

## State Aid

Under the precepts of Article 107 Paragraph 1 of the Treaty of the Functioning of the European Union, TFEU (formerly Article 87, Paragraph 1 of the Treaty Establishing the European Economic Community), any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market. Publicly owned enterprises can also be recipients of aid (Article 106 Paragraph 1 of the TFEU) or, from their side, grant public aid. According to consistent case-law delivered by the EU courts, the previously named conditions must be cumulatively fulfilled, meaning that the financial support

- must be granted by a Member State or through public resources,
- favouring certain undertakings or manufacturing sectors,
- distort or threaten to distort competition, and
- affect trade between Member States.

Each of these characteristics contains a large number of legal questions and is marked by the – in part, very sector-specific – practice of the EU Commission and by decisions of the EU courts.

If state aid is present, it can, if necessary, be compatible with the Common Market. However, formally viewed, that fundamentally presupposes a previous application for **approval (Notification) from the EU Commission. Until the Commission's decision**, intentional aid grants are subject to an implementation prohibition (Article 108, Paragraph 3 of the TFEU). Any aid granted without (prior) approval of the commission is classified as an unlawful grant. The regulations under European Union law provide for a mechanism of sanctions, which the EU Commission implements in the framework of its monitoring of state aid.

The German Federal Supreme Court, in two published judgements on 10 February 2011<sup>1</sup> addressed the issue of complaints by competitors concerning the law governing state aid, and fundamentally recognised the (liability-relevant) characteristic of a protective law in the implementation prohibition of Article 108, Paragraph 3, Sentence 3 of the TFEU).

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<sup>1</sup> ZR 136/09, I ZR 213/08.

Previously, in a judgement on 6 November 2008<sup>2</sup>, the German Federal Supreme Court addressed the issue of the aid-granting agency's duties to advise, and hereby explained in a guiding principle:

*"If an authority grants aid subject to a duty of notification, without previously...filing it with the European Commission and waiting for the resolution of the commission, it is to advise the parties, who are to post security for any possible demands for reclaims, of the danger that it will be demanded that the financial contribution be returned."*

**Violations of the EU law's regulations governing state aid consequently contain risks at the Union level and that of the respective Member State.**

The regulations for state aid, however, are not only EU-wide, but also apply uniformly in the entire European economic area.

State aid, which non-EU countries (third countries) grant to domestic industries and services providers, can present hindrances for market access – be it to the market of the country which grants the aid, be it to the market of a third country – in that they artificially lower the costs of local market participants and prevent competition based on performance.

While customs barriers are being dismantled, non-tariff trade restraints more and more obstruct access to foreign markets. State aid furnishes unfair advantages to domestic companies and thus harms the interests of European competitors, because these do not encounter the same competitive conditions. In view of the deficient transparency with respect to the scope (amount, duration), the applicable area (selected companies in a sector in a third country, an entire industry), the instruments (direct grants, subsidy credits, tax relief, subsidized inputs such as energy, etc.) and the granting issuer (central, regional or local issuers, state-owned banks, etc.), state aid generates an uncertain environment for trade and investment, and thereby hampers sound business decisions for European companies.

The EU has concluded a series of bilateral trade agreements (such as the Euro-Mediterranean Agreement with the Mediterranean countries), focusing on the non-tariff trade impediments, among which state aid is also counted, and which contain the provisions governing state aid. Still, the enforcement of these agreements continues to be problematic.

We advise you concerning:

- Application of regulations governing state aid:
  - Guidelines of the Community for environmental state aid
  - State aid for research, development, and innovation

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<sup>2</sup> III ZR 279/07.

- State aid for salvaging and restructuring companies in difficulty
  - Guidelines for state aid with regional objectives, 2007-2013
  - Aid for equalisation as an offset for receipt of public services (social services in the public interest)
  - State aid for promoting venture capital investments in small and medium-sized companies
  - aid in the form of liability obligations and suretyship guarantees
  - State aid in short-term export credit insurance
  - State aid elements in sales of buildings or property by public authorities
  - Aid elements in direct company taxation
  - State aid for the motion picture industry
  - State aid for radio broadcasting in the public interest
  - State aid for railway companies
- Proceedings for execution of EU or EFTA aid monitoring
  - Complaints from competitors (and with provisional proceedings for legal protection), which are raised against you or could be raised against you with the goals of:
    - Preventing payment of unlawful aid
    - Issuing information
    - Reclamation of unlawful aid
    - Payment of illegality interest
    - Payment of compensatory damages for competitors, and
    - Interim measures relating to unlawful aid

We represent you in all litigated matters before the EU Commission, the EFTA Surveillance Authority, the EU courts, and the German courts.

For further information, please contact your legal advisor at BSU Legal.