УДК 341
DOI https://doi.org/10.32782/2524-0374/2023-3/125

РОЛЬ ПІДЗАКОННИХ АКТІВ У ПРАКТИЦІ ЗАСТОСУВАННЯ НОРМ ДЕРЖАВНОЇ ДОПОМОГИ АНТИМОНОПОЛЬНИМ КОМІТЕТОМ УКРАЇНИ

THE ROLE OF BY-LAWS IN THE ENFORCEMENT PRACTICE OF STATE AID RULES BY THE ANTIMONOPOLY COMMITTEE OF UKRAINE

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Стаття присвячена актуальному питанню запровадження та реалізації підзаконних актів у сфері державної допомоги. Прийняття відповідних та ефективних критеріїв для оцінки допустимості державної допомоги є життєво важливим питанням, оскільки існує загальна заборона на надання державної допомоги як в Угоді про асоціацію між Україною та ЄС, так і в національному законодавстві України щодо державної допомоги, якщо інші положення не містяться в нормативно-правових актах України. акти, що визначають критерії допустимості. Той факт, що критерії допустимості не прийняті в певних секторах, є дуже шкідливим, оскільки за відсутності таких критеріїв захід буде оцінюватися відповідно до критеріїв ЄС, які можуть бути набагато суворішими, оскільки норми державної допомоги функціонують у ЄС протягом тривалого часу. З іншого боку, в Україні правила державної допомоги почали застосовуватися лише з серпня 2017 року, і заходи, які певною мірою фінансуються державою, дійсно необхідні для соціальних цілей. Таким чином, відсутність таких критеріїв може призвести як до заборони державної допомоги, так і до повернення незаконної державної допомоги, якщо критерії сумісності не будуть прийняті. Державна допомога часто стосується чутливих сфер; тому необхідно прийняти критерії та розрізнити, що є допустимим в розрізі конкуренції, а що ні. У той же час галузь матиме можливість отримати вигоду від заходів з реструктуризації чи ліквідації, і також не буде неправильного використання державних коштів. Таким чином, усі зацікавлені сторони, пов'язані з такою економічною діяльністю, повинні вжити ефективних заходів для забезпечення прийняття та виконання необхідних галузевих критеріїв допустимості.
Ключові слова: державна допомога суб'єктам господарювання, критерії допустимості, підзаконні нормативно-правові акти, АМКУ, секторальні критерії, блокові виключення.

The Article is dedicated to the relevant issue of introducing and implementing by-laws in the field of state aid. The adoption of relevant and effective criteria for assessment of state aid compatibility is a vital issue as there is general prohibition on granting state aid both in EU-Ukraine Association Agreement and the domestic legislation of Ukraine as to state aid unless other provisions contained in Ukraine's regulatory acts that determine compatibility criteria. The fact that compatibility criteria are not adopted in certain sectors is very detrimental as in the absence of such criteria the measure will be assessed according to EU criteria which can be much more stringent because the state aid rules have been functioning in the EU for much a longer period and were modernized to achieve the better effect. In Ukraine, on the other hand, state aid rules have been enforced only since August 2017 and measures financed by the state to some extent are really necessary for social purposes. Therefore, in absence of such criteria may lead both to prohibition of state aid and to recovery of unlawful state aid unless compatibility criteria are adopted. State aid is often concerned with sensitive fields; therefore, it is necessary to adopt criteria and distinguish what is compatible with competition and what is not. At the same time, there will be a possibility for an industry to benefit from measures in either restructuring or liquidation and at the same time, there will be no misuse of public funds. Therefore, all the stakeholders related to such economic activity must take effective steps to ensure the adoption and enforcement of the necessary sectoral compatibility criteria.
Key words: state aid to undertakings, compatibility criteria, by-laws, AMCU, sectoral criteria, block examption.

Formulation of the problem. In the European Union, state aid to undertakings has been in place for more than 60 years. However, in Ukraine it has in facto been enforced only since 2017. That is why it is vital to bridge the gap in regulatory framework and enforcement to ensure as smooth state aid enforcement as possible. In addition to EU-Ukraine Association Agreement and the Law on State Aid, sectoral criteria for assessing the compatibility of state aid play a vital role.

