

MARCHENKO DANEVYCH

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LEGAL ALERT

State Aid Is Soon To Be Assessed In Ukrainian Legislative Process

1. On March 23, 2018 the Draft Law 'On Amending Certain Laws of Ukraine to Bring Them in Compliance with the Law of Ukraine 'On State Aid to Undertakings' No. 8191 (**Draft Law**) was registered with the Parliament of Ukraine (**Parliament**). The Draft Law, initiated by the Cabinet of Ministers of Ukraine (**CMU**), is yet another development of the Ukrainian legislation on state aid, as required by the EU – Ukraine Association Agreement.
2. The Draft Law ensures that certain Ukrainian laws are consistent with the Law of Ukraine 'On State Aid to Undertakings' (**State Aid Law / Law**) so long as they may provide for granting such an aid. Hence, the requirement of the Antimonopoly Committee of Ukraine (**AMCU**) approving any measure which may constitute state aid will be included in a number of laws pertaining to various subject matters and sectors, such as insolvency, employment, scientific and technological activity, innovations, environmental protection and others.
3. Importantly, the Draft Law as well requires all Ukrainian draft laws to be assessed on state aid substances before they are adopted. This is effected by amending the Rules of Procedure of the Parliament (**Rules of Procedure**), which will warrant the AMCU's decision accompanying any draft law in case it may envisage state aid.
4. A draft law, providing for state support, will, thus, only be adopted if the AMCU qualifies the state support either as state aid compatible with competition or not a state aid.

In case any law is adopted to grant illegal state aid, the AMCU shall notify the grantor, as well as the CMU so that it proposes amendments to the law in question.

5. Such an amendment of the Rules of Procedure, although definitely welcomed to progressively develop state aid regulations in Ukraine, raises few questions as to its practical implementation.
6. First, the said amendment only relates to 'draft laws or other acts which provide for state aid to undertakings *for the purposes of State Aid Law*'. This means that a particular measure must be assessed on whether it falls within the scope of state aid as understood by the Law. It is not yet directly prescribed who shall be responsible for such a qualification, provided that it necessarily requires solid expertise in applying state aid legislation. Under the current process of reviewing draft laws submitted to the Parliament, the Committee on Economic Policy, particularly, its anti-monopoly sub-committee might be entrusted with the mentioned task. If this is the case, it will be for the committee to decide whether AMCU's decision is required for a draft law to proceed to the adoption.
7. Such a burden of qualification by national authorities dealing with public spending, which might constitute state aid, was reduced in the EU by issuing the Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU in 2016.

In case the Draft Law is adopted, Ukraine may find itself in the need of a similar guidance to clarify basic aspects of applying state aid legislation in Ukraine.

8. Second, the proposed amendment to the Rules of Procedure does not apply to state aid, which, even if envisaged under any draft law, is exempted from the requirement of notification to the AMCU according to State Aid Law, namely:
 - *de minimis* state aid;
 - *changes* in the current state aid programs (amounting to less than 20 per cent increase);
 - *state aid* which is relieved from the notification obligation.
9. The latter category of state aid is referred to in Article 7 of State Aid Law, essentially corresponding to the EU concept of block exemptions.
10. As for Ukraine, it is for the AMCU to define the conditions for certain categories of state aid to be 'block exempted' and submit them for the approval of the CMU before August 2018.

It is of particular interest for the purposes of the Draft Law, since the Rules of Procedure will not practically allow dispensing with the AMCU's decision as long as block exemption regulation is not adopted. No such draft regulation has been produced by the CMU so far.

11. Finally, the mentioned administrative burden is likely to become a pressing issue for the AMCU considering the Draft Law requires it to deal with any act submitted to the Parliament and possibly providing for a state aid. This is why prompt adoption of block exemption regulation is even more warranted.

On the other hand, responsibility for the adoption of any draft law or act possibly providing for a state aid will considerably consolidate the AMCU's influence on the legislative process, as well as its overall status among the Ukrainian public authorities.

12. It should be mentioned that the proposed amendment of the Rules of Procedure, stipulated by the Draft Law, is of real significance for Ukraine, where practice of members of the Parliament initiating legislative acts, which often envisage state aid, is much more common and widespread than in the EU. This situation must be remedied, since it has often led to unreasonable public spending far from being in accordance with state aid regulations.
13. By and large, the Draft Law constitutes an important step to develop state aid regulation in Ukraine and reflects one of the first practical and significant manifestations of its functioning. While the AMCU is now busier with taking inventory of existing state aid and advocating state aid regulations which are absolutely new for Ukraine, it is important not to leave the new laws, which are constantly produced, without state aid control.

Even if some issues call for further clarification, the adoption of the Draft Law is definitely welcomed, since it accommodates appropriately state aid into the Ukrainian legislative framework, as well as strengthens the role of the AMCU.

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