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## **Теоретико-правові засади *acquis* ЄС у сфері державної допомоги та особливості його транспозиції у законодавство України**

*У статті досліджено структуру та обсяг джерел права ЄС у сфері державної допомоги, їх класифікація, а також проаналізовані можливі механізми щодо їх транспозиції у правову систему України з огляду на Угоду про асоціацію між Україною та ЄС.*

**Ключові слова:** угода про асоціацію, державна допомога, *acquis* ЄС.

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## **Теоретико-правовые основы *acquis* ЕС в сфере государственной помощи и особенности его транспозиции в законодательство Украины**

*В статье исследовано структуру и объем источников права ЕС в сфере государственной помощи, их классификация. Также проанализированы возможные механизмы их транспозиции в правовую систему Украины в свете Соглашения об ассоциации между Украиной и ЕС.*

**Ключевые слова:** соглашение об ассоциации, государственная помощь, *acquis* ЕС.

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## **Legal foundations of the EU State Aid *acquis* and its transposition into Ukrainian legislation**

*The article explores the structure and defines the scope of the EU State Aid *acquis*. Also, the options of the transposition of the EU State Aid *acquis* into Ukrainian legislation are analyzed in light of the EU-Ukraine Association Agreement.*

**Key words:** Association Agreement, State Aid, the EU *acquis*.

### **Definition of the problem**

On 27 June 2014, the Association Agreement (AA), “the milestone in the history of relations” [1] between the EU and Ukraine, was signed. This agreement “has an outstanding reputation because of its ambitious aim to set up a Deep and Comprehensive Free Trade Area (DCFTA) between the contracting parties that should lead to Ukraine’s gradual integration into the EU internal market” [2, c.1]. In Section 2, Chapter 10, Title IV of the AA [3], Ukraine undertakes to fulfill different requirements of the EU State aid *acquis* and to establish a close cooperation with the EU in this field.

Article 264 of the AA provides: “The Parties agree that they will apply... [*Articles of the AA related to state aid*] ... using as sources of interpretation the criteria arising from the application of Articles 106, 107 and 93 of the Treaty on the Functioning of the European Union, as well as relevant secondary legislation, frameworks, guidelines and other administrative acts in force in the European Union” [3].

However, the implementation of the above-mentioned rule is constrained by the lack of understanding of the structure and the scope of the EU *acquis* as well as by uncertainty about the mechanism that should be used for its transposition into the Ukrainian legal order.

### **Analysis of recent studies and publications**

The EU State Aid Law is addressed as a part of the EU Competition Law by various Ukrainian and foreign authors such as: Kseniya Smirnova, Valentyna Lukyanets, Alison Jones, David Vaughan, Richard Whish, David Bailey and others. General aspects of the EU-Ukraine legislative approximation in different areas were addressed by R. Petrov [2; 4; 20; 21], Guillame van der Loo [20], Peter van Elsuwege [20; 21]. The structure and the scope of the EU State Aid *acquis* was addressed mainly by foreign authors such as: Kelyn Bacon, Santa Maria Alberto, Marise Cremona.

### **Non-solved parts of the problem**

In order to be able to successfully comply

with the EU state aid *acquis* requirements as enshrined into the AA, Ukrainian law enforcement bodies, namely Antimonopoly Committee of Ukraine (hereinafter – AMCU) and courts, should have a common understanding of the notion and the scope of the EU state aid *acquis* and on how to apply the latter in their enforcement practices.

### **The goals of the article**

The main goal of the article is to analyze legal foundations of the EU state aid *acquis* and to consider different options of their transposition into Ukrainian legal order.

### **The main body of the article**

It should be noted as an outset that this article does not aim to give a full description of the EU state aid *acquis* because it would exceed the scope allowed for such type of articles; instead, we will provide reader with an understanding of the structure of the EU state aid *acquis*. Given the fact that the scope and the nature of the EU *acquis* is subject to a broad scientific discussion [4, p.35], first, the brief explanation of this term is required.

The notion of the EU *acquis* (the community *acquis* or *acquis communautaire* – these terms will be used interchangeably) could be found in the EU legislation glossary as “the body of common rights and obligations which bind all the Member States together with the European Union”[5]. Moreover, the scholars notice that concept of the *acquis* is much broader than its legal dimension and includes not only the legislation but also other achievements such as non-binding rules and “informal rules” [4, p. 40].

