Index

Achmea case
2012 award by arbitral tribunal 178
arbitral tribunal in 175–6
investment by 174–5
judgment of ECJ Grand Chamber 180–81
judicial review by German courts 177
opinion of Advocate General 178–80
Administrative Court of Appeal of Marseille 165
Aid
bad 77, 94
definition of 56–8
good 77, 89, 94, 97
regional 61–3
see also State aid
aid recovery with interest 143
airports infrastructure 89–90
Analytical Grids 77–8
ANGED see National Association of Large Distribution Companies
Apple case 64–6
Arbitration Act (1966) 187
Article 107(1) TFEU examples 26–40
Adria Wien judgment 34
EDF case 37–9
ING case 37–8
Larko case 30–31
Lübeck case 33–5
Preussen-Elektro doctrine 29
Sloman Neptun case 27
Spanish Goodwill case 31–3, 35–6
Stardust case 27–9
five elements 54, 69
notion of aid 20–23
1973 Italian Textile case 22–3
cumulative conditions 20
effects doctrine 21
Limburg Coal Mines case 23
reasons for erratic case law 24–6
Article 107(3), infrastructure funding
airports 89–90
broadband 90–91
energy 90
important projects of common European interest 91–2
regional aid 91
Bacon, Kelyn 40
bad aid 77, 94
see also aid; State aid
balancing test, State aid policy 101, 103–5
bilateral investment treaties (BITs) 6, 171–4
BITs see bilateral investment treaties
broadband infrastructure 90–91, 106–10
broadband-specific State aid policy 111–15
Broadband State Aid Guidelines 103, 120
CETA see Comprehensive Economic and Trade Agreement
challenges, of SGEI
for the Commission 95–6
for national authorities 96–7
for national regulatory authorities 97
State aid, industrial policy and strategy for growth 94–5
summary of 97–8
CLEC see competitive local exchange carriers
Colomer, Ruiz-Jarabo 166, 186
Commission Notice on the Notion of State Aid
compatible State aid
competition assessment
(CLEC) 108
Comprehensive Economic and Trade Agreement (CETA) 173
cooperation tools
assistance to national courts 147
damages in claims 161–9
case law by French courts 164–6
standstill obligation 168
unlawful and incompatible
State aid 166–8
Enforcement Notice, 2009 149,
151–3, 161–3
general principles to codification
146–50
genesis of 146–50
outlook analysis 157–60
*amicus curiae* observations
157, 159–60
authentic interpretation of rules 158
number and type of
observations 159
Procedural Regulation, 1999 147,
149–50
Procedural Regulation, 2013 150
purpose of 150–52
scope of 150–52
Staff Working Documents 152–7
corporate income tax 63–6

*D. v Inspecteur van de Belastingdienst*
179

DAE see Digital Agenda for Europe 2012
damages (third parties) 134–5
damages in claims, cooperation tools 161–9
case law by French courts 164–6
standstill obligation 168
unlawful and incompatible State aid 166–8
*de facto* primacy 14

*De Minimis* Regulation 4, 68, 73, 78, 83,
93, 95, 121, 144
demand-side policies 119
Digital Agenda for Europe 2012 (DAE) 8, 102
digital targets, risk of 115–20
digital terrestrial television (DTT) 220
DTT see digital terrestrial television
duality system 142

ECHR see European Convention on
Human Rights
effect-based analysis 7–8
EFSI see European Fund for Strategic Investment
Emergency Government Ordinance 24/1998 182
energy infrastructure 90
enforcement see private State
aid enforcement; State aid enforcement
Enforcement Notice (2009) 11, 15, 149,
151–2, 161–3
EU–Canada free trade agreement 173
EU Charter on Fundamental Rights 173,
232
EU industrial policy 8–9
EU–Singapore free trade agreement 179
European Coal and Steel Community 23
European Convention on Human Rights
(ECHR) 176
European Fund for Strategic Investment
(EFSI) 80
*ex ante* system 5

fibre-to-the-home (FTTH) coverage 104,
109, 116, 117
first *Altmark* condition 86
fourth *Altmark* condition 86–7
‘futureproof’ approach 118, 120

*GBER* see General Block Exemption Regulation
General Block Exemption Regulation
(*GBER*) 4, 8, 44–5, 55, 76
regional aid 61–3
German broadcasting financing system
overview of 213–14
power of Art. 267 TFEU 215–16
Regional Civil Court 214–15
good aid 77, 89, 94, 97
see also aid; State aid

ICSID see International Centre for
Settlement of Investment Disputes

illegality interest (beneficiary) 133
important projects of common European
interest (IPCEI) 91–2
incompatible State aid 58
incompatibility 58–61
infrastructure
Article 107(3)
airports 89–90
broadband 90–91
energy 90
important projects of common
European interest 91–2
regional aid 91
and SGEI
development/owner, economic
activity 80–82
distortion of competition 82–4
national vs. EU public resources
79–80
public financing assessment
84–5
selectivity and economic
advantage 82
trade effects 82–4
interim measures, categories of 190–91
International Centre for Settlement of
Investment Disputes (ICSID) 12, 176
Investor–State Dispute Settlement
(ISDS) 173
IPCEI see important projects of common
European interest
ISDS see Investor–State Dispute Settlement