Analysis of the research. The issues of state aid enforcement have been researched by Angela Wigger, Erika Szyszczak, Hubert Buch-Hansen, Leigh Hancher, Phedon Nicolaides, Piet Jan Slot, Tom Ottervanger and others.

Formulation of the purpose of the article. This article is aimed at examining the role by-laws play in state aid rules enforcement by the Antimonopoly Committee of Ukraine.

Presenting main material. The Antimonopoly Committee of Ukraine is the authority tasked with enforcing state aid rules. In its activity it is guided by the Law on State Aid and numerous by-laws. For the purpose of enforcing the state aid rules AMCU adopted the following instruments:

The Procedure for submission and registration of new state aid notifications and amendments to the conditions of existing state aid [1]. This Procedure is one of the fundamental procedural documents for getting information on existing state aid measures and measures to be introduced. It contains substantive and procedural rules on the matter at hand and covers bodies of the AMCU involved in considering notifications, persons involved in considering State aid notifications or amending existing State aid conditions, their rights and obligations, detailed procedural rules for submitting and considering new and existing state aid notifications, Preliminary consultation of State aid grantors with the Committee. The Procedure also contains annexes with templates of respective notifications forms.

The Law on State Aid fully entered into force on 2 August 2017, therefore the notification mechanisms started working full-fledged form that time. It is worth analyzing the structure of the notifications submitted and of the decisions of the AMCU. The Department of Monitoring and Control of State Aid was formed on 17 July 2017.

Therefore, the first steps of AMCU were to provide clarifications on most relevant concepts for state aid grantors, as the institute of state aid was just established on domestic level and given lack of awareness, it was necessary for AMCU to provide official explanations on practical aspects of state aid functioning.

The AMCU also adopted Procedure for consideration of cases on state aid to undertakings [2]. It governs substantive and procedural aspects of state aid case consideration. This AMCU activity is aimed at decision-making process as to measures notified to the AMCU and forming legal positions to which state aid stakeholders can later have recourse to for practical aspects of state aid rules application.

The rationale behind the fact that there are few decisions on incompatibility with state aid rules is that major notifications were submitted by local authorities and municipalities, and they did so with double-checking purposes, even if the Law clearly stipulated that the measure is not a state aid. In the beginning of state aid functioning such trend is more or less understandable on the part of grantors and beneficiaries, but if

such a trend continues, it will be impediment to the effective functioning of AMCU in relation to state aid as it will be overflooded with "minor" notifications and unable to concentrate on major cases. On the other hand, the fact that major grantors fail to notify measures for AMCU to check their compatibility with competition in the longer run may undermine the essence of state aid institute. Therefore, it is necessary for the AMCU to engage in cooperation mechanisms and raising awareness at different levels to address these challenges.

Moreover, AMCU provides clarifications on application of state aid legislation most frequently raised by grantors, including summary clarifications in the field of agriculture, infrastructure, natural monopolies, SGEIs, existing individual state aid, culture, setting tax rates by self-governing bodies, guarantees provided with involvement of international financial institutions, education.

When giving clarifications, considering notifications and conducting investigation and rendering decisions, the AMCU uses domestic legislation of Ukraine on state aid as well as the EU law (primary and secondary legislation, guidelines, recommendations and best practices) and acquis.

The ground for application of EU Law is Article 264 of the EU-Ukraine Association Agreement. This is the so-called "bridge" for AMCU to apply EU Law and acquis. It is essential because the state aid institute is a new legal phenomenon for Ukraine and it has obligations to implement it under EU state aid standards. However, the regulatory gap in terms of state aid between EU and Ukraine is significant, therefore such legal ground for application of EU state aid law makes approximation process function in a relevant manner.