The EU *acquis* consists of several elements, which produce its legal effect. Firstly, it is so-called “fundamental *acquis*”, which comprise “the skeleton of the whole *acquis communautaire*, and therefore cannot be altered or repealed without destroying the unique nature of the EU” [4, p.42]. In legal terms, the fundamental *acquis* includes different provisions of the EU founding Treaties; the secondary legislation issued on the legal basis of these provisions and the decisions of the European Court of Justice (the ECJ), issued for the interpretation of the abovementioned

elements [4, p. 47]. Secondly, the *acquis* also consists of such elements as different *jus cogens* provisions of international law, inter-governmental agreements between the EU Member States and the ‘soft law’ [4, p. 42]. The soft law, in its turn, consists of “recommendations, opinions and other instruments not mentioned in article 288 TFEU, such as communications, notices, or guidelines” [6, p. 11]. Bearing in mind this construction, it is possible, therefore, to proceed with analyzing of the EU state aid *acquis*.

**Fundamental *acquis*.** The whole state aid control system in the EU is based on several provisions of the TFEU, namely articles 107-109. Article 107 TFEU (ex 87 EC), states the substance of the state aid control and provides fundamental provisions such as the declaration of incompatibility of the state aid with the internal market and two types of exemptions: one contains aid which is automatically compatible with the internal market, leaving no alternative for the Commission (part 2), other is followed by the discretionary power of the Commission to conclude on compatibility of such aid. In its turn, art. 108 TFEU contains procedural rules of state aid control such as the obligation of the Commission to carry out the constant review of the systems of the existing aid and the obligation of the Member States to notify the commission of any plans to grant or alter aid.

These provisions are further developed in the secondary legislation and the case law of the ECJ. For instance, the notion of the state aid is fully developed by the case law and should be read as follows: “*an economic advantage granted directly or indirectly through State resources in favor of certain undertakings or the production of certain goods which is liable to distort competition and affect trade between Member States*” [7, p. 20]. The secondary legislation could be divided (by means of objectives) on substantial and procedural parts.

The secondary legislation related to the substance includes several regulations, which focus, merely, on the questions of compatibility of different types of state aid with the internal market. These are the Enabling Regulation [8] and the General Block Exemption

Regulation (GBER) [9]. Based on the article 109 TFEU, the Enabling Regulation, whereas highlighting the special role of the Commission in the assessment of the state aid, enables it to adopt the GBER. In the GBER the Commission defines the specific types of horizontal aid which are compatible with the internal market and are not a subject for the notification. Those types of aid are, inter alia, regional aid, aid to small and medium enterprises (SME), aid for environmental protection, aid for research and development and innovation, etc., i.e. aid which is addressed to companies across all sectors. Another important regulation in this regard is *De Minimis* Regulation, which determines the ceiling of EUR 200 000 per the period of 3 years as the amount of *de minimis* aid which, therefore, is compatible with the internal market and is not a subject for notification.

As regards the procedural side, there are two regulation of general importance. First of all, it is Procedural Regulation [11], which sets out specific rules on the procedure of state aid control. More precisely, it contains the provisions on the notification procedure, the investigation procedure, the procedure regarding unlawful aid, etc. Secondly, it is Implementing Regulation [12], which establishes a notification form and the rules on how to fill it in rightfully.

**The ‘Soft Law’.** As it is noticed in the doctrine, the EU “soft law” is a part of the EU *acquis* if it has a certain legal effect; the ‘soft law’ without legal effect is no more than policy desires [4, p. 72]. The existence of the mentioned legal effect of a concrete soft law document is considered if the ECJ takes it into consideration in the course of proceedings [4, p. 72]. It should be noted, that for the period of 2000-2011, the number of cases before the General Court regarding state aid issues, in which soft law instruments were mentioned, comprises 148 out of 480. This is to say, that the Court referred to the soft law in 38% of cases [6, p. 58]. Therefore, a large part of the soft law in the state aid area could be considered as a part of the EU state aid *acquis*.

