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The 2014 Block Exemption Regulation of State Aid Control in the EU*

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목 차

유럽연합은 경쟁법(Competition Law)을 통해서 회원국들의 정부보조금을 규제하고 있다. 특히 각 회원국으로부터 지원을 받는 개별 사업자는 관련 시장에서 특별한 우위를 점할 수 있으며, 이는 경쟁뿐만 아니라 무역에도 부정적인 영향을 준다. 그러므로 유럽연합에서는 정부보조금 관련 경쟁법을 적용하여 정당화 사유가 없는 경우 반경쟁적 보조금을 원칙적으로 금지하고 있다. 유럽연합의 정부보조금규제는 역내시장의 순기능을 보장하는 것에 그 목적을 두고 있다. 따라서 이러한 규제를 통해 시장진입장벽을 제거하고 경쟁을 제한하는 것을 금지할 수 있다. 법적구속력이 있는 유럽연합법(EU Law)을 통한 정부보조금규제가 유럽연합에서는 국제법 및 행정법의 성격을 동시에 갖는 법체계의 하나로서 중요하게 인식되고 있는 반면, 우리나라에서는 크게 다루어지지 않고 있다.

그러나 유럽연합의 회원국으로부터 정부보조금 수혜를 받는 우리나라 기업들이 등장하면서 향후 유럽연합 정부보조금규제에 대한 연구수요가 증가할 것으로 예상한다. 또한 국제무역규범에서의 정부보조금규제와 관련하여 모범이 되고 있는 유럽연합의 규칙은 우리나라에서도 연구가 필요하다. 무엇보다 한-EU 자유무역협정에는 경쟁조항에 정부보조금의 내용을 담고 있는데, 이는 유럽연합법에서의 정부보조금규제를 포함한 경쟁조항을 그대로 본받은 것이라 할 수 있다. 그러므로 실무적·학문적 측면에서 향후 유럽연합 정부보조금규제의 발전내용을 중요하게 연구해야 할 것이다. 이 연구는 유럽연합 정부보조금 관련 법체계에 대해서 알아보고, 2014년 개정된 정부보조금 일괄적용제외규정에 대해서 소개하고 특징을 논하고자 한다. 또한 개정된 유럽연합규칙을 통해 경쟁법적 특징인 법의

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목적으로서의 질서자유주의 배경과 발전에 대해서도 논의하도록 한다.

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Ⅰ. Introduction

The European Union (hereinafter the EU or the Union), as an international and supranational organisation, has played a pivotal role of implementing EU law. In particular, its competition law is one of the most important regulatory tools for market integration in the European Union; it involves administrative intervention to improve the competitive process and solve the problem of market failure.[1] Unlike other competition regimes, the EU competition rules consist of both antitrust[2] and State aid control.

Therefore, the Union controls aids which are provided by Member States under Articles 107, 108 and 109 of the Treaty on the Functioning of the European Union (TFEU). They directly prohibit a State's interference with competition in the Union.[3] In fact, an undertaking[4] that receives a State's support normally obtains an advantage over its rivals in the market, which is regarded as State intervention in the shape of financial assistance, subsidies or other forms of preferential treatments.[5] However, this eventually distorts competition and trade between countries.[6] For this reason, the competition rules of State aid generally prohibit

1) Barry J. Rodger and Angus MacCulloch, *Competition Law and Policy in the EU and UK,* 5th edn, Routledge, 2015, p. 2.

2) The EU has applied its competition rules to anti-competitive agreements, abuse of market dominance and mergers which inhibit competition.

3) Martin Heidenhain, "General Principles", in Martin Heidenhain (ed.), *European State Aid Law,* C.H. Beck, 2010, p. 1.

4) Undertaking usually refers to enterprise, but its concept within the EU State aid rules is often flexible, covering private and public ones. See Leigh Hancher, et al., *EU State Aid,* 4th edn, Sweet & Maxwell, 2012, pp. 76-77.

5) Alison Jones and Brenda Sufrin, "State Aid", in *EU Competition Law: Text, Cases, and Materials* (Online Resource, Oxford University Press), p. 2, available at http://global.oup.com/uk/orc/law/competition/jones_sufrin5e/ (accessed 28 January, 2015).

6) In particular, subsidies are also regulated by the international regime, such as the WTO Agreement on Subsidies and Countervailing Measures. However, the notion of subsidy in the

subsidies for undertakings unless the aids can be justified for the general economic interests of the Union as a whole. In the EU, the services of general economic interest have been regarded as the essence of the socio-economic model of the Union as a proxy of objective justification.[7]

With regards to implementation of the law, the EU Commission plays an important role in examining whether a State aid complies with EU law.[8] In particular, the EU's State aid control is different from the competition rules on cartel and abuse of market dominance, which have a procedural perspective, because its aim is to monitor whether a Member State's intervention distorts competition.[9] Thus, it is strongly related to a Member State's action,[10] and the negative outcome from State aids can be monitored by the Commission.

The legal framework and enforcement of the EU State aid control has been considered as a role model to the international trade regime. In particular, EU law, which is legally binding, has characteristics of international law and administrative law. Therefore, it is meaningful to research the EU State aid control for academia and practitioners. Whilst the subject of State aid is important, it has not been highlighted in Korea. There is no doubt that EU competition law, which has been implemented on the subjects of cartel and abuse of market dominance, has become important to Korean businessmen as the volume of trade between Korea and the EU increases.[11] On the contrary, the rules on State aid have not

WTO regime is not the same as that of State aid in the EU. See Tim Maxian Rusche et al. "State Aid", in Jonathan Faull and Ali Nikpay (eds.), *The EU Law of Competition,* 3rd edn, Oxford University Press, 2014, pp. 1923-1924. There are also some parallel cases of Articles 101 and 107 TFEU, e.g., T-17/93 *Matra v Commission* [1994] ECR II-597 and Case C-225/91 *Matra v Commission* [1993] ECR I-3203. See also Hancher, et al., op. cit., p. 126.

7) Georgios Kamaris, "The Reform of EU State Aid Rules for Services of General Economic Interest in Times of Austerity", *European Competition Law Review*, Vol. 33, No. 2, 2012, p. 55.

