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封面图片：斯德哥尔摩市政厅
拍摄地：瑞典斯德哥尔摩
拍摄者：金涌

中国法制出版社
官方微信

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补贴和国家援助的概念

世贸组织法和欧共体法之比较

【英】鲁卡·如比尼 ◎著
连文怡　司仝乐　赵春蕾 ◎译

The Definition of Subsidy and State Aid:
WTO and EC Law in Comparative Perspective

Luca Rubini

中国法制出版社
CHINA LEGAL PUBLISHING HOUSE

著作权合同登记号：图字 01-2017-9302 号

图书在版编目（CIP）数据

补贴和国家援助的概念：世贸组织法和欧共体法之比较 /（英）鲁卡·如比尼（Luca Rubini）著；连文怡，司仝乐，赵春蕾译．—北京：中国法制出版社，2020.3
（欧洲法与比较法前沿译丛）
书名原文：The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective
ISBN 978-7-5216-0888-5

Ⅰ．①补… Ⅱ．①鲁… ②连… ③司… ④赵… Ⅲ．①世界贸易组织－贸易法－补贴－研究②欧洲经济共同体－贸易法－补贴－研究③世界贸易组织－经济援助－研究④欧洲经济共同体－经济援助－研究 Ⅳ．①D996.1 ②D950.229 ③F743.1 ④F116.7

中国版本图书馆 CIP 数据核字（2020）第 028664 号

项目策划：马颖　　本书策划 / 责任编辑：王雯汀　　封面设计：李　宁

补贴和国家援助的概念：世贸组织法和欧共体法之比较
BUTIE HE GUOJIA YUANZHU DE GAINIAN: SHIMAO ZUZHIFA HE OUGONGTIFA ZHI BIJIAO
著者 /【英】鲁卡·如比尼
译者 / 连文怡　司仝乐　赵春蕾
经销 / 新华书店
印刷 / 三河市紫恒印装有限公司
开本 / 710 毫米 ×1000 毫米　16 开
版次 / 2020 年 3 月第 1 版
印张 / 31.25　字数 / 512 千
2020 年 3 月第 1 次印刷

中国法制出版社出版
书号 ISBN 978-7-5216-0888-5
定价：119.00 元

北京西单横二条 2 号　邮政编码 100031
网址：http://www.zgfzs.com
市场营销部电话：010-66033393
值班电话：010-66026508
传真：010-66031119
编辑部电话：010-66060794
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General Editor's Preface

One of the most complex and difficult issues in the context of the world trading system rules is the subject of subsidies. Subsidies are inherently troublesome for policy makers and governments. In many situations, subsidies are an essential tool of governance, and can be a substantial benefit for societies in carrying out important and valid measures to benefit their citizens. On the other hand, some 'subsidies' can have important damaging effects, including 'distortions' of the market system, in the eyes of economic analysts. Often there is a constant and deep tug of war between these and other various viewpoints of benefits conferred by governments on citizens and constituents. Also often there are very fundamental but controversial policy goals, including distributional allocations among competing interest in society. Consequently it should not be surprising that the subject of 'subsidies' in the reality (as well as the theory) of international economic regulation and measures (including taxation and regulatory benefits) create (or reveal) major tensions and conflicts. Often these tensions and conflicts develop into major juridical cases, including such cases in the WTO dispute settlement system. In that context the 'subsidy' (or SCM agreement) cases represent a major portion of all the WTO dispute settlement cases which have been brought there so far.

This book, *The Definition of Subsidy and State Aid*, published by Oxford University Press in its series on International Economic Law, is not only timely, but is immensely important in probing in a strikingly fundamental way, many of the perplexing treaty textual and policy issues of the subject. The title 'Definition' only begins to chart a pathway of analysis in this book which constantly poses and seeks to answer core assumptions and premises which bedevil the subject. The author, Dr Luca Rubini, has clearly gone beyond the normal roadmaps which chart the rules and practices of an international law subject, and has probed deeply into the inevitable mix of treaty text in the context of difficult policy choices and 'balancing' processes often encountered in such subject.