In fact, comparing to the ‘hard law’ provisions, the soft law instruments are widely used by the Commission for regulation of state aid,

and includes dozens of notices, guidelines, recommendations, etc. Usually, these soft law acts specify the application of 'hard law' instruments to the specific areas both of the substance and the procedure. As concerns the substantive part, an example may be the acts which deal with horizontal issues, such as the Regional Aid Guidelines [13], in which the Commission "sets out the conditions under which regional aid may be considered to be compatible with the internal market and establishes the criteria for identifying the areas that fulfill the conditions of art. 107(3)(a) and (c) of TFEU"; the SME Recommendation [14] which provides the definitions of micro, small and medium-sized enterprises used in the state aid policy; the Community Framework for R&D [15] which deals with the whole complex of state aid for research and development areas; etc. An example of the procedural part of the state aid 'soft law' *acquis* may be the Simplified Procedure Notice [16] in which the Commission establishes a simplified procedure in order to accelerate the assessment time of certain types of state aid; or the Best Practices Code [17] which provides guidance on the day-to-day conduct of State Aid procedures for the best understanding between all parties concerned.

However, the 'soft law' in state aid area not only develops the 'hard law' provisions but also regulates the whole areas that are not covered by the 'hard law'. These are sector specific rules and measures adopted as a response to the financial crisis. For example, there exist plenty of Commission Communications which cover the sectors as steel, coal, postal services, broadcasting, electricity, shipbuilding, transport, etc. As was mentioned above, the description of the whole body of the EU state aid *acquis* goes beyond the scope of the present study, therefore, a deeper analysis of the 'soft law' concerned is left for the reader's consideration.

To conclude, it should be borne in mind that the State aid *acquis* is a large body of legislation which consists of several parts. First of all, it is fundamental part that includes the relevant TFEU provisions and secondary legislation as well as the case law of the ECJ which interprets them. Second of all, it

is a wide range of the 'soft law' which covers the whole areas of sector specific aid and develops the 'hard law' requirements in the areas of horizontal aid and procedure related to state aid.

Article 264 of the AA, cited above, creates an obligation for Ukraine to apply all EU state aid *acquis*, including 'soft law', for the interpretation of general clauses on State Aid, enshrined in art. 262 and 263 AA and which basically, repeat articles 107, 108 TFEU. However, as Ukraine is not a member state of the EU, state aid *acquis* does not form a part of Ukrainian legal order. Therefore, the question of how to make it applicable for the Ukrainian national authorities or judiciary has to be answered. In our view there are two possibilities to do it: either Ukraine will make the EU state aid *acquis* directly applicable in the Ukrainian legal order or Ukrainian government will be given the power to transpose all relevant rules of the EU state aid *acquis* by adopting similar national legislative acts. These two options therefore require an analysis which would allow to consider on a likelihood of their application.

The first option, as was mentioned, is to make the EU state aid *acquis*, *i.e.* legislative acts, ECJ case law and 'soft law' acts, directly applicable in the Ukrainian legal order. In theory, it is a possible option. The Ukrainian Constitution provides that: "international treaties in force, consented by the Verhovna Rada of Ukraine as binding, shall be an integral part of the national legislation of Ukraine" [18]. According to this provision, article 264 AA shall be considered as an integral part of Ukrainian national legislation and shall be directly applicable. Consequently, national authorities, while assessing the compatibility of concrete state aid scheme, may use the EU state aid *acquis* directly on the basis of article 264 AA. The same applies for the judiciary: it is possible to invoke concrete legislative acts of the EU or cases of the ECJ before Ukrainian national courts on the ground of abovementioned article. The example of such system may be the Czech Republic during the pre-accession period, when the so-called Europe Agreement provided also the implementation of the EU state aid *acquis*. The Commission

noticed that: “As regards secondary legislation, the Czech Republic has confirmed that Czech law allows for direct reference to the *acquis* through the Europe Agreement and its implementing rules. The Czech Republic, therefore, does not need to separately adopt new secondary legislation. For reasons of transparency, the Office for the Protection of Economic Competition has published a series of guidance notes explaining the *acquis* in the various areas of state aid control” [19].