8) EU Commission website, http://ec.europa.eu/competition/state_aid/overview/index_en.html (accessed 27 January, 2015).

9) Yo Sop Choi, "EU Competition Policy Via Controlling State Aid", *International Area Review*, Vol. 13, No. 2, 2010, p. 304.

10) Wolf Sauter and Harm Schepel, *State and Market in European Union Law: The Public and Private Spheres of the Internal Market before the EU Courts,* Cambridge University Press, 2009, p. 193. According to Sauter and Schepel, State aid control in the EU aims at ensuring a level functioning of the internal market, preventing market entry barriers and the inhibition of competition resulting from State protectionism at the cost of taxpayers.

been an important area for Korean lawyers, as the number of cases involving Korean undertakings is not considerable. However, because the number of Korean beneficiary undertakings is growing,[12] the demand for study on State aid is also increasing.[13]

Furthermore, unlike other Free Trade Agreements (FTAs) which Korea has concluded with other countries, the Competition Chapter in the Korea-EU FTA includes the provision of State aid. This demonstrates the EU's influence on the FTA Competition Chapter as the structure of the provision is similar to that in the EU. For example, Chapter 11 Section B of the Korea-EU FTA prescribes the matters of subsidies, and Article 11.9 states that both trading Parties should remedy or remove distortions of competition caused by subsidies in so far as they influence trade between them and prevent the incidence of such situations by applying their competition laws. This provision implies that understanding EU competition rules on State aid has become crucial for Korean undertakings. Moreover, one can find the EU's intention of improving global disciplines on aid, as shown in the Korea-EU FTA, which demands a study on the subject of State aid control in the EU.[14]

This article thus aims at exploring the recent development of EU law regarding State aid

11) In effect, the number of EU competition enforcement against Korean companies has increased noteworthy over the last decades under the principle of extraterritorial application. For further detail about extraterritorial application of EU competition law, see Cosmo Graham, *EU and UK Competition Law,* 2nd edn, Pearson, 2013, p. 589 et seq. In particular, the geographic scope of State aid control extends to the European Economic Area (EEA) under Article 61(1) EEA Agreement, which is identical to Article 107 TFEU. The block exemption regulations are also applicable to the EEA. See also Hancher, et al., op. cit., pp. 145–146; Heidenhain, "General Principle", op. cit., p. 5; Damir Kaufman, "International Agreements", in Kelyn Bacon (ed.), *European Community Law of State Aid,* Oxford University Press, 2009, pp. 148–150.

12) E.g., Hyundai Motors (in the Czech Republic in 2006, based on the exemption of least developed region) and Samsung Electronics (in Poland in 2008, 2009, 2013 etc, based on the exemption of least developed region), available at http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result (accessed 3 February, 2015).

13) Yo Sop Choi, "Modernisation of the EU State Aid Regulation: Competition Policy on Environmental Protection", *Dankook Law Review*, Vol. 36, No. 2, 2012, pp. 238–239. Some explain that the EU State aid control and its policy have stayed in the shadow of competition policy in a narrow sense, as there was no parallel development of other competition law provisions. See also Adinda Sinnaeve, "Competition Policy, State Aid and State Enterprises", in Barry Hawk (ed.), *2001 Fordham Corporate Law Institute: International Antitrust Law and Policy,* Juris Publishing, 2002, p. 67.

14) Hancher, et al., op. cit., pp. 232–233.

control, focusing on the newly adopted block exemption regulation (hereinafter BER) of 2014. The remainder of this article is as follows. Section II provides the general background of the EU State aid rule, including the case law. This section explains the legal framework of State aid control. Section III, then, discusses the new BER of State aid and its meaning for the future policy of the Union. It further demonstrates EU's legal technique for simplification which provides legal certainty and reduction of investigation costs. Its recent development also confirms EU's Ordoliberalism which is important in the implementation of EU economic law. Finally, Section IV summarises and concludes with the discussion of the need for research on EU State aid control as expecting its demand for the future.

Ⅱ. The EU Regulation on State Aid: A Sound Design

1. The Foundations of EU Competition Rules on State Aid

As stated above, competition itself is a founding philosophy of the Union.[15] Article 3(3) of the Treaty of the European Union (TEU) declares that the EU aims to establish an internal market and to work for sustainable development based on a highly 'competitive social market economy'. A social market economy is one of the most important elements for ensuring an effective competition policy, which means that the policy cannot be influenced by the discretion of politicians or bureaucrats, but solely by the legal system, to improve the economic order of a free society.[16]

Article 3(1)(b) TFEU also states that the Union has the exclusive competence to establish the competition rules, which include State aid. It also allows exemptions based on certain situations. For example, Article 14 TFEU acknowledges the meaning of a general economic interest in the shared values of the EU and their role in promoting social and territorial cohesion.

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15) In particular, the now withdrawn ECSC Treaty prohibited State aid to the coal and steel industries as considered as *prima facie*. See Conor Quigley and Anthony M Collins, *EC State Aid Law and Policy,* Hart Publishing, 2003, p. 2.

16) Christian Watrin, "Germany's Social Market Economy", in Alastair Kilmarnock (ed.), *The Social Market and the State,* Social Market Foundation, 1999, pp. 94-95.

In sum, EU law, as a legally binding international law, prohibits State aid, but it allows it when it satisfies the criteria of exemption, including general economic interest. In order to ensure the EU's interests from the competition law perspective, the TEU and the TFEU guarantee the Union's control of State aid based on its competition policy,[17] and the substantive and procedural provisions are stated in Articles 107 through 109 of the TFEU as follows.[18]

First, Article 107(1) TFEU broadly prohibits State aid, which is often considered a catch-all provision,[19] as it clarifies that any State aid which inhibits competition by favouring specific undertakings, when it affects inter-State trade, is incompatible with EU law.[20] Nevertheless, Article 107(2) allows certain State aid as compatible, which satisfies specified criteria such as the case of disasters or exceptional incidents. This is often considered as an automatic exemption provision.[21] Article 107(3), then, stipulates that an aid is compatible with the internal market where it satisfies certain conditions.[22]

To summarise, the general framework of EU State aid control is prohibition and exemption. Article 107(2) is the provision of mandatory exemptions, whilst Article 107(3) provides for

17) Alberto Santa Maria, *European Economic Law,* 2nd edn, Kluwer Law International, p. 419. The author argues that the aim of State aid control seems to be market protection or non-discrimination between traders in the light of globalisation from the conventional view of competition law.

