



STATE AID: DEFECTS, WAYS OF REGULATION

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Peer review method: Double-Blind
Accepted: May 16, 2023
Published: June 2, 2023
Original scientific article
DOI suffix: 10.36962/NEC18022023-17



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ABSTRACT

The article „State Aid” refers to the problems of issuance of this aid. Therefore, in the article is highlighted the gaps of the state aid procedures, it is critically analyzed and is presented concrete proposals for their resolution (with the legislative amendments).

Ultimately, there is underlined that the draft proposals for the Georgian Law on Competition will help to uproot the existing gaps of the Law and will increase the efficiency of law enforcement mechanisms, which by establishing the principles of competition protection and free trade, should contribute to improving the quality and safety of business and investments in the country.

Keywords: state aid; consent; Agency; legislation; regulated sector; government; obligation.

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2. The Law on Free Trade and Competition of June 3, 2005;
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4. Resolution of the Government of Georgia of September No. 529 of 1, 2014 on Approval of the Insignificant Amount of Individual State Aid and the General Rule of State Aid;
5. Association agreement between Georgia and the European Union and Georgia signed on September 1, 2014.



INTRODUCTION

According to the Law of Georgia On Competition, state aid which is here the same as subsidy, is a decision made with respect to an economic agent and it includes tax exemptions, tax reductions or tax deferrals, debt restructuring, granting loans on favorable terms, transfer of operating assets, provision of monetary assistance, granting of profit guarantees, privileges, etc.

In addition, in accordance with Article 12, Clause 2 of the above law, state aid which does not require the consent of the National Competition Agency of Georgia is permissible if:

- a) it is granted to individual consumers as a social allowance, provided that the aid does not lead to the discrimination against the producer of the relevant goods/services;
- b) it is intended to eliminate the consequences of natural disasters and force-majeure events;
- c) it is intended to carry out environmental protection activities;
- d) it is intended to exercise the rights or fulfill the obligations stipulated under the relevant legislative act of Georgia or an international agreement to which Georgia is a party;
- e) it is granted in an insignificant amount in the form of individual state aid;

f) it is intended to implement an important state project, and if the Government of Georgia has made a decision in this respect.

THE MAIN TEXT

Based on the above, it can be said that on the one hand, it is not mandatory to provide the information to the National Competition Agency about the state aid granted for the above purposes, which, in our opinion, serves as an obstacle to the enforcement of this part of the Law of Georgia On Competition. In particular, the National Competition Agency does not and cannot have information and, therefore, cannot determine whether competition is hindered in the markets where state aid in the amount of 400,000 GEL (or less) was granted to individual economic agents. In addition, the agency cannot have information (therefore, it cannot determine whether the legislation on competition is violated or not) on the state aids that are granted for the implementation of duties defined by separate legislative acts. Here we definitely do not mean the activities of the inter-departmental commission for restructuring and writing off debts of the Ministry of Finance of Georgia, as National Competition Agency of Georgia, the main competition body in the country, has been involved in the activities of this commission since





2006 (excluding 2009-2014) until now (14.12.2022); (Free Trade and Competition Agency, the state sub-Agency under the Ministry of Economic Development of Georgia was actively involved in the work of this commission in 2006-2008).

On the other hand, according to Chapter 10 (Competition), Article 206 (Subsidies), Paragraph 2 of the Association Agreement between the European Union and Georgia, "each Party shall ensure transparency in the area of subsidies. To that end, each Party shall report every two years to the other Party on the legal basis, the form, the amount or the budget and, where possible, the recipient of the subsidy granted by its government or a public body in relation to the production of goods. Such report is deemed to have been provided if the relevant information is made available by each Party on a publicly accessible website."