However, even if it seems to be a realistic model, it has a number of significant disadvantages. Firstly, as Petrov noticed “taking into account that Ukrainian institutions are not involved in the decision making process of EU legislation, the question arises to what extent this [direct application of the EU law] can be reconciled with fundamental constitutional principles such as legality and sovereignty” [20, p. 24]. Indeed, direct application of EU law in Ukrainian legal order raises a serious question about its compatibility with Ukrainian Constitution. Secondly, even if this rule would not be in contradiction with Ukrainian Constitution, it is hardly to imagine Ukrainian judiciary referring directly to the Commission Guidelines or a case of the ECJ. The problem is that “there is no settled practice on application of provisions of international agreements and their place within Ukrainian legal order. The Ukrainian judiciary is still reluctant to refer to international agreements in the judgments and there is no formal recognition of their direct effect within the Ukrainian legal order” [21, p. 140-141]. This means that it would be very hard to induce a Ukrainian judge to recognize the direct applicability of art. 264 AA and to invoke any document which form part of the EU state aid *acquis*. Thirdly, even if a judge is convinced to recognize the direct applicability, the merely technical questions arise. For instance, there is no official translation of the Commission guidelines, notices, cases of ECJ, etc. into the Ukrainian language. The EU makes attempts to improve this situation by financial assistance to the judicial reforms in Ukraine and by introducing different instruments as Technical Assistance and Information Exchange instrument. TAIEX supports public admini-

strations with regard to approximation, application and enforcement of EU legislation, including the translation. However, I consider that this path of implementation of article 264 AA into the Ukrainian legal order is highly unlikely to be utilized.

The second option is to transpose the relevant acts of the EU state aid *acquis* into national legislation by granting the power to the national competition authority or to the Ukrainian government to adopt the secondary legislation which would repeat the provisions of the EU state aid *acquis*. This option has a number of its strengths and weaknesses. The most important strength is that there would not be any problem with enforceability of such legislation. While assessing a compatibility of a state aid the competition authority and national judiciary would rely on the acts of internal legislation, therefore, no problems should occur.

However, this model also has several important weaknesses. First of all, the dynamic nature of the EU *acquis* means that it changes over time considerably quickly. Therefore, the Ukrainian national legislation adopted in order to implement the EU state aid *acquis* would be the subject of a constant review. This implies a lot of time and material resources, as well as an additional workload to such authority. Secondly, it is not clear how to transpose the case law of the ECJ. As I described above in the Chapter I, the state aid control contains many elements, such as the notion of the “state aid”, which are interpreted and developed exclusively by the ECJ case law. Therefore, in order to be able to transpose it into the national legislation, Ukraine has to codify all relevant ECJ case law (which is not always an easy task for the ECJ itself), translate it and adopt a national legislative act. In my view, this can lead to a big amount of distortions and misinterpretations that would have a negative impact on the system of state aid control in Ukraine.

A possible solution of this problem could be in the introduction of a sort of “mixed” system: Ukraine transposes what is possible to transpose into the national legislation, the rest could be invoked on the basis of the direct applicability of article 264 AA and other rele-

vant articles of the AA. It seems that this way is also accepted by the Parties. Article 267 AA says that “to comply with the obligations [...] of this Agreement [...] Ukraine shall in particular adopt national state aid legislation” [3]. It is worth to mention that Ukraine has already started to comply with this obligation and in July 2014 the law “On the state aid to undertakings” was adopted [22]. This law transposes provisions of article 262 AA into the Ukrainian legislation; describes several important notions like “new aid”, “existing aid”; establishes the national state aid monitoring authority; etc. Taking into the account that this law has a general character and the state aid *acquis* requires further transposition, the Law specifically refers that “the Chamber of Ministers shall define the criteria for an assessment of compatibility of different types of state aid, inter alia, regional aid, aid for SMEs, environmental aid, etc.” The need to adopt national state aid legislation was also stressed by the Commission. In its recent reports on Ukraine, the Commission highlights:

In July the Parliament passed a law on state aid to companies, designed to work as a framework law for the Ukrainian state aid system. The law was compatible with EU

standards, but care needed to be taken to ensure that the large amount of secondary legislation was also compliant with the EU state aid *acquis* (*emphasis added – M. I.*). The EU supported Ukraine in setting up a sound state aid monitoring and audit system [23, p. 14].

### Conclusions

Therefore, the EU state aid *acquis* is a complex structure of primary, secondary legislation, cases of the ECJ and “soft law” acts. Moreover, the area of State Aid is particularly highly regulated by the case law and “soft law” which makes it extremely complicated to define in the scope and to transpose into the third countries legal systems.