18) For general introduction to legal structure of State aid, see also Choi, "Modernisation of the EU State Aid Regulation", op. cit., pp. 240-241.

19) Richard Craven, "State Aid and Sport: Football Clubs in Difficulty", *European Competition Law Review*, Vol. 35, No. 12, 2014, p. 581.

20) When examining a violation of Article 107 TFEU, to provide actual evidence of distortion of competition is not necessary because the existence of State aid itself indicates its liability of prevention of competition, e.g., Case C-372/97 *Italy v. Commission* [2004] ECR I-3679; Case T-288/97 *Regione Autonoma Friuli-Venezia Giulia v. Commission* [2001] ECR II-1169. See A.G. Toth, *The Oxford Encyclopaedia of European Community Law, Vol III,* Oxford University Press, 2008, p. 677.

21) Hancher, et al. op. cit., p. 140.

22) The criteria include as follows: (a) aid for economic growth in a case of a low standard of living and serious underemployment; (b) aid for a project of common EU interest; (c) aid for the development of certain economic activities or of certain economic regions; (d) aid for culture and heritage conservation; and (e) other categories of aid pursuant to the decisions of the Council on a proposal from the Commission.

discretionary exemptions by the Commission.[23] These provide the categories of State aid which can be regarded as compatible with EU law.[24] Although it often has been considered political in some cases, this discretionary condition is regarded as quite flexible,[25] and it can be suitable to address issues that arise within the fast moving global market, such as the financial crisis in 2008.[26]

Compared with other areas of EU competition law, the number of State aid cases is not noteworthy. Nevertheless, the Court of Justice of the European Union (CJEU) has continuously issued meaningful judgments, e.g., *Altmark*.[27] The *Altmark* Court clarifies the criteria for the application of Article 107(1) TFEU as follows: (i) an intervention by the State or through State resources; (ii) its influence on trade between Member States;[28] (iii) its conferral of an advantage on the recipient undertaking; and (iv) the distortion of or threat to distort competition.[29] In particular, historically, the concept of State aid has been interpreted broadly, which favours a wide range of discretion for the Commission, thereby preventing illegitimate State support.[30]

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23) With regards to the State aid control, the Commission holds a wide discretionary power, e.g., Case 730/79 *Philip Morris v. Commission* [1980] ECR 2671. See also Toth, op. cit., p. 681.

24) Ibid., p. 667. However, some argue the problem of discretionary power. See also Thomas J. Doleys, "Managing the Dilemma of Discretion: The European Commission and the Development of EU State Aid Policy", *Journal of Industry, Competition, and Trade*, Vol. 13 2013, p. 23 et seq.

25) Vivien Rose and David Bailey, *Bellamy & Child European Law of Competition,* 7th edn, Oxford University Press, 2013, p. 1269.

26) For example, the volume of aid, supporting the financial sector, increased between 2008 and 2011 due to the financial crisis. See also Damian Chalmers et al., *European Union Law,* 3rd edn, Cambridge University Press, 2014, pp. 1082-1085. In fact, the influence of financial crisis demonstrates the EU's policy in the global context. See also Hancher, et al., op. cit., p. 28.

27) Case C-280/00, *Altmark Trans GmbH v. Regierungspräsidium Magdeburg* [2003] ECR I-7747.

28) The notion of State resources can be broadly interpreted, e.g., Case 248/84 *Germany v. Commission* [1987] ECR 4013; Case C-482/99 *France v. Commission* [2002] ECR I-4397. For further detail, see also Toth, op. cit., pp. 668-669. The distinction between aid granted by a State and that through State resources does not signify when applying the relevant rules.

29) Sandra Marco Colino, *Competition Law of the EU and UK,* 7th edn, Oxford University Press, 2011, p. 414.

30) Toth, op. cit., p. 667.

2. The General Principle of Exemptions

The legal framework for State aid control above explains that the policymakers seem to admit that the main reason for State involvement is to solve socio-political problems, for instance, those derived from economic depression, but they cannot allow the distortion of competition as a consequence of the State aid.[31] Although State aid is a method in the politicians' toolkit, which they usually enjoy in pursuit of the purpose of being elected, the State aid policy in the EU decides the scope and limit of their aid choices.[32] Therefore, the notification-and-authorisation method by the EU regime is the minimum level of a guarantee of competition, whereby it protects against unfair advantage over competitors and eliminates the artificial support of unproductive undertakings, which results in inefficiency.[33] Following the authorisation procedure, Member States need to give notification of their aids to certain undertakings and should receive permissions of the Commission.

Nonetheless, some argue that the various tools of the EU competition authority are somewhat confusing, because its documents are often regarded as a mixture of practical, conceptual, and political issues.[34] Moreover, the economic recession since 2008 has resulted in complex issues which may generate legal uncertainty in the implementation of the law. To solve this problem, the Council of the EU recently accepted the Commission's proposal of new regulations for the exemption, i.e., the procedural and enabling regulations, which were a part of modernisation.[35] This was influenced by the modernisation efforts aimed at other

31) Colino, op. cit., p. 412.

32) Francesco de Cecco, *State Aid and the European Economic Constitution,* Hart Publishing, 2013, p. 1.

33) Christian Ahlborn and Claudia Berg, "Can State Aid Control Learn from Antitrust? The Need for a Greater Role for Competition Analysis under the State Aid Rules", in Andrea Biondi, et al. (eds.), *The Law of State Aid in the European Union,* Oxford University Press, 2004), p. 48; Colino, op. cit., p. 413.

34) Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials,* 5th edn, Oxford University Press, 2011, p. 1086. For example, there has been a conflict between the EU and the US regarding State aids on the airline industries. See e.g., Jae-Min Lee, "The Subsidy Dispute between the United States and European Union Concerning the Large Civil Aircraft: A Critical Review of the EC-LCA Panel Decision", *Korean Forum on International Trade and Business Law*, Vol. 20, No. 1, 2011, pp. 207-240.