The book begins with an important overview of the analytical structure it undertakes, which is to peer deep into the depths of the policy maze and then to build upon that undertaking to address questions that may seem simple and solvable, but when sliced open often have implications of enormous importance to society and international peace and security. For example, the author discusses the meaning of 'advantage' as indicated in the WTO subsidy rules, and immediately reveals that analysis must often go beyond 'mere economics'.

The author also pays attention to another body of international rules in the context of the European Union 'State aids', to enlighten with comparisons, the policy maze involved.

Likewise, the author perceptively notes that many of the international rules concerning subsidies require 'comparisons' to some 'benchmark' such as the market paradigm. So the comparisons often imply the need for balancing, which of course raises important questions in what manner should the balance be controlled, and by whom.

It is a delight once again, to see this OUP series providing a book of this profound importance, and stimulating and penetrating analysis.

John H. Jackson

Foreword

As we have noted on the occasion of the publication of the last broad comparative study of the subsidies disciplines of the WTO and the EU, such studies are rare. This statement, made three years ago, remains valid today. To our knowledge, this is only the second time that a similar enterprise has been undertaken. But it is distinct from its predecessor in at least two aspects: first, with respect to its subject matter and second, its approach.

A quick look at the table of contents shows that: Luca Rubini's book is essentially devoted to *one* major theme, ie, the definition of the *scope* of the rules on subsidies under the WTO and on State aids in the EU. Conversely, the author does not examine what might be called the other side of the coin, ie, the reasons which may *justify* the granting of a subsidy or a State aid. The distinction between scope and justification is a 'Leitmotif' of the book. The author emphasizes repeatedly that scope and justification must not be conflated but kept strictly separate.

Institutional issues are alluded to but they remain marginal compared with the main subject of the book.

The author's approach to the analysis of the notion of subsidy and State aid is highly *conceptual*. The author abundantly discusses existing WTO and EU case law, but this discussion is neither purely descriptive or apologetic nor critical in measuring the coherence of the jurisprudence in using only the parameters set by the Appellate Body of the WTO or the ECJ itself. The author develops and uses his own yardsticks. He is not only interested in the subsidy and State aid rules as they are, but also as they should be.

The author's approach is nicely encapsulated in the three 'essential', most fundamental questions, which should be posed in progressive and escalating order. 'What is the purpose of the subsidy/State aid definition? What is the purpose of the discipline of which it is part and defines its scope? And, ultimately, what are the more general, overall objectives of the political and legal system which accommodates the subsidy discipline.'

To be distinguished from these fundamental systemic issues is the question of the objective(s) pursued by the measure under examination itself. Normally, this question does not belong to the determination of whether the measure at issue is a subsidy, ie, a matter of scope, but whether the measure can be justified, ie, a matter of justification. That is particularly true where the government pursues an economic activity and where the 'market' is therefore the only appropriate benchmark for determining whether the measure confers an advantage.

However, the situation is different if the government pursues a non-economic activity, such as taxation. In this case, the only appropriate benchmark is the rationality of the government's own action. In examining this rationality, objectives count. The author distinguishes judiciously between inherent/internal and external objectives. Differences in taxation which are justified by the inherent/internal logic of the tax do not derogate from the norm and therefore do not constitute an advantage. Conversely, differences which result from external objectives do constitute a derogation and confer an advantage, and are therefore considered as subsidies.

Why do we mention this point specifically? Because we believe that it is a major contribution to the qualification of taxation under WTO subsidy and EU State aid rules. The qualification of differences resulting from taxation, while little explored in the WTO, is one of the most difficult and controversial areas of EU State aid law. The increasing use of taxes as incentives and disincentives, in particular in the fight against global warming, will further augment the importance of this question.

The finding that a measure is a countervailable or actionable subsidy under the WTO or that it fulfils the conditions of Article 87 (1) EC has, of course, major consequences. These consequences are more visible and serious under the EC Treaty. The finding that a measure is a State aid under Article 87 (1) EC entails, according to Article 87 (3), the obligation of EU Member States to notify the measure to the Commission before it is put into effect, to respect the standstill obligation, and to recover any aid put into effect in violation of the standstill obligation. The recognition that a measure constitutes a State aid thus entails a dramatic shift of responsibilities and, ultimately, power from the Member States to the Commission.

