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State Aid rules in Kosovo: the need for approximation with EU *acquis*

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Abstract: Provided in the EU Treaty (Arts. 107-109 TFEU) and applied at the EU institutional level and in the EU Member States, the rules on state aid are also foreseen as criteria to be achieved for the Western Balkans (WB) by being included as parts of the respective Stabilization and Association Agreements (SAAs) signed between the EU and each of the WB countries. Kosovo as having signed an SAA with the EU is also required to comply with the EU requirements in this field. This paper will be focused on highlighting the existing legal shortcomings and gaps in the Kosovo state aid legislation and on identifying the measures to be taken towards aligning Kosovo state aid legislation with the EU *acquis*. Further approximating the state aid legislation would properly address one of the challenging issues towards fulfilling the respective EU requirements provided in the SAA.

Keywords: State Aid Rules, EU Law, Western Balkans, Stabilization and Association Agreements

Introduction

Approximating national legislation with EU *acquis* in the field of state aid has been a challenge for Kosovo. Already applicable for a long time at the EU institutional level and EU Member State level as it has been provided for in the EU founding treaties, this field is traditionally less known in the Western Balkans (WB).

The state aid rules along with the competition rules have been an EU requirement for the Western Balkans since these countries became part of the Stabilization and Association Process (SAP) and consequently associated with the Stabilization and Association Agreements (SAA) since such contractual agreements with the EU integration perspective have been signed between the EU on the one side and each of the countries of the WB on the other side.

According to the obligations provided by the SAAs, as with the other rules, the state aid rules have also to be adopted and properly implemented by the countries of the WB. In this regard,

Kosovo has been facing a double challenge, at first, the state aid rules have to be adopted and therefore be in line with the EU requirements which means that the approximation level of national state aid rules with the EU *acquis* should be at a satisfactory level and the country continually be able to follow up the respective legislative changes at the EU level. And, second, when it comes to the practical implementation of state aid rules, Kosovo state aid authorities should also be well - prepared.

This paper will comprehensively be focused on providing a clear view on the main challenges with regard to the state aid rules that Kosovo is dealing with. As such, it is evident that: Kosovo's obligation deriving from the signature of the SAA, the existing shortcomings in the Kosovo state aid legislation and the need for its approximation with the EU *acquis* must be implemented. The paper aims to highlight the shortcomings in the national state aid legislation and its importance when coming to fulfilling the criteria provided by the SAA as a clear roadmap towards the EU.

The SAA obligations in the field of State Aid rules

It has to be taken into account that the EU state aid rules are mandatory and provided by the EU Treaty (Articles 107-109 TFEU) meaning that first, there are the EU Members States themselves which are obliged to comply with the respective EU Treaty provisions and the EU secondary legislation issued [1].

On its way towards the EU, Kosovo has to align its legislation with the EU standards and work towards achieving the respective criteria as provided by the SAA in the certain given fields. Kosovo as any other WB country as part of the SAP has entered in the contractual relation with the EU through the signature of the respective SAA. In this regard, in accordance with the SAA state aid provisions, the main EU state aid legislation has to be transposed into the national legislation as a way to approximate the Kosovo legislation and bring it in line with the EU *acquis*.

With regard to the state aid rules, the obligations assumed by Kosovo date back many years. Kosovo first assumed to meet these obligations with the Central European Free Trade Agreement (CEFTA - 2006) and the Energy Community Treaty (2006), which required Kosovo to establish and regulate state aid regulatory bodies. Later, it is the SAA between the EU and Kosovo which has outlined the relevant set of provisions that Kosovo needs to properly transpose in its national legislation and implement it. The respective SAA provisions (Arts. 74, 75) have outlined certain requirements to be achieved such as:

- it requires Kosovo to refrain from providing state aid (Art 75(1)) SAA;
- the authorities are required to assess the state aid measures based of the criteria deriving from article 107 TFEU (Art 75(2)) SAA;

- the Kosovo authorities are required to gradually approximate the national legislation with the EU *Acquis* (Art 74(2)) SAA;
- Kosovo should ensure an operationally independent authority entrusted with powers necessary for the full application of state aid (Art 75(3,4)) SAA;
- Kosovo shall ensure transparency in the area of state aid ((Art 75(5)) SAA;
- Kosovo should also establish an inventory of aid schemes and align such aid schemes with the respective criteria and state aid rules (Art 75(6)) SAA [2].

The aforementioned SAA provisions have clearly outlined the progress that Kosovo needs to make with regards to the state aid rules.