Another mechanism that should facilitate the effective monitoring and control of state aid is the provision of part four of Article 35 of the Budget Code of Ukraine. If the budget request involves the granting of state aid to undertakings at the expense of the state budget in any form, the main disposers of funds are under the obligation to attach to the budget request a copy of the decision of the AMCU.

Unfortunately, as the analysis of the AMCU's decisions on state aid shows, this provision of the Budget Code is mostly implemented by local self-government bodies and is largely ignored by central government bodies.

The enforcement of state aid rules regarding services of general economic interest (hereinafter – SGEIs) is really challenging. Regarding the list of SGEI, it should be noted that the Cabinet of Ministers adopted a resolution dated May 23, 2018 No. 420 [3], which approved a list of measures qualifying as SGEIs. The current version of this list reflects those services provided in the fields of energy and public utilities. However, comparing to the idea laid down in EU regulation in as to SGEIs, there is no such list in the EU at all. Instead, the list of criteria to be met by the measure in order to be qualified as SGEI has been approved.

The challenge is mainly is about controversy in interpretation by different stakeholders. From analysis of notifications and cases brought before the AMCU the following findings can be made. It so happens that different stakeholders (central executive authorities, municipalities, international financial institutions) use the concept of SGEIs to circumvent the obligations under state aid rules, stating that the services provided are for the benefit of society and are not aimed at distorting competition.

In particular, the assumption that Services of General Economic Interest (SGEI) are exempt from State aid control by definition is based on incorrect interpretation of Article 3(2) of Law on State Aid (hereinafter – LSA). According to Paragraph 2 of Article 3(2) the SGEI are excluded from the scope of LSA, only in so far as compensation for such services is well justified. It means that even if the certain activity is on the list of SGEI the grantors should make sure that they have done all necessary calculations to avoid overcompensation and should notify the measures to AMCU since it has to examine whether the proposed compensation to particular SGEI providers is covering only well justified costs. This is also in line with EU acquis in State aid sphere. Primarily, it follows from Article 106 (2) of TFEU, which specifically addresses "SGEI" concept and provides that "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them…"

Similar approach is established in the Ukrainian legislation. More specifically in Article 262(4) of the Association Agreement and in Article 3(2) of LSA (although the latter limits application of the competition rules by the requirement that compensation should be well justified).

In other words, even if SGEI were defined in full compliance with the definition in Article 1(14) of LSA and with Point (c) of Annex XXIII to the Association Agreement, such activities still would be subject to State aid control (at least until the national legislative framework defines some specific criteria that would exclude overcompensation and, therefore, advantage to SGEI providers).

The purpose of the State aid rules is to prevent unjustified intervention of the State into economic activities, which may distort competition in the market and trade between EU and Ukraine. It is the economic nature of an activity that qualify service providers as undertakings, regardless of their legal status and the way in which they are financed. This is a general principle established by the European Courts and reiterated in Point 7 of the Commission Notice on the Notion of State aid as referred to in Article 107(1) of the TFEU. So, the services proposed to be included on the list should be economic. The concept of service of general economic interest is an evolving notion that depends, among other things, on the needs of citizens, technological and market developments and social and political preferences in the Member State concerned. The Court of Justice has established that SGEIs are services that exhibit special characteristics as compared with those of other economic activities.

The regulatory proposal is qualifying services not as specific activities but by two cumulative conditions that are not activity specific – the legal status (entities in the public ownership) and the source of financing (financed by international financial institutions). Such approach is discriminating between service providers. For instance, if an international financial institution is financing a project implemented by a private undertaking – it means that such service would not be considered as SGEI since it is not in public sector. And conversely, if a public undertaking implements a project which is financed by a private bank or even from the local budget – the same activity (service) would not qualify as SGEI. Such definition of SGEI obviously is not in line with EU principles and State aid rules.

Interpretation of SGEI based on the legal status of service providers and on the source of financing does not comply with the principles of State aid control, neither it is based on definitions of SGEI in LSA and in Point c) of Annex XXIII of the Association Agreement.

It is further important to differentiate between compensation for SGEI and investment aid for infrastructure development (which is often used for providing of SGEI).