It is likely that institutional considerations are the hidden agenda of the jurisprudence of the ECJ, which limits the notion of State aid to measures that operate a transfer of *public* resources to certain undertakings. The ECJ has thus excluded from the scope of the State aid rules those advantages that flow from regulatory schemes which put the burden on *private* enterprises. This jurisprudence, which culminated in the famous *PreussenElektra* ruling, appears to be rather counter-intuitive, as it leads to a notion of State aid under the EC Treaty which is narrower than the corresponding notion of subsidy under the SM Agreement of the WTO, although the EU pursues more ambitious goals than the WTO. It is not surprising that Rubini criticizes this jurisprudence as formalistic and leading to results which do no make much sense from the point of view of their economic effect. Instead, he advocates use of the selectivity criterion to distinguish between advantages flowing from purely regulatory measures which are caught by Article 87 (1) of the EC Treaty as opposed to those which are not. This would, of course, require a more in depth examination of the selectivity requirement, which so far has been relatively little explored in EU law.

This consideration leads us back to the fundamental questions asked by the author and in particular to the issue of what purpose the subsidy/State aid rules serve in the two legal systems. The author believes that more emphasis should be put on the distortion of competition among competitors than on the obstacles to international trade, frustrating market access. He therefore advocates focusing more on the distortion of competition requirement expressly mentioned in Article 87(1) EC. It is well known that this requirement is scarcely given any real relevance in past and present EU decision making, as the distortion of competition is presumed to flow automatically from an advantage given to certain enterprises.

The author's views can easily be accommodated under the EC Treaty. They are more difficult to follow in the WTO context. For the time being, the main obstacles are the wording of the SCM Agreement and the methods of interpretation applied by the Appellate Body, which remain stricter than those of the ECJ, although the Appellate Body has become more flexible in recent years. A competition oriented interpretation of the injury or serious prejudice standard might be possible, but it would require the case law to make a step forward. Rubini suggests a way that this could be done. In any case, in line with the books approach, he provides good food for thought.

This observation leads us to our final remark. Comparative studies are of enormous value for both legal systems—the WTO and the EU. They enable a clearer perception of the strengths and weaknesses that each system presents.

The EU particularly will benefit from such studies. The basic EC Treaty rules are broader and therefore more flexible than the corresponding, detailed provisions of the SCM agreement. The EU's capacity to enact implementing legislation is surprisingly well functioning, in spite of the increase to 27 Member States and the absence of fundamental Treaty reform. Such legislative capacity is practically lacking in the WTO. Further, the EU has a policy-making institution, the Commission, at their disposal, which has no equivalent in the WTO. Finally, the ECJ is less constrained in its interpretative approach than the Appellate Body of the WTO.

We would even go a step further. We would suggest that the EU will not only benefit, but that it also needs the comparison with the WTO rules on subsidies. These rules constitute the only legal system from which the EC can learn to refine its own State aid discipline. Other States have laws on countervailing duties. But to our knowledge, no legal system other than the WTO has an all-embracing mechanism which controls and limits the granting of subsidies, although one might expect such control mechanisms in federal States, such as the USA or Canada. There is therefore no transatlantic dialogue on subsidies comparable to the vivid discussions on antitrust law which have contributed so much to the shaping and implementation of EC competition law in recent in recent years.

EU State aid law has of course influenced the existing WTO rules on subsidies. But these rules have to be—and are—interpreted by panels and the Appellate Body.

It is useful for the EU to observe the evolution of this WTO jurisprudence. Such attention might contribute to the further evolution and maturing of the EU's own system of State aid control, and ultimately avoid future conflicts.

Thus the encouragement, notably to the members of the steadily growing WTO subsidy and EU State aid 'constituency', to reflect on Rubini's impressive monograph, his findings, and his recommendations.

Claus-Dieter Ehlermann
Brussels
August 2009

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