The legal framework in the field of state aid

In Kosovo the rules on state aid have initially been provided by the Law on State Aid (2011) and consequently the first bylaws were adopted. Thereafter, the SAA between EU and Kosovo (entered into force in 2016) has required from Kosovo that its existing law and future legislation be gradually compatible with the EU *acquis*. In this regard, Kosovo adopted a new Law on State Aid (2017), which is still applicable.

The existing Law on State Aid (2017) is generally in line with the main respective EU requirements in this field. Aiming to properly implement the legal provisions, additionally a certain set of bylaws have been adopted.¹ According to the Law on State Aid, the institutional structure for the control of state aid is established. It consists as follows:

- a) The State Aid Department (hereinafter: SAD) – as the administrative wing and;
- b) The State Aid Commission (hereinafter: SAC) as the decision - making authority [3].

The aforementioned institutions have recently been active in issuing secondary legislation, consisting of not only normative acts dealing with the mere implementation of the state aid rules but also informative ones such as brochures and guidelines aiming to expand the understanding of what state aid is and why it should be controlled.² This is done in order to promote the necessity of the State Aid institutional control in society and among other institutions.

¹ Regulation (GRK) No.19/2018 on Procedures and Forms of State Aid Notification; Regulation (GRK) - No 04/2020 on De Minimis Aid; Regulation (GRK) – No. 05/2021 on Treatment of Compensation for the Provision of General Economic Interest Services.

² See for example: State Aid Guideline – State Aid for Grantors for the Reporting of Existing State Aid Schemes and New Aid to the State Aid Department, January 2019; Brochure - State Aid Explained, June 2021; Brochure - Kosovo’s international obligations to operate a State Aid Regulatory System, June 2021; Brochure - Unlawful State Aid – Concept and Consequences, June 2021; Brochure – Why is State Aid Control Needed, June 2021; Brochure - Who controls state aid in Kosovo, June 2021; State Aid Brochure – How State Aid is assessed in Kosovo, June 2021; Brochure - De Minimis Aid Frequently Asked Questions, June 2021; State Aid Brochure - State Aid When

In addition, it is worth mentioning the main activity of the state aid institutions which have been dealing with state aid decision - making issues meaning assessments of the state aid schemes (by the SAD) and adopting decisions on state aid schemes (by the SAC).³ In doing this, it is essential that the actions of the state aid institutions should be taken in accordance with the provisions provided by the Law on State Aid and by the respective bylaws. Such legal acts defining the compatibility of state aid, the procedure, rules and provisions for granting horizontal state aid, specific instruments for granting aid and aid granted to specific sectors have to be aligned with the *EU acquis*.

The Law on State Aid, in general prohibits providing aid to undertakings, but on certain occasions such aid may be allowed and consequently be granted under certain compatibility criteria [3]. The compatibility criteria to provide state aid to undertakings should be well established and therefore, in addition to the law, many procedural issues and other respective rules should be provided for with bylaws. To date, the respective legal shortcomings and existing gaps in the legislation, especially the lack of respective bylaws have negatively affected on the work and on the overall performance of the SAD and SAC in the field of state aid control.

Currently, a major challenge in operation remains the existing institutional structure. “The institutional structure of state aid control in Kosovo according to law 2017 is unusual in the sense that it continues to be divided between two institutions positioned in two different organizations, like nowhere else in the region and/or in the EU Member States in the period before their membership” [4]. According to the SAC, this institutional structure affects the normal course of the work and the efficiency of the state aid control institutions. “The department within a ministry – Ministry of Finance, Labour and Transfers (MFLT), at the same time one of the largest providers of state aid in the country, on the one hand, and the Commission within the Assembly of the Republic of Kosovo (ARK), in the absence of an administration of its own, and challenged by insufficient level of administrative and operational support from the Assembly administration, on the other hand - constitutes the institutional framework where there is a lack of clarity in the hierarchy. As a result, an efficient management without obstacles, delays, uncertainty and compromised quality in decision making, in both the Committee-Department and the Committee-Administration of the Assembly relations, remains a challenge for the next period” [4].

The need for approximation with the *EU acquis*

The existing Law on State Aid is generally in line with the *EU acquis*, namely with the respective EU rules on state aid. But, still there are changes needed to be adopted in the current law on state aid. As such, those changes would further approximate the law with the *EU acquis*.

Public Service obligations by enterprises are being compensated by the state (“Services of General Economic Interest”), June 2021.

³ According to the Annual Report of the State Aid Commission 2020, the Commission based on the Law on State Aid (LSA) during 2020 managed to take 18 decisions, of which 2 negative and initiated 6 investigative procedures.