Kletterhallen case
Art. 4 decisions 203–4
Art. 107 (1) vs. Art. 107 (3) TFEU
202–3
Art. 107 (1) TFEU 206–8
Art. 267 TFEU 204–6
overview of 200–201
State aid control exemplified 201–2
threat to EU State aid law 208–9

Kreiskliniken Calw case
Art. 4 SGEI decisions 211–12
Art. 107 (1) TFEU 212–13
case proceedings 209–10
conclusive proceedings 213
overview of 209

Law 34/2015 227
Legal Service of the European
Commission 153
Lisbon Strategy for growth and jobs 101
Lopez, Piernas 40
Lufthansa aftermath decisions
Kletterhallen case
Art. 4 decisions 203–4
Art. 107 (1) vs. Art. 107 (3) TFEU
202–3
Art. 107 (1) TFEU 206–8
Art. 267 TFEU 204–6
overview of 200–201
State aid control exemplified
201–2
threat to EU State aid law
208–9
legal implications 195–6

Lübeck case
BGH’s comments 198–9
OLG Schleswig’s reference
197–8
preliminary reference, function
and impact of 199–200
parallel commission investigations
and national proceedings
195–6

Market Economy Operator Principle
(MEOP) 10, 19, 26, 36, 56, 82, 111
market failure
definition of 107
public investment 106
MEOP see Market Economy Operator
Principle

Micula case
facts of 182–4
interim measures 190–91
overview of 182
preliminary ruling references 191–2
proceeding before Commission 185
proceedings in England and Wales 187–9
Romania’s unenviable position 185–7
ruling of General Court 189–90

National Association of Large Distribution Companies 234
National Competition Authorities (NCAs) 55–6, 67–9
national vs. EU public resources 79–80
national recovery legislation 16–17
National Competition Authorities
National regulatory authorities (NRAs) 97, 107
NCAs see National Competition Authorities
Next Generation Networks (NGNs) creation of 99
deployment of 99–100
NGNs see Next Generation Networks
Notice on cooperation (1995) 147
NCAs see national regulatory authorities

PPP see public–private partnership
private enforcement 3–4
private investor test 56–8
private State aid enforcement

prophylactic function of national courts 128–9
restorative function of national courts 130–36
damages (third parties) 134–5
further tasks 130
illegality interest (beneficiary) 133
recovery, unlawfully implemented State aid 131–3
restitution of tax, financing unlawful State aid 135–6
role of national courts 123–8
assigning missions 127
peculiarities 124–5
positive and conditional decisions 126
procedural perspective 124
State aid measures 125–6
subjective rights 124

Procedural Regulation (2013) 150
prophylactic function 9–11, 128–9
PSO see public services obligation
public enforcement 3–4
public financing 107
assessment 84–5
‘step change’ requirement 108
public funding
‘black’ areas 108–10
on competition 109
dynamic crowding out 110
‘grey’ areas 108–10
rationale and effects 106–10
recipients 107
supply-side interventions 106–7
‘white’ areas 106–7
public investment
‘indirect’ investments 107
key driver of 107
market failure 106
multiplier effect 110
public–private partnership (PPP) 107
public services obligation (PSO) 71, 86
regional aid 61–3
infrastructure 91
see also aid; State aid
restitution of tax, financing unlawful State aid 135–6
restorative function 9–11, 130–36
damages (third parties) 134–5
further tasks 130
illegality interest (beneficiary) 133
recovery 131–3
restitution of tax, financing unlawful State aid 135–6
Royal Decree 1070/2017 229
SAAP see State Aid Action Plan 2005
selectivity 58–61
services-based competition 108
services of general economic interest
(SGEI)
challenges
for the Commission 95–6
for national authorities 96–7
for national regulatory
authorities 97
State aid, industrial policy and
strategy for growth 94–5
summary of 97–8
Court of Justice and Commission
from Altmark to Almunia
package 71–3
from Leipzig Halle to
regulatory package 73–8
fitness check 93
framework 93
infrastructure
development/owner, economic
activity 80–82
distortion of competition 82–4
national vs. EU public resources
79–80
public financing assessment
84–5
selectivity and economic
advantage 82
trade effects 82–4
interpreting Altmark conditions
first Altmark condition 86
fourth Altmark condition 86–7
overview of 70–71
State aid control implications 78
SGEI see services of general economic
interest
Spain, State aid enforcement
digital terrestrial television 220, 224, 227
legal framework 222–3
recovery of State aid 217–21
significant uncertainty 217–21
specific legal provision adoptions
227–38
Supreme Court’s support for
proactive recovery 223–7
trends in 217
Spanish Supreme Court 15–16
Staff Working Documents (SWDs)
152–7
standstill obligation 142
State aid
Apple case 64–6
compatible 114–15
competition assessment 66–7
control see State aid control
corporate income tax 63–6
definition of 54
elements under Art. 107(1) 54
enforcement see State aid
enforcement
EU Court of Justice definition of 58
GBER and regional aid 61–3
legislative developments 63–6
National Competition Authorities
67–9
policy see State aid policy
selectivity and incompatibility
58–61
State Aid Action Plan 2005 (SAAP) 2, 7,
46, 77, 101, 112, 148
State Aid Broadband Guidelines (2013) 8
State aid cases
Achmea case
2012 award by arbitral tribunal
178
arbitral tribunal in 175–6
investment by 174–5
judgment of ECJ Grand
Chamber 180–81
judicial review by German
courts 177
opinion of Advocate General
178–80
Micula case
facts of 182–4
interim measures 190–91
overview of 182
preliminary ruling references
191–2
proceeding before Commission
185
proceedings in England and
Wales 187–9
Romania’s unenviable position
185–7
ruling of General Court 189–90
State aid control
Index