Obviously, in accordance with this part of the Association Agreement, the Government of Georgia can assign the responsibility for the implementation of the undertaken obligations to any government institution (the Ministry of Economy and Sustainable Development of Georgia, the Ministry of Finance of Georgia or any structural subdivision of the Government of Georgia, etc.). However, in our opinion, the National Competition Agency of Georgia which is responsible for promoting free trade and competition in the country according to the Law of Georgia On Competition and the secondary legislation based on it (On Approving Small Amounts of Individual State Aid and General Procedure for Granting State Aid - Resolution No. 529 of the Government of Georgia dated 1st of September, 2014), and which, among others, includes the inadmissibility of state aid that restricts competition should be the body accountable to the European Union in this respect. This goal cannot be achieved without receiving and processing relevant (accurate) information about state aid implemented in the country in general.

The issue is even more pressing given the situation that according to the first paragraph of Article 12 of the Law of Georgia on Competition, "state aid provided to an undertaking or for a specific type of activity in a form that hinders competition or endangers it shall be prohibited". However, the fact is that 1) if the state aid hinders competition, the agency still cannot prohibit it, as the agency only issues a legal opinion or recommendations and submits it to the Government of Georgia in accordance with Article 14, Clause 4 of the Law of Georgia On Competition. Accordingly, it is the Government

of Georgia and not the National Competition Agency who makes the final decision on granting state aid that restricts competition. The agency does not have any administrative tools to influence such cases (according to Article 15 of the Law of Georgia on Competition, the person who has suffered damages may appeal to court against the state aid granted. Thus, it turns out that the National Competition Agency should watch the process from the outside in this case); 2) In case the state aid that hinders competition is granted without the consent of the National Competition Agency, or a danger of hindering competition in the relevant market occurred after the state aid was granted in agreement with the Agency, the National Competition Agency has no tools to regulate the situation, except for making decisions that serve as recommendations.

Based on the above, we consider that the part of the Law of Georgia On Competition referring to the state aid needs to be completed (the exceptions provided by Article 12, Clause 2 of the Law should be necessarily revised). In our opinion, all the cases of granting state aid should require the consent of the National Competition Agency of Georgia except the cases specified by the following subsections of this paragraph: "a" (state aid is granted to individual consumers as a social allowance, provided that the aid does not lead to the discrimination against the producer of the relevant goods/services); "b" (state aid is intended to eliminate the consequences of natural disasters and force-majeure events), and "e" (state aid is granted in an insignificant amount in the form of individual state aid). There may be some exceptions with regard to the state aid in the regulated sector. In particular, based on the amendments and additions made to the Law of Georgia On Competition on September 16, 2020, sectoral regulatory bodies (the National Bank of Georgia; Georgian National Communications Commission; Georgian National Energy and Water Supply Regulatory Commission), were granted the authority to enforce competition legislation (identification and prevention the abuse of a dominant position and the actions restricting competition in the fields subject to their regulation, as well as in the direction of merger control) in the fields subject to their regulation. It is also possible to assign them the function of supervision (consent) on compliance of state aid to be granted in the regulated sector with the competition law.

CONCLUSION

Based on the above, we believe that the competition



framework law should oblige the state aid providing body (a public authority, an authority of an Autonomous Republic and/or a local self-government authority, a non-entrepreneurial (non-commercial) legal entity, a legal entity under public law, an undertaking in which the State holds more than 50% interest or an intermediary undertaking acting on behalf of the State, which directly or indirectly exercises the authority to grant state aid) to promptly provide information on state aid granted by them (state aid granted in accordance with Article 12, Clause 2 of the Law of Georgia on Competition) to the National Competition Agency of Georgia (including state aid granted in the regulated sector).

In addition, an appropriate administrative sanction should be determined for each case when the obligations outlined in the competition framework law (obligation of the state aid provider to agree the procedure

for granting state aid with the National Competition Agency) are not fulfilled. Additionally, in case there is a fact of hindering competition due to the provision of state aid in the period following the granting of this aid, it is necessary to suspend (terminate) such aid. Accordingly, for such cases the legislation should ensure mechanisms for returning the amount granted as the state aid.

In conclusion, we believe that correcting the above-mentioned defects in the law of Georgia on Competition will improve the efficiency of competition law enforcement mechanisms and make entrepreneurial relations in the country more attractive, which ultimately, should contribute to improving business protection and attracting investments to the country through establishing the principles of competition protection and free trade.