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Two Years of State Aid in Ukraine

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Following the entry of EU-Ukraine Association Agreement (“Agreement”), Ukraine adopted basic state aid regulations which became effective from August 02, 2017. Bringing Ukrainian state aid regulations in compliance with the EU legislation is expected to come soon to a more definitive stage.

Despite the progress made during the first two years when the state aid regulations were effective, one may not observe any noticeable results in terms of effective control of existing and new state aid which leaves a huge room for discussion.

The amount of work conducted by the Antimonopoly committee of Ukraine (“AMCU” or “Committee”) starting from 2014 when the Agreement was signed is very impressive. A major Law of Ukraine No. 1555-VII On the state aid to undertakings (“Law”) and a set of sector-specific state aid compatibility criteria were adopted and became effective, multiple clarifications and guidelines on state aid application were issued by AMCU and more criteria to be adopted in the nearest future.

The Law was a good starting point, but the Committee already realized that certain amendments were obviously needed to make the Law work efficiently. This was partly due to a manifest reluctance of many central and municipal authorities to notify AMCU on provided state aid which resulted in a very small amount of appropriate notifications filed with the Committee.

AMCU initiated and proposed several legislative amendments including: effect on trade between Ukraine and the EU to be added as another criterion for qualifying a particular measure as state aid; explicit definition of the concept of undertaking; adding direct obligation to pay annual interest for use of state aid to be recovered; clarification of certain powers of AMCU allowing the latter to request information necessary for deciding on the compatibility of state aid and inclusion of the Law into the framework of the Ukrainian legislation on protection of economic competition.

AMCU is now preparing and publicly discussing drafts of state aid compatibility criteria for vital sectors of Ukrainian economy including coal industry, banking sector and few other industries. The criteria for culture, sport and transport are also in the pipeline. The Committee tries to bear in mind Ukrainian economic and political realities and does not copy EU precedents which provided for chopping off the anchor of industries that absorb the state resources without reasonable grounds.

According to the online state aid register, during 2018, there were 916 state aid notifications filed with AMCU and the Committee delivered 185 decisions. Only 5% of the notifications related to

potential existing aid, the rest 95% were potential new state aid notifications. However, there were only 2 out of 11 decisions whereby the aid was considered by AMCU as incompatible with the market and consequently the Committee requested to make recovery of the aid. In the rest of the decisions (in so-called no-aid cases), AMCU decided that the provided state support did not constitute state aid or that (in some very rare cases) the state aid was compatible. In many cases AMCU reviewed the state support provided to the social institutions, including the ridiculously small subsidies to kindergartens, hospitals and other public service institutions.

The 2019 statistics show that the situation with a number of inappropriate notifications could be slightly improving. However, in the current troubled situation when most state aid is far away from being notified in Ukraine, AMCU together with other state authorities should find the tactic and approach to move away rapidly from small or no-aid cases to large and important cases.

Moreover, EU experts recognize that AMCU state aid decisions need to be better structured and substantiated. Additionally, the ongoing first litigations are now testing the quality of AMCU's decisions.

The absence of any large cases or domestic market leaders under the state aid review may also have other explanations.

First, even though the state aid providers are legally obliged to submit notifications on both the existing aid and the new aid, there is a lack of immediate sanctions for failure to report the existing state aid. Moreover, the practice of Ukrainian parliament initiating legislative acts which often envisage new state aid, is much more common and widespread than in the EU. That is why in 2018 AMCU initiated a draft law whereby all Ukrainian draft laws are required to be assessed on state aid substance before adoption. In the same vein there is an initiative to introduce the similar state aid review procedure for the draft resolutions of the Ukrainian Government.

Second, AMCU appears to believe that it cannot monitor and review the existing state aid until it is formally classified as such following a formal notification from the grantor. Thus, one may claim that the current mechanism of control of existing state aid is very far away from being perfect.

Third, there is a poorly regulated issue of reviewing the complaints filed by the concerned parties. The right of AMCU to collect, use, and check the information from the alternative sources, including the information provided by the third parties, whose market rights and interests were or could be violated by the beneficiaries of state aid, is just declared by the Law. This rule has not been rationally applied yet for several reasons.

Initially, there are few market players ready to take a proactive position in protecting their rights to a fair competition by filing a complaint with AMCU. Moreover, when a market player decides to address AMCU in a search of a fair remedy against an existing and not notified state aid, it may face reluctance of the Committee to commence a formal procedure.

Finally, one may say that issuing of one incompatibility and recovery decision by AMCU in an actually large case may bring much more market awareness about state aid than hundreds of seminars, consultations and decisions on social-related aid.

Driving conclusions half-way through the implementation of the Agreement is not as suitable as evaluating the future prospects. There are still few years until Ukraine should align existing state aid with the relevant regulations. The legislative and advocacy work of AMCU can be greatly

appraised.

However, the Committee continues to consider a massive number of inappropriate notifications, instead of sustaining fair competition in postal services, shipbuilding, energy, aviation and other prospective industries. This situation should be corrected as soon as possible so that the Committee may efficiently utilize its resources.

Even the currently available imperfect Ukrainian state aid regulations possess all basic elements and allow to control state aid in Ukraine. Development of Ukrainian state aid practice will obviously depend not only on the enforcement priorities of the Committee, but also on the proactive attitude of the foreign and Ukrainian businesses that struggle in Ukrainian market competition against businesses benefiting from existing and new Ukrainian state aid.

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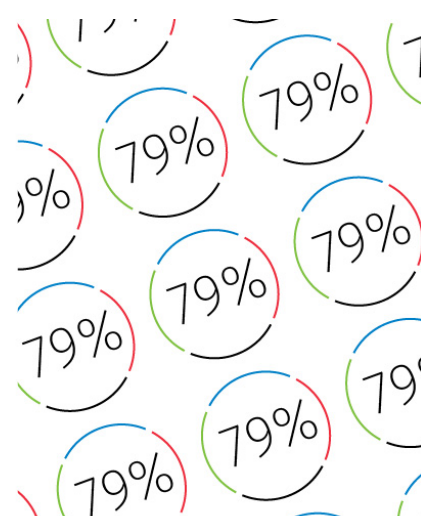
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