35) See e.g., Preslava Y. Dilkova, "The New Procedural Regulation in State Aid: Whether

competition rules in the EU.[36] In fact, the Member States have recently offered quite a number of State aids to help financial institutions which have faced exceptional circumstances under Articles 107(2) and (3) TFEU,[37] based on the *lex specialis* principle.[38] Likewise, the improved framework of State aid control in the TFEU, which was developed as part of the modernisation, has provided a quick and sound control, which was shown in the State aid to financial institutions facing the 2008 crisis. Overall, this modernisation has currently brought a rapid development of EU State aid rules, thereby balancing the principles of prohibition and exemption. This satisfies the objective of European Ordoliberalism.

Ⅲ. The Evaluation of the New Block Exemption Regulation

1. The New BER of State Aid: An Attempt to Simplify the Rules for Improving Legal Certainty

There have been enormous efforts aimed at the modernisation of EU competition law, and State aid control was not an exception. The Commission started reviewing the overall procedures and rules for State aid in 2005, and it eventually adopted the General Block Exemption Regulation (GBER), which was acknowledged as the consolidated State aid BER in 2008[39] and as complying with the line of a modernised economic approach.[40] The BER

"Modernisation" is in the Right Direction?", *European Competition Law Review*, Vol. 35, No. 2, 2014, p. 88.

36) Thibaut Kleiner, "Modernization of State aid Policy", in Erika Szyszczak (ed.), *Research Handbook on European State Aid Law,* Edward Elgar, 2011, p. 9.

37) Mara Hellstern, "The European Commission's Decision-Making on State Aid for Financial Institutions: Good Regulation in the Absence of Good Governance?", *European Competition Law Review*, Vol. 34, No. 4, 2013, p. 207.

38) Andrew Evans, *European Community Law of State Aid,* Clarendon Press, 1997, p. 1.

39) Choi, "Modernisation of the EU State Aid Regulation", op. cit., pp. 243-244; Colino, op. cit., p. 427.

40) Hancher, et al. op. cit., p. 3. However, there were some delays of adoption of economic principles in State aid control because of the importance of normative and social objectives and economic relationships between Member States. See e.g., Ulrich Schwalbe, "European State Aid Control -

allows Member States to offer aids to private undertakings without notification to the Commission when the aids satisfy the conditions under the BER.

This regulation was again revised in 2014.[41] Because the overall competition policy was modified in the light of the modernisation, EU policymakers also started considering a modernisation of State aid rules in the early 2000s. An important modernisation was made in the 2012-2014 programme, which was launched in May 2012 to pursue the following objectives: (i) fostering growth, (ii) focusing on important cases which influence the internal market, and (iii) streamlining rules and accelerating procedures.[42] Above all, the third objective influenced a significant amendment to the old regulations, as the Council adopted a new regulation regarding procedures and the GBER, etc.[43]

As announced by the Commission, the improvement of the competitiveness and dynamism of the European economy, based on the Lisbon Strategy, was crucial in the programme of modernisation. In particular, the 2005 State Aid Action Plan was aimed at contributing to the Lisbon strategy to improve the competitiveness of EU industries and to solve unemployment.[44] There was a political reason behind this action plan, wherein the linkage between State aid control and the European economic reform agenda was emphasised.[45] In addition, one of the major plans for this modernisation was to simplify the relevant rules, and thereby, to ensure legal certainty.[46] As the number of new Member States has increased, the number of notifications and the amount of scrutiny has also grown. This has been an

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The State Aid Action Plan", in Jürgen Basedow and Wolfgang Wurmnest (eds.), *Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid,* Wolters Kluwer 2011, p. 162.

41) Commission Regulation (EU) No. 651/2014, declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

42) State Aid Modernisation Communication COM (2012), available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0209&from=EN (accessed 30 January, 2015).

43) Jones and Sufrin, op. cit., p. 4; Rusche et al. op. cit., pp. 1926-1927.

44) Alan Dashwood et al., *Wyatt and Dashwood's European Union Law,* 6th edn, Hart Publishing, 2011, p. 848.

45) Michela Angeli, "The European Commission's 'New Policy' on State Aid Control: Some Reflections on Public and Private Enforcement of Recovery of Illegal Aid", *European Competition Law Review*, Vol. 30, No. 1, 2009, p. 533.

46) Rose and Bailey, op. cit., p. 1270.

administrative burden on the Commission. Therefore, the amended rules help the Commission to focus its resources on difficult cases, rather than insignificant ones.[47)]

Furthermore, the design of modernised rules is important. In effect, the administrative rule-making, which is the Commission's power to improve hard and soft laws, is an important measure to provide predictability and transparency in the implementation of the law, thereby enhancing legal certainty and the predictability of enforcement.[48)] Moreover, the Commission can resist political pressures in certain cases by committing itself to satisfying the standards written in hard and soft laws,[49)] which clarify the standards.[50)] This approach offers an idea to other competition regimes, especially in the developing countries with a civil law tradition. When a regime prefers legal certainty, its competition policymakers need to establish clear guidance through designing hard and soft laws.

In fact, it is very unusual for the EU authority to amend or adopt new regulations quickly. However, the Commission adopted a GBER in 2008 and revised it in 2014. This indicates that the policy underlying State aid control is important and needs to be updated in order to catch up with the fast moving global economy and business environment, thereby to satisfy socio-political goals, including Ordoliberalism. The 2014 GBER simplifies the relevant rule by categorising aids with updated thresholds.[51)] This development indicates an adaptation

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47) Raymond H.C. Luja, *Assessment and Recovery of Tax Incentives in the EC and the WTO: A View on State Aids, Trade Subsidies and Direct Taxation,* Intersentia, 2003, p. 72; Rose and Bailey, op. cit., p. 1270. In particular, some argue that the Commission seems to continue to rely on soft law measures with relates to State aid. See e.g., Hancher, et al. op. cit., p. 24.

