC to other Provisions of the Treaty .....</b>                   | <b>785</b> |
| A. General .....   | 785        |
| B. Relationship to Article 12 EC .....   | 787        |
| C. Relationship to Article 28 EC .....   | 787        |
| D. Relationship to Article 31 EC .....   | 788        |
| E. Relationship to Article 43, 48 EC .....   | 788        |
| F. Relationship to Article 81, 82 EC .....   | 788        |
| G. Relationship to Article 90 EC .....   | 789        |
| H. Relationship to Article 132 EC .....  | 789        |
| I. Relationship to Council Regulation 139/2004 .....   | 789        |
| <b>Chapter 12. State Aid and Public Procurement Law .....</b>  | <b>791</b> |
| <b>§ 46 State Aid and Public Procurement .....</b>   | <b>791</b> |
| § 46   |            |
| Points of Contact between State Aid Law and Public Procurement Law .....                                 | 792        |
| A. The Award of Public Contracts as State Aid .....  | 793        |
| I. A Selective Advantage through the Award of Public Contracts .....                                     | 793        |
| 1. Excessive price .....   | 794        |
| 2. Other non-market contract terms .....   | 795        |
| 3. Consideration of irrelevant award criteria .....  | 795        |
| 4. De facto awards of public contracts .....   | 798        |
| 5. In-house awards .....   | 799        |
| 6. Positive discrimination .....   | 799        |
| 7. Public contract for unnecessary services .....  | 800        |
| 8. Granting of exclusive rights or concessions .....   | 802        |
| II. Avoidance of State Aid through the Awarding of Contracts in Open Competition .....                   | 804        |
| 1. Requirements for a non-discriminatory bidding procedure .....   | 805        |
| 2. Effect under State aid law of awarding a contract in compliance with the procurement directives ..... | 806        |
| III. Consequences of a Public Contract Qualifying as State Aid .....                                     | 808        |
| 1. Standstill obligation .....   | 808        |
| 2. Recovery of State aid .....   | 809        |
| 3. Legitimate expectations and counterclaims by the unlawfully advantaged contractor .....               | 810        |
| B. The Treatment of State Aid in Public Procurement Procedures .....                                     | 811        |
| I. Exempt or Approved State Aid .....  | 812        |
| II. Unlawful State Aid .....   | 812        |
| 1. Review of the bidders' suitability .....  | 812        |
| a) Personal situation of the bidder .....  | 812        |
| b) Economic and financial soundness of the bidder .....  | 813        |
| 2. Abnormally low tenders .....  | 813        |
| a) Formally and substantively unlawful State aid .....   | 814        |
| b) "Neutralization" of unlawful aids through an increase in the offer submitted .....                    | 814        |
| III. Subsequently Approved Aids .....  | 815        |
| IV. Appropriate Measures .....   | 815        |
| V. The Contracting Authorities' Duty to Investigate .....  | 815        |

