

EVOLUTION OF LEGAL REGULATION OF SERVICES OF GENERAL ECONOMIC INTEREST IN UKRAINE

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Summary

The purpose of the article is to show in the historical development the formation of the institute of services of general economic interest (SGEI) in the Ukrainian legal tradition under the influence of European integration strategic actions. One of such actions is the harmonization of Ukrainian legislation with the law of the European Union. SGEI, in the context of another "legal novelty" for Ukraine as state aid as part of competition law, have changed the existing approaches to the distribution of already known subsidies and grants. A set of new rules forced the state authorities to adhere to clear rules, failure to comply with which is fraught with real sanctions.

In the course of the study, it was revealed that the institute of SGEI has already found its reflection and practice in the Ukrainian legal system. But at the same time, all norms of legislation on services of general economic interest do not correspond to the practice of the EU, and legislative changes are necessary to launch reforms in this area.

Keywords: SGEI, European integration, state aid, harmonization (approximation), Altmark criteria

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1. Introduction

State aid to undertakings is commonplace, but it must be subject to certain rules, especially for those undertakings that provide so-called services of general economic interest. These services cannot be provided without such state support – which allows for different interpretations of such state aid, even when, by all indications, it should be declared incompatible. It is also relevant that Ukraine should take into account the positive trends and development of the institute of state aid to economic entities that provide services of general economic interest not only to harmonize their own legislation, but also to develop uniform law enforcement practice on this issue.

The main purpose of the article is to trace the historical and legal trends in the development of Ukrainian legislation on the regulation of state aid to economic entities that provide services of general economic interest.

Kolosova O. and Lillemiae O. raised the general issues of SGEI in their works, in which the legal nature of services of general economic interest is studied, as well as national legislation, European Union legislation and the case law of the European Court of Justice in this field are analysed. K. Smyrnova covered the general analysis of the problem of legal regulation of state aid in Ukraine, the historical development of its normative-legal consolidation, its adaptation to the EU legislation in her work.

Historical-legal and formal-logical research methods were used to identify patterns of historical development of the system of norms on state aid for services of general economic interest, to determine the formation and features of legal regulation in different periods of this legal institution in Ukraine. The comparative legal method was used to analyse the norms, principles and mechanisms of state aid regulation in the European Union and in Ukraine in order to establish the compliance of Ukrainian legislation with EU law in this area.

For the first time in Ukrainian doctrine, the study consolidates all aspects of the development of legal regulation of state aid to economic entities providing services of general economic interest in our country – Ukraine, based on EU practice, where this mechanism has already achieved some successful development, whose experience is necessary to transfer to the Ukrainian realities.

2. The first attempts at Europeanization of Ukrainian legislation on state aid

Prior to the conclusion of the Association Agreement between Ukraine and the EU, Ukrainian legislation did not recognize such a legal institute as state aid, as well as services of general economic interest.

Until 2014, similar to state aid in the sense of European legislation, subsidies or dotation from the state to economic entities were allocated without any clear rules and forms of control over this activity.

Chernikov D. identifies the following three stages in the development and formation of the legal institute of state aid: "At the first stage (1991-2000), the principles of the Soviet economic system, which consisted of providing direct budget support to undertakings, generally dominated. In the second stage (2001-2005), after the beginning of the budget reform, the introduction of the program-target method in the budget process, there was a certain modernization of state support. Legislation on its provision determines the formal characteristics of recipients, types of support, in some cases determine its time frame. The third stage (2005-2010), related to the intensification of efforts in the direction of international economic integration, was marked by a large-scale reduction of forms of state support without further modernization of the system of its provision, which could be based on relevant international experience and legal standards" (*Chernikov, 2013:4*).

In retrospect, we can recall the attempts of the Antimonopoly Committee of Ukraine (AMCU) to introduce certain rules of state aid control harmonized with European legislation, namely in 2004.

It should be reminded in 2003-2004 the political situation contributed to the active adoption of regulations on the adaptation of Ukrainian legislation to EU law: as an example, we can cite the Law of Ukraine "On the National Program for Adaptation of Ukrainian Legislation to European Union Legislation", according to which competition rules were identified as one of the priority areas for adaptation.

In 2004, the AMCU developed and the Cabinet of Ministers of Ukraine submitted to the Verkhovna Rada of Ukraine the Draft Law № 5469 on State Aid. The draft did not provide for any mention of services of general economic interest, instead there was a rule that the Law does not apply to state aid of a social nature, and special rules may be established for state aid to ensure national security and public interests, according to which competition rules were identified as one of the priority areas for adaptation.