48) De Cecco, op. cit., p. 48; Phedon Nicolaides et al., *State Aid Policy in the European Community: A Guide for Practitioners,* Kluwer Law International, 2005, p. 5.

49) Alison Oldale and Henri Piffaut, "Introduction to State aid law and policy", in Kelyn Bacon (ed.), *European Community Law of State Aid,* Oxford University Press, 2009, p. 4.

50) Maria Rehbinder, "Recent Developments in Commission State Aid Policy and practice", in Andrea Biondi, et al. (eds.), *The Law of State Aid in the European Union,* Oxford University Press, 2004, p. 118.

51) For example, Article 2 BER provides clear definitions of the wording regarding State aid, and Article 3 explains certain conditions regarding group exemptions from mandatory notification to the Commission, which are based on the amount of euros, rather than on market share thresholds. The new BER also sets higher notification thresholds and aid intensities to allow aid more easily than before, and it added greater scope through the inclusion of additional categories of aid. EU Commission, Press Release (21 May 2014), available at http://europa.eu/rapid/press-release_IP-14-587_en.htm (accessed 4 February, 2015).

to global circumstances.

In particular, the GBER allows the Member States to grant certain positive aids more quickly,[52] and it can also solve the problem of vague statements in Article 107 TFEU.[53] In summary, dissimilar to the implementation of Article 101 TFEU, the EU competition regime accommodates both the methods of notification under the TFEU and those of non-notification under the GBER for effective State aid control. In sum, the recent design of State aid control in the EU is based on a three-tiered system, including group exemption, standard assessment and detailed scrutiny, which has been developed to face the globalisation of the economy.[54]

2. The Choice of Modernisation: The Development of Ordoliberalism

There is no doubt that Ordoliberalism,[55] which was developed by the Freiburg School, has influenced the overall policy of the EU, including its competition policy. In particular, Ordoliberalism has influenced other competition regimes including Korea, but its influence is limited to the area of prohibition of abuse of market dominance or the control of large conglomerates, such as *Chaebol*. On the contrary, it affects policy on State aid in the EU. Ordoliberals argue that a competitive economic system is necessary to protect the process of competition, to ensure the equitable distribution of wealth, and to minimise the State's intervention, thereby protecting individuals' economic freedom from monopolies and inefficient government.[56] Whenever there are conflicting views on competition and capitalism regarding the concept of common interest in the EU, Ordoliberalism has often prevailed. Ordoliberal views provide the regulator with the scope to authorise State intervention when it appears

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52) Hancher, et al., op. cit., p. 365.

53) Some asserts Article 107 TFEU contains a wide and unclear definition. See e.g., Carl Michael von Quitzow, *State Measures Distorting Free Competition in the EC,* Kluwer, 2002, p. 39.

54) Hancher, et al. op. cit., p. 7.

55) The Freiburg School's Ordoliberalism influenced the development of social market economy and economic constitution. See e.g., De Cecco, op. cit., pp. 11–13.

56) David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus,* Oxford University Press, 2003, p. 232. There are various views on Ordoliberalism involving social market economy in Europe. See also Giorgio Monti, "EU Competition Law from Rome to Lisbon – Social Market Economy", in Caroline Heide-Jorgensen et al. (eds.), *Aims and Values in Competition Law,* DJØF Publishing, 2013, p. 36.

necessary to achieve a desirable policy outcome.[57)]

Similar to the general objectives of EU competition law, the State aid control is aimed at achieving the objective of a common interest, which is based on two concepts: economic purposes and non-economic purposes. First, the economic objective is related to the efficiency in solving the market failure problem, especially when there are certain problems involving externalities. Second, the non-economic objective deeply involves 'fairness', which also can be interpreted as equity, and it concerns issues such as regional development, employment, culture, etc.[58)] Therefore, the State aid control exemplifies the philosophy of Ordoliberalism by adopting general prohibitions, with exemptions for certain cases.

In order to harmonise the conflicting views on State aid, the design of well-defined implementation and exemption regulations is crucial, thereby balancing the pros and cons of State aid.[59)] To further that point, it is important to understand the meaning of State aid control; it deeply intervenes in the freedom of Member States in the area of industrial and economic policy.[60)] Therefore, the Commission plays a central role in balancing the diverse objectives of competition in order to avoid any possible disagreements in EU policy to promote harmonisation. In summary, the establishment of a balance between the internal market and social rights is important.[61)]

The ultimate goal of State aid control, which is based on Ordoliberalism, is founded on the idea of the common interest in achieving the Union policy.[62)] Above all, the statement in Article 107(2)(a) TFEU, 'a social character, granted to individual consumers', demonstrates the Union policy on consumer interests, which is one of the most important views of

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57) Rusche et al. op. cit., pp. 1925–1926.

58) Ibid., pp. 1964–1965.

59) The balancing test indicates that the State aid in concern which may cause noteworthy distortion of competition should be authorised if it also improves benefits from that aid, which is under the proportionality assessment. See Hancher, et al. op. cit., p. 8; Phedon Nicolaides, "Distortion of Competition in the Field of State Aid: From Unnecessary Aid to Unnecessary Distortion", *European Competition Law Review*, Vol. 31, No. 10, 2010, p. 402.

60) Jones and Sufrin, op. cit., p. 2.

61) De Cecco, op. cit., pp. 20–24; Leigh Hancher and Wolf Sauter, "Public Services and EU Law", in Catherine Barnard and Steve Peers (eds.), *European Union Law,* Oxford University Press, 2014, p. 539.

62) Heidenhain, "General Principle", op. cit., pp. 4–5.

Ordoliberalists. This provision can only be applied when the aid in concern directly benefits consumers, irrespective of which undertaking provides the products with which the social purpose is to be achieved. Aid of a social character is often interpreted as a means of helping socially or economically weak individuals.[63)]

The scope of the GBER also confirms the social character in EU competition law. The EU competition regime exempts certain categories of State aid which contain social characteristics, such as regional aid, SME employment aid, aid for environmental protection, and aid for disadvantaged or disabled workers under the GBER.[64)] Furthermore, the standard within the GBER ensures the fairness or objectivity of states' policy- or decision-making,[65)] which promotes Ordoliberal aims.