From a close review and analysis on the existing Law on State Aid, one may conclude that some of the shortcomings evident are as follows:

- The law does not include provisions on the main functions and powers of the SAD and SAC;
- The key provisions such as the *Deggendorf Principle* (which States that the payment of a new aid has to be suspended until any illegally obtained aid previously granted to the same beneficiary has been recovered) - are missing from the Law;
- There are no compatibility criteria established in the law to offer guidance to the state aid providers, namely for SAD to base their assessment and for the SAC to base their decision;
- The law does not foresee the consequences where an SAC decision is not complied with;
- The law has not foreseen the possibility to block exemption, declaring specific categories of aid compatible if they fulfill certain conditions;
- The law has not included the meaning of certain definitions which are of certain importance to the state aid issues, such as: undertaking, undertaking in difficulty, small and medium sized undertakings, etc. [5].

Due to the aforementioned shortcomings in the existing Law on State Aid as well as the lack of the secondary legislation, it is consequently considered that necessary changes should be made. In this regard, it is to note that in addition to the proposed changes to the Law on State Aid, it is also necessary to draft certain secondary legislation in the respective area [5].

Given the complexity and the extensive EU legislation in this area, it is almost impossible to apply a maximalist approach – what means to transpose into the national legislation all the EU legislation in the field of state aid. The length and the complicated nature of the legislation would make it almost impossible; among others it would require a lot of time, and administrative resources. Therefore, in this case, performing transposition of the main relevant substantive EU provisions such as regulations, guidelines and frameworks in the respective areas would be the more appropriate way to follow up.⁴

In this regard, it is to be noted that until now significant progress has been made. It can be said that most recently a certain set of rules in the secondary legislation have been adopted. As such, we may easily conclude that the recently adopted acts are largely in line with the respective EU

⁴ For example when it comes to the transposition of the EU acquis requirements on horizontal aid it is necessary to take into account not only the provisions of GBER (Regulation (EU) No 651/2014 of June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the TFEU) but also the requirements of soft law instruments/ other EU secondary Legislation relevant in the field of horizontal aid such as: Guidelines on regional State aid for 2014-2020 (OJ C 209 of 23 July 2013); Guidelines on risk finance aid for 2014-2020 (OJ C19 of 22 January 2014); Commission Guidelines on regional State aid, 19.4.2021, C(2021) 2594 final.; Guidelines on State aid for environmental protection and energy 2014-2020 (OJ C 200 of 28 June 2014); Communication from the Commission – Framework for State Aid for Research and Development and Innovation, (Official Journal C 198 of 27 June 2014.); Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249 of 31 July 2014) etc.

legislation [6]. Still, in order to fully align with the respective EU legislation, more secondary legislation is necessary to be adopted. In this regard, it is worth mentioning acts such as: rules on granting horizontal aid and rules on sectorial aid and on specific aid instruments.

According to the SAC's Performance Plan and the objectives set therein, the state aid institutions are determined to continue working towards meeting the EU standards as provided by the SAA in the field of state aid rules. In this regard, some of the issues that need to be resolved and will be in the focus of the SAC for 2021 are as follows: drafting legislation, establishing of the state aid inventory, update of the General Register of state aid schemes, monitoring and control of state aid, *De Minimis* Register, Capacity building and awareness on state aid rules and transparency [7].

Conclusions

Since the state aid rules are relatively little known in Kosovo, such rules have been almost out of sight for some time and consequently less developed and practiced by relevant institutions. Even though the state aid rules officially became an obligation to the Kosovo institutions with the Central European Free Trade Agreement (CEFTA - 2006) and the Energy Community Treaty (2006) requiring Kosovo to establish and regulate state aid regulatory bodies, in fact the real efforts thereto by the Kosovo authorities were taken after the SAA between Kosovo and EU was achieved (2015).

In the aftermath of the SAA, Kosovo adopted a new Law on State Aid which is generally in line with the main EU provisions on state aid rules (in force from 2017). In this regard, the Kosovo state aid institutions (SAD and SAC) started drafting and adopting the first bylaws in the implementation of the law as well as gradually the assessment and the decision making of state aid schemes. Still, on its way towards the EU, Kosovo needs further adjustments in the state aid national legislation including further changes to the Law on State Aid and to the secondary legislation. Therefore, the respective Kosovo institutions including the state aid institutions need to continue working towards adopting the required legislation.

Due to the specifics of the field of state aid, particular attention should be paid to human resources. Since the state aid rules are constantly changing at the EU level (recently under the influence of the Covid-19 pandemic), the state aid staff should be sufficiently prepared and trained to properly understand and implement the applicable state aid rules as well as to be able to follow the ongoing changes taking place in this area at the EU level.

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