assessment of compatibility 87–9
culmination of reshaping of state aid system 43–8
Enabling Regulation 47–8
evolution of 41
InvestEU Fund 48
legal concept of aid 40
notion of aid consequences 49–51
phases of policies 42
policy dimension 87–9
priorities of 40–41
public spending 48
role of Commission and relevant tools 87–9
SGEI implications 78
State aid enforcement
Commission vs. national courts 11–16
caption of aid 6–8
for EU industrial policy 8–9
national recovery legislation 16–17
parallel State aid proceedings 11–16
prophylactic function 9–11
restorative function 9–11
Spain
digital terrestrial television 220, 224, 227
legal framework 222–3
recovery of State aid 217–21
significant uncertainty 217–21
specific legal provision adoptions 227–38
Supreme Court’s support for proactive recovery 223–7
trends in 217
see also private State aid enforcement
State Aid Modernization (SAM) project 4, 9, 41–3, 49, 67, 99, 149
State aid policy
broadband infrastructure 106–10
in broadband sector 100–105
broadband-specific applications 111–15
evolution of 100–105
balancing test 101, 103–5
better targeted State aid 101
‘common interest’ objectives 101, 103
Connectivity Package 102–3
Digital Agenda 102
fibre-to-the-home (FTTH) coverage 104
NGA networks 104–5
overview of 99–100
rationale and effects, public funding 106–10
risk of digital targets 115–20
State aid puzzle 100
State aid rules 81, 103, 141
Commission and national courts 142–5
aid recovery with interest 143
duality system 142
standstill obligation 142, 144
Union principles and rules 145
effect-based analysis 7–8
overview of 141–2
private enforcement 3–4
public enforcement 3–4
subjective rights 122, 124
supply-side interventions, public investment 106–7
supply-side policies 119
SWDs see Staff Working Documents
tax law 2
Spanish 32
TEU see Treaty on the European Union
TFEU see Treaty on the Functioning of the European Union
third party damages 134–5
trade effects, SGEI 82–4
Treaty on the European Union (TEU)
Article 3(5) 171
Article 4(3) 146, 198
Treaty on the Functioning of the European Union (TFEU)
Article 3 141
Article 3(1)(b) 195
Article 18 172, 177, 179, 180
Article 101 151
Article 102 151
Article 106(2) 20, 72–3, 87, 93, 111, 209–11
Article 107 18, 69, 71–2, 85, 149, 178, 195, 208
Article 107(1) 1, 5, 8–12, 14, 18, 49, 55, 58, 76, 78, 80, 94–5, 121, 123–4, 144, 151, 159, 185, 196, 202–3, 206–9, 212–13, 219, 226
examples 26–40
five elements 54, 69
notion of aid 20–23
reasons for erratic case law 24–6
Article 107(2) 1, 5, 20, 58, 131, 203
Article 107(3) 1, 7, 8, 11, 20, 59, 67, 76–7, 89–94, 96, 127, 131, 203
Article 107(3)(a) 87
Article 107(3)(b) 46, 91–2
Article 107(3)(c) 87, 202, 205–6
Article 108 10, 142, 151, 159, 194
Article 108(2) 139, 161
Article 108(3) 1, 3, 9, 11, 124–5, 128–9, 132, 137, 139–40, 142–3, 162–3, 190, 195–6, 202, 208–9, 215, 224–6
Article 109 123, 145
Article 109 123, 145
Article 123 201, 206
Article 151, 177, 180, 181, 196, 199–200, 205–7, 215–16
Article 207(1) 199
Article 207(1)(b) 206
Article 207(3) 199, 206, 208, 211–13, 216
Article 344 177, 180
Article 351 172
Treaty of Rome 17, 20
State aid modernization 1–5
UNCITRAL see United Nations Commission on International Trade Law
United Nations Commission on International Trade Law (UNCITRAL) 175
Vestager, Margrethe 47