To conclude, the socio-economic model, e.g., the general economic interests in EU law, is based on the welfare state model, which aims to attain two objectives: ensuring a minimum income for citizens and providing optimum standards of social services to all.[66)] This concept has developed through case law and legislation.[67)] In addition, the new GBER exempts certain categories of State aid from the obligation of prior notification to the Commission when the benefits from the aid outweigh the possible distortion of competition. This legal technique has certain objectives, which are listed as follows: (i) it extends the possibilities for offering good aid to undertakings without prior Commission scrutiny; (ii) it simplifies the award of aid, thereby reducing the duration of the process; and (iii) it introduces ex post requirements, which eventually provides transparency.[68)] This newly developed framework of the 2014

63) Martin Heidenhain, "State Aid of a Social Character to Individual Consumers: Article 87(2)(a) EC", in Martin Heidenhain (ed.), *European State Aid Law,* C. H. Beck, 2010, p. 145. Moreover, the TEU confirms the Union's aim of social and economic advancement. For example, Article 3(3) TEU articulates that the EU aims at 'full employment and social progress', which implies that growth and jobs are among the major purposes of the internal market. See Ilan Sherr, "Employment and Training Aid", in Kelyn Bacon (ed.), *European Community Law of State Aid,* Oxford University Press, 2009, p. 197.

64) For further detail, see also Volker Zuleger, "General Block Exemption Regulation", in Martin Heidenhain (ed.), *European State Aid Law,* C. H. Beck, 2010, pp. 422-423.

65) Hancher, et al. "General Principle", op. cit., p. 33.

66) Kamaris, op. cit., p. 55.

67) See e.g. Wolf Sauter, "The Altmark Package Mark II: New Rules for State Aid and the Compensation of Services of General Economic Interest", *European Competition Law Review*, Vol. 33, No. 7, 2012, p. 307 et seq.

GBER limits the discretionary power of the Commission and ensures the function of EU law in accordance with Ordoliberalism.

Ⅳ. Conclusions

As a prominent competition law scholar, Fox, notes, States are often tempted to offer financial support or other forms of benefits to domestic undertakings. In particular, extensive governmental support of state industry was a sort of norm in mid-twentieth century Europe. Therefore, it was crucial for the founding fathers of the EU to adopt rules on State aid in order to establish the internal market.[69] However, the basic aim of EU competition policy does not address economic norms alone,[70] but rather, the indirect pursuit of the public interest. This view highlights that the Commission needs to scrutinise the scope of the beneficial consequences of an aid in concern broadly, taking into account economic efficiency and the equity of social cohesion.[71] Therefore, State aid control is regarded as a founding pillar of EU competition law and policy and as a legal tool for a cohesion policy,[72] especially for Ordoliberal objective.

Moreover, the EU Treaty demonstrates a mixture of public policies regarding competition and trade.[73] Maintaining the overall policy, which is mainly based on competition policy, is crucial for the EU, because it prevents many hybrid trade restraints. The EU Treaties have

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68) EU Commission, Press Release (21 May 2014), available at http://europa.eu/rapid/press-release_IP-14-21_en.htm (accessed 4 February, 2015).

69) Eleanor M. Fox, *The Competition Law of the European Union in Comparative Perspective: Cases and Materials,* West, 2009, p. 347.

70) Phedon Nicolaides and Sanoussi Bilal, "State Aid Rules: Do They Promote Efficiency?", in Sanoussi Bilal and Phedon Nicolaides (eds.), *Understanding State Aid Policy in the European Community: Perspectives on Rules and Practice,* Kluwer, 1999, p. 32.

71) Oldale and Piffaut, op. cit., p. 4; Adinda Sinnaeve, "State Aid Control: Objectives and Procedures", in Sanoussi Bilal and Phedon Nicolaides (eds.), *Understanding State Aid Policy in the European Community: Perspectives on Rules and Practice,* Kluwer, 1999, p. 14.

72) Phedon Nicolaides, et al. *State Aid Poicy in the European Community,* 2nd edn, Kluwer, 2008, p. 5.

73) Giorgio Monti, *EC Competition Law,* Cambridge University Press, 2007, pp. 90-91.

indicated the EU policymakers' views on antitrust and on four freedoms, including goods, services, persons and capital, and both rules have intersections.[74] The guarantee of the internal market, i.e., 'a space without boundaries', can be threatened by a State's intervention.[75] In addition, the State aid rules demonstrate the Union's deepening integration by confirming its competence in economic policy, by eliminating subsidy races between Member States.[76]

Competition law and policy is evolving quickly, as the market environment develops rapidly. In the EU, competition law implementation includes not only private restraints on trade, but also state restraints on trade, and State aid control is one of the main legal measures to ensure international competition and trade. The development of overall competition law and policy in the EU has been considered as an outstanding example for trading countries and the world trade regime. In particular, the EU's competition law, including State aid control, is a type of international and supranational laws which are voluntarily adopted and prohibit predatory or rent-seeking states' policies. The EU's legal structure of State aid control under the Treaties and BER indicates the most efficient way of enforcement of the law. This offers a view of the future harmonisation of trade and competition laws in the global market.[77] Therefore, it is necessary to research this subject in a comparative and international law perspective.

In particular, unlike other FTAs that Korea has concluded, the Korea-EU FTA competition chapter includes a subsidy provision, which appears very unique. However, when considering the background of EU competition policy, which contains the State aid control to ensure competition and free trade, it is not surprising that the inclusion of the wording of subsidies

74) Andrea Biondi and Piet Eeckhout, "State Aid and Obstacles to Trade", in Andrea Biondi, et al. (eds.), *The Law of State Aid in the European Union,* Oxford University Press, 2004, p. 107 et seq; Eleanor M. Fox and Deborah Healey, "When the State Harms Competition: The Role for Competition Law", *Antitrust Law Journal*, Vol. 79, No. 3, 2014, p. 771. In particular, the State aid control is strongly related to the free movement principles, e.g. Case 74/76 *Ianelli & Volpi v Meroni*, [1977] ECR 557.