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Also, the current version of the Commercial Code of Ukraine was also adopted. Article 16 of the Code stipulates that the state can provide grants to subjects of managing: on support of production of the vital food, on production of the vital medicines and means of rehabilitation of persons with disability, on import purchases of separate goods, services of transport providing socially important transportations and also to the subjects of managing which appeared in critical social and economic or ecological situation for the purpose of financing of capital investments at the level necessary for maintenance of their activities, on the purpose of technical development which give considerable economic effect, and also in other cases provided by the law. The state can perform compensations or surcharges to agricultural producers for the agricultural products sold by them to the state. The bases and procedure for application of means of the state support of subjects of managing are determined by the law.

The Academic Glossary of the Ukrainian Language defines that a "subsidy" an additional allocation from the state budget to an enterprise, institution or organization to cover overspending and other needs. That is why subsidies are nothing more than a form of state aid in the sense of European legislation and practice on state aid control.

It is also particularly interesting that the grounds and procedure for applying the means of state support of economic entities are determined by law. But at the time of the adoption of such a provision of Article 16 of the Commercial Code (2004), there was no separate law on state aid that would comply with all the provisions of European competition law, but there were still attempts.

3. New legislation on state aid for the implementation of the Association agreement EU-Ukraine (2014)

The next attempt to adopt the Draft Law on State Aid took place after the initialling of the text of the Association Agreement, which provided for Ukraine's commitment to create a national competition system modelled on the EU. In 2013, before the Revolution of Dignity, the Draft Law of Ukraine № 2549 on state aid to economic entities was submitted to the Verkhovna Rada of Ukraine, where in Article 1 item 13 Definition of terms we find a legal definition of services of general economic interest as services, related to meeting the particularly important general needs of citizens, which cannot be provided on a commercial basis without state support.

This Law was adopted on July 1, 2014 and was promulgated by the new President of Ukraine after the signing of the Association Agreement between Ukraine and the EU. Therefore, as we see again, the adoption of such an important law was preceded by appropriate political activity on the topic of European integration, which again comes to the fore.

In addition to this definition in the Law, the term "services of general economic interest" is available in Annex XXIII to Chapter 10 "Competition" of the Association Agreement and is given the following definition: This means economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there was no public intervention. The activity must exhibit special characteristics as compared with the general economic interest of other economic activities. As you can see, the term in the Law of Ukraine "On State Aid to Business Entities" was taken from the current European legislation, as well as the Association Agreement between Ukraine and the EU. The only thing that can be noticed is that in the definition given in the Association

Agreement the formulated part is more in the conditional style “that would not be supplied (or would be supplied under different conditions)”, and in the profile Law of Ukraine – in categorically negative – “...which cannot be provided on a commercial basis without state support”.

Some researchers, such as O. Kulyk, note that this is essential and the definition of "services of general economic interest" provided in the relevant Law of Ukraine does not comply with EU law (Kulyk, 2019). Also, significant problems that prevent us from talking about the final Europeanization of Ukrainian legislation in the field of state aid, in particular the institution of services of general economic interest and compensation provided to economic entities providing such services, include: lack of the Law of Ukraine "implementation" of the criteria developed by the Court of Justice to determine the lawful and reasonable compensation for the provision of services of general economic interest, the so-called Altmark criteria, as well as the right of the Cabinet of Ministers of Ukraine to determine the list of services of general economic interest in 2018. Whereas the European Commission has deliberately refused to define such a list, as it is impossible to determine which services are services of general economic interest due to their special nature, as well as the freedom to define such services by EU Member States.

Subsequently, the AMCU attempted to amend the Law of Ukraine "On State Aid to Business Entities", as in the process of its operation and application since 2017 there were significant gaps, including in accordance with the principles of state aid control in EU law. In 2018, the AMCU develops and submits the Draft Law “On Amendments to the Law of Ukraine “On State Aid to Business Entities”. According to the text of the draft law, we can see that the definition of the term "services of general economic interest" is subject to appropriate changes, namely, services of general economic interest are defined as services that public authorities or local governments define as being of particular importance to citizens and which are not or cannot be provided by economic entities operating in market conditions or provided in the presence of conditions concerning, in particular, the cost, purpose, quality, continuity, frequency and availability of such services, which is in the public interest, designated by public authorities or local governments.

If we compare these two definitions, we can distinguish two significant conclusions: first, the definition in the draft law is closer to European regulation, as Member States have a wide discretion in defining this service as SGEI, as well as to calculate compensation for their provision in accordance with the EU Competition rules.

In addition, in this draft Law of Ukraine we see significant changes in approaches to determining compensation to enterprises provided for services of general economic interest, which in turn is not considered state aid and does not fall under this Law (the so-called Altmark concept).

That is, the AMCU proposed instead of removing from the Law all cases of provision of services of general economic interest in terms of compensation of reasonable costs for the provision of such services (a general rule that is not relevant in EU practice and does not meet the obligations under the Association Agreement) to enshrine the Altmark criteria at the legislative level, as well as to remove the norm on granting the right to determine the list of services of general economic interest to the Cabinet of Ministers of Ukraine.

