State Aid Rules and Effectiveness of State Aid Control in the Electricity Sector under the Energy Community Treaty

Study on behalf of the Energy Community Secretariat

- Final Report -

Brussels and Vienna, 8 April 2011
TABLE OF CONTENTS

INTRODUCTION .......................................................................................................................... 7
I. Legal Framework .................................................................................................................. 7
II. State aid and State aid control in the Energy Community .................................................. 9
III. Scope and Structure of the Study ...................................................................................... 10
   1. Legal and Institutional Framework for State aid (Part I) ............................................... 10
   2. State aid Inventory (Part II) ......................................................................................... 10
   3. Assessment of State aid Measures and Control System (Part III) ............................. 11

PART I: LEGAL AND INSTITUTIONAL FRAMEWORK .......................................................... 13
I. ALBANIA .................................................................................................................................. 13
   1. Legal framework ............................................................................................................. 13
      A. Public International Law ......................................................................................... 13
      B. Competition Law ....................................................................................................... 14
      C. State aid Law .............................................................................................................. 14
         a. Primary legislation ................................................................................................. 14
         b. Secondary legislation .......................................................................................... 15
      D. Energy / Electricity Law .......................................................................................... 15
         a. Primary legislation ................................................................................................. 15
         b. Secondary legislation .......................................................................................... 16
      E. Other legislation related to energy ............................................................................ 16
   2. Institutional Framework .................................................................................................... 17
      A. Authority responsible for competition law enforcement ............................................. 17
      B. Authority responsible for State aid law enforcement .................................................. 17
         a. Institutional design and organisational set-up ......................................................... 17
         b. Level of independence .......................................................................................... 19
         c. Investigative and decision-making powers ............................................................. 19
         d. Procedure of controlling State aid ........................................................................ 20
         e. Remedies against decisions taken by the CC ......................................................... 20
         f. Role of other public authorities ............................................................................. 29
         C. Authority responsible for energy law enforcement .................................................. 25
II. BOSNIA AND HERZEGOVINA ......................................................................................... 24
   1. Legal framework ............................................................................................................. 24
      A. Public International Law ......................................................................................... 24
      B. Competition Law ....................................................................................................... 25
      C. State aid Law .............................................................................................................. 25
      D. Energy / Electricity Law .......................................................................................... 26
         a. Primary legislation ................................................................................................. 26
         b. Secondary legislation .......................................................................................... 27
   2. Institutional framework .................................................................................................... 27
      A. Authority responsible for competition law enforcement ............................................. 27
      B. Authority responsible for State aid law enforcement .................................................. 27
         a. Institutional design and organisational set-up ......................................................... 28
         b. Level of independence .......................................................................................... 28
         c. Investigative and decision-making powers ............................................................. 28
         d. Procedure of controlling State aid ........................................................................ 28
         e. Remedies against decisions taken by the CC ......................................................... 29
         f. Role of other public authorities ............................................................................. 29
         C. Authority responsible for energy law enforcement .................................................. 29
III. CROATIA..............................................................................................................30

1. Legal framework ........................................................................................................30
   A. Public International Law ..............................................................................30
   B. Competition Law .........................................................................................30
      a. Primary legislation ..............................................................................30
      b. Secondary legislation ........................................................................31
   C. State aid Law ...............................................................................................31
      a. Primary legislation ..............................................................................31
      b. Secondary legislation ........................................................................32
   D. Energy / Electricity Law ..............................................................................33
      a. Primary legislation ..............................................................................33
      b. Secondary legislation ........................................................................34

2. Institutional framework ............................................................................................34
   A. Authority responsible for competition law enforcement .........................34
   B. Authority responsible for State aid law enforcement ...............................35
      a. Institutional design and organisational set-up ......................................35
      b. Level of independence .........................................................................36
      c. Investigative and decision-making powers ...........................................36
      d. Procedure of controlling State aid ..........................................................36
      e. Application of EU State aid rules and practice ........................................37
      f. Sanctions regime ......................................................................................38
      g. Remedies against decisions taken by the CCA ........................................38
      h. Role of other public authorities ..............................................................38

IV. FORMER YUGOSLAV REPUBLIC OF MACEDONIA ........................................39

1. Legal framework .................................................................................................39
   A. Public International Law ..............................................................................39
   B. Competition Law .........................................................................................39
      a. Primary legislation ..............................................................................39
      b. Secondary legislation ...........................................................................40
   C. State aid Law ...............................................................................................40
      a. Primary legislation ..............................................................................40
      b. Secondary legislation ...........................................................................41
   D. Energy / Electricity Law ..............................................................................42
      a. Primary legislation ..............................................................................42
      b. Secondary legislation ...........................................................................43
   E. Other legislation ............................................................................................44
      a. Technological Industrial Development Zones ......................................44
      b. Public Enterprises ..................................................................................44

2. Institutional framework ............................................................................................45
   A. Authority responsible for competition law enforcement .........................45
   B. Authority responsible for State aid law enforcement ...............................45
      a. Institutional design and organizational set-up ......................................45
      b. Level of independence .........................................................................45
      c. Investigative and decision-making powers ...........................................46
      d. Procedure of controlling State aid ..........................................................46
      e. Application of EU State aid rules and practice ........................................47
      f. Sanctions regime ......................................................................................48
      g. Remedies against decisions taken by the CPC ........................................49
      h. Role of other public authorities ..............................................................49
V. MONTENEGRO....................................................................................................50

1. Legal framework................................................................................................50
   A. Public International Law ............................................................................50
   B. Competition Law ....................................................................................50
   C. State aid Law ............................................................................................51
      a. Primary legislation ..............................................................................51
      b. Secondary legislation ..........................................................................52
   D. Energy / Electricity Law ......................................................................53
      a. Primary legislation ..............................................................................53
      b. Secondary legislation ..........................................................................53
   E. Other legislation .......................................................................................54

2. Institutional framework..................................................................................54
   A. Authority responsible for competition law enforcement .......................54
   B. Authority responsible for State aid law enforcement .............................54
      a. Institutional design and organizational set-up..................................54
      b. Level of independence .......................................................................55
      c. Investigative and decision-making powers .......................................55
      d. Procedure of controlling State aid .....................................................55
      e. Application of EU State aid rules and practice ..................................55
      f. Sanctions and remedies .....................................................................56
      g. Role of other public authorities .........................................................56

VI. SERBIA.............................................................................................................57

1. Legal framework............................................................................................57
   A. Public International Law ............................................................................57
   B. Competition Law ....................................................................................58
   C. State aid Law ............................................................................................58
      a. Primary legislation ..............................................................................58
      b. Secondary legislation ..........................................................................58
   D. Energy / Electricity Law ......................................................................59

2. Institutional framework..................................................................................59
   A. Authority responsible for competition law enforcement .......................59
   B. Authority responsible for State aid law enforcement .............................59
      a. Institutional design and organizational set-up..................................60
      b. Level of independence .......................................................................60
      c. Investigative and decision-making powers .......................................61
      d. Procedure of controlling State aid .....................................................61
      e. Application of EU State aid rules and practice ..................................62
      f. Sanctions and remedies .....................................................................63
      g. Role of other public authorities .........................................................64

VII. UNMIK (under UN Security Council Resolution 1244) .......................................65

1. Legal framework............................................................................................65
   A. Public International Law Obligations ......................................................65
   B. Competition Law ....................................................................................65
   C. State aid Law ............................................................................................66
   D. Energy / Electricity Law ......................................................................66
   E. Other legislation .......................................................................................67

2. Institutional framework..................................................................................68
   A. Authority responsible for competition law enforcement .......................68
   B. Authority responsible for State aid law enforcement .............................68
a. Institutional design and organisational set-up..........................69
b. Level of independence ..............................................................69
c. Investigative and decision-making powers ...............................69
d. Application of EU State aid rules and practice .........................69
e. Sanctions and remedies.............................................................70
f. Role of other public authorities.................................................70

PART II: STATE AID INVENTORY ..............................................................................71

I. ALBANIA..........................................................71
1. General information .................................................................71
2. State aid inventory .....................................................................71
   A. Decision No. 25 of 2 May 2008 .............................................71
   B. Decision No. 27 of 18 August 2008 ........................................72
   C. Decision No. 19 of 1 November 2007 .....................................72
   D. Decision No. 17 of 16 July 2007 ..............................................73
   E. Decision No. 660 of 12 September 2007 .................................73
   F. Other support measures .......................................................74

II. BOSNIA AND HERZEGOVINA ..........................................................78
1. General Information .................................................................78
2. Inventory of National State aid Measures ..................................78
   A. Foreign Investors Support Fund ............................................78
   B. Loans provided by the Investment-Development Bank of RS ....78
   C. Loans provided by the Development Bank of FBiH .................79
   D. Other support measures .......................................................79

III. CROATIA..........................................................81
1. General information .................................................................81
2. State aid inventory .....................................................................83
   A. Decision of 29 July 2008 authorizing certain types of State aid ....83
   B. Decision of 10 June 2010 .......................................................85
   C. Reconstruction and Development Loan Programme ...............86
   D. Agreement on sale of electricity between HEP and TLM-TVP ....87

IV. FORMER YUGOSLAV REPUBLIC OF MACEDONIA .................................88
1. General information .................................................................88
2. State aid inventory .....................................................................88
   A. Decision No. 10-18/12 of 12 February 2007 .........................88
   B. Additional categories of support measures ............................88

V. MONTENEGRO..........................................................91
1. General Information .................................................................91
2. Inventory of National State aid measures ..................................91
   A. Investment and Development Fund of Montenegro ...............91
   B. Fund for Energy Efficiency ....................................................92
   C. State budget .......................................................................92
   D. Other support measures .......................................................92

VI. SERBIA..........................................................96
1. General information .................................................................96
2. State aid inventory .....................................................................96
   A. Loans granted by the Environmental Protection Fund .............96
   B. Guarantees provided to electricity undertakings ........................97
   C. Loans provided to electricity undertakings ..............................98
   D. Repayment of loans by electricity undertakings .....................98
E. Subsidies granted by the Autonomous Province of Vojvodina ................................................. 100
F. Other support measures .............................................................................................................. 100

VII. UNMIK (under UN Security Council Resolution 1244) ....................................................... 102
1. General Information .................................................................................................................. 102
2. State aid inventory ..................................................................................................................... 102
   A. Subsidized assistance for categories of consumers ................................................................. 102
   B. Additional categories of support measures ............................................................................ 103

PART III: EU STATE AID RULES AND ELECTRICITY ................................................................ 106
I. Treaty provisions on State aid .................................................................................................... 106
1. Prohibition under Art. 107(1) TFEU ......................................................................................... 106
   A. Transfer of State resources ..................................................................................................... 106
   B. Economic advantage .............................................................................................................. 107
   C. Selectivity .............................................................................................................................. 107
   D. Effect on competition and trade ........................................................................................... 107
2. Exemptions under Art. 107(3)(c) ............................................................................................... 107
II. State aid enforcement in EU electricity markets ......................................................................... 109
1. Stranded costs ............................................................................................................................ 109
2. Regulation of end-user tariffs .................................................................................................... 113
3. Environmental protection ......................................................................................................... 115
4. Research and development ....................................................................................................... 116
5. Public Service Obligations under Art. 106(2) TFEU ................................................................ 117
III. Assessment of State aid rules and practice in the Energy Community ........................................ 119
1. ALBANIA .................................................................................................................................... 119
2. BOSNIA AND HERZEGOVINA ............................................................................................... 121
3. CROATIA .................................................................................................................................... 122
4. FORMER YUGOSLAV REPUBLIC OF MACEDONIA .............................................................. 122
5. MONTENEGRO ........................................................................................................................ 124
6. SERBIA ....................................................................................................................................... 125
7. UNMIK (under UN Security Council Resolution 1244) ............................................................. 126
IV. Recommendations ..................................................................................................................... 128
INTRODUCTION

I. Legal Framework

The Treaty establishing the Energy Community (the Treaty) was signed in 2005 and entered into force on 1 July 2006 between the European Union (EU) on one side and initially nine Contracting Parties in South East Europe (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Former Yugoslav Republic of Macedonia, Montenegro, Romania, Serbia and UNMIK (under UN Security Council Resolution 1244)) on the other side. The status of Bulgaria and Romania changed from Contracting Party to that of Observer in 2007 upon accession to the EU, leaving seven Contracting Parties. Moldova acceded to the Treaty on 1 May 2010, becoming the eighth full-fledged Contracting Party. Ukraine signed an Accession Protocol in September 2010 and joined the Energy Community as a full-fledged Contracting Party on 1 February 2011. Georgia, Norway and Turkey have the status of Observers. The present Study does not encompass the two countries having joined the Energy Community most recently, nor the above mentioned Observers.

The Treaty essentially aims at extending the EU acquis communautaire in the fields of energy, competition and environmental law to the Contracting Parties. By signing the Treaty, the Contracting Parties committed themselves to implementing the EU’s core legislation on electricity, gas, the environment, competition, renewables and energy efficiency into their domestic legal orders on an ongoing basis in line with the evolution of EU law pursuant to Articles 24 and 25 of the Treaty.

Moreover, the Treaty establishes a set of institutions and procedures to further develop and adapt the acquis communautaire applicable in the Energy Community and to monitor, assist and enforce its implementation. The principal decision-making institution of the Energy Community is the Ministerial Council, composed of one representative from each Contracting Party and two representatives from the EU. The Permanent High Level Group (PHLG) brings together senior officials from each Contracting Party and two representatives from the EU, ensuring continuity of and follow-up to the political meetings of ministers.

The Regulatory Board, composed of regulators from each Contracting Party and the European Commission, advises the Ministerial Council and the PHLG on details of statutory, technical and regulatory rules and makes recommendations in the case of cross-border disputes between regulators.

The Fora, chaired by the European Commission, have the task of advising the Energy Community and bring together all interested stakeholders from the industry, regulators, industry representative groups and consumers. Finally, the day-to-day activities of the Energy Community are administered by the Secretariat, in particular by regular review of each Contracting Party’s fulfilment of its obligations under the Treaty and by initiating Treaty enforcement procedures. The Secretariat is also responsible for making sure that the Energy Community’s budget is correctly spent and accounted for.

At the core of the EU law to be implemented by the Contracting Parties lay the two Directives establishing common rules for the internal markets in electricity and gas: Directives 2003/54/EC and 2003/55/EC, respectively. The full liberalization of the gas and electricity markets is to be concluded by 1 January 2015. In September 2010, the Ministerial Council adopted two recommendations paving the way for the future incorporation of the EU’s “third package” of internal market legislation adopted in 2009.
The directives on electricity and gas are supplemented by further energy-specific legislation such as the Regulations on cross-border trade in electricity and gas (Regulations 1228/2003 and 1775/2005) and the Directives on security of supply in electricity and gas (Directives 2005/89/EC and 2004/67/EC). The transposition of the most recent EU legislation in the fields of renewable energy, energy efficiency and oil is currently under preparation.

Besides the sector-specific law for the energy sector, the Treaty provides for the implementation of certain rules in the area of environment and competition to the extent that they affect the energy sectors (electricity, natural gas and oil) within the territory of the Contracting Parties. With respect to competition, Chapter IV of Title II of the Treaty (The Acquis on Competition) reads as follows:

**Article 18**

1. The following shall be incompatible with the proper functioning of the Treaty, insofar as they may affect trade of Network Energy between the Contracting Parties:

   (a) all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition,

   (b) abuse by one or more undertakings of a dominant position in the market between the Contracting Parties as a whole or in a substantial part thereof;

   (c) any public aid which distorts or threatens to distort competition by favouring certain undertakings or certain energy resources.

2. Any practices contrary to this Art shall be assessed on the basis of criteria arising from the application of the rules of Arts 81, 82 and 87 of the Treaty establishing the European Community (attached in Annex III).

**Article 19**

With regard to public undertakings and undertakings to which special or exclusive rights have been granted, each Contracting Party shall ensure that as from 6 months following the date of entry into force of this Treaty, the principles of the Treaty establishing the European Community, in particular Art 86(1) and (2) thereof (attached in Annex III), are upheld.

Annex III to the Treaty reproduces Arts. 81, 82, 86(1) and 86(2), and 87 of the EC Treaty. Pursuant to the Treaty on the Functioning of the European Union (TFEU), these Articles have been re-numbered, and will hereafter be referred to as, Arts. 101, 102, 106(1) and 106(2), and 107 TFEU, respectively.
II. State aid and State aid control in the Energy Community

Generally speaking, sectors shaped by publicly owned companies and public service obligations are particularly prone to state intervention of various kinds. In the context of the objectives pursued by the Treaty, the rules on State aid are meant to make an important contribution to creating competitive energy markets within the Contracting Parties’ territories by ensuring that certain types of government intervention do not distort competition and trade between Contracting Parties, with the effect that all energy undertakings within the Energy Community can operate on a truly level playing field. Against this background, Art. 18(1)(c) of the Treaty, essentially corresponding to Art. 107(1) TFEU, requires the implementation in each Contracting Party of a prohibition of State aid which distorts or threatens to distort competition and affects the energy trade between the Contracting Parties. This obligation is independent of any commitments made by individual Contracting Parties under the terms of any bilateral Stabilisation and Association Agreements.

When it comes to the scope of this general ban on State aid, it follows from Art. 18(2) of the Treaty that any assessment in individual cases is to be made on the ground of criteria arising from the application of Art. 107 TFEU. More particularly, pursuant to Art. 94 of the Treaty, any “term or other concept used in this Treaty that is derived from European Community law” is to be interpreted “in conformity with the case law of the Court of Justice or the Court of First Instance [now the General Court] of the European Communities [now the European Union].” Moreover, even though there is no provision in the Treaty mirroring Art. 108 TFEU, Art. 6 of the Treaty commits the Contracting Parties to ensure the efficient implementation of their obligations under the Treaty, of which efficient enforcement of the State aid acquis is one aspect. Bearing in mind the differences owed to the lack of a central monitoring institution and notification/authorization procedure within the Energy Community, the ultimate objective of the implementation commitment is still to reach a level of State aid monitoring comparable, in terms of substance and enforcement, with the situation prevailing in the European Union.