75) Alberto Santa Maria, "Introduction", in Alberto Santa Maria (ed.), *Competition and State Aid: An Analysis of the EC Practice,* Kluwer Law International, 2007, pp. 1–2.

76) Neelie Kroes, "Antitrust and State Aid Control: The Lessons Learned", in Barry Hawk (ed.), *2009 Fordham Competition Law Institute: International Antitrust Law and Policy,* Juris Publishing, 2010, p. 82.

77) Hancher, et al., "General Principle", op. cit., p. 32.

matters, because it is often highlighted as a particularity of the EU legal order.[78] Although the legal framework of the Korea-EU FTA is somewhat different from that of the EU, it is important to understand the trading Party's competition policy in general for future policy-making.

Consequently, a study on EU State aid control has become important worldwide in practical and theoretical perspectives. In particular, the new development of the GBER in 2014 highlights a simple rule for exemption, which provides a potential standard for the world trade regime that does not require the monitoring of aid. This development can attract interests of the Korean undertakings and lawyers, and we expect further researches on the EU law development of legal techniques for harmonisation and market integration.

78) Rusche et al. op. cit., p. 1923.

References

1. Books

Chalmers, Damian et al. *European Union Law*. 3rd edn, Cambridge University Press, 2014.

Colino, Sandra Marco. *Competition Law of the EU and UK*. 7th edn, Oxford University Press, 2011.

Craig, Paul and de Búrca, Gráinne. *EU Law: Text, Cases, and Materials*. 5th edn, Oxford University Press, 2011.

Dashwood Alan, et al. *Wyatt and Dashwood's European Union Law*. 6th edn, Hart Publishing, 2011.

De Cecco, Francesco. *State Aid and the European Economic Constitution*. Hart Publishing, 2013.

Evans, Andrew. *European Community Law of State Aid*. Clarendon Press, 1997.

Fox, Eleanor M. *The Competition Law of the European Union in Comparative Perspective: Cases and Materials*. West, 2009.

Gerber, David J. *Law and Competition in Twentieth Century Europe: Protecting Prometheus*. Oxford University Press, 2003.

Graham, Cosmo. *EU and UK Competition Law*. 2nd edn, Pearson, 2013.

Hancher, Leigh, et al. *EU State Aid*. 4th edn, Sweet & Maxwell, 2012.

Luja, Raymond H.C.. *Assessment and Recovery of Tax Incentives in the EC and the WTO: A View on State Aids, Trade Subsidies and Direct Taxation*. Intersentia, 2003.

Monti, Giorgio. *EC Competition Law*. Cambridge University Press, 2007.

Nicolaides, Phedon et al. *State Aid Policy in the European Community: A Guide for Practitioners*. Kluwer Law International, 2005.

Nicolaides, Phedon, et al. *State Aid Poicy in the European Community*. 2nd edn, Kluwer, 2008.

Quigley, Conor and Collins, Anthony M. *EC State Aid Law and Policy*. Hart Publishing, 2003.

Rodger, Barry J. and MacCulloch, Angus. *Competition Law and Policy in the EU and UK*.

5th edn, Routledge, 2015.

Rose, Vivien and Bailey, David. *Bellamy & Child European Law of Competition.* 7th edn, Oxford University Press, 2013.

Santa Maria, Alberto. *European Economic Law.* 2nd edn, Kluwer Law International, 2009.

Sauter, Wolf and Schepel, Harm. *State and Market in European Union Law: The Public and Private Spheres of the Internal Market before the EU Courts.* Cambridge University Press, 2009.

Toth, A.G. *The Oxford Encyclopaedia of European Community Law, Vol III.* Oxford University Press, 2008.

Von Quitzow, Carl Michael. *State Measures Distorting Free Competition in the EC.* Kluwer, 2002.

2. Articles and Book Chapters

Ahlborn, Christian and Berg, Claudia. "Can State Aid Control Learn from Antitrust? The Need for a Greater Role for Competition Analysis under the State Aid Rules. Biondi, Andrea, et al. (eds.). *The Law of State Aid in the European Union.* Oxford University Press, 2004.

Angeli, Michela. "The European Commission's 'New Policy' on State Aid Control: Some Reflections on Public and Private Enforcement of Recovery of Illegal Aid". *European Competition Law Review.* Vol. 30, No. 1, 2009.

Biondi, Andrea and Eeckhout, Piet. "State Aid and Obstacles to Trade". Andrea Biondi, Andrea et al. (eds.). *The Law of State Aid in the European Union.* Oxford University Press, 2004.

Choi, Yo Sop. "EU Competition Policy Via Controlling State Aid". *International Area Review.* Vol. 13, No. 2, 2010.

___________. "Modernisation of the EU State Aid Regulation: Competition Policy on Environmental Protection". *Dankook Law Review.* Vol. 36, No. 2, 2012.

Craven, Richard. "State Aid and Sport: Football Clubs in Difficulty". *European Competition Law Review.* Vol. 35, No. 12, 2014.

Dilkova, Preslava Y. “The New Procedural Regulation in State Aid: Whether "Modernisation" is in the Right Direction?”. *European Competition Law Review.* Vol. 35, No. 2, 2014.

Doleys, Thomas J. “Managing the Dilemma of Discretion: The European Commission and the Development of EU State Aid Policy”. *Journal of Industry, Competition, and Trade.* Vol. 13, 2013.

Fox, Eleanor M. and Healey, Deborah. “When the State Harms Competition: The Role for Competition Law”. *Antitrust Law Journal.* Vol. 79, No. 3, 2014.

Hancher, Leigh and Sauter, Wolf. “Public Services and EU Law”. Barnard, Catherine and Peers, Steve (eds.). *European Union Law.* Oxford University Press, 2014.

Heidenhain, Martin. “General Principles”. Heidenhain, Martin (ed.). *European State Aid Law.* München: C.H. Beck, 2010.

_______________. “State Aid of a Social Character to Individual Consumers: Article 87(2)(a) EC”. Heidenhain, Martin (ed.). *European State Aid Law.* C.H. Beck, 2010.