In accordance with the amendments to Part 2 of Article 6 of the proposed Draft Law of Ukraine, the Cabinet of Ministers of Ukraine has the right to determine not the list of such services, but the criteria for assessing the compatibility of state aid, in particular services of general economic interest.

However, the draft Law of Ukraine in this version was not considered by the Verkhovna Rada of Ukraine, and given the systematic gaps identified during the implementation and application of the current Law of Ukraine "On State Aid to Business Entities" it was decided to

prepare a new version of the Law of Ukraine "On state aid to business entities", which in turn would repeal the Law of 2014 and replace it.

4. Regulatory problems of implementation of European rules on state aid for services of general economic interest in Ukraine

In 2018, pursuant to the third paragraph of paragraph 2 of the second part of Article 3 of the Law of Ukraine "On State Aid to Business Entities", the Cabinet of Ministers of Ukraine adopted Resolution № 420 of May 23, 2018 "On approval of the list of services of general economic interest". Only services in the field of functioning of the electricity market and services in the field of functioning of the natural gas market were identified.

In December 2018, the Cabinet of Ministers of Ukraine amended the list of services of general economic interest approved by the Cabinet of Ministers of Ukraine dated May 23, 2018 № 420, supplementing it with paragraph 3 on services in the field of housing and communal services:

- district heating services, heat supply services;
- centralized hot water supply services;
- services for centralized cold-water supply;
- centralized drainage services;
- services for the removal of household waste.

In line with EU practice, as noted above and confirmed by other scholars, services of general economic interest are a flexible tool, and each country is given the freedom to define such services, while respecting EU competition rules. As a rule, each case of such state aid in the form of compensation for costs related to services of general economic interest is considered separately by the antitrust authorities of the EU Member States and the European Commission separately and all aspects are taken into account. Therefore, the compilation of any lists of services of general economic interest is clearly not in line with current EU practice and should therefore be modified.

This is also noted by the Association of Ukrainian Cities, which represents the majority of local governments as the largest body, a platform for cooperation between various local authorities in all regions of Ukraine. In particular, from 2018, the Association summarizes the practice and seeks clarification from the AMCU on the correct application of the provisions of the Law of Ukraine "On State Aid to Business Entities". In 2020, the Association, based on the generalized practice of providing such state aid by all local governments, sent a letter to the AMCU and the Ministry of Community Development with a proposal to modify Resolution № 420 and supplement it with new services of general economic interest.

The letter states that "according to the Law of Ukraine" On State Aid to Business Entities", local governments may provide state aid only after receiving a positive decision of the Antimonopoly Committee of Ukraine. Obtaining such an opinion is a lengthy procedure and can take more than 8 months. This situation leads to delays in the implementation of almost all local programs, the impossibility of prompt provision of financial support to utilities to ensure the livelihood of communities. However, the Law of Ukraine "On State Aid to Business Entities" stipulates that its effect does not apply to the provision of services of general economic interest, in terms of compensation for reasonable costs for the provision of such services (the list of such services is set by the Government). It is extremely important to fill this List with socially important activities of public utilities that ensure the provision of quality public goods to residents of municipalities.

The Association of Ukrainian Cities sends proposals to expand the list of services of general economic interest, approved by the Cabinet of Ministers of 23.05.2018. № 420, such services:

- services for the improvement of settlements;
- maintenance services for buildings and structures and adjacent territories, as well as housing management services;
- ritual services;
- services for the organization of school and preschool baby food;
- milk-based baby food services for children under 2 years of age;
- services for the production and maintenance of special vehicles;
- passenger transport services by public transport;
- services (works) for the installation of commercial metering devices for heat energy and water supply.

Most of these services are already recognized by the AMCU as services of general economic interest on a case-by-case basis – in each case separately, bringing it closer to the European approach. We hope that the relevant Draft Law on Amendments to the Law of Ukraine will be adopted by the Verkhovna Rada of Ukraine, and Resolution № 420 of 23.05.2018 was repealed and replaced by a Resolution approving the relevant criteria for determining the eligibility of state aid for services that constitute general economic interest.

5. Conclusions

Thus, we can state that two attempts (unsuccessful in 2004, successful in 2014) to introduce a EU law institute of state aid, as well as services of general economic interest depended entirely on political pressure and the situation in which Ukraine found itself. Despite attempts to adopt the relevant Law of Ukraine on State Aid in 2004, real progress in the europeanization of this institute, and in general its creation as such under European rules took place only in 2014 with the adoption of the Law of Ukraine on State Aid to business entities, but its implementation began only in 2017. Researchers and practitioners in this field are currently identifying structural problems, including regulatory ones, that need to be changed as soon as possible for the further harmonious development of this institute in Ukraine, as well as to fulfil its obligations under the Association Agreement with EU. Amendments to the existing law of Ukraine will need to be further strengthened at the level of bylaws, as well as the implementation practice of the controlling body – the AMCU, and therefore this topic leaves much room for further research.

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