The AMCU should clarify situations when certain investment projects could be free of State aid depending on the type of infrastructure and on the role of undertakings taking part in such projects. Some activities related to such projects may contain State aid element, although it does not necessarily mean that such State aid is incompatible with competition.

As far it is understandable, the main concern of the Ministry of Finance is not so much the implementation of specific infrastructure projects (in principle, such projects should

be the responsibility of the Ministry of Economic Development and Trade, or the Ministry of Infrastructure rather than the Ministry of Finance) but rather the need to issue guarantees in order to secure obligations of municipal undertakings implementing such projects.

Under the current circumstances, in enforcement practice, the AMCU may address this problem through adoption of a block exemption from the notification of aid for investment activities but at the same time preserving the requirement for the grantors to report such activities to AMCU on annual basis. In particular, AMCU could use competences established by Article 7 of LSA (probably with reference to Point 1) of Article 6(2).

Therefore, inadequate interpretation of SGEI as currently proposed for the amendment of the Cabinet of Ministers Resolution approving the list of SGEI should not be supported. The AMCU should look into the possibility to apply its powers under Article 7 of LSA in order to establish, at least on a temporary basis, some criteria for exemption from notification of aid measures for the development, upgrading and operating of public infrastructure of general use, which possibly could include also clarifications that guarantees issued to securing obligations of undertakings implementing such investment projects should be also exempt in relevant cases.

The LSA being amended now should, inter alia, create a proper pattern for assessment of such investment projects including those financed by international financial institutions and enforcement of state aid rules.

However, the CMU has already approved criteria for assessing the compatibility of state aid for the following categories of state aid: to ensure the development of regions [4]; support for small and medium-sized enterprises [5]; for the professional training of employees [6]; employment of certain categories of workers and creation of new jobs [7]; to restore solvency and restructure undertakings [8]; for research, technical development and innovation [9].

Here it should be born in mind that the basis for drafting state aid legislation is predicated on the need to "prevent inappropriate interference by public authorities and local governments in the functioning of a market mechanism based on competition by providing resources to one or more commercial enterprises" [10, p. 323].

In addition to supporting small and medium-sized enterprises, these criteria, by title, meet certain horizontal provisions of the EU acquis. However, they do not fully comply with the assessment principles laid down in such acquis. The rationale behind it is differing levels of state aid functioning in the EU and Ukraine, but gradually such compatibility criteria must be as much approximated as possible. Still, it is essential that the spirit of compatibility criteria are not contrary with EU law and acquis.

In regard to so-called sectoral criteria for assessing the compatibility of state aid, the adoption of which is also governed by part two of Article 6 of the Law, at this time the AMCU has developed, published and conducted public consultations only on the criteria in the coal sector and in the banking sector.

Article 7 of the Law of Ukraine on state aid provides for the possibility for the AMCU to adopt a normative legal act that will exempt from the obligation to notify new state aid certain groups of providers of categories of state aid. In fact, these provisions of the Act should duplicate GBER.

Conclusions. Therefore, the stakeholders must unite their efforts and adopt horizontal criteria. The current EU enforcement practice shows a significant trend in applying GEBER provisions and dispensing with minor cases, but rather concentrating on major ones. This is best practice Ukraine should take to as now AMCU enforcement practice faces many technicalities in minor cases that are time- and recourses-consuming. On the contrary, the AMCU enforcement activity should be focused on major measures and shaping consistent approaches to enforcing state aid rules. This will contribute to better perception by stakeholders in state aid granting process and eliminate regulatory and institutional challenges.

Hence, the role of by-laws in enforcement practice by the AMCU is crucial as they govern both substantial and procedural details of applying state aid rules. It is by-laws that provide compatibility criteria in sectors based on which the AMCU conducts assessment. In its enforcement practice and clarifications, the AMCU applies EU law and acquis as well on a regular basis. It is crucial for state aid stakeholders to undertake necessary efforts in adopting the required sectoral and horizontal compatibility criteria. This will contribute to effective enforcement practice and eliminate risks.

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