I should be concluded that the best way for the EU State aid *acquis* to be implemented in Ukraine is to be partly transposed into Ukrainian legal order when the state aid control will be based on the application of national legislation of Ukraine. However, due to the direct applicability of the provisions of binding international treaties in the Ukrainian legal order, the possibility of reference to the EU state aid *acquis* as such remains realistic. Altogether, it can be called as ‘mixed’ system of application of the EU law and Ukrainian national law.

### Bibliography

1. Herman Van Rompuy, President of the European Council Statement at the signing ceremony of the Association Agreements with Georgia, Republic of Moldova and Ukraine, Brussels, 27 June 2014, EUCO 137/14, available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/143415.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/143415.pdf)
2. Guillaume Van der Loo, Peter Van Elsuwege and Roman Petrov, ‘The EU-Ukraine Association Agreement: Assessment of the Innovative Legal Instrument, EUI Working Paper, LAW, 2014/09
3. EU-Ukraine Association Agreement, available at: [http://zakon3.rada.gov.ua/laws/show/984\\_011](http://zakon3.rada.gov.ua/laws/show/984_011)
4. R. Petrov, Exporting the *acquis communautaire* through European Union External Agreements, Nomos, Baden Baden, 2011
5. Summaries of EU legislation web site, available at: [http://europa.eu/legislation\\_summaries/glossary/community\\_acquis\\_en.htm](http://europa.eu/legislation_summaries/glossary/community_acquis_en.htm), (visited on 13.04.2015);
6. Oana Ștefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union*, Kluwer Law International BV, The Netherlands, 2013
7. Kelyn Bacon, *European Union Law of State Aid*, 2<sup>nd</sup> ed., Oxford University Press: Oxford, 2013
8. Council Regulation (EC) No. 994/98 of 7 May 1998 on the application of articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal state aid (Enabling Regulation), [1998], OJ L 142/1
9. Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (GBER), [2014], OJ L 187/1
10. Commission Regulation (EU) No. 1407/2013 of 18 December 2013 on the Application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (De minimis regulation), [2013], OJ L 352/1

11. Council Regulation (EC) No. 659/1999 of 22 March 1999 laying down the detailed rules for the application of article 93 of EC Treaty (Procedural Regulation), [1999], OJ L 83/1
12. Council Regulation (EC) No. 794/2004 of 21 April 2004 implementing Council Regulation (EC) 659/1999 laying down the detailed rules for the application of article 93 of EC Treaty (Implementing Regulation), [2004], OJ L 140/1
13. European Commission Guidelines on Regional State Aid for 2014-2020, [2014], OJ C 209/1
14. Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-size enterprises, C (2003) 1422, OJ L 124
15. Community Framework for State aid for Research and Development and Innovation, [2006], OJ C 323
16. Commission Notice on Simplified Procedure for the treatment of certain types of State Aid, [2009], OJ C 136
17. Commission Notice on a Best Practices Code on the Conduct of State Aid control proceedings, [2009], OJ C 136
18. Constitution of Ukraine
19. Regular report from the Commission on Czech Republic's progress towards accession, SEC (2001) 1746 final (13.11.2001), p. 54, first cited in Marise Cremona, 'State Aid Control: Substance and Procedure in the Europe Agreements and the Stabilisation and Association Agreements', (2003) 9 European Law Journal, No. 3, p. 271
20. Guillaume Van der Loo, Peter Van Elsuwege and Roman Petrov, 'The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument', (2014) 09 EUI Working Paper Law
21. Roman Petrov, "Legislative Approximation and Application of EU Law in Ukraine", in Peter Van Elsuwege and Roman Petrov (ed.), Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?, Routledge, 2014
22. Zakon Ukrainy "Pro derszavny dopomogu sub'ektam gospodariuvannia", [The Law of Ukraine "On the state aid to the undertakings"] of 1 July 2014, No. 1555-VII, available at: <http://zakon4.rada.gov.ua/laws/show/1555-18/print1390850637538541> (visited at 24.04.2015)
23. Joint Staff Working Document, Implementation of the European Neighbourhood Policy in Ukraine Progress in 2014 and recommendations for actions, SWD (2015) 74 final