

The Ukrainian Supreme Court concludes that in state aid cases the Antimonopoly Committee of Ukraine does not have to analyse the effect of aid on trade between Ukraine and the EU

Kluwer Competition Law Blog

April 14, 2020

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Please refer to this post as: Anastasia Usova, Veronika Kalyta, 'The Ukrainian Supreme Court concludes that in state aid cases the Antimonopoly Committee of Ukraine does not have to analyse the effect of aid on trade between Ukraine and the EU', Kluwer Competition Law Blog, April 14 2020, <http://competitionlawblog.kluwercompetitionlaw.com/2020/04/14/the-ukrainian-supreme-court-concludes-that-in-state-aid-cases-the-antimonopoly-committee-of-ukraine-does-not-have-to-analyse-the-effect-of-aid-on-trade-between-ukraine-and-the-eu/>

On 31 March 2020, the Ukrainian Supreme Court (the "**Supreme Court**") upheld the first decision of the Antimonopoly Committee of Ukraine (the "**AMC**") on the unlawfulness of state aid.

In November 2018, the AMC recognised as unlawful state aid in the form of subsidies granted by the local government authority to the public utility company "Vinnitsya Transport Company" (the "**Recipient**") to compensate for free transportation services. The Recipient was appointed without a competitive bidding process, and the AMC ordered the local government authority to suspend the provision of aid and to recover the amounts that were paid.

The local government authority tried to justify that it had not held a public procurement tender since there were no actual competitors of the Recipient in the relevant market. However, the lower courts found that in reality there were such competitors, and thus the aid granted to the Recipient has conferred upon it a selective advantage which would not have been provided under normal market conditions.

The state aid regime was introduced in Ukraine based on the requirements of the EU-Ukraine Association Agreement (the "**Association Agreement**"), and fully entered into force on 2 August 2017. In Ukraine it is the authority of the AMC to make an assessment of and to conclude whether (i) certain measure constitutes state aid and (ii) it may be deemed compatible with competition rules or not. Under the Association Agreement, the Ukrainian state aid rules shall be in line with the EU's principles and be interpreted in view of the relevant jurisprudence of the Court of Justice of the EU, as well as secondary legislation, frameworks and guidelines in force in the European Union.

Nevertheless, there are certain important differences of the state aid framework in Ukraine as compared with the EU's regime. In particular, while Art. 262 of the Association Agreement envisage that "*any aid granted by Ukraine or the Member States of the European Union through state resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the proper functioning of this Agreement in so far as it may affect trade between the Parties*", the definition of state aid provided in the Law of Ukraine "On State Aid to Undertakings" is missing the last criterion, that of the potential effect on trade between Ukraine and the European Union.

The local authority attempted to appeal the AMC's decision, in particular, by arguing that the AMC should have analysed the effect of the aid on trade between Ukraine and the European Union, which had not been undertaken by the AMC. The Supreme Court upheld the position of court of appeal that, under the Ukrainian state aid laws, the AMC is not entitled to analyse the effect of aid on trade between Ukraine and the European Union in state aid cases, and the respective laws do not provide for the effect on trade amongst the criteria for assessment of state aid. Thus, the court of appeal concluded that the claims of the appellant that the AMC should have analysed the effect of the aid on trade between Ukraine and the EU were groundless.

Thus, until the State Aid Law is amended in line with the EU Ukraine Association Agreement, the AMC shall assess state aid measures based on its potential effect on competition and without analysis of whether the aid may potentially affect trade between Ukraine and the European Union.