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State aid law is coming to Ukraine: A high-level overview of the reform

Sergiy Glushchenko (Asters) · Friday, October 28th, 2016

Under the EU-Ukraine Association Agreement (Association Agreement), Ukraine is required to roll out state aid regulation in convergence with the EU acquis. The European-style regulation – to be effective from 2 August 2017 – will be based on the Association Agreement itself, the Law of Ukraine on State Aid to Undertakings No. 1555-VII of 1 July 2014 (State Aid Law) and secondary legislation.

In particular, the Association Agreement sets out the fundamental principles, including the obligation of Ukraine to interpret its provision (and thus the Ukrainian state aid legislation) using as sources of interpretation the criteria stemming from the EU law and practice. In turn, the State Aid Law is a framework law, which contains basic definitions, principles, procedures and allocates monitoring and compliance with the new rules to the Antimonopoly Committee of Ukraine (AMC). Finally, the details are left to secondary legislation to be developed over a three-year transitional period from the date the State Aid Law was published (2 August 2014) to the date the State Aid Law enters into force (2 August 2017). So far the AMC has already adopted various secondary procedures, including those that clarify how the AMC will (i) monitor state aid; (ii) collect information on existing state aid, review submissions regarding the same and issue recommendations; (iii) maintain state aid register; (iv) issue information requests and review cases on unlawful or misused state aid; (v) review the new state aid measures notified by state aid providers. Yet, some other secondary legal acts are still in the pipeline and should be finalized within 2016-2017. These include substantive rules on assessment of horizontal and sectoral aid, as well as those laying down the procedure for the recovery of unlawful aid.

More specifically, under the Ukrainian state aid legislation, state aid will generally be considered incompatible with competition. For this reason, there will be a standstill obligation not to implement a new state aid measure before it is notified and cleared by the AMC. Before clearing an aid measure the AMC will need to make sure that it meets certain criteria and is economically justified. In general terms, state aid will be considered justified if, for example, it brings social and economic development to regions with poor living standards or a high unemployment rate, or supports and preserves national cultural heritage, etc. Notably, under the State Aid Law, the AMC can develop and adopt block exemptions from the obligation to notify a new state aid. However, we understand that this is not on AMC's short-term agenda.

While it is state aid providers who will bear primary responsibility for ensuring that their policy measures and projects comply with the state aid rules, beneficiaries of aid, as well as their

competitors, will also be considerably involved in the notification and investigation process.

As far as the beneficiaries are concerned, under the State Aid Law, an undertaking planning to obtain an aid measure will have to provide extensive information to the aid provider. Additionally, the secondary rules enable state aid providers to seek participation of state aid beneficiaries in the pre-notification consultations with the AMC. Separately, under the State Aid Law, the AMC can open a formal investigation procedure whenever it finds that authorised aid is being misused. In this case, the aid beneficiary will likely bear a status of the defendant (either alone or together with the aid provider) required to provide the AMC with all assistance or information needed. To ensure equal treatment of the parties in this case, such aid beneficiary will have various corresponding rights, including access to file and the right to be heard by the AMC.

As to competitors of the beneficiaries, if they believe an aid to be unlawful, they will have the right to complain to the AMC. Upon review of the complaint, the AMC may open a state aid case where the competitor will have the status of the complainant with all corresponding rights, including access to file. Moreover, under the State Aid Law, an interested party can ask the AMC for interim measures. In particular, a competitor can submit a formal complaint to the AMC and, in parallel, ask the authority to suspend the state aid measure if it affects or may affect competition.

If the AMC finds that certain state aid measures are in fact unlawful and incompatible with competition, it will issue a negative decision, which means that a beneficiary of this aid will be obliged to pay it back (including the interest accrued on the amount of the aid), unless the 10-years' limitation period has passed or the aid beneficiary is insolvent.

Importantly, state aid measures in existence as of August 2017 will have to be registered in the Ukrainian state aid register by August 2018, so that the AMC could examine their impact on competition and compliance with the terms of the Association Agreement. Thus, it is in the interest of providers of state support to re-examine their measures timely and ensure that they can withstand further scrutiny by the AMC. Because of the complexity of substantive state aid rules, it makes sense to commence this re-examination in advance to identify potentially problematic state support and be able to adapt it accordingly at an early stage.

Given the obvious risks for beneficiaries associated with failure to comply with the new state aid legislation (i.e. lengthy investigations and eventual repayment of the received aid plus interest), the aforesaid policy consideration appears to be equally important to business. Undoubtedly, success of further interaction with the AMC in certain cases will likely depend on close cooperation of a beneficiary with an aid provider.

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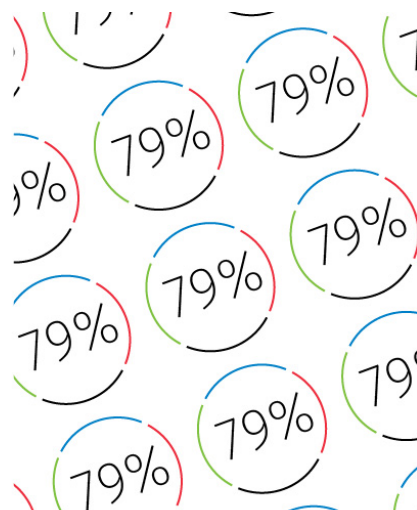
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