

In the Picture



The public authority is giving your competitor a serious leg up... What to do?

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Imagine...

Your company has been going through a rough patch for several months now. Raw material prices keep rising - while at the same time, new orders seem to have dried up. The situation is all the more alarming because your biggest competitor is constantly boasting on its website about all its new customers, even though its products are on essentially the same quality level as your own.

You are hearing rumours about how this same competitor has been successfully offering highly competitive prices - which defies all logic, given the current negative economic situation. So you call together your staff in order to figure out just what magic formula your competitor has hit upon to navigate today's turbulent market with such ease.

One of your colleagues tells you about an article he read in a local paper, reporting that the town where the competitor is established has been making free warehouses available to it, in addition to granting it

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a whole array of tax benefits. This easily amounts to a value of more than EUR 1 mio.

Such preferential treatment might well explain how your competitor has managed to flourish in these difficult times. You discuss this with your legal counsel, who notes that prohibited state aid might be involved. Prohibited state aid? What is that about? And even more importantly, what can your company do against it?

A brief clarification.

The aim of competition law is to ensure that companies active in Europe compete on an equal footing. For this reason, in principle competition law prohibits state aid.

The notion of “state aid” covers any support measure whereby a public authority grants a selective economic advantage to a (private or public) company that distorts or threatens to distort competition and trade between EU Member States.

There are two exceptions to this basic prohibition on state aid. A company may receive state aid:

- If the Member State involved notifies the support measure in advance to the European Commission and the latter approves the support measure and declares it to be compatible with the internal market.
- If the support measure fulfils the conditions for an exemption regulation or decision of the European Commission or when the aid amount is lower than the thresholds provided in one of the *de minimis* regulations.

Aid that is not exempted or which does not fall under one of the *de minimis* regulations and is granted by a public authority without prior approval from the European Commission qualifies as unlawful state aid.

Every form of state aid that is regarded as unlawful or incompatible with the internal market must in principle be reimbursed by the beneficiary to the Member State involved.

An order to recover state aid can be pronounced:

- by the European Commission if, within the framework of an investigation, it determines that unlawful and incompatible aid was granted to a company;
- by a national judge who finds that the beneficiary company did indeed receive unlawful aid.

A company that suspects that a competitor has received anticompetitive state aid thus has two possibilities for compelling this competitor to reimburse the unjust advantage it allegedly received.

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Filing a complaint with the European Commission has the advantage of simplicity: the complaint form that must (obligatorily) be used for this is available online on the European Commission's website. A further advantage is that the European Commission has extensive investigative powers both to determine the existence of state aid and to assess, where necessary, the compatibility of such aid.

The drawback of procedures before the European Commission is that they do not lead to an expeditious solution. The Procedural Regulation on state aid cases indeed provides a period of 2 months for the initial investigation phase, and a (non-binding) period of 18 months for the formal investigation phase. Moreover, the European Commission can also dismiss a complaint without further effects.

A proceeding before a national judge can go faster (state aid cases can form the object of a cease and desist action or a summary proceeding). Moreover, a judge - in contrast to the European Commission - is obliged to rule on the pending dispute.

However, a proceeding before a national judge has the disadvantage that the burden of proof (of the existence of state aid) rests on the plaintiff, without the latter being able to exercise similar investigative powers as the European Commission.

Concretely:

- A company which suspects that unlawful and/or incompatible state aid was granted to one of its competitors has two possibilities for challenging this: a complaint submitted to the European Commission or a proceeding before a national judge.
- To file a complaint with the European Commission, an online complaint form is available via [this link](#).
- In order to address the situation at the national level, a procedure before the national court will need to be initiated. There is no possibility to file a complaint at the national level.

Want to know more?

- In July 2016, the European Commission issued a Notice on the notion of "state aid". This Notice is available via [this link](#).
- The European Commission procedure for examining whether Member States have complied with their obligations on state aid is explained in a [Procedural Regulation](#) and an [Implementing Regulation](#).