Hellstern, Mara. “The European Commission’s Decision-Making on State Aid for Financial Institutions: Good Regulation in the Absence of Good Governance?”. *European Competition Law Review.* Vol. 34, No. 4, 2013.

Kamaris, Georgios. “The Reform of EU State Aid Rules for Services of General Economic Interest in Times of Austerity”. *European Competition Law Review.* Vol. 33, No. 2, 2012.

Kaufman, Damir. “International Agreements”. Bacon, Kelyn (ed.). *European Community Law of State Aid.* Oxford University Press, 2009.

Kleiner, Thibaut. “Modernization of State aid Policy”. Szyzczak, Erika (ed.). *Research Handbook on European State Aid Law.* Edward Elgar, 2011.

Kroes, Neelie. “Antitrust and State Aid Control: The Lessons Learned”. Hawk, Barry Hawk (ed.). *2009 Fordham Competition Law Institute: International Antitrust Law and Policy.* Juris Publishing, 2010.

Lee, Jae-Min, “The Subsidy Dispute between the United States and European Union Concerning the Large Civil Aircraft: A Critical Review of the EC-LCA Panel Decision”, *Korean Forum on International Trade and Business Law*, Vol. 20, No.

1, 2011 (in Korean).

Monti, Giorgio. "EU Competition Law from Rome to Lisbon – Social Market Economy". Heide-Jorgensen, Caroline, et al. (eds.). *Aims and Values in Competition Law.* DJØF Publishing, 2013.

Nicolaides, Phedon. "Distortion of Competition in the Field of State Aid: From Unnecessary Aid to Unnecessary Distortion". *European Competition Law Review.* Vol. 31, No. 10, 2010.

Nicolaides, Phedon and Bilal, Sanoussi. "State Aid Rules: Do They Promote Efficiency?", Bilal, Sanoussi and Nicolaides, Phedon (eds.). *Understanding State Aid Policy in the European Community: Perspectives on Rules and Practice.* Kluwer, 1999.

Oldale, Alison and Piffaut, Henri. "Introduction to State aid law and policy". Bacon, Kelyn (ed.). *European Community Law of State Aid.* Oxford University Press, 2009.

Rehbinder, Maria. "Recent Developments in Commission State Aid Policy and practice". Biondi, Andrea, et al. (eds.). *The Law of State Aid in the European Union.* Oxford University Press, 2004.

Rusche, Tim Maxian et al. "State Aid". Faull, Jonathan and Nikpay, Ali (eds.). *The EU Law of Competition.* 3rd edn, Oxford University Press, 2014.

Santa Maria, Alberto. "Introduction". Santa Maria, Alberto (ed.). *Competition and State Aid: An Analysis of the EC Practice.* Kluwer Law International, 2007.

Sauter, Wolf. "The Altmark Package Mark II: New Rules for State Aid and the Compensation of Services of General Economic Interest". *European Competition Law Review.* Vol. 33, No. 7, 2012.

Sherr, Ilan. "Employment and Training Aid". Bacon, Kelyn (ed.). *European Community Law of State Aid.* Oxford University Press, 2009.

Sinnaeve, Adinda. "State Aid Control: Objectives and Procedures". Bilal, Sanoussi and Nicolaides, Phedon (eds.). *Understanding State Aid Policy in the European Community: Perspectives on Rules and Practice.* Kluwer, 1999.

______________. "Competition Policy, State Aid and State Enterprises". Hawk, Barry (ed.). *2001 Fordham Corporate Law Institute: International Antitrust Law and Policy.* Juris Publishing, 2002.

Schwalbe, Ulrich. "European State Aid Control – The State Aid Action Plan". Basedow, Jürgen and Wurmnest, Wolfgang (eds.). *Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid.* Wolters Kluwer 2011.

Watrin, Christian. "Germany's Social Market Economy". Kilmarnock, Alastair (ed.). *The Social Market and the State.* Social Market Foundation, 1999.

Zuleger, Volker. "General Block Exemption Regulation". Heidenhain, Martin (ed.). *European State Aid Law.* C.H. Beck, 2010.

3. Websites

EU Commission, Press Release (21 May 2014): http://europa.eu/rapid/press-release_IP-14-21_en.htm

EU Commission, Press Release (21 May 2014): http://europa.eu/rapid/press-release_IP-14-587_en.htm

EU Commission website: http://ec.europa.eu/competition/state_aid/overview/index_en.html

EU Commission website: http://ec.europa.eu/competition/state_aid/legislation/legislation.html

EU Commission website: http://ec.europa.eu/competition/state_aid/modernisation/index_en.html

EU Commission website (decision on Hyundai Motors): http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

EU Commission website (decision on Samsung Electronics): http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

Jones, Alison and Brenda Sufrin, "State Aid", in EU Competition Law: Text, Cases, and Materials (Online Resource, Oxford University Press): http://global.oup.com/uk/orc/law/competition/jones_sufrin5e/

State Aid Modernisation Communication COM (2012): http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0209&from=EN

[Abstract]

The 2014 Block Exemption Regulation of State Aid Control in the EU

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Unlike other competition regimes, the EU controls State aids of Member States. An undertaking that receives a State's support obtains an advantage over its rivals in the market, and this may distort competition and inter-State trade. Therefore, the EU competition rules of State aid, which have a characteristic of international law, prohibit subsidies for undertakings, except when the aids can be justified. In particular, EU State aid control aims at ensuring a level functioning of the internal market, preventing market entry barriers and the inhibition of competition resulting from State protectionism of the market. Whilst the subject of State aid is important in the EU, it has not been highlighted in Korea. However, because the number of beneficiary undertakings from Korea is growing, the demand for study on State aid is also increasing. Furthermore, the EU State aid control is considered as a role model for the international trade regime. Moreover, the Korea-EU FTA includes the provision of State aid. This provision implies that understanding EU competition rules on State aid has become crucial for Korean firms. This article thus aims at introducing the recent development of EU law regarding State aid control, focusing on the newly adopted block exemption regulation of 2014 and the development of Ordoliberalism in the EU competition regime that is distinctive.

[Key Words] EU Law, Competition Law, State Aid Control, 2014 General Block Exemption Regulation, Ordoliberalism

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