Based on information submitted by the Contracting Parties, the Energy Community Secretariat (ECS) regularly monitors the implementation of Arts. 18 and 19 of the Treaty on a Contracting Party-by-Contracting Party basis. In its Spring 2009 report, the ECS expressed its concerns based on the finding that an effective and comprehensive system for ex ante control of State aid had not been established in all Contracting Parties, with Bosnia and Herzegovina, Serbia and UNMIK then having no legislation in place. The efficiency of the systems established by the other Contracting Parties remained to be assessed. Key challenges in monitoring the implementation of the State aid acquis consisted in the lack of data, owed partly to a lack of transparency and publicity, in particular with respect to State aid in the energy sectors. Taking account of these challenges, the Energy Community Work Programme 2008/2009 envisaged the outsourcing of a detailed study in relation to competition in general and State aid in particular, including a workshop. Given the different levels of maturity of the network energy sectors in South East Europe, the focus of the study was limited to electricity. The call for the study was published on the Energy Community’s website, and the project was awarded to a joint bid from Hunton & Williams and Eisenberger & Herzog in December 2009.

III. Scope and Structure of the Study

The study covers State aid and its control in the electricity sectors (generation, transmission, distribution, supply, trade and consumption) in seven of the Contracting Parties to the Treaty. Moldova and Ukraine, the Contracting Parties with the most recent date of accession, were not included in the scope of this study.

1. Legal and Institutional Framework for State aid (Part I)

Part I of the study contains a description of the current legal and institutional framework of each of the seven Contracting Parties for the monitoring of State aid measures granted at national level, including the specific powers and enforcement practice of the relevant national authorities.

This overview covers both primary and secondary legislation (including rules and acts adopted by State aid monitoring authorities and regulatory authorities), as well as ‘hard’ legislation (statutory law, decisions, etc.) and ‘soft’ legislation (such as guidelines and recommendations issued by the competent authorities) in each of the seven Contracting Parties. This information has been summarized in Country Chapters initially drafted on the basis of publicly available information, and subsequently complemented, expanded and verified by representatives of the competent national authorities (national experts) and local counsels with expertise in the area of State aid in each of the seven Contracting Parties.

The local law firms consulted in order to complete the study were:

- GW Legal: UNMIK
- Hoxha, Memi & Hoxha (www.hmh.al): Albania
- Karanović & Nikolić (www.karanovic-nikolic.com): Bosnia & Herzegovina, Former Yugoslav Republic of Macedonia, Montenegro and Serbia
- Zuric i Partneri: Croatia

The purpose of this descriptive first part of the study is to set out the fundamental legal principles and institutional structures under which individual State aid measures in the electricity sector are scrutinized. The overview provides the context in which to read the inventory of State aid measures which follows as Part II of the study, and of the assessment of the efficiency of the State aid monitoring systems in each Contracting Party which follows in Part III of the study.

2. State aid Inventory (Part II)

Part II of the Study provides a comprehensive inventory of State aid measures adopted by the authorities of the seven Contracting Parties considered in the study for the benefit of companies operating in the respective territories in any of the steps of the value chain in the electricity sector, such as generation, transmission, trading and distribution. The bulk of the inventory consists of the most common support measures used in the electricity sector.

The inventory as such is presented for each Contracting Party in the form of a list of specific measures having been adopted by the respective national authorities. As in Part I, the data
required for this inventory was compiled on the basis of a three-step process, beginning with the identification and inclusion of publicly available information. This was supplemented and deepened by means of specific questionnaires sent to the national experts and local counsels (listed above), intended to identify the most common forms of State aid in use in the EU and verify the use of these forms in the Contracting Parties.

3. **Assessment of State aid Measures and Control System (Part III)**

Building on the information presented in Parts I and II of the study, Part III assesses and evaluates the legislative framework relating to State aid in the electricity sector and its practical application in the territory of each of the seven Contracting Parties included in the study. The benchmark for this evaluation is the law and practice of the EU. Accordingly, Part III begins with a brief introduction to State aid law enforcement in the EU, with an emphasis on the practice of the European Commission and the EU Courts in cases related to State aid in the electricity sector.

Subsequently, the legal and institutional framework and the typical aid measures for each Contracting Party are summarized and assessed in light of the EU State aid rules. This analysis is not carried out in detail for each individual support measure but rather from a broader outlook, with emphasis on the most significant and frequent examples of support measures identified and for which sufficient data has become available during the data gathering process performed for the study.

The procedural aspects of State aid enforcement in the Contracting Parties are assessed and compared with the level of enforcement in the EU, on the basis of some or all of the following elements, to the extent that they apply to the electricity sector and to the extent that the necessary information has been made available during the course of this study:

- The existence of appropriate laws, regulations, decisions, guidelines, *et al*, relevant for State aid monitoring on all levels (including international obligations)
- Institutional design and procedure applicable to granting and controlling State aid, organizational set-up, administrative capacity and level of independence of the State aid authority
- Investigative and decision-making powers
- Application and interpretation of fundamental notions and methodologies of EU State aid law and practice by the competent authorities
- Respect of procedural principles either explicitly stated (notification requirement, standstill principle, *ex ante* authorization) or implicitly foreseen in EU law (transparency, publicity, procedural rights of aid recipients and other undertakings)
- Procedural routine/workflow in practice
- Scope of exemptions to the extent applicable in the energy sector and their practical relevance
- Extent to which public undertakings as recipients come within the scope of State aid control
• Recovery of unlawful or non-compliant aid
• Existence, efficiency and practical use of sanctions and appeal procedures
• Role of competition, regulatory and other authorities in State aid enforcement

Based on this overall assessment of the State aid monitoring enforcement practice in the electricity sector, certain recommendations are made as to how each Contracting Party may improve its present system and methodology of State aid monitoring and control.

The study and the recommendations derived therefrom form the basis for a one-day workshop, organized in Vienna on 22 March 2011, for high-level civil servants from domestic institutions in charge of State aid control. The workshop aims at raising awareness of the challenges and difficulties connected to State aid in the energy sectors of the Contracting Parties, and helping them overcome the obstacles to improving the monitoring and control systems.
PART I: LEGAL AND INSTITUTIONAL FRAMEWORK

I. ALBANIA

1. Legal framework

A. Public International Law

The international obligations of Albania in the field of Competition and State aid derive from the Stabilisation and Association Agreement\(^2\) (SAA), the European Partnership Decision\(^3\) (EPD), the Energy Community Treaty\(^4\) (ECT) and the Central European Free Trade Agreement\(^5\) (CEFTA). Art. 71 SAA provides for a general prohibition of State aid (Art. 71 (1) (iii) SAA) and the establishment of an independent authority charged with the control of State aid (Art. 71 (4) SAA).

This authority is also entrusted with providing an annual report on State aid in order to ensure transparency (Art. 71 (5) SAA), and with the maintenance of a comprehensive inventory of State aid schemes (Art. 71 (6) SAA) in use in Albania.

The EPD requires the implementation of legislation on State aid, the updating on an ongoing basis of the inventory of State aid schemes, the further improvement of enforcement in the area of State aid control and the alignment of domestic State aid schemes with EU competition rules.

In parallel, Art. 18 (1) (c) ECT also provides for a general prohibition of State aid\(^6\) and Art. 19 ECT declares Art. 106 (1) and (2) TFEU applicable with regard to public undertakings to which special or exclusive rights have been granted.

---


\(^5\) The Central European Free Trade Agreement 2006, signed on 19 December 2006 in Bucharest, entered into force on 26 July 2007 for five countries: Albania, Montenegro, Former Yugoslav Republic of Macedonia, Moldova, and UNMIK; on 22 August 2007, they were joined by Croatia, on 24 September 2007 by Serbia, and on 22 November 2007 by Bosnia and Herzegovina. Art. 21 CEFTA sets forth obligations in the field of State aid. Art. 21 (1) CEFTA provides for a general prohibition of State aid which essentially reproduces Art. 107 (1) TFEU. Pursuant to Art. 21 (4) CEFTA, the principles developed under Art. 107 TFEU shall be applicable in order to assess State aid. In Art. 21 (7) the transparency principle is laid down by inter alia reporting annually and providing information upon request concerning State aid.

\(^6\) Modelled according to Art. 107 (1) TFEU.
B. Competition Law

Albania’s basic competition law is the Law on Competition Protection (No. 9121 of 28 July 2003: LCP). The LCP entered into force on 1 December 2003 and repealed the previous Law on Competition (No. 8044 of 7 December 1995). The LCP essentially replicates the provisions of the EU competition framework. The LCP defines its scope of application, provides for the prohibition of certain types of agreements, provides for merger control procedures and prohibits abuse of a dominant position. Moreover, the LCP prescribes the legal framework for an independent and efficient competition authority. According to Art 3 (1) LCP the law applies to private and public undertakings. The LCP does not include provisions with regard to State aid.

C. State aid Law

a. Primary legislation

Albania has adopted Law No. 9374 dated 21 April 2005 On State aid (LSA), which entered into force on 1 January 2006. The LSA provides both the substantive principles and the procedure used for the authorization and regulation of State aid measures in Albania and sets up a regulatory authority. This law was amended in 2009 by Law No. 10183, dated 29 October 2009 On some amendments and additions to Law No. 9374, dated 21 April 2005, On State aid. This amendment introduced, inter alia, rules on State aid for risk capital and for environmental protection as well as new provisions on aid for newly established small enterprises.


Art. 4 LSA stipulates a general prohibition of State aid, in principle modelled according to Art. 107 (1) TFEU. The LSA applies to both public and private undertakings (Art. 2 (1) and Art. 3 (2) LSA) without distinction. Additionally, pursuant to Art. 4 (1) LSA, the application of the LSA is not subject to the affectation of trade between the Contracting Parties within the meaning of Art. 18 (1) of the ECT.

10 Energy Community Secretariat, Report on the implementation of the acquis under title II of the treaty establishing the Energy Community, January 2010, at p. 6.
b. Secondary legislation

Art. 14 (2), Art. 15 (5) and Art. 20 (4) LSA provide the basis for the adoption of secondary legislation in the form of regulations by the Council of Ministers. The Regulation On conditions and procedures of granting the regional aid (CMD No. 815 of 28 December 2005), the Regulation On conditions and procedures of granting the aid for rescuing and restructuring (CMD No. 816 of 28 December 2005) and the Regulation On procedures and forms of notification (CMD No. 817 of 28 December 2005) were adopted in 2005. Furthermore, the following procedural regulations and guidelines have been adopted by the State Aid Commission (SAC), aimed at convergence with EU State aid legislation:

- Decision No. 1, dated of 31 May 2006, On organization and functioning of the State aid Commission;
- Decision No. 34, dated 2 April 2010, Guidelines On State aid for research, development and innovation;
- Decision No. 32, dated 15 February 2010, Guidelines On State aid for environmental protection;
- Decision No. 29, dated 8 April 2009, On the establishment of the interest rate for the return of unlawful aid for year 2009;
- Decision No. 30, dated 8 April 2009, On the approval of the State aid map;
- Decision No. 28, dated 25 September 2008, Guidelines On the methodology used for analysing standard costs in granting State aid, specifically for short term export credit insurance;
- Decision No. 26, dated 17 June 2008, Guidelines On State aid in the form of public service compensation;
- Decision No. 23, dated 12 December 2007, Guidelines On approval of guidelines for certain categories of horizontal aid;

D. Energy / Electricity Law

a. Primary legislation

The Law on Power Sector (LPS) (No. 9072 of 22 May 2003) regulates activities in the electrical power sector and defines the rights and duties of the physical and legal persons and state administration involved in this sector (Art. 2 LPS). Art. 25 (1) LPS stipulates that the activities of electricity generation, transmission, distribution and supply of tariff clients, as well as the market organisation and operation of the electricity network constitute public services. The tariff methodology does not generally include subsidies to compensate for public service obligations. Furthermore, these methodologies do not provide any form of price supplement to undertakings within the electricity sector. The LPS prohibits cross-subsidization between the customer categories.
A provision for compensation for public service obligations may be found in Art. 25 (2) LPS. It states that the licensee has no obligation to secure service in areas where the service was not offered on the day the LPS entered into force, unless otherwise required by the Energy Regulatory Entity (ERE). In case ERE provides for such specific extension of service, ERE’s regulations should foresee a fair division of the additional costs of this service between the clients requesting the service and the existing customers. Art. 26 LPS provides that tariffs in the electric energy sector are set by ERE. Art. 27 LPS sets forth the principles to be used by ERE when setting tariffs on the regulated electricity market. For regulated markets in which public service obligations apply, tariffs approved by ERE are fixed tariffs and not a minimum or average price.

Under the LPS, ERE grants licenses for the following activities: generation of electricity, transmission of electricity, distribution of electricity, wholesale supply of electricity to the public, retail supply of electricity to the public, supply of qualified clients with electricity and trading of electricity. Under the LPS, with the exclusion of the Transmission System Operator (TSO), the Distribution System Operator (DSO), the Wholesale Public Supplier (WPS) and the Retail Public Supplier (RPS), any company meeting the legal and technical requirements can apply and, subject to the licensing procedures, obtain the relevant license with ERE. Therefore, with the exclusion of the undertakings mentioned, above, there is no limited amount of licenses granted by ERE with respect to activities in the energy sector. Under the licensing regulation, ERE should decide on the license application within 90 days of the date of the first publication, this decision being published in the Official Gazette.

According to Art. 39 (1) LPS, electric power producers with an installed capacity exceeding 100 MW, are obligated to produce at least 2% of their total electricity output from renewable energy sources. Art. 39 (2) LPS further specifies that this obligation can be met by buying the required amount from other producers. Law 10196 of 10 December 2010, amending the LPS, raised the threshold for production from renewable energy sources to 3% of total production, increased by 0.75% for each year during the period 2010 – 2012.

b. Secondary legislation

Based on the LPS, with Decision No. 338 dated 19 March 2008 On the approval of the Power Market Model, as amended, the Council of Ministers approved the Power Market Model, which sets out the overall structure of the Albanian power market, the participants in the market, the main rules governing relations between the participants and the governing authorities in the sector. Furthermore, with Decision No. 68 dated 23 June 2008, as amended, ERE approved the Power Market Rules (PMR). The PMR define the rules and procedures for the operation and regulation of the market, as well as the commercial relations between the licensees. The PMR encourage efficient power generation and supply, as well as promoting competition in the power sale and purchase markets. The PMR set out requirements for the relationship between monopoly energy operators (TSO, DSO etc.), public operators and other market participants. The rules and procedures for the operation and regulation of the market can be regarded as objective and non-discriminatory.

E. Other legislation related to energy

Albania adopted a Law on Concession (LC) (No. 9663 of 18 December 2006). According to Art. 4 (1) (b) LC, the law applies to the sectors of generation and distribution of electricity. An entity holding a concession will in any case need to apply for an energy license. However this is not valid for the contrary. A license operator does not always need a concession, i.e.
the operator of a thermal plant owning the land where the project is developed, will not necessarily need a public concession, while a hydropower plant always requires both the energy license and the public concession, as it uses water which is a natural public resource.

Previously, the LC provided for several forms of State aid. After the amendment in 2006, the LC now provides for a competitive procedure regarding the selection of the concessionaire. The former law on concession admitted the possibility to grant concessions to selected companies on a non-requested offer basis instead of concessions based on public offers. Furthermore, in some cases public assets and equipment as well as certain tax advantages were granted, not limited in time, not progressively decreased and without the participation of State aid regulatory bodies. Another problem was related to the absence or non-application of sanctions. The amendments of the law replaced these forms with competitive forms of participation for concessions.


2. Institutional Framework

A. Authority responsible for competition law enforcement

According to Art. 18 LCP, the Albanian Competition Authority (ACA) ensures the enforcement of competition law. Its duties and competences are set forth in Art. 24 LCP. The ACA is charged with the supervision of the LCP, which is, however, silent with regard to State aid. Therefore, the ACA is not entrusted with competences in the field of State aid control.

B. Authority responsible for State aid law enforcement

According to the recent structural development of the Ministry of Economy, Trade and Energy (METE), the State aid Department (SAD) has become a section within the Market Mechanism and State aid Department. In practice, this section and the State aid Commission (SAC) are competent in monitoring the existing State aid schemes and in ensuring the implementation of legal provisions on analysis and assessment of new State aid plans. The SAD is now known, under the new structure, as the State aid Sector (SAS).

a. Institutional design and organisational set-up

The SAS, which is subordinated to the Ministry of Economy, Trade and Energy, is the technical-administrative body with the primary task of controlling State aid. The SAS consists of 4 specific civil servants, (three specialists and one sector chief) and the head of the

---

13 Website of the Ministry of Economy, Trade and Energy.
14 Albanian Council of Ministers, Decision No. 45 of 16 January 2008, at p. 3.
Directorate of Market Mechanisms and State aid. Despite the recent structural changes, the sector’s functions are the same: the staff continues to carry out the economic and legal assessment, monitoring and reviewing of State aid plans, either recommending approval or, where necessary, identifying cases of unlawful State aid. Staff members are typically either economists or lawyers by training.

The competences of the SAS are laid down in the LSA. This legislation provides for defined duties and responsibilities for this organization. In light of its subordination to the Ministry of Economy under the LSA, the full legal independence of the SAS is less well established compared to those State aid enforcement bodies in other Contracting Parties which form part of the competition authority.

The SAS performs the related functions of technical and administrative procedures applicable to all law and implementing regulations pursuant to the LSA. The tasks of the SAS are – not exhaustively – listed in Art. 18 LSA:

- Gathering, processing and monitoring data concerning State aid;
- Receiving notifications and preparing the SAC’s decisions;
- Keeping records on State aid;
- Taking procedural decisions, in compliance with the provisions of the LSA;
- Drafting guidelines for approval by the SAC;
- Preparing the Annual Report on State aid;
- Co-operating with competent foreign authorities and other international organizations regarding State aid issues

Under Art. 16 (1) LSA, the SAC is the decision-making body, supported by the SAS. The SAS is a permanent structure while the SAC meets, under the law, whenever it is necessary for decision-taking purposes. The SAC has the power to authorise plans for State aid and to order recovery of unlawfully granted State aid. In practice, the SAC has not to date approved any decision ordering the recovery of unlawful State aid. The SAC is organized as an independent entity whose competences are – exhaustively – set forth in Art. 17 LSA.

The SAS currently comprises of four employees. Pursuant to Art. 16 (2) LSA, the SAC is composed of five members. The chairman of the SAC is the Minister of Economic Affairs. The other members of the SAC are appointed by the Council of Ministers, on proposal of the Ministers of Finance, Economic Affairs and Justice and a representative from Civil Society with a mandate for four years. With regard to their professional skills, the members of the SAC have to be high professionals with experience in the field of economics pursuant to Art. 16 (2) LSA. The amount and source of compensation is defined by the Council of Ministers as stipulated in Art. 16 (4) LSA. Three out of the five members of the SAC are employees of the Albanian ministries. According to Art. 19 LSA, the State aid authorities have to apply the Albanian Code of Administrative Procedures in performing their tasks.

---

15 Albanian Council of Ministers, Decision No. 45 of 16 January 2008, at p. 3.
b. Level of independence

The independence of the State aid administrative structure (essentially, the SAS) in relation to the SAC has been established in 2008.\footnote{Albanian Council of Ministers, Decision No. 45 of 16 January 2008, at p. 3.} As stipulated in Art. 16 (1) LSA, the SAC is operationally independent in carrying out its functions. The fact that members of the SAC are not directly involved in providing State aid, and that the SAC’s competencies are attributed by law ensures the SAC’s functional independence in the field of State aid law enforcement.

The procedures related to reporting and all operational lines of information flow between the SAS and the SAC are clearly defined by the law and its implementing regulations. These procedures are well respected in all cases reviewed, such as analysis and evaluation of existing State aid schemes, as well as the review of new plans up to final decisions by the Commission.

Even though SAS is part of METE, it conducts its technical and administrative functions on the basis of a specific legal framework providing for clearly defined duties and responsibilities. Hence, a degree of formal legal independence is assured.

Nevertheless, there is a line of command between the SAS and other members of the METE. The SAS is part of the administrative structure of the METE, which is also the ministry responsible for energy matters. As a result, at least with regard to energy, doubts may be raised on its substantial independence from the executive power.

The LSA explicitly defines the SAC as an independent body, but does not further define features of such independence. The composition of the SAC by members, who should not be directly involved in providing State aid, as well as the competencies attributed by the law to the structures for the control of State aid (SAC, SAD) may provide for a formal degree of independence.

Under the LSA, members of the SAC are appointed by the Council of Ministers (which also provides for their remuneration) upon proposal of the Minister of Finance, Minister of Economy and Minister of Justice. One member is appointed from civil society. Under the LSA, the SAC is chaired by the Minster of Economy. As the Minister of Economy, Trade and Energy is the minister responsible for energy matters and simultaneously the Chairman of the SAC, doubts as to the SAC’s independence may be raised as regards State aid in the energy sector.

c. Investigative and decision-making powers

In case of alleged unlawfully granted aid, the SAC or the SAS are empowered to demand the submission of information necessary for the assessment of the legality of the aid, pursuant to Art. 25 LSA. Furthermore, by virtue of Art. 26 LSA, the SAC can order the suspension of the alleged unlawful aid, until the SAC renders its decision. According to Art. 27 LSA, the SAC has the power to order recovery of granted aid deemed to be unlawful. The decision of recovery of unlawful aid constitutes an executive title pursuant to Art. 28 (1) LSA.

In general it can be said that decisions of the SAC are based on the Albanian legislation and not directly on the EU legal framework. However, the Albanian legislation on State aid is aimed at harmonizing with the Commission Regulation (EC) No. 800/2008 of 6 August 2008,

d. Procedure of controlling State aid

According to Art. 20 (1) LSA, any potential provider of State aid is under an obligation to notify plans on State aid to the SAS. The Council of Ministers adopted the Regulation on procedures and forms of notification (CMD No. 817 of 28 December 2005) in order to define the notification procedure. The SAC shall render its decision within 60 calendar days, counted from the day of the receipt of a complete notification as laid down in Art. 22 (3) LSA. Based on the LSA, aid is unlawful if it infringes the LSA or if it is contrary to decisions taken by the SAC. The decisions of the SAC are published in the Official Gazette of Albania. Decisions of the SAC are legally binding on the State aid provider.

Each year, providers of State aid are obliged, not later than 31st of March of the following year, to submit to the SAS annual reports on State aid schemes and individual aid granted. On the basis of these submissions, the SAS assesses whether SAC decisions are properly implemented, or whether any infringement has occurred. The SAS may also detect elements of unlawful aid during the review of various draft acts from State aid providers. Neither the SAC nor the SAS conduct market investigations. However, the SAS may by incident (e.g. when giving opinion for a draft legislative act) detect potential State aid. In such cases, the SAS advises the State aid providers to notify the State aid measures.

According to Art. 22 of the Regulation On the procedures and forms of notification, interested parties may inform the SAS of any alleged unlawful aid. Where the SAS determines that information in its possession is insufficient, even after correspondence with interested third parties, it shall transmit the information, with a partial opinion, to the SAC. The SAC shall then issue a decision based on the available information. According to Art. 2 of the Regulation on the procedures and notification forms, “interested parties” are State aid recipients and competing undertakings or associations of undertakings, whose interests may be affected by the granting of aid. The State aid legislation moreover foresees judicial complaints by third parties. Any interested party may inform the SAD of any alleged unlawful State aid in written form.

e. Application of EU State aid rules and practice

**Notification requirement:** Art. 20 (1) LSA sets forth a general notification requirement for any type of State aid. The SAS and SAC themselves are responsible for raising awareness and advocating a strong State aid legal framework, a significant element of which would be the education of other government and public bodies in relation to the notification requirement for granting State aid. However, the official initiatives and resources currently devoted to raising awareness of the State aid legal framework appear to be somewhat underdeveloped.

One exception is the IPA 2008 national programme for Albania supporting the Albanian Competition Authority and State Aid Department. The scope of this programme is to provide technical assistance to bring Albanian legislation in line with the latest legal framework of the EU in the field of competition and State aid, comprising the following elements:
Final Report of 8 April 2011

- Technical assistance for amending, preparing, adopting and improving the legislation according to the upgraded EU legal framework;

- Review of the enforcement procedures and implementing tools to enhance the efficiency of competition and State aid decisions;

- Translation of relevant EU regulations and related interpretative documents;

- Publication of Albanian legislation and informative brochures in competition and State aid fields;

- Organisation of consultations and workshops to introduce the new legal reforms, including training for staff of the State Aid Department and the Albanian Competition Authority.

Furthermore, some assistance has been received from international projects, such as Community Assistance for Reconstruction, Development and Stabilisation (CARDS). The name of the respective projects was Support to competition and State aid and Support to Albanian State aid directorate in assessing State aid scheme.

The aim of this project has been to enhance the awareness and understanding of the purposes and role of State aid legislation. In view of this, the responsible structure (SAS) has advised several legal drafts. The SAS provides consultancy for a better understanding and implementation of State aid rules. In this respect, improvements in the quality of notification, as well as in the number of notified State aid measures have been observed, although further improvements are needed with respect to raising understanding and awareness of the State aid provisions by State aid providers. In general, State aid providers meet their legal obligations as set forth in the LSA. Where problems are encountered, they are normally overcome with the assistance of the State aid administrative structure to State aid providers. Generally speaking, State aid providers report sufficient information necessary for the assessment of State aid cases. In case the level of information is insufficient, the SAC and SAS are empowered to request additional information from the State aid provider.

**Exemptions from notification or authorisation:** Arts. 7 to 15 LSA provide for the conditions under which State aid for certain purposes shall be deemed compatible with the LSA, including *de minimis* aid (Art. 8 LSA), aid for small and medium-sized undertakings (Art. 9 LSA), employment aid (Art. 10 LSA), training aid (Art. 11 LSA), research and development aid (Art. 12 LSA), regional aid (Art. 14 LSA), and aid for undertakings in difficulty (Art. 15 LSA).

**Ex ante authorisation and stand-still principle:** Until an authorising decision by the SAC has been issued, the aid shall not be granted according to Art. 21 LSA. To date, the stand-still obligation has been respected without exception.

**Transparency and publicity:** Pursuant to Art. 32 (1) LSA, providers of State aid are obliged, not later than 31 March of the following year, to submit to the SAS annual reports of State aid schemes and individual aid granted. On the basis of this data, an assessment takes place on whether SAC decisions have been implemented, or the infringement of any law has occurred. Another means of detecting potentially unlawful aid is the review of various draft acts from aid providers. In general, State aid providers meet their obligation to provide an annual report of granted State aid schemes and individual aid granted according to Art. 32 (1)
LSA. The SAS and the SAC address reminders in written form each year to State aid providers who are subject to the reporting obligation. According to Art. 32 (2) LSA, the SAS is obliged to submit annual reports of State aid schemes and granted individual aid to the Council of Ministers by 30 June. The report is prepared and established in cooperation between the SAS and SAC (Arts. 17 (f) and 18 (f) LSA).

Procedural participation rights of undertakings: No such provisions are foreseen in the LSA.

Sanctions regime: Neither the LSA nor any secondary legislation in the field of State aid provide for any sanctions other than the recovery of unlawful aid. If State aid is granted even though there is a decision of the SAC not authorising the measure, the SAC requests the recovery of the aid from the beneficiary. The amount to be recovered shall include interest at an appropriate rate. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary, until the date of its recovery. The SAC or the SAS request all the information necessary in order to assess the alleged unlawful aid according to Art. 25 LSA. The SAC may adopt a decision requiring the provider to suspend any unlawful aid, until the SAC has taken a decision on the compatibility of the aid according to Art. 26 LSA. Under Art. 28 LSA the decision for the recovery of unlawful aid constitutes an Executive Title. Under the Civil Procedure Code (Arts. 510 to 511) an Executive Title is enforced based on an Executive Order issued from the competent court, ordering the bailiff service to execute the Executive Title.

The Civil Procedure Code vests the status of Executive Title to final court decisions and final arbitration awards, as well as to specific private acts in order to enable their immediate execution by the bailiff service. Moreover, the executive title procedure requires the active involvement of the court system, which may create unnecessary encumbrances for the execution of administrative acts, such as the decision of the SAC on the return of unlawful aid. Under the Administrative Procedure Code (Art. 131), the enforcement of obligations contained in administrative acts may be executed directly by the administration, without requiring the intervention of the court system, as long as the enforcement is made pursuant to legal requirements. So far, no case has been brought before the court, and this provision has not yet been implemented.

Remedies against decisions taken by the SAC: Pursuant to Art. 30 (1) LSA, a complaint against Commission decisions can be made to the Court of Tirana within 30 days from the receipt of the decision. However, under Art. 30 (2) LSA, complaints of this type do not have suspensory effect as regards the granting of the aid. Once the complaint is filed with the court it becomes a judicial litigation matter, outside the jurisdiction and powers of administrative structures. The procedure for the hearing of complaints is governed by the legal and procedural rules provided by the relevant civil legislation. To date, no decision of the SAC has been appealed before the Court of Tirana. These provisions, however, seem not to be consistent with the nature of the Executive Title as provided by the Civil Procedure Code, which normally is a final act allowing immediate execution, as well as an overlay and potential conflict with special procedures for opposition to the Execution of the Title.17

17 For the first case the procedure for the appeal against administrative acts is envisaged in Arts. 324 and ss. of the Civil Procedure Code. For the case of opposition to the executing procedures, the applicable procedure is envisaged in Art. 609 and ss. of the Civil Procedure Code.
Role of other public authorities with regard to State aid Control: Art. 4 LPS sets up the Energy Regulatory Entity (ERE). According to Art. 8 (2) (h) LPS, the ERE is responsible for the promotion of competition in the electricity sector. However, the ERE is not part of the State aid monitoring structures. The Competition Authority is not involved in State aid regulation in Albania.
II. BOSNIA AND HERZEGOVINA

1. Legal framework

A. Public International Law

The international obligations of Bosnia and Herzegovina (BiH) in the field of competition and State aid derive from the Interim Agreement on Trade and Trade-Related Matters \(^{18}\) (IA) in conjunction with Art. 10 EU Regulation No. 594/2008, the European Partnership Decision \(^{19}\) (EPD), the Energy Community Treaty \(^{20}\) (ECT) and the Central European Free Trade Agreement \(^{21}\) (CEFTA).

The Stabilisation and Association Agreement \(^{22}\) (SAA) is not yet ratified by all member States and therefore has not entered into force. \(^{23}\) Art. 36 IA enshrines a general prohibition of State aid (Art. 36 (1) (c) IA), as well as the establishment of an independent authority possessing the power to ensure compliance with obligations (Art. 36 (3) IA) under State aid law, to provide an annual report on State aid in order to ensure transparency (Art. 36 (5) IA), and to maintain a comprehensive inventory of State aid schemes in use in BiH (Art. 36 (6) IA).

In parallel, the EPD requires the implementation of legislation on State aid, the ongoing maintenance of an up-to-date inventory of State aid schemes, the further improvement of the enforcement record in the area of State aid control and the alignment of State aid schemes with the EU competition rules. In addition, Art. 18 (1) (c) ECT also requires a general prohibition of State aid \(^{24}\) and Art. 19 ECT declares Art. 106 (1) and (2) TFEU applicable with regard to public undertakings to which special or exclusive rights have been granted.

---


\(^{19}\) EU Council Decision on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2006/55/EC, OJ L 80/1 of 18 February 2008.


\(^{21}\) The Central European Free Trade Agreement 2006, signed on 19 December 2006 in Bucharest, entered into force on 26 July 2007 for five countries: Albania, Montenegro, Former Yugoslav Republic of Macedonia, Moldova, and UNMIK; on 22 August 2007, they were joined by Croatia, on 24 September 2007 by Serbia, and on 22 November 2007 by Bosnia and Herzegovina. Art. 21 CEFTA sets forth obligations in the field of State aid. Art. 21 (1) CEFTA provides for a general prohibition of State aid which essentially reproduces Art. 107 (1) TFEU. Pursuant to Art. 21 (4) CEFTA, the principles developed under Art. 107 TFEU shall be applicable in order to assess State aid. In Art. 21 (7) the transparency principle is laid down by inter alia reporting annually and providing information upon request concerning State aid.

\(^{22}\) Stabilisation and Association Agreement between the European Communities and their Member States and Bosnia and Herzegovina, signed on 16 June 2008, which reproduces Art. 36 IA in its Art. 71.


\(^{24}\) Modelled according to Art. 107 (1) TFEU.
B. Competition Law

BiH has adopted the federal Act on Competition (AC) (Official Gazette of BiH, No. 48/05), which entered into force on 27 July 2005. On 24 September 2007, the AC was amended, shortening the timeframe for the rendering of decisions from six to three months. On 1 October 2010, the AC was amended again, inter alia adding to the definition of a dominant position on a relevant market and detailing the procedure for notification of intended concentrations. The AC applies to both private and public undertakings pursuant to Art. 2 AC. Art. 20 AC establishes the Council of Competition (CC). The CC has adopted a comprehensive framework of secondary legislation in the area of competition law. The secondary legislation mainly refers to the procedural rules before the CC, leniency policy, relevant market determination, group exemptions, etc. However, this secondary legislation is silent with regard to State aid as there has been no State aid legislation adopted so far.

C. State aid Law

Adequate State aid legislation has yet to be adopted. The State aid Law for the territory of BiH was planned to be adopted by the Parliamentary Assembly of BiH by 1 July 2010, but the parliament failed to adopt the said law as some members of parliament believe that this issue should be regulated on the entity level but not on the level of BiH. BiH was criticised and has been urged by the EU to adopt relevant legislation on State aid.

On 21 September 2010, the Energy Community Secretariat initiated a dispute settlement procedure against BiH pursuant to Articles 6 and 16 of the Rules of Procedure for Dispute Settlement. The Energy Community Secretariat held that BiH failed to fulfil its obligations under the Energy Community Treaty by not adopting legislation prohibiting State aid and enforcing that prohibition.

The failure to pass the State aid Law in July 2010 is believed to be due to the lack of an agreement between representatives of the Republic of Srpska and the Federation of Bosnia and Herzegovina. The draft law was renamed the State aid System Law, whereby the entities, Republic of Srpska and Federation of Bosnia and Herzegovina, will have competences over State aid while the State aid Council of Bosnia and Herzegovina will have a coordinating role. The draft appears to prescribe that State aid grantors will be: Bosnia and Herzegovina, the entities (both the Federation of Bosnia and Herzegovina and the Republic of Srpska), Brcko District of Bosnia and Herzegovina, cantons and municipalities, as well as other legal entities where the public ownership is predominant.

The role of the State aid Council, once it is established, would be to (i) approve the State aid; (ii) impose return of State aid granted contrary to the law; (iii) coordinate the establishment of the comprehensive State aid inventory and (iv) prepare the annual report on State aid.

25 See Act on Amendments to the Act on Competition.
28 According to the Minister Zirojevic.
29 See http://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Dispute_Settlement/01_10
In the Republic of Srpska in 2009, the Parliament adopted a State aid Law only for the territory of the Republic of Srpska, but there have been remarks that the law is not in accordance with the EU standards. Although the law is technically in force, there have been no practical steps as to implementation, as there has been neither an adoption of secondary legislation nor a formation of the regulatory body. At the moment there are no publicly known plans for further steps.

D. Energy / Electricity Law

a. Primary legislation

BiH features a complex political structure. It is divided into two entities, the Federation of BiH (FBiH) and the Republic of Srpska (RS). The legal framework for the electric power sector in BiH is defined by (i) competences at BiH level, mainly relating to rules on the transmission and foreign trade of electricity, and providing the general legal framework for the sector’s operation and (ii) competences at entity level, containing detailed provisions on the sector’s operation and principally regulating the production, distribution, supply and trade of electricity.

BiH enacted the Law on Transmission of Electric Power, Regulator and System Operator of Bosnia and Herzegovina (Official Gazette, No. 07/02), which entered into force on 18 April 2002 and has been amended two times, in 2003\(^{30}\) and 2009\(^{31}\). Moreover, BiH adopted the Law Establishing an Independent System Operator for the Transmission System of Bosnia and Herzegovina called ISO Law (Official Gazette, No. 35/04), which entered into force on 6 August 2004. In addition, the Law Establishing the Company for the Transmission of Electric Power in Bosnia and Herzegovina called TRANSCO Law (Official Gazette, No. 35/04) entered into force on 6 August 2004 and amended in September 2009\(^{32}\).

FBiH adopted the Electric Power Law (Official Gazette, No. 41/02: EPL), which was amended in June 2005\(^{33}\) and September 2009.\(^{34}\) Additionally, a Law on Application of Tariff System was adopted.

RS adopted the Law on Energy, applicable from 1 September 2009, whereby one regulatory body was created for the whole energy sector including electric power, gas and oil. Previously, the RS had adopted an Electric Power Law (Official Gazette, No. 66/02), which entered into force on 31 October 2002. According to Art. 105 of this law, companies (owned by the public entities) active in the distribution of electricity may not be subject to bankruptcy proceedings.


\(^{31}\) Law on Amendments to the Law Establishing an Independent System Operator for the Transmission System of Bosnia and Herzegovina (Official Gazette, No. 76/09) entered entirely into force on 1 January 2010.

\(^{32}\) Law on Amendments to the Law Establishing the Company for the Transmission of Electric Power in Bosnia and Herzegovina (Official Gazette, No. 76/09) entered into force on 29 September 2009.

\(^{33}\) Law on Modifications and Amendments to the Law on Electricity (Official Gazette, No. 38/05) entered into force on 23 June 2005.

\(^{34}\) Law on Amendments to the Law on Electricity (Official Gazette, No. 61/09) entered into force entirely on 1 January 2010.
b. Secondary legislation

Secondary legislation relating to the electricity market includes:

- Decision on Methodology for Determination of Prices for Electricity Produced from Renewable Resources in the facilities of up to 5MW in RS (Official Gazette, No. 71/04);
- Rule on Licence Granting Procedure in FBiH (Official Gazette, No. 18/05);
- Rule on Tariff Procedure in BiH (Official Gazette, No. 44/05);
- Rule on Tariff Methodology and Tariff Procedure in FBiH (Official Gazette, Nos. 45/05 and 77/10);
- Rule on Tariff Methodology and Tariff Procedure in RS (Official Gazette, No. 61/05);
- Rule on Qualified Buyers Status in FBiH (Official Gazette, No. 53/06);
- Rule on Qualified Buyers Status in RS (Official Gazette, Nos. 88/06 and 29/10);
- Decision on General Conditions for Distribution and Supply of Electric Power in RS (Official Gazette, Nos. 85/08 and 79/10);
- Regulation on Use of Renewable Resources and Cogeneration in FBiH (Official Gazette, No. 36/10);
- Rule on Licence Granting Procedure in RS (Official Gazette, No. 39/10).

2. Institutional framework

A. Authority responsible for competition law enforcement

The Council of Competition (CC) is charged with the enforcement of the Competition Law of BiH. In contrast with the institutional framework for the energy sector, the competition law regime has been unified for the entire country, and the CC is the only institution in BiH that deals with competition issues.

B. Authority responsible for State aid law enforcement

The establishment of an operationally independent State aid authority remains pending. The CC “assumes essential responsibility and mandate” in the area of State aid control according to its website. But, as explained below, once the new law is adopted it is possible that the new public authority named State aid Council will be responsible for State aid law enforcement in BiH.

---

35 Official website of the CC is www.bihkonk.gov.ba
In RS, the authority legally responsible for State aid enforcement is the RS Commission for Control of State aid to Commercial Entities, pursuant to the State aid Law of 2009. However, this Commission has not yet been set up. It is unclear whether this RS Commission will remain in existence once the BiH State aid law is enacted.

a. **Institutional design and organisational set-up**

It remains unclear which body will be the authority responsible for State aid law enforcement in BiH once the new law is adopted. The draft law that was on the agenda of the Parliament granted competence over State aid to the CC, but the draft did not pass the parliamentary stage due to the issue of control over State aid regulation (whether it will be controlled by the CC or another administrative department established by the entities). The options discussed include the competence of the CC and the formation of a State aid Council of BiH. The latter proposal foresaw that the Council consists of seven members, nominated by the BiH Council of Ministers, entity governments and one representative of the Brcko District of BiH.

In the RS, the law prescribes that the Commission for Control of State aid to commercial entities will be controlling the aid as well as grantors of the State aid, but such Commission has not been appointed although the deadline for its appointment was March 2010. The CC consists of six members who are appointed for a six-year-term pursuant to Art. 22 (1) CA. Art. 22 (2) CA stipulates the professional skills required for members of the CC, whereas Art. 22 (3) and (4) CA provides for the appointment procedure of the members. The CC currently disposes of 26 experts. The RS State aid Law prescribes that the Government will appoint the Commission for State aid Control consisting of six members, five of which will be recruited from different ministerial departments (finance, industry, trade, economical relations and administration) and one expert member (proposed by the Ministry of Finance). However, this Commission has not been formed yet.

b. **Level of independence**

According to Art. 21 (1) AC, the CC is an independent entity. In RS, the Commission for State aid Control will be formed as inter-sectorial governmental body appointed by the RS Government.

c. **Investigative and decision-making powers**

The CC may initiate proceedings if there is suspicion that there has been serious violation of fair competition. In RS, the not yet formed Commission for State aid Control would be empowered to report to the Government if State aid is being granted without the Commission’s approval and propose either to suspend the aid or order the return of the aid.

d. **Procedure of controlling State aid**

Such procedures are not yet in place, pending adoption of the State aid Law. Due to ongoing consultations concerning the Law, there is neither a draft for publication nor adequately precise information concerning the procedure available. In RS, each State aid grantor must ask the Commission for the approval of the proposed State aid.

---

e. Remedies against decisions taken by the CC

Decisions of the CC can be brought before the Court of BiH as an administrative dispute according to Art. 46 CA.

f. Role of other public authorities

It is unknown what, if any, role other authorities play in the field of State aid.

C. Authority responsible for energy law enforcement

Due to the political structure of BiH, there are three electricity regulatory authorities: the State Electricity Regulatory Commission of BiH (SERC\textsuperscript{39}), the Regulatory Commission for Electricity in the Federation of BiH (FERK\textsuperscript{40}) and the Regulatory Commission for Energy of the Republic of Srpska (RCERS\textsuperscript{41}). All authorities adopt secondary legislation including rules on electricity tariffs, based on their respective competences. SERC has jurisdiction over transmission of electricity, transmission system operations and international trade in electricity, as well as generation, distribution and supply of electricity in the Brčko District of BiH (an administrative unit with special status). FERK and RCERS are competent to regulate generation, distribution and supply of electricity within their respective entities.

\textsuperscript{39} Website of SERC: www.derk.ba

\textsuperscript{40} Website of RCEFBIH: www.ferk.ba

\textsuperscript{41} Website of RCERS: www.reers.ba
III. CROATIA

1. Legal framework

A. Public International Law

The international obligations of Croatia in the field of competition and State aid derive from the Stabilisation and Association Agreement\(^{42}\) (SAA), the European Partnership Decision 2008\(^{43}\) (EPD), the Energy Community Treaty\(^{44}\) (ECT) and the Central European Free Trade Agreement\(^{45}\) (CEFTA). The SAA imposes a general prohibition of State aid (Art. 70 (1) (iii) SAA) and establishes an independent authority, charged with the control of State aid, possessing the power to ensure compliance with obligations (Art. 71 (4) SAA) under State aid law, to provide an annual report on State aid in order to ensure transparency (Art. 70 (5) SAA) and to maintain a comprehensive inventory of State aid schemes (Art. 70 (6) SAA) in use in Croatia.

In parallel, the EPD stipulates the implementation of legislation on State aid, the ongoing maintenance of an up-to-date inventory of State aid schemes, the further improvement of enforcement record in the area of State aid control and the alignment of State aid schemes with the EU competition rules. In addition, Art. 18 (1) (c) ECT also requires a general prohibition of State aid\(^{46}\) and Art. 19 ECT declares Art. 106 (1) and (2) TFEU applicable with regard to public undertakings to which special or exclusive rights have been granted.

B. Competition Law

a. Primary legislation

The competition law currently in place is the Competition Act (CA) (Official Gazette, No. 79/09), which became applicable on 1 October 2010 and is considered to be in line with the acquis.\(^{47}\) As set forth in Art. 3 CA, the provisions of the CA also apply to both private and public undertakings, including legal and natural persons entrusted with the performance of

\(^{42}\) Stabilisation and Association Agreement between the European Communities and their Member States and the Republic of Croatia, signed on 29 October 2001 and entered into force on 1 February 2005.


\(^{44}\) Treaty establishing the Energy Community between the European Community the Republic of Albania, the Republic of Bulgaria, Bosnia and Herzegovina, the Republic of Croatia, the Former Yugoslav Republic of Macedonia, the Republic of Montenegro, Romania, the Republic of Serbia, and The United Nations Interim Administration Mission in UNMIK pursuant to the United Nations Security Council Resolution 1244, signed on 25 October 2005, entered into force on 1 July 2006.

\(^{45}\) The Central European Free Trade Agreement 2006, signed on 19 December 2006 in Bucharest, entered into force on 26 July 2007 for five countries: Albania, Montenegro, Former Yugoslav Republic of Macedonia, Moldova, and UNMIK; on 22 August 2007, they were joined by Croatia, on 24 September 2007 by Serbia, and on 22 November 2007 by Bosnia and Herzegovina. Art. 21 CEFTA sets forth obligations in the field of State aid. Art. 21 (1) CEFTA provides for a general prohibition of State aid which essentially reproduces Art. 107 (1) TFEU. Pursuant to Art. 21 (4) CEFTA, the principles developed under Art. 107 TFEU shall be applicable in order to assess State aid. In Art. 21 (7) the transparency principle is laid down by inter alia reporting annually and providing information upon request concerning State aid.

\(^{46}\) Modelled according to Art. 107 (1) TFEU.

services of general economic interest or exclusive rights. The Croatian Competition Agency (CCA) is set up under Art. 26 CA.

b. Secondary legislation

The Competition Council (CC), which is the managing body of the CCA, adopted the Statute of the Croatian Competition Agency (SCCA) on 4 December 2003, approved by the Croatian Parliament on 30 January 2004 (Official Gazette, No. 15/04). The Statute was amended on 13 July 2006 and the amendments were approved by the Croatian Parliament (Official Gazette, No. 138/06). Pursuant to Art. 2 SCCA, the Statute shall regulate the internal organisation and operational framework of the Agency as well as other relevant issues, particularly its enforcement activities, management, professional secrecy, publicity and financing. Other secondary legislation concerning competition does not provide for rules concerning State aid.

C. State aid Law

a. Primary legislation

The Croatian State Aid Act (Official Gazette, No. 47/03 and No. 140/05; CSAA) entered into force in 2003. According to Art. 2 (2) CSAA, the CSAA applies to legal and natural persons who perform an economic activity, thus to both private and public undertakings. Art. 3 (1) CSAA contains a general definition of what is considered to be State aid in the sense of the CSAA: any actual and potential State expenditure or reduced State income that distorts or threatens to distort competition by giving the beneficiary an advantage on the market, regardless of the form of such aid, in so far as it affects the realization of the international commitments undertaken by the Republic of Croatia.

Art. 3 CSAA further provides for two different categories of State aid: (i) Individual State aid, which is State aid granted individually, not based on a State aid program, and State aid granted on the program basis if additional authorisation is required; and (ii) State aid Program, defined as an action by which State aid is granted according to a project, to a category of beneficiaries that are not predetermined individually, as well as action by which State aid is granted regardless of a special project, to one or more beneficiaries for an undetermined period of time and/or in an undetermined amount.

Art. 4 (1) CSAA sets forth a general prohibition of State aid which distorts or threatens to distort competition and could affect trade between the Republic of Croatia and the European Union. However, Art. 4 (2) CSAA provides for an exception from this general prohibition if State aid is granted to make good the damage caused by natural disasters, exceptional circumstances or occurrences of war. Nevertheless, prior authorisation of such State aid is required.

Further exceptions are listed in Art. 4 (3) CSAA: a) State aid to promote the economic development of areas where the standard of living is extraordinary low or where there is serious underemployment; b) State aid to promote culture and heritage conservation; c) State aid to promote the execution of important international projects or to remedy a serious disturbance in the economy; d) State aid to facilitate the development of certain economic activities or of certain economic areas; e) State aid for legal and natural persons which are entrusted pursuant to separate laws with the operation of services of general economic interest or which are granted an exclusive right to undertake certain activities, if without such
aid they would be unable to perform activities entrusted to them, provided that State aid represents only reimbursement for the performance of those activities.

However, the listed categories of State aid may be considered compatible with the CSAA only if previously authorised and if they do not affect the realization of the international commitments undertaken by the Republic of Croatia.

b. Secondary legislation

On the basis of the CSAA, the Regulation on State aid (Official Gazette, No. 50/06. RSA) was adopted. According to Art. 1 RSA, the RSA sets out the assessment criteria, the assessment procedure and the key elements on the assessment of compatibility of State aid with the provisions of the CSAA. Art. 8 RSA lists four conditions, all of which must cumulatively be met in order for a measure to be qualified as State aid:

- The measure represents an actual or potential expenditure of, or actual or potential reduced income for the Republic of Croatia, local or regional self-government units, or other legal persons in charge of granting or managing State aid according to the CSSA;
- The measure is selective in its nature, i.e. it confers an advantage on certain beneficiaries or a certain group of beneficiaries;
- The measure distorts or has the potential to distort competition;
- The measure affects trade between the Republic of Croatia and the EU.

Furthermore, pursuant to Art. 70 SAA, Croatia has adopted Rules on State aid (Official Gazette, Nos. 121/06, 45/07, 13/08, 12/09 and 31/10), containing a list of various EU legislation on State aid, based on which the CCA makes its assessment of compatibility of State aid with the provisions of the CSAA, as provided by Art. 2 RSA. However, the Rules on State aid do not contain criteria under which the State aid measures can be considered compatible with the law, but only the list of EU legislation on State aid applicable in making a comparability assessment.

Apart from this general list, Croatia has also adopted a number of particular EU rules on State aid by publishing them in full text, such as rules on State aid for environmental protection (Official Gazette, Nos. 98/07 and 154/08); rules on de minimis aid (Official Gazette, No. 45/07); rules on State aid for rescuing and restructuring of firms in difficulty (Official Gazette, No. 20/07); and rules on State aid for research and development and innovation (Official Gazette, No. 84/07).

The Ordinance on the Form and Content of the Notification and the Method of Data collection and Keeping the State aid Register (Official Gazette, No. 11/05: OFC) stipulates the form and content of notifications, including in Annex I a Standard State aid Notification Form. Additionally, the ordinance provides for rules regarding the annual reports on State aid required to be published by the CCA under Art. 20 CSAA.
Croatia adopted the following new secondary State aid legislation in 2008:

- Rules on State aid in the Form of Guarantees (Official Gazette, Nos. 13/08 and 39/09);
- State aid Rules for Small- and Medium-Sized Enterprises; Public Service Compensation and Short-Term Export Credit Insurance (Official Gazette, No. 39/08);
- Rules on the Application of State aid Rules to Measures Relating to Direct Business Taxation, Postal services and cinematographic and other audiovisual works (Official Gazette, No. 46/08);
- Rules on Regional aid and aid in the form of Financial Transfers to Public Undertakings (Official Gazette, No. 58/08);
- State aid Rules on aid for Employment, Professional Development and Training (Official Gazette, No. 68/08);
- State aid Rules to promote Risk Capital Investments in Small- and Medium-Sized Enterprises (Official Gazette, No. 91/08);
- Rules on State aid Elements in Sales of Land and Buildings by Public Authorities (Official Gazette, No. 106/08);
- Rules on Setting the Reference and Discount Rates (Official Gazette, No. 114/08);
- Rules on State aid for the Steel sector (Official Gazette, No. 134/08);
- Rules on State aid linked to Stranded Costs for Reimbursement of Expenses due to the Liberalisation of the Electric Energy Market (Official Gazette, No. 150/08);
- Rules on State aid in the Shipbuilding sector (Official Gazette, No. 154/08).

Furthermore, Croatia adopted General Block Exemption Rules for State aid (Official Gazette, No. 37/09), Temporary Framework Rules for State aid measures to support access to finance in the current financial and economic crisis (Official Gazette, No. 56/09), Rules on State aid in the Transport sector (Official Gazette, Nos. 141/08 and 31/10) and State aid Rules to Public Service Broadcasting (Official Gazette, Nos. 68/08 and 31/10).

D. Energy / Electricity Law

a. Primary legislation

The Energy Act (Official Gazette, No. 68/01: EA) entered into force on 1 January 2002. The EA was amended in 2004 and 2007. The EA regulates measures to ensure a secure and reliable energy supply, efficient power generation and its use, and enforcement of acts on the basis of which the energy policy and energy strategy will be designed. The EA also regulates

---

49 Act on Amendments to the Energy Act (Official Gazette 177/04).
50 Act on Amendments to the Energy Act (Official Gazette 76/07).
the carrying out of energy activities based on market principles or pursuant to public service obligations, and other key issues relevant for the energy sector. In 2004, the Act on the Regulation of Energy Activities (Official Gazette, No. 177/04: AREA) was adopted and amended in 2007. The AREA regulates the establishment and implementation of the regulation of energy activities and related procedures. Art. 6 AREA provides for the set-up of the Energy Regulatory Agency (HERA). Furthermore, the Energy Sector Development Strategy (Official Gazette, No. 38/02) and Environmental Protection and Energy Efficiency Fund Act (Official Gazette, No. 107/03) were adopted.

Significant changes to the legislative framework were introduced in 2008: the Act on Amendments to the Energy Act (Official Gazette, No. 152/08), and the Amendment to Methodology on providing balancing energy services in the electric power system (Official Gazette, No. 90/08). These laws introduced a formerly non-existent activity within the electricity sector, namely the electricity trade. The EA was further amended in the 4th quarter of 2010, however, these amendments did not affect the State aid legislative regime.

For the purpose of implementation of the third EU legislative package on liberalisation of electricity markets further amendments to the EA, EMA and AREA are planned for the 1st quarter of 2011.

b. Secondary legislation

The Ordinance on Conditions for Carrying Out an Energy Activity (Official Gazette, Nos. 6/03 and 94/05: OCCEA) was adopted, regulating the conditions of technical and financial, as well as professional qualifications to be fulfilled by a legal person in order to obtain a decision approving market activities in the field of energy by the Energy Regulatory Council. It also regulates the form, contents and manner of keeping the register of issued and withdrawn licenses.

2. Institutional framework

A. Authority responsible for competition law enforcement

The CCA is the authority in charge of the enforcement of competition law. The CCA assesses mergers and blocks those which would substantially impede competition. The CCA promotes
competition in the economy of Croatia by identifying restrictions of competition in laws and regulations, advising the Government of Croatia, giving opinions related to competition issues, carrying out market investigations and preparing statistical reports. As of 1 October 2010 the CCA is empowered to impose sanctions on businesses breaching the CA.

B. Authority responsible for State aid law enforcement

According to Art. 5 CSAA, the CCA shall authorise and monitor the implementation of State aid. A detailed catalogue of competences of the CCA is set forth in Art. 6 CSAA. Apart from publishing its decisions and annual reports on State aid, since 2006, the CCA has also published Annual Plans containing its strategies and future planned activities. In the Annual Plan 2010-2011, the CCA announced it will continue its work on the alignment of the existing State aid schemes and other legislative acts on the basis of which State aid has been granted before and after the CSAA entered into force in 2003. It also announced that it will continue to work in partnership with State aid providers to establish an efficient State aid notification system, transparent granting system and effective monitoring of State aid.

The CCA plans to intensify the training activities aimed at its staff and aid providers, particularly at the regional and local level, on the application of the newly established State aid data management system. Finally, as one of the priorities in this period, the CCA recognized the need to bring the structure of State aid in Croatia as close as possible to the relevant structure of State aid in EU member states, since this would eventually promote international competitiveness of the Croatian economy. According to Art. 8 CSAA and Art. 67 CA, the second instance authority for enforcement of the State aid rules is the Administrative Court of the Republic of Croatia, where decisions of the CCA can be challenged in an administrative proceeding.

a. Institutional design and organisational set-up

The Competition Council (CC) is the managing body of the CCA. It consists of 5 members, one of whom is the president of the Council. All of the members are appointed and relieved from duty by the Croatian Parliament on the proposal of the Government of the Republic of Croatia. The Council issues all general and individual decisions in its sessions, with the consent of a majority of at least three votes, whereby no member of the Council may abstain. Three members of the Council constitute a quorum and the president of the Council is obligated to attend the sessions. The expert team and the departments perform administrative and professional activities. The State aid Division (SAD) within the CCA is responsible for State aid matters. In 2009, the CCA consisted of 51 employees, including the members of the Competition Council; 21 of them being lawyers and 18 of them


Art. 27 CA.

Art. 31 CA.

See http://www.aztn.hr/o-nama/33/strucna-sluzba/.

See http://www.aztn.hr/o-nama/33/strucna-sluzba/.
economists.\textsuperscript{64} Since the implementation of the new CA requires the increase of the CCA’s administrative capacity, employment of 6 more people is planned for 2011.\textsuperscript{65}

b. Level of independence

The CCA performs its tasks autonomously and independently.\textsuperscript{66} According to Art. 26 (1) CA and Art. 1 (1) SCCA, the CCA is a legal person with public authority which independently and autonomously performs the activities within its scope and powers regulated by the CA and the CSAA and which only responsible \textit{vis-à-vis} the Croatian Parliament. In order to ensure the independence and impartiality of the members, Art. 28 (4) CA provides that the members of the Council may not be State officials, persons who perform duties in any administrative body of a political party, members of supervisory boards and executive bodies of undertakings, or members in any kind of interest associations, which could lead to conflicts of interest. Furthermore, according to Art. 28 (7), the president and the members of the Council are obligated to behave in a manner to protect the reputation of the Agency and not to challenge its independence and autonomy in decision-making. Finally, Art. 26 (2) CA provides for a general prohibition against any kind of influence regarding the activities of the Competition Council.

c. Investigative and decision-making powers

According to Art. 6 (2) CSAA, the CCA is vested with public powers. Pursuant to Art. 9 (1) CSAA, the CCA possesses the power to request all data and documents it deems necessary for the assessment of the legality of State aid measures. According to Arts. 14 (1) and 15 (3) CSAA, the CCA has the power to recover unlawfully granted State aid or aid used in contravention of the rules. The CCA monitors the implementation of authorised aid \textit{ex officio} according to Art. 15 (1) CSAA. Pursuant to Art. 15 (2) CSAA, the CCA has the power to order remedy within three months in case of established irregularities. Pursuant to Art. 6 (3) CSAA, the CCA has the power to establish expert and advisory bodies to fulfil its functions.

d. Procedure of controlling State aid

Arts. 10 (1) and 11 (1) CSAA require that every legislative proposal including State aid has to be submitted to the CCA for its prior review and binding opinion or authorisation before being sent to the Government or the Parliament. Pursuant to Arts. 10 (4) and 11 (4) CSAA, Ministries or other public authorities may not refer a draft law or other legal document to the Croatian Government without a positive opinion by the CCA. A binding opinion of the CCA is needed when State aid is to be contained in a law, while authorisation is obligatory when State aid is a part of any other kind of legal documents.

The authorising decision of the CCA shall be taken within 90 days from the receipt of a complete notification of proposed State aid according to Art. 13 (1) CSAA. Unless the proposed State aid is in accordance with the CSAA, the CCA shall refuse to grant the

\textsuperscript{64} Energy Community Secretariat, Report on the Implementation of the \textit{aquis} under title II of the Treaty establishing the Energy Community, at p. 12.

\textsuperscript{65} Program of the Government of the Republic of Croatia for takeover and implementation of EU legislation for 2011, p.115.

authorisation. Pursuant to Art. 13 (3) CSAA, the CCA has the power to grant authorisation subject to conditions and time limits.

Once the State aid is authorised, its use is monitored by the CCA ex officio, as well as upon request of State aid beneficiaries or any legal or natural person having a legal interest. If any irregularities are established, the CCA can order the State aid grantor and/or the beneficiary to remedy them within three months. Should they fail to do so, the CCA shall order the recovery of State aid.

e. Application of EU State aid rules and practice

**Notification requirement:** Art. 12 (1) CSAA sets forth a general notification requirement for any type of proposed State aid. The OFC includes a Standard State aid Notification Form as Annex I.

**Exemptions from notification or authorisation:** Croatia has adopted Rules on *de minimis* Aid (Official Gazette, No. 45/07) contained in the Regulation (EC) No. 994/98, which provide for certain categories of aid that shall not be subject to the notification requirements. Furthermore, individual State aid measures granted on the basis of an already authorised State aid Program are exempted from the notification requirements. Nevertheless, in cases where notification is obligatory, according to Art. 14 (2) CSAA, the CCA may in duly justified cases grant an *ex post* authorisation, provided that the State aid in question is in line with the State aid provisions. Again, such an authorisation may be granted subject to conditions and time limits.

**Ex ante authorisation and stand-still principle:** Generally, State aid granted without prior authorisation by the CCA is considered to be unlawful aid pursuant to Art. 14 (1) CSAA. Until the positive decision of the CCA, aid may not be awarded pursuant to Arts. 12 (2) and 13 (6) CSAA, safe for the cases listed above.

**Transparency and publicity:** Art. 20 CSAA requires the CCA to establish an annual report on State aid. Furthermore, Arts. 6 (1) (e) and 17 CSAA require the CCA to maintain a State aid register. The form, content and the means of data acquisition and maintenance of the register is regulated by the CC. Pursuant to Art. 18 CSAA, opinions and decisions of the CCA, as well as decisions of the competent court based on the opinions and decisions of the CCA have to be published in the Official Gazette of Croatia.

**Procedural participation rights of undertakings:** According to Art. 15 (1) CSAA, State aid beneficiaries or any legal or natural person having a legal interest can request the CCA to monitor authorised State aid. Furthermore, in case of established irregularities, the CCA shall not automatically order the recovery of such aid (unless the aid was granted without its obligatory authorisation, in which case the recovery order will follow automatically), but will

---

67 Art. 13 (2) CSAA.
68 Art. 15 (1) CSAA.
69 Art. 15 (2) CSAA.
70 Art. 15 (3) CSAA.
71 Art. 17 CSAA.
allow the beneficiaries to remedy those irregularities within a certain period of time and thus avoid the sanction.\textsuperscript{72}

f. **Sanctions regime**

The CA has established an effective sanctions regime for competition law violations with the CCA possessing the power to directly impose sanctions.\textsuperscript{73} However, the sanctions regime applies only to cases of distortion of competition, i.e. where the infringement of the CA is established (such as prohibited agreements, concentrations, or abuse of a dominant position).

The sanction for infringements of the CSAA, i.e. cases of unlawfully granted State aid or State aid used in contravention of the rules, is the recovery of such State aid together with the statutory default interest accruable from the day on which the State aid became unlawful or used in contravention of the rules.\textsuperscript{74} This sanction will be applied only after the beneficiary failed to remedy the established irregularities within a certain period of time determined by the CCA, which may not be longer than three months.\textsuperscript{75} However, the latter opportunity shall not be given in cases of unlawfully granted aid, i.e. aid granted without the CCA’s authorisation.\textsuperscript{76}

g. **Remedies against decisions taken by the CCA**

As stipulated in Art. 8 CSAA in conjunction with Art. 67 CA, generally, no appeal is allowed against the decisions of the CCA, but they can be challenged in an administrative dispute before the Administrative Court of the Republic of Croatia within 30 days from the receipt of the decision, where the claim shall be decided by a panel of three judges. Art. 69 CA further provides that all actions brought before the Administrative Court of the Republic of Croatia pursuant to the CA are urgent.

h. **Role of other public authorities**

Art. 15 of the Regulation on internal organisation of the Ministry of Finance (Official Gazette, Nos. 70/01, 71/03, 198/03, 114/05, 14/06, 138/06, 127/07, 14/08, 27/08 and 29/09), establishes the Department for State aid and Natural disasters within the Economy Directorate of the Ministry of Finance of the Republic of Croatia. The Department is further divided into two sections, one of which is the State aid Section. The State aid Section is given a wide range of competences by the Regulation: it analyses State aid; participates in drafting legislation on State aid; proposes measures for a more efficient system of authorisation, registration and control of State aid; participates in alignment of the national laws with the EU laws; and co-operates in projects and programs of international institutions.

---

\textsuperscript{72} Art. 15 (2) CA.
\textsuperscript{73} \textit{Idem}.
\textsuperscript{74} Arts. 14 (1) and 15 (3) CA.
\textsuperscript{75} Arts. 15 (2) and (3) CA.
\textsuperscript{76} Art. 14 (1).
IV. FORMER YUGOSLAV REPUBLIC OF MACEDONIA

1. Legal framework

A. Public International Law

The international obligations of the Former Yugoslav Republic of Macedonia in the field of Competition and State aid derive from the Stabilisation and Association Agreement\(^{77}\) (SAA) with its Protocols, the European Partnership Decision 2008\(^{78}\) (EPD), the Energy Community Treaty\(^{79}\) (ECT) and the Central European Free Trade Agreement (CEFTA). Arts. 69 and 70 SAA set forth policies to be implemented in the area of State aid law. In summary, Art. 69 SAA demands the general prohibition of State aid (Art. 69 (1) (iii) SAA), to provide an annual report on State aid in order to ensure transparency (Art. 69 (3) (b) SAA) and the obligation to provide information on State aid upon request by one party (Art. 67 (3) (b) SAA). Moreover, the EPD requires the establishment of an effective \textit{ex ante} control of State aid, the further alignment of legislation with the State aid \textit{acquis}, and the further improvement of enforcement record in the area of State aid control. In addition, Art. 18 (1) (c) ECT provides also a general prohibition of State aid\(^{80}\) (aid that distorts or threatens to distort competition by favouring certain undertakings or certain energy resources) and Art. 19 ECT declares Art. 106 (1) and (2) TFEU applicable with regard to public undertakings to which special or exclusive rights have been granted.

B. Competition Law

a. Primary legislation

The former Law on Protection of Competition (Official Gazette, No. 04/2005) was applicable in the period between 1 January 2005 and 8 November 2010. The new Law on protection of competition (Official Gazette, No. 145/2010: the New LPC) was enacted in November 2010, in order to increase the efficiency of actions by the Commission of Protection of Competition (CPC) and, \textit{inter alia} introduce a leniency policy for cartels. An unofficial English version of the New LPC is available on the website of the CPC.\(^{81}\) According to the New LPC, it applies to both private and public undertakings. The New LPC covers three main areas of potential negative effect to competition: (i) prohibited agreements, (ii) abuse of a dominant market position, and (iii) concentrations of undertakings (merger control). The position of the authorised regulator - the CPC, composed of five members appointed by the national Assembly for a five-year period - is not significantly amended by the new law.


\(^{80}\) Modelled according to Art. 107 (1) TFEU.

Proceedings before the CPC have been the focus of the latest amendments. Namely, the final section of the New LPC is providing EU-compliant solutions with regard to the evidence, misdemeanour and administrative procedures before the CPC. It is important to mention that the CPC is independent in processing and decision-making in view of sanctioning any distortions of competition. These very important sections of the CPC’s scope of work are further regulated within the New LPC, providing more precise solutions and correspondent authorisations. It is expected that such novelties will provide the basis for effective, responsive and just control of competition. A legislative act on further harmonization of national legislation with the *acquis* in the field of competition is planned by the end of 2012 according to the National Programme for Adoption of the Acquis Communautaire 2009.82

b. Secondary legislation

The CPC provides Guidelines to the Law on Protection of Competition.83 The guidelines were published by the CPC in April 2007 and are non-legislative in character. Further, the Government has enacted eight regulations during 2005. These bylaws further regulate proceedings before the CPC, group exceptions of certain kinds of agreements and other features of the protection of competition. The existing secondary legislation in the area of competition does not entail provisions with regard to State aid.84

C. State aid Law

a. Primary legislation

The former Law on State aid (Official Gazette, No. 24/03) was applicable in the period between 1 January 2004 and 8 November 2010. In November 2010, the former legislation was replaced with the new Law on control of State aid (Official Gazette, No. 145/2010: New LSA). As in the former law, the New LSA stipulates that it will apply to each form of provided State aid, which can affect trade within the Former Yugoslav Republic of Macedonia, trade between the Former Yugoslav Republic of Macedonia and the EU countries and trade between the Former Yugoslav Republic of Macedonia and third countries/co-parties to international agreements containing provisions on State aid.

The primary function of the New LSA is to establish efficient control of the provided State aid to all kinds of undertakings, to prevent distortion of the competition on domestic markets and within trade between the Former Yugoslav Republic of Macedonia and third countries and to shift such control on the level of the EU countries, in accordance with the directives and regulations of the EU, as detailed further in the text. The last issue existed already in the previous law and remained unchanged in the new.

The New LSA provides for a broad definition of the potential recipients of State aid. According to the New LSA, an “undertaking” is any kind of business venture, regardless of its organization and management, including the free professions, public enterprises founded for the purpose of conducting activities of public interest and any other legal or natural person, institution or other legal or natural person with public authority or a government body

---

that is engaged in any kind of economic activity, irrespective of whether they are considered entrepreneurs or not.

Moreover, the New LSA introduces novelties in terms of the effectiveness of action by the CPC in the monitoring and control of State aid. The New LSA further specifies the rules for assessment of State aid and improvement of the evaluation procedure. The New LSA establishes a more efficient system of State aid control by: (i) investigations on the existence of illegal State aid, (ii) investigations on the legality of the State aid, and (iii) regulations on the recovery of illegal State aid. The new LSA does not stipulate which EU rules have been implemented into the legal system of the Former Yugoslav Republic of Macedonia. However, the New LSA stipulates that the evaluation of State aid with impact on trade between the Former Yugoslav Republic of Macedonia and the EU shall be made under the criteria arising from the provisions on State aid in the EU. Further harmonization with secondary EU State aid law is also expected, especially with EU regulations such as Regulation 659/1999,85 Regulation 800/200886 (State aid for SMEs) and Regulation 1998/200687 (de minimis aid clauses).

b. Secondary legislation

The Regulation on the Forms and Procedure of Notification to the State aid Commission and for Assessment of State aid (RFP) (Official Gazette, No. 81/03) became applicable on 1 January 2004. The Regulation on Establishing Conditions and Procedure for Granting Regional Aid (Amended: Official Gazette, No. 118/09) and Regulation on Establishing Conditions and Procedure for Granting Aid for Rescue and Restructuring of Firm in Difficulty (Official Gazette, Nos. 81/03 and 83/07) came into force 1 January 2004. Until the beginning of 2010, rescue or restructuring aid has not yet been provided.88 Furthermore, there is secondary legislation on the conditions and procedures for the granting of horizontal aid.

According to the New LSA, all the bylaws will have to be enacted within 6 months from the day of the enactment of the New LSA. This means that the bylaws will have to be enacted prior to 16 May 2011. To date, there are no bylaws enacted pursuant to the New LSA. Furthermore, the new law stipulates that until the new bylaws are enacted the old bylaws will still be in force.

As part of State aid legislation, the Regulation on establishing conditions and procedure for granting horizontal aid (Official Gazette of RM, No. 157/07) was adopted in 2007. Such regulation applies to the field of services of general economic interest. The undertakings that pursue activities of public interest can receive public support to cover all costs incurred, including a reasonable profit in carrying out general service tasks, defined by law or defined by the State aid provider, whilst ensuring that there is no overcompensation liable to distort

86 Commission Regulation (EC) No. 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Arts. 87 and 88 of the Treaty (General block exemption Regulation).
competition. If the enterprise provides other activities than those of general interest, it has to separate the accounts to make sure that a cross-subsidization does not take place.

The following developments are planned for 2011 or 2012:

- New Regulation on conditions and procedure for submission of notification of State aid to the Commission for Protection of Competition and for assessment of State aid;

- Regulation on conditions and procedure for granting State aid of minor importance (de minimis), the first one in the Former Yugoslav Republic of Macedonia;

- Establishment of a credible enforcement record on the control of State aid (entailing an inventory of State aid measures and an annual report on the provision of State aid);

- Methodology for the determination of the level of compensation of undertakings entrusted with providing services of general economic interest (by the end of 2012).

D. Energy / Electricity Law

a. Primary legislation

The Assembly enacted a new Energy Law on 3 February 2011 (published in the Official Gazette No. 16/2011 on 10 February 2011: the New EL). The New EL substitutes the former Law on Energy enacted in 2004. The New EL, as did the old one, constitutes a so-called “umbrella” law covering different areas of energy (electricity, natural gas, crude oil, oil products and fuels, and thermal energy). One of the changes in the New EL is the general rule that all foreign trade companies intending to acquire a licence to perform activities in the energy sector must have a representative office registered in the Former Yugoslav Republic of Macedonia’s Central Register. As an exception, licences to perform regulated energy activities (i.e. those considered as public service activities) will be only issued to the Former Yugoslav Republic of Macedonia’s companies and public enterprises, so that foreign entities contemplating to perform these kinds of activities will have to establish a company in the Former Yugoslav Republic of Macedonia.

Also, while the New EL gives more competencies to the independent regulatory body, the Regulatory Commission for Energy (ERC), it still fails to provide for genuine independence to this institution, due to the fact that all five members of this body will be chosen by the Parliament upon a proposal of the Government. The New EL, which incorporates two EU regulations and twelve EU directives into the national legal system, inter alia introduces new forms of energy trading, allows for more free movement of energy and is intended to serve as a platform for the development of competition in the energy market.

Furthermore, the New EL also prepares the way for the transformation of the price of electricity from a “social price” (i.e. a price affordable for every household) to a “market price” determined by supply and demand. The ERC (the competent body to adopt decisions on prices and tariffs) is gradually implementing this transformation with a number of decisions over the past couple of years, under which the price of electricity has increased. This trend is expected to continue and the president of the ERC, Dimitar Petrov, has announced that a new decision on the price of electricity will be made in April 2011.
The New EL also contains new rules on the conditions for cross-border exchanges of energy, to be further specified through specific rules for the allocation of cross-border transmission capacities that will be adopted by the operator of the electricity transmission system, upon approval by the ERC, and based on the principles of transparency and non-discrimination by system users. Furthermore, the New EL also obliges the operator of a distribution system to adopt, upon approval by the ERC, specific rules for the distribution grid. These rules will, *inter alia*, include the conditions of using the distribution system by third parties on the basis of the transparency and non-discrimination principles.

b. Secondary legislation

According to the New EL, secondary legislation will be enacted within 18 months from the day of the enactment of the Law. Until the new secondary legislation is enacted, the old legislation remains in force. The following explanations are provided on the basis of the old law and the secondary legislation enacted under the provisions of that law.

The secondary legislation pursuant to the old Energy Law is passed by ERC. The ERC’s most important function is issuing, amending and revoking energy licenses and the regulation of the prices and tariff systems for different types of energy. The ERC generation of secondary regulation can be divided in two major groups: (i) regulation of each of the separate energy markets (electricity, gas, oil, thermal energy, renewable energy sources (RES)) and (ii) licensing. The ERC passes various rulebooks, decisions, rules and other instructional acts for each market (as mentioned above), in the following areas: books of regulations, methodologies, conditions for supply, tariff systems, grid codes and market codes.

The other main regulatory task of the ERC concerns licensing. In order to be able to perform energy activities in Macedonia, it is necessary to acquire an energy license issued by the ERC. Energy licenses are issued for a period of three to 35 years, depending on the activity and the period of time for the use of the energy goods (e.g. concession agreement). Energy licenses cannot be transferred to other entities. The ERC has adopted a Rulebook on the Conditions, Method and Procedure on Issuing, Altering, Extending and Withdrawing Energy Activity Licenses. Though the Rulebook stipulates that the procedure for issuance, changes, continuation, suspension or revocation of the licences is public, transparent, objective, non-discriminatory, efficient and economic, there is no special procedure in place to ensure compliance.

There are several decisions of the ERC in the electricity sector with regard to electricity prices, regulating the tariffs and the prices for eligible consumers. Furthermore, the ERC adopted a decision for approval of tariff rates on 14 September 200689 and a new tariff system for electricity was passed in 2010.90

The New EL stipulates that the provision of electricity is a public service obligation. Also according to the New EL, the tariffs and the prices regulated by means of the tariff system are meant to be compensatory for the costs of, and to provide an appropriate return for the capital expended by the providers of public service obligations. Regarding electricity generation, the ERC provides rules for the method of calculation and approval of feed-in tariffs for the sale

---

90 Published in the Official Gazette of RM, No. 13/2010.
of electricity produced from small HPPs and photovoltaic systems for generation. All secondary legislation and decisions passed by the ERC are published on its website.91

E. Other legislation

a. Technological Industrial Development Zones

The Law on Technological Industrial Development Zones of February 2007 as amended (Official Gazette, Nos. 14/07, 103/08, 130/08 and 139/09) provides for a scheme of regional aid. On this basis, State aid may be granted to all foreign investors to invest in technological industrial development zones. Benefits of the Law on Technological Industrial Development Zones only apply to foreign companies whose investment decisions focus on free economic zones in the Former Yugoslav Republic of Macedonia. At this moment, there are no foreign companies active in the electricity sector that are using benefits based on the Law on Technological Industrial Development Zones. An amendment of the Law on Technological Industrial Development Zones is not planned in the near future.

b. Public Enterprises

The Law on Public Enterprises (Official Gazette, Nos. 38/96, 9/97, 6/02, 40/03, 49/06, 22/07, 83/09 and 97/10: LPE) applies to public enterprises that are active in the energy sector. Further, the LPE stipulates that the main focus of public companies is to conduct economic activities of public interest. Art. 2 stipulates that economic activities of public interest are considered separate activities accomplished for the public interest: energy, rail and public transport of passengers, maintenance of road network, air transport, telecommunications and postal traffic system of radio and TV links, pipeline transport of oil and gas, forest management, water, pastures and other types of natural resources, planning and arrangement of space, communal activities, veterinary and sports, as well as other economic activities determined by law.

Energy is an activity of public interest and such activity is carried out by public companies or companies who have been entrusted with conducting the activities of public interest. According to the LPE, financial relations between public establishments granting State aid and undertakings carrying out activities of public interest should be transparent. This is especially applicable to the following examples:

- Settlement of losses from operations;
- The provision of capital;
- Irreversible assistance or loans under favourable conditions;
- Providing financial benefits through the exemption of profit or return of amounts received;
- Cancellation of the normal return of used tools;
- Compensating the financial burden imposed by state authorities.

91 www.erc.org.mk.
Public companies and companies that perform activities of public interest are obliged to keep separate accounts when they (i) perform other activities than activities of public interest only; (ii) have exclusive rights in the performance of activities of public interest; or (iii) receive State aid in any form including assistance, support or compensation in relation with the performance of activities of public interest.

2. Institutional framework

A. Authority responsible for competition law enforcement

The Commission for Protection of Competition (CPC) is set up in Art. 26 of the New LPC. Pursuant to Art. 6 LPC, the CPC is responsible for competition law enforcement. The basic competencies of the CPC are the control of the application of the provisions stipulated in the New LPC, to monitor and analyze the conditions on the market to the extent necessary for the development of free and efficient competition, and to conduct procedures and make decisions according to the provisions of the Law. The president and four members of the CPC are appointed and dismissed for a five-year period by the Assembly with the possibility to be reappointed.

B. Authority responsible for State aid law enforcement

Formerly, the SAC was in charge with monitoring of State aid pursuant to the previous version of Art. 9 LSA. Since 1 June 2006, according to Art. 9 (1) of the former LSA, the CPC is entrusted with the monitoring of State aid. Further, the New LSA defines the basic concepts used in the implementation of the control of State aid and defines compatible aid. Also, it provides the State aid providers with basic obligations for submitting notifications and reports to the CPC. As mentioned before, at the same time, the New LSA regulates the procedure before the CPC for assessment of State aid.

Upon request of the Assembly, the Government of the Republic of Macedonia, other state authorities or undertakings, the CPC provides opinions upon draft laws and other acts regulating economic activities which may influence competition in the market. Ex officio, the CPC provides expert opinions on issues in the area of competition policy, the protection of competition in the market and the granting of State aid.

a. Institutional design and organizational set-up

The CPC consists of a president and four members pursuant to Art. 25 (1) of the former LPC and its composition has not been amended with the New LPC or the New LSA. The president and the members are supported by Qualified Personnel. According to the organizational chart92 of the CPC, such Qualified Personnel compromises the Department of State aid Control, counting six experts working particularly in the area of State aid.

b. Level of independence

The CPC is an independent legal entity pursuant to provisions of the New LPC. The CPC is established as a state institution that is independent in its work and its decision-making in accordance with the LPC. However, the CPC is funded directly by the central budget. The financial resources allocated to the CPC remain limited, thus arguably hindering its capacity.

---

for effective regulation. Furthermore, the members of the CPC are elected by the state’s Assembly and the political influence on the decision-making process cannot be excluded.

c. **Investigative and decision-making powers**

The CPC employs 23 civil servants. The Department of State aid control currently employs six persons with university degrees (four economists and two lawyers). In order to monitor and control the approved State aid and the aid granted without approval of the CPC (i.e. those measures contrary to the provisions of the law), there is a need for additional new jobs. For this purpose, it is planned to strengthen the administrative capacity in the field of State aid with one new employment in the Department of State aid control in the CPC by the end of 2010. Moreover, administrative capacity is planned to continually increase with one new employment in 2011 and 2012, respectively. Administrative capacity and the ability to ensure effective implementation of State aid law would be improved by organizing training for the staff of CPC. Furthermore, organizing trainings, seminars (especially in the field of research techniques and dealing with cases) would contribute to having more employees that are able to deal with the complexity of the tasks.

Pursuant to the New LSA and Art. 3 of the RFP, the CPC has the right to request all information it considers to be important for the assessment of State aid from both the State aid provider and the recipient. According to Art. 11 RFP, the CPC has the power to request, on its own initiative, the submission of information regarding alleged unlawful aid. If State aid is granted without prior authorization, the CPC may demand suspension or recovery of the aid pursuant to the New LSA and Art. 5 RFP.

Further, in accordance with Art. 18 of the New LSA, the CPC is entitled to immediately investigate any information on existence of illegal State aid provision. At the conclusion of the investigation, the CPC will pass a decision on the compliance or the non-compliance of the provided State aid. Moreover, the CPC is entitled to pass a resolution on temporary measures that oblige the providers of State aid to suspend the provision of the already granted State aid. In case the State aid provider does not comply with the alignment propositions of the CPC, the CPC initiates a procedure for reassessment of compatibility of State aid and adopts a decision on its compatibility with this law (Art. 15 of the New LSA). According to Arts. 5 and 19 RFP, the CPC may require the suspension and recovery of State aid.

d. **Procedure of controlling State aid**

Each provider of State aid is in principle obliged to submit a notification for the planned provision of State aid. The State aid cannot be provided prior to enactment of the relevant decision of the CPC. The procedure for granting State aid is further detailed in the RFP and encompasses acceptance of notification, assessment of the State aid proposal according to the provisions of the New LSA, the RFP and other relevant bylaws, and enactment of a decision on the approval or prohibition of the proposal. The period within which a decision of the CPC shall be taken is stipulated in Art. 6 of the RFP:

- Within two months in cases of new State aid;
- Within 30 working days in cases of aid for particular industries (individual aid) granted under aid schemes which have been authorized by the CPC;
Within 20 working days in cases of existing State aid for which significant modifications are proposed, of State aid to small and medium-sized enterprises (with the exception of aid promoting export), operating aid, aid for rescue and restructuring of firms in difficulty, and of State aid for promotion of employment and training.

e. Application of EU State aid rules and practice

Notification requirement: Art. 13 (1) of the New LSA sets forth a general notification requirement for any State aid provider planning to provide aid or to modify existing aid, regardless of whether the State aid is provided on an individual basis or within a scheme. Art. 14 of the New LSA and Form 1 annexed to the RFP provide the required content of the notification. It appears that within the CPC there is no separate team or unit dealing with complaints of competitors of recipients of unlawful aid. There is also no separate team or unit dealing with investigations of the market for potentially unlawful aid. These tasks are conducted by the employees of the Department of State aid control.

Regarding the awareness of State aid providers about their obligations under State aid regulations, the activities of the CPC to raise awareness of its existence, the manner of reporting and allocation of State aid continued in government institutions, which appear as providers of aid. These activities consisted in organizing seminars, training sessions, conferences and other events. More such events are planned for the future in order to make sure that the providers of aid improve their knowledge of the obligations deriving from the Law on State aid.

According to the 2009 report, the CPC has issued ten opinions that were requested by the State aid providers, with regard to the preparation phases of the State aid granting procedures while six such opinions were rendered in 2008. According to the report, this shows qualitative improvement of the collaborations with the providers of State aid compared to the previous years. Furthermore, the 2009 report states that some of these opinions show that certain ministries in the Government are becoming more aware of the State aid procedures and did not collaborate in the past on this level. It can be concluded from the increasing number of such ex ante opinions that State aid providers are relatively well aware of their obligations under State aid law.

However, according to the CPC annual report for 2009, the number of passed decisions in the previous four years is declining. The CPC passed eight decisions related to State aid in 2007, five in 2008, four in 2009 and only one in 2010. Regarding the compliance of State aid providers with the terms set forth in the RFP, the CPC established cooperation with the providers of State aid informing them of their obligations. It cannot be confirmed with certainty that all providers of State aid generally fulfilled their obligation to notify the intended State aid measure to the CPC. To improve the situation, the CPC plans to organize a twinning project for the end of 2011 or beginning of 2012 to enhance the awareness of the providers of the State aid.

Exemptions from notification or authorisation: Exemptions are laid down in Arts. 8 to 9 of the New LSA and specified in the abovementioned regulations. Such exemptions refer to (i) aid that has a social character, granted to individual consumers in accordance with the law, (ii) aid for mitigation of damage caused by natural disasters or other exceptional events, including military activities and (iii) de minimis State aid. The new regulation on the conditions and procedures related to the de minimis State aid should be enacted within six months from the day of enactment of the New LSA (until May 2011).
**Ex ante authorisation and stand-still principle:** State aid should not be put into effect prior to a decision by the CPC, in accordance with Art. 13 (2) of the New LSA. State aid providers are informed upon notification by the CPC about the legal obligations under Art. 13 (2) LSA that aid may not be put into effect until the CPC has made a decision. As it appears, it has never happened that a notification by a State aid provider was followed by provision of the State aid before the relevant decision of the CPC was enacted. Nevertheless, in the European Commission’s 2009 Progress Report on the Former Yugoslav Republic of Macedonia, it is mentioned that “the \textit{ex ante} control of State aid is partial and confined to a few large State aid providers.”\textsuperscript{93} In February 2007, an amendment to the Rules of Procedure of the Government included the obligation that all documents containing forms of State aid must be sent to the CPC in order to receive an opinion or a decision from the CPC.\textsuperscript{94} Practice showed that this rule was observed only partially.\textsuperscript{95}

**Transparency and publicity:** Art. 26 (6) of the New LPC requires the CPC to submit, by 31 March of every year, an annual report on its work to the Assembly. Moreover, according to Art. 29 of the New LSA, the decisions of the SAC are published in the Official Gazette. Furthermore, Art. 24 of the New LSA regulates the issues of monitoring State aid. As in the former law, the providers are obliged to record all relevant data related to the provision of State aid (including \textit{de minimis} aid) and submit relevant reports to the CPC on State aid provided in the previous year.

**Procedural participation rights of undertakings:** According to the New LSA, “interested parties” have the right to appeal against the decision of the CPC. Furthermore, pursuant to Art. 12 of the New LSA, “third parties” may request the CPC to impose measures in order to align State aid which is (allegedly) not in compliance with the LSA. According to Art. 8 of the RFP, the CPC shall open a formal investigation procedure in cases where the CPC has doubts about the compatibility of the State aid with the State aid Law, and shall:

- Notify the State aid provider of the reasons thereof and require additional information within an appropriate time limit;
- Publish the investigation in the Official Gazette, disclosing the main elements of the State aid concerned and call upon interested persons to submit their comments and opinions in written form within one month from the date of publication;
- Take a decision under Art. 13 of the New LSA as far as possible within a period of 18 months after the decision to open a formal investigation procedure.

**Sanctions regime**

No sanctions regime exists other than the procedure for the recovery of unlawful aid as described below. In case the aid provider does not act according to the requirements of the CPC to meet legal obligations provided by the New LSA, the CPC as the sole national


authority for assessing the compatibility of State aid can take measures within the meaning of Arts. 11 and 12 of the RFP. Such considered measures are effective and contribute to the cooperation developed between the providers of aid and CPC and meeting the legal obligations on their part. Starting from the fact that any form of State aid is monitored by the CPC and that any aid which is granted contrary to the provisions of the New LSA might be reimbursable (Art. 21), such cases will proceed to an assessment of unlawful State aid pursuant to Arts. 11, 12, 13, 14, 15 and 16 of the RFP. Art. 4 RFP states: “If the State aid provider takes actions related to the implementation of the notified State aid project, before the CPC adopts a decision under Art. 13 (1) of the New LSA or if those actions are in breach of Regulations adopted under this law, the CPC may require suspension or recovery of State aid, according to Art. 2 (2) of the LSA.” Furthermore, the New LSA prescribes: “Aid granted contrary to the provisions of this Law shall be reimbursable.”

g. Remedies against decisions taken by the CPC

Against decisions of the CPC a lawsuit for initiating an administrative dispute can be submitted before the Administrative court in Skopje. The lawsuit for initiating such administrative disputes should be submitted within 30 days from the day of their delivery. The complaint does not postpone the execution of the decision of the CPC.

h. Role of other public authorities

As mentioned above, the EL sets up the ERC. Art. 19 EL sets forth the competences of the ERC. Pursuant to Art. 19 of the EL, the ERC monitors the energy market and proposes measures designed to ensure non-discrimination, efficient competition and efficient functioning of the market. The ERC is also competent for the setting of prices and tariffs according to Art. 20 EL. According to Art. 1 (1) of the Memorandum of Cooperation in the Field of Protection of Competition on the Energy Market96 (the MC), the CPC and the ERC cooperate in the protection of competition in the energy market. Under the provisions of this memorandum, a special committee is formed for coordination and cooperation between the CPC and the ERC. The members and the co-presidents of the committee meet every six months and exchange relevant data and other information necessary for the execution of their tasks under the relevant regulations. With this, the ERC and CPC exchange experiences and relevant data in order to improve the competition in the energy market.

Another important feature of this memorandum is the fact that the CPC informs the ERC of any procedure initiated within the CPC related to the energy sector. Furthermore, the CPC provides its opinion with regard to the network rules for transmission and distribution in the markets of electricity, natural gas and thermal energy, as well as the market rules for the electricity market, all enacted by the ERC. The ERC is obliged to analyse and consider the provided opinion of the CPC. The memorandum was signed in January 2007 and applies for a period of 5 years, with the possibility of renewal.

---

V. MONTENEGRO

1. Legal framework

A. Public International Law

The international obligations of the Republic of Montenegro in the field of competition and State aid derive from the Stabilisation and Association Agreement\textsuperscript{97} (SAA), the European Partnership Decision 2008\textsuperscript{98} (EPD), the Energy Community Treaty\textsuperscript{99} (ECT) and the Central European Free Trade Agreement\textsuperscript{100} (CEFTA).

Art. 73 SAA imposes a general prohibition of State aid (Art. 73 (1) (iii) SAA), and requires the establishment of an independent authority charged with the control of State aid and possessing the power to ensure compliance obligations (Art. 73 (3) and (4) SAA) under State aid law, to provide an annual report on State aid in order to ensure transparency (Art. 73 (5) SAA), and to maintain a comprehensive inventory of State aid schemes (Art. 73 (6) SAA).

Additionally, the EPD requires the establishment of an effective \textit{ex ante} control of State aid, the further alignment of legislation with the State aid \textit{acquis}, and the further improvement of enforcement in the area of State aid control.

B. Competition Law

The Law on Protection of Competition (Official Gazette, Nos. 69/05 and 37/07: LPC) entered into force on 1 January 2006.\textsuperscript{101} According to Art. 4 (1) LPC, the law also applies to public undertakings. Furthermore, Art. 4 (2) LPC copies Art. 106 (2) TFEU with regard to undertakings entrusted with services of general economic interest. The LPC, however, does


\textsuperscript{100} The Central European Free Trade Agreement 2006, signed on 19 December 2006 in Bucharest, entered into force on 26 July 2007 for five countries: Albania, Montenegro, Former Yugoslav Republic of Macedonia, Moldova, and UNMIK; on 22 August 2007, they were joined by Croatia, on 24 September 2007 by Serbia, and on 22 November 2007 by Bosnia and Herzegovina. Art. 21 CEFTA sets forth obligations in the field of State aid. Art. 21 (1) CEFTA provides for a general prohibition of State aid which essentially reproduces Art. 107 (1) TFEU. Pursuant to Art. 21 (4) CEFTA, the principles developed under Art. 107 TFEU shall be applicable in order to assess State aid. In Art. 21 (7) the transparency principle is laid down by \textit{inter alia} reporting annually and providing information upon request concerning State aid.

\textsuperscript{101} The Law is available in English at \url{http://www.uzzk.gov.me/images/stories/docs/zakoni/competition_law.pdf}; amendments of the Law from 2007 are available at \url{http://www.uzzk.gov.me/images/stories/docs/zakoni/competition_law_modification.pdf}. 
not cover rules on State aid.\textsuperscript{102} A revision of the LPC is expected to be adopted in the near future.\textsuperscript{103} However, it is yet to be decided when this will be achieved. The legislation in the field of competition law does not provide for provisions regarding State aid.\textsuperscript{104}

C. State aid Law

a. Primary legislation

The Law of Control of State Support and Aid (Official Gazette, No. 26/07: LCSSA) entered into force on 24 May 2007. According to Art. 2 LCSSA, the law applies to legal and natural persons, which in performing their economic activity participate in the circulation of goods and services. In Art. 3 LCSSA a general prohibition of State aid was stipulated.

On 9 November 2009, a new Law on State aid Control was adopted (Official Gazette, No. 74/09: LSAC\textsuperscript{105}) and repealed the LCSSA.\textsuperscript{106} The LSAC regulates the conditions and the procedure for granting and controlling the use of State aid by applying the principles of market economy, by preservation of competition and by ensuring transparency in fulfilling the obligations assumed under ratified international treaties.

According to Art. 2 LSAC, State aid is defined as expenditures, reduced revenues or reducing assets of the state or municipality that distort or may distort free competition in the market and that may affect trade between Montenegro and the EU or a member state of the Central European Free Trade Agreement by conferring a more favourable market position on certain economic entities, products or services. Exceptions to Art. 2 LSAC, which shall not be considered as State aid, are the following:

- Investment and/or reduction of revenues of the State aid grantor on the basis of market principles that do not provide the beneficiary with economic advantage;
- Investment of the grantor in the infrastructure in general use, if the construction of such infrastructure is not in exclusive interest of the economic entity;
- Purchase and sale of immovable property by the State aid grantor, if a purchase/sales price is determined on the market principles, by auction and on the basis of an appraisal by an independent appraiser;
- State guarantee for beneficiary’s loan, which did not show in financial reports increase in loss, reduction of revenues, increase of inventory, reduction of cash inflow, increase of indebtedness and reduction of asset value, during the period of two years preceding the


\textsuperscript{103} Energy Community Secretariat, Report of the implementation of the acquis under title II of the Treaty establishing the Energy Community, January 2010, at p. 16.

\textsuperscript{104} The secondary legislation is available, in the Montenegrin language only, at the website of the Directorate for Protection of Competition of Montenegro at: http://www.uzzk.gov.me/index.php?option=com_content&view=category&layout=blog&id=45&Itemid=89&lang=en.

\textsuperscript{105} The Law on State Aid Control is available on: http://www.mf.gov.me/en/organization/state-aid-unit/98760/Law-on-State-Aid-Control.html

provision of guarantee, provided that (i) beneficiaries may obtain a loan under market conditions on the financial market; (ii) guarantees are provided for a defined amount and a defined period of time; (iii) amounts of guarantees do not cover more than 80% of the credit liability; and (iv) guarantees are based on the market price.

In addition, according to Art. 6 LSAC, State aid may be allowed if it is aimed at the following purposes:

- Improve the economic development of Montenegro;
- Remedy serious disturbances in the economy of Montenegro;
- Improve the development of certain economic activities or certain areas in Montenegro, where such aid does not significantly affect market conditions and competition in the market;
- Conserve cultural and historical heritage;
- Purposes having a social character, granted to individual consumers, under equal conditions;
- Remedy damage caused by natural disasters or exceptional occurrences;
- Carry out activities of public interest in performing economic activities delegated to legal persons to an extent necessary for carrying out such activities.

Art. 7 LSAC provides that the state aid may be granted in the form of:

- Subsidies;
- Fiscal reliefs (taxes, contributions and other public revenues);
- State or municipal guarantee;
- Interest rate subsidy for loans;
- Giving gain and/or dividends of the state or municipality for grantor’s development projects to economic entities;
- Discharge of debt;
- Sale of immovable property by the state or municipality at a price lower than the market price or purchase at a price higher than the market price.

b. Secondary legislation

The following secondary State aid legislation was adopted in Montenegro:

- Decree on the Method and procedure of Submission and Contents of Documents essential for ex ante and ex post control of State Support and State Aid (Official Gazette, No. 13/08) enacted on 7 February 2008 specifying the information required in order to properly assess State aid measures.
• Decree on the Manner and Procedure for Notification of State aid (Official Gazette, No. 27/10) entered into force on 20 May 2010 and repealing the previous Decree. This Decree provides the application form and list of documentation necessary to be submitted with a notification.

• Decree on Specific Criteria, Intended Purpose and Requirements for Award of State Support and Aid (Official Gazette, No. 13/08) enacted on 7 February 2008 setting forth the basis for State aid which may be awarded (including horizontal aid, rescue and restructuring aid, etc.); repealed by Decree on Specific Criteria, Conditions and Manner for Granting of State aid (Official Gazette, No. 27/10) which entered into force on 20 May 2010.


• On 20 May 2010 entered into force the Decree on Manner of Record Keeping of State aid (Official Gazette, No. 27/10), which regulates the manner of keeping records of notified State aid and granted State aid in electronic form.

D. Energy / Electricity Law

a. Primary legislation

The Energy Law (EL), adopted on 22 April 2010, was published in the Official Gazette No. 28/10. The EL is much more elaborated compared to the old law, regulating all aspects of energy activities in much more detail, and introduces significant changes into the existing regulatory framework. Changes introduced by the new Energy Law include, among others, the introduction of new planning and policy documents for the development of the energy sector, and changes in the status and competences of the regulatory bodies in the energy sector. Under the EL, the Government defines the national energy policy of Montenegro, the preparation of the Energy Development Strategy and the accompanying Action Plan for Implementation of the Strategy. Additionally, the Government is in charge of issuing separate programs for development and utilisation of RSE and high efficiency co-generation. The Ministry of Economy (in charge of energy in Montenegro) prepares annual reports on the implementation of policy documents, the issuance of energy permits for construction of energy facilities and approvals for exploration of the RSE. The Regulatory Energy Agency (established by the old 2003 Energy Law) is the main regulatory authority, with the powers in relation to, inter alia, issuance of energy licenses, issuance of “green certificates”, issuance of methodologies for calculation of prices of the connection to the transmission/distribution grid, and the approval of prices determined by system operators.

b. Secondary legislation

The Decree on wind-power plants (Official Gazette, No. 67/09) provides that the public supplier is required to purchase all of the electricity produced in wind power plants delivered in the grid under guaranteed prices set in accordance with the Methodology for calculation of prices of electricity produced in wind-power plants. The rules on the calculation of prices of electricity produced in wind-power plants (Official Gazette, No. 46/07; Official Gazette, No. 27/10) set out the methodology for the calculation of guaranteed prices for electricity
produced in such plants. Temporary methodologies were adopted for the calculation of prices for the use of the transmission and distribution system, for the calculation of the maximum approved income of a public supplier, and for the calculation of electricity prices for tariff customers (Official Gazette, No. 58/10). In addition, there are rules on the establishment of coal prices for the generation of electricity (Official Gazette, No. 35/10).

E. Other legislation

Other relevant legislation includes the Law on Energy Efficiency (Official Gazette, No. 29/10), the Law on Free Zones (Official Gazette, Nos. 42/04, 11/07 and 76/08), and the Law on Concessions (Official Gazette, No. 8/09).

2. Institutional framework

A. Authority responsible for competition law enforcement

An amendment in May 2007 to the LCP established the Directorate for Competition Protection (DCP) as the body competent to enforce the LCP.107 Currently, the DCP, according to the Rulebook on its internal organisation could be composed of 16 members, but it has nine employees.108

B. Authority responsible for State aid law enforcement

The authority responsible for the enforcement of the LSAC is, according to Art. 9 LSAC, the State Aid Control Commission (SACC). The tasks of the SACC are laid down in Art. 10 LSAC. According to Art. 25 LSAC, the activities of the SACC shall be performed by the Commission for the Control of State Support and Aid (CCSSA) appointed by the decision of the Government (Official Gazette, Nos. 18/07 and 16/08) until the expiration of its term of office. The CCSSA has had 7 members including a president, and has been operating since March 2008. This was the time when by-laws were adopted.

a. Institutional design and organizational set-up

According to Art. 11 LSAC, the SACC is composed of a chairperson and eight members. Art. 11 LSAC stipulates that the Ministry shall propose a chairman of the Commission. The Ministry and state administration bodies in charge of economic development, European integration, maritime affairs and transportation, agriculture, forestry and water resources management, tourism and the Community of Municipalities shall each propose one member of the Commission. One member of the Commission shall be proposed by associations of employers, in accordance with the procedure determined by the Ministry within 15 days from the effective day of this Law. According to Art. 12 LSAC, the chairman and members of the Commission shall be appointed for the period of four years and may be reappointed.

According to Art. 15 LSAC, the tasks of the Ministry of Finance are to prepare expert groups for decision-making of the Commission on the basis of the submitted notifications, as well as

107 Energy Community Secretariat, Report of the implementation of the acquis under title II of the treaty establishing the Energy Community, January 2010, at p. 16.


b. **Level of independence**

The SACC is appointed by the Government of Montenegro. Additionally, the professional, administrative and technical tasks for the SACC are to be performed by the DPSA within the Ministry of Finance. The SACC is an independent body having its own annual budget. The decisions are final decisions in the administrative procedure.

c. **Investigative and decision-making powers**

The SACC has the power to request any information it deems necessary in order to assess the compatibility of State aid from the State aid provider pursuant to Art. 18 (2) LSAC. The Commission may request additional data and documentation within a deadline prescribed by the Commission, which shall not exceed 30 days from the day of receiving the request of the Commission. According to Art. 19 (5) LSAC, the SACC possesses the power to order alignment of State aid measures in case granted State aid is not in line with the LSAC. According to Art. 21 (4) LSAC the Commission shall inform the Government or competent body of local self-government, and propose measures that should be taken, if the State aid grantor fails to take the measures referred to in paragraph 3 of this Article within the specified deadline.

d. **Procedure of controlling State aid**

Art. 19 (1) LSAC stipulates that the Commission shall be obliged to adopt, within a deadline that cannot exceed 30 days from the day of submission of a proper State aid notification, the decision on compliance of the State aid with this Law. Art. 15 (1) point 1 provides that the Ministry shall prepare expert groups for decision-making of the Commission on the basis of the submitted notifications, as well as necessary documentation regarding the State aid.

e. **Application of EU State aid rules and practice**

**Notification requirement:** Art. 16 LSAC sets forth a general notification requirement before granting of State aid for any provider of State aid.

**Exemptions from notification or authorisation:** In Art. 5 LSAC, exemptions of the application of the LSAC are stipulated. The abovementioned secondary legislation in the area of State aid also provides for certain exemptions.
**Ex ante authorisation and stand-still principle:** Under Art. 17 LSAC, State aid shall not be granted until the SACC authorises the State aid. Under Art. 20, the Commission (SACC) may order the temporary suspension of granting of the State aid, if it evaluates that granting of State aid would cause significant distortion of the competition in the market.

**Transparency and publicity:** According to Art. 23 LSAC, the SACC is obliged to submit an annual report on State aid to the Government and the Parliament by 30 June of every year. A State aid inventory (List of Applied and Granted State Support) for 2008 has been established.\(^{111}\) According to the Art. 13 (5), Resolutions of the SACC shall be published on the website of the SACC. However, the website of the SACC does not exist. At the time of the finalization of the present report, this website was still under construction. According to Art. 23 LSAC, the State aid grantor shall be obliged to submit to the Ministry the data on notified and granted State aid until 15 March of the current year for the previous year.

**Procedural participation rights of undertakings:** There are no provisions within the LSAC concerning rights of third parties. Art. 22 states that the grantor or beneficiary of the State aid have the right to participate in the work of the SACC, related to the procedure of evaluation of the State aid’s compliance with the Law, without having a voting right.

**f. Sanctions and remedies**

No sanctions mechanism is yet in place. There are no provisions on remedies within the LSAC in this area. The SACC issues the decision in the form of a resolution. The SACC’s resolution is an administrative act which is final in the administrative procedure and may be challenged only before the Administrative Court.

**g. Role of other public authorities**

Art. 21 LCP stipulates competences of the Montenegrin Regulatory Agency for Energy (REGAGEN) with regard to competition. As stipulated in Art. 38 of the EL, one of the competences of the REGAGEN is the establishment of tariffs and prices. Under the EL, the REGAGEN establishes methodology for calculation of prices of coal used for production of electricity, and approves prices calculated by the coal producers.

---

VI. SERBIA

1. Legal framework

A. Public International Law

The international obligations of the Republic of Serbia in the field of competition and State aid derive from the following legal acts:

- Interim Agreement on Trade and Trade-Related Matters between the European Community and the Republic of Serbia\textsuperscript{112} (IAT);
- European Partnership Decision 2008\textsuperscript{113} (EPD);
- Treaty Establishing the Energy Community\textsuperscript{114} (ECT);
- Central European Free Trade Agreement\textsuperscript{115} (CEFTA); and
- Stabilisation and Association Agreement between the European Communities and their Member States and the Republic of Serbia, signed on 29 April 2008, not yet ratified.\textsuperscript{116}

Art. 38 IAT sets forth policies and obligations to be implemented in the area of competition and State aid law,\textsuperscript{117} in particular a general prohibition of any State aid which distorts or threatens to distort competition (Art. 38 (1) (iii)). The establishment of an operationally independent authority in charge of the control of State aid with the powers to ensure full compliance with the legal obligations is provided under Art. 38 (4) IAT. The principle of transparency in the area of State aid is proclaimed under Art. 38 (5) which is to be achieved through providing regular annual reports on State aid, and a comprehensive inventory of State aid schemes should also be established (Art. 38 (6) IAT). In addition, Art. 39 IAT relates to public undertakings and provides for a 3-year period, starting from the day of entry into force of the IAT, during which State aid provisions do not apply to public undertakings.

The EPD requires the establishment of an independent and fully and effectively functioning authority for monitoring State aid, the establishment of a proper legal framework for State aid in line with the SAA requirements and the reduction of State aid relative to GDP.

\textsuperscript{112} Interim Agreement on Trade and trade-related matters between the European Community and the Republic of Serbia, OJ L 28/2 of 30 January 2010, signed on 29 April 2008, entered into force on 1 February 2010.


\textsuperscript{114} Treaty establishing the Energy Community between the European Community the Republic of Albania, the Republic of Bulgaria, Bosnia and Herzegovina, the Republic of Croatia, the Former Yugoslav Republic of Macedonia, the Republic of Montenegro, Romania, the Republic of Serbia, and The United Nations Interim Administration Mission in UNMIK pursuant to the United Nations Security Council Resolution 1244, signed on 25 October 2005, entered into force on 1 July 2006.

\textsuperscript{115} http://www.cefta2006.com/.


\textsuperscript{117} Which will be replaced by Art. 73 of the SAA once the SAA is ratified by all member states.
B. **Competition Law**

The Serbian Competition Law (SCL) was enacted by the Serbian Parliament on 8 July 2009. The Law was published in the Official Gazette, No. 51/2009, and entered into force on 1 November 2009. In comparison to the previous Law on Protection of Competition (Official Gazette, No. 79/05, entered into force on 24 September 2005), the basic principles have remained the same, but with some modifications. In accordance with Art. 74 SCL, procedures initiated prior to the entry into force of the new Competition Law are subject to the old Law on Protection of Competition. The SCL does not contain provisions on State aid.

C. **State aid Law**

a. **Primary legislation**

The Law on State aid Control (Official Gazette, No. 51/09: LSAC) was adopted by the National Assembly of the Republic of Serbia in July 2009 and entered into force on 1 January 2010. This law contains the very first legal provisions in the field of State aid law in Serbia. In addition, the law still does not apply to public undertakings due to Art. 39 of the IAT. Art. 39 of the IAT refers to public undertakings and stipulates that by the end of the third year following the entry into force of this Agreement, the principles set out in the EC Treaty, with particular reference to Art. 86 (now Art. 106 TFEU), shall apply in Serbia to public undertakings and undertakings to which special and exclusive rights have been granted.

Most of the undertakings in Serbia in charge of production, transmission and distribution of electricity are public undertakings. Private undertakings are active on the market for the wholesale of energy. Under the State aid law, there are no provisions for State aid granted to public undertakings or provisions regarding services of general economic interest, despite Serbia’s obligation to enact such provisions under the Energy Community Treaty. According to Art. 2 (3) LSAC, a State aid beneficiary is any legal or natural person who, in his business operations concerning production and/or trade of goods and/or provision of services on the market, receives State aid in any form whatsoever. Art. 3 of the LSAC sets forth a general prohibition of any State aid which distorts or threatens to distort market competition.

b. **Secondary legislation**

Secondary legislation on State aid, adopted by the Government in March 2010, consists of the Regulation on rules for State aid Granting (Official Gazette, No. 13/2010) and the Regulation on the method and procedure for State aid notification (Official Gazette, No. 13/2010). These two by-laws enabled full application of the LSAC. The Commission for State aid Control itself is responsible for adopting the Rules of Procedure of the Commission, according to Art. 6 (6) LSAC. The Commission adopted these rules in March 2010. The Annual Report on State aid for 2009 states that the last remaining piece of legislation, the Regulation on the methodology of drafting of annual reports and the deadline for their submission to the Ministry of Finance, will be enacted as soon as possible in accordance with the respective EU regulations. The planned Regulation came into effect on 1 February 2011. It is now called Regulation on the methodology of drafting of annual reports on state aid.

D. Energy / Electricity Law

The Energy Law (Official Gazette, No. 84/04: EL) entered into force on 1 August 2004. The EL sets general rules governing the energy activities in all energy sectors in Serbia, including the incentives for producers of the energy from renewable sources. The rules set by the EL are elaborated on a number of regulations. Under the EL, the main pillars of the institutional framework in the energy sector are the Government, the Ministry of Mining and Energy, the Energy Agency and the Energy Efficiency Agency.

The Government is primarily involved in policy-making activities in the energy sector and supervision of energy prices (giving approval to the regulated prices determined by the undertakings in the electricity sector). Additionally, as the owner of public undertakings in the electricity sector, the Government has significant influence on their major investment decisions. The Ministry, inter alia, issues regulations for implementation of the EL, issues energy permits for construction of energy facilities and supervises compliance with the energy regulations by the participants in the electricity sector.

The Energy Agency, being the main regulatory body in the sector, was established by the EL. Among other functions, it establishes tariff methodologies and tariff systems for calculation of regulated prices in the energy sector, decides on the issuance and termination of energy licenses and approves operating rules of transmission, transport and distribution grid issued by the grid operators. The Energy Efficiency Agency acts primarily as consultative body and does not have regulatory authority. Primarily, it proposes measures for the improvement of energy efficiency and coordinates programs for the rational consumption of energy.

The Ministry announced the adoption of a new Energy Law. Since no official draft or proposal has been presented, at this point it is not clear which concrete changes will be introduced by the new Energy Law.

2. Institutional framework

A. Authority responsible for competition law enforcement

The Commission for Protection of Competition\(^{119}\) (CPC) is the competent authority for the enforcement of competition law in Serbia. The CPC is organised as an independent agency with the status of a legal entity. The CPC is directly responsible to the Serbian Parliament (Art. 20 of the Competition Law). The Competition Commission consists of the Council (four members) and the Head of the Commission, all appointed by the Serbian Parliament. The new members of the CPC have just been elected by the Serbian Parliament. In October 2010, the Serbian Parliament appointed Ms. Vesna Jankovic as the new Head of the Competition Commission and the four new members of the Competition Council for a 5-year term.

B. Authority responsible for State aid law enforcement

In Serbia, State aid control was not entrusted to the Competition Commission. Instead, the Law, under Art. 6, provides for the establishment of a separate State aid Commission comprised of five members, one of which is a representative of the Competition Commission. Therefore, the Commission for State aid Control (CSAC) is in charge of State aid control in Serbia. The CSAC is not an independent agency, but instead a governmental body, formed

\(^{119}\) CPC’s official website is http://www.kzk.org.rs/?link=84&lang=1.
and funded directly by the Government of Serbia. The CSAC was established on 29 December 2009 and held its first constitutive session in March 2010. Until November 2010, the CSAC held eight sessions and issued over 40 decisions.

Specialists, administrative and technical activities in the area of State aid are performed by the Ministry of Finance (Art. 10 of the Law on State aid Control). These activities are conducted by the Division for Control of State aid subordinated to the Department of Economy and Public Enterprises within the Ministry of Finance. Therefore, two bodies are involved in the control of State aid in Serbia: the State aid Commission and the Division for Control of State aid within the Ministry of Finance.

a. Institutional design and organizational set-up

The CSAC is composed of five members who are appointed for a five-year term with the possibility of reappointment (Arts. 6 and 8 LSAC). The head of the CSAC is a representative of the Ministry of Finance pursuant to Art. 6 LSAC. The deputy chairperson is a representative of the CPC. According to Art. 6 LSAC, the CSAC is set up by the government upon the proposal of the Ministry of Finances, the Ministry of Economy and Regional Development, the Ministry for Infrastructure, the Ministry of Environmental Protection, and the Commission for Protection of Competition.

With regard to the professional requirements of the members, Art. 6 of the LSAC stipulates that members of the CSAC have at least a university degree and expert knowledge in the field of State aid, competition and/or EU legislation. In addition, members have to be citizens of the Republic of Serbia. The staff within the Division for State aid Control within the Ministry of Finance meets the professional requirements needed to provide efficient specialist, technical and administrative support to the CSAC. The administrative capacity of the Department for State aid Control has been strengthened so that the people engaged in providing support to the CSAC have different professional and educational backgrounds – in economics and law, and proficiency in the English language.

b. Level of independence

The CSAC is a governmental body, directly formed and funded by the Serbian Government. According to Art. 6 (7) of the LSAC, the CSAC shall be operationally independent. According to Art. 10 LSAC, specialist, administrative and technical activities for the CSAC shall be performed by the Ministry of Finance. In particular, these activities are the following:

- Collect and process the notifications and other data about State aid;
- Prepare the decision of the CSAC in the procedures of ex ante and ex post control;
- Keep records of State aid;
- Prepare the proposal of the annual report on State aid granted in the Republic of Serbia, to be submitted by the CSAC to the Government;
- Cooperate with the Supreme Audit Institution, the Republic authority for budget inspection, the autonomous province department, namely the department of the local self-government unit responsible for budget inspection, and with other domestic and international authorities, organizations and institutions in the field of State aid control.
These activities are performed by the Group for Control of State aid subordinated to the Department of Economy and Public Enterprises within the Ministry of Finance.\textsuperscript{120} New Rules of Procedures on Organization and Systematization of Working Positions in the Ministry of Finance should increase the number of employees to eight employees in total, but at this time there are two permanent employees, two on part time and two on the UNDP contract. There might be eight full time employees within the Division for Control of State aid until the end of 2010.

In addition to the tasks referred to in Art. 10 of the LSAC, the Ministry of Finance also performs the tasks of preparing legal acts, regulating State aid control as well as proposals of amendments thereto and other tasks in accordance with the LSAC. The independence of the CSAC is not limited by the fact that the Division for Control of State aid within the Ministry of Finance prepares draft decisions (Art. 10 (2)). The CSAC can request more information from the Ministry of Finance if it cannot make a decision on the basis of the existing information. It can also adopt another decision if it disagrees with the draft. However, the CSAC has not disagreed with the draft decision of the Division for Control of State aid so far. Until the end of 2010, the CSAC had adopted more than 40 decisions The representative of the Ministry of Finance is the Chairperson of the CSAC at the same time. Moreover, facilities and administrative and technical assistance are provided by the Ministry of Finance while funds for the activities of the Commission are provided from the budget of the Republic of Serbia (Art. 7 of the LSAC).

These factors are not regarded as obstacles for the independence of CSAC. Moreover, CSAC has adequate premises and financial resources to ensure its full independence and effective operation. However, the level of transparency and independency would be greater if the CSAC was organised as an independent agency.

c. Investigative and decision-making powers

There are two methods of State aid control envisaged under the Law: prior control and \textit{ex post} control. The CSAC is competent for \textit{ex ante} and \textit{ex post} control of State aid pursuant to Art. 13 of the LSAC. In case the CSAC is not provided with the requested information in relation to the notification submitted by the applicant, the CSAC has the power to issue a decision rejecting the State aid notification as incomplete pursuant to Art. 13 (4) of the LSAC. If the CSAC demands the alignment of State aid with the provisions of the law and the provider does not meet its obligations, the CSAC has the power to issue a decision proclaiming that State aid is not allowed (Art. 13 (7) LSAC). If the State aid is granted without prior notification (\textit{ex post} control) the CSAC has the power to order temporary suspension of the State aid pursuant to Art. 16 of the LSAC. According to Art. 18 (3) of the LSAC, the CSAC has the power to order suspension of granting and recovery of unlawfully granted State aid.

d. Procedure of controlling State aid

The CSAC shall, according to Art. 13 of the LSAC, decide on the authorisation of State aid within 60 days as of the date of filing of a complete notification. The notification may be either in the form of an aid scheme or individual aid. Irrespective of the form of the notification, the grantor is not allowed to put the notified aid into effect before it has been

authorized by the Commission (stand-still principle). The notification should be submitted together with the Standard Notification Form to the Commission via the Ministry of Finance. It may be submitted electronically or via mail (Art. 5 of the Regulation on the method and procedure for State aid notification).

e. Application of EU State aid rules and practice

Notification requirement: Art. 11 (1) of the LSAC stipulates a general notification requirement for any State aid provider prior to the allocation of State aid. The LSAC clearly defines obligations State aid grantors must comply with. However, there would be a need for additional measures that the Division for State aid Control is already planning to take in order to raise awareness of State aid control and to make sure that rules, responsibilities and reporting requirements are clearly understood by each State aid grantor. Most of the State aid grantors comply with the terms set forth in the LSAC. All State aid granted without prior notification in the first quarter of 2010 was notified when the CSAC started working. However, as the CSAC has only been put in place in March 2010, there are many cases pending which have not been dealt with. So far, grantors notifying State aid to the CSAC have generally proven willing to provide the Department for State aid Control with all the information necessary for the proper assessment of notified State aid.

In general, the provider of State aid would comply with the obligation by notifying draft versions to the CSAC before forwarding it for adoption according to Art. 11 (2) of the LSAC. Regarding the notification requirement of changes to notified State aid measures pursuant to Art. 11 (3) LSAC, the CSAC has not received any such notifications yet, due to the fact that the CSAC held eight sessions and the amendments of already notified State aid are expected to be notified by State aid grantors only in the following period. According to Art. 16 (1) LSAC, the CSAC shall conduct ex post control based on its own information or based on the information obtained from any source implying that the State aid has been granted and/or is in use or has been used contrary to the provisions of the LSAC. According to the national expert, unlawfully granted State aid mainly comes to the attention of CSAC via complaints by third parties. Neither the CSAC nor the Division for Control of State aid conduct market investigations in order to find unlawfully granted State aid.

Exemptions from notification or authorisation: There are no exemptions from notification or authorisation under the LSAC. Art. 4 states what kind of State aid is considered permissible, whilst Art. 5 states what kind of State aid may not be considered permissible. The law does not, however, state that these kinds of State aid are exempt from the notification or authorisation requirement. Both kinds of State aid still have to comply with the provisions of the LSAC.

Ex ante authorisation and stand-still principle: Irrespective of the form of the notification, the grantor is not allowed to put the notified aid into effect before it has been authorized by the Commission (stand-still principle). According to Art. 15 of the LSAC which deals with ex ante control, State aid without its prior authorisation by the CSAC cannot be granted. Also, Art. 16 (4) provides for the suspension of State aid in the ex post control until the assessment of the State aid in question is complete. State aid grantors generally meet the obligation defined under Art. 15 (1) LSAC and do not grant notified aid before the adoption of a decision by the CSAC or the conclusion on ex ante control. To date, there have not been any orders of the CSAC asking the grantor of State aid to suspend further granting of State aid (in accordance with Art. 16 (4) of the LSAC).
Transparency and publicity: Pursuant to Arts. 10 (1) and 23 LSAC, the Ministry of Finance is under an obligation to prepare an annual report on granted State aid which is to be submitted by the CSAC to the Government. Annual reports for 2006, 2007, 2008 and 2009 are publicly available on the Ministry’s website.\textsuperscript{121} The 2008 Annual Report states that, starting from 2005, EU methodology for drafting of annual reports is being followed to the largest possible extent; it is still not possible, however, to fully comply with it. The Regulation on the methodology of drafting of annual reports on state aid came into effect on 1 February 2011. The CSAC publishes all of its decisions on the Ministry’s website. In that respect the decisions are easily accessible.\textsuperscript{122} However, in practice it is difficult to engage directly with the members of the CSAC or the Division for Control of State aid. They usually instruct callers to send an official letter to the Ministry with all of the questions the callers have. This is an inefficient procedure which takes a long time, the letters often get lost or misplaced and the caller often receives no answers at all. According to the legal counsels, there is a need to educate staff within the Ministry about the paramount goal of the reforms Serbia is currently undergoing and the introduction of the new laws which is to increase transparency and legal certainty in every segment of public authorities and their work. A lot has been done in the area of State aid in comparison to how it was couple of years ago; nevertheless, transparency is an ongoing problem in the area of State aid.

Procedural participation rights of undertakings: Art. 21 (3) LSAC states that a representative of the State aid grantor, or the entity which initiated the proposal of the regulation constituting the grounds for State aid who is not a member of the Commission shall be entitled to participate in the State aid control procedure and to provide additional information but shall not have the right to take part in the decision-making process. The CSAC can also involve other authorities, organisations or associations in the procedure of granting of the State aid, but only for the purpose of getting additional information. They will not have any role in decision-making. Art. 21 also deals with issues concerning conflicts of interest. In addition, according to Art. 17 (1) LSAC, “any person with a legal interest” has the right to file a request in order to trigger a reassessment of granted State aid.

f. Sanctions and remedies

There is no sanctions regime in place. There has not been a situation yet where sanctions would have been necessary. Art. 20 (1) LSAC stipulates that an administrative dispute can be initiated against a decision of the CSAC. Furthermore, Art. 20 (2) LSAC provides the possibility of initiating an administrative dispute in case the CSAC omits to render the decision according to the deadline proscribed under Art. 13 (3) LSAC. However, the initiated administrative procedure will not suspend the execution of the resolution issued by the Commission pursuant to Art. 20 (3) LSAC. So far there are no examples of cases that have been appealed before the Administrative court.

\textsuperscript{121} http://www.mfin.gov.rs/pages/issue.php?id=7322.
g. Role of other public authorities

The EL sets up the Energy Agency (AERS). Arts. 67 and 69 EL provide for uniform tariffs determined by the AERS. According to the LSAC, the Regulation on Rules for State aid Granting and the Regulation on Rules and Procedure for State aid Notification, which regulate the area of State aid control in Serbia, the AERS does not have any competences with regard to State aid.
VII. UNMIK (under UN Security Council Resolution 1244)

1. Legal framework

A. Public International Law Obligations

The international obligations in the field of competition and State aid derive from the European Partnership Decision 2008 \(^{123}\) (EPD), the Energy Community Treaty \(^{124}\) (ECT) and the Central European Free Trade Agreement \(^{125}\) (CEFTA). Neither an Interim Agreement on Trade Related Matters (IA) nor a separate formal Stabilisation and Association Agreement (SAA) with the European Union yet exist.

The EPD requires the establishment of an independent, fully and effectively functioning authority for monitoring State aid, the establishment of a proper legal framework for State aid in line with the SAA requirements and the reduction of State aid relative to the GDP. In addition, Art. 18(1)(c) ECT imposes a general prohibition of State aid \(^{126}\) and Art. 19 ECT declares Art. 106(1) and (2) TFEU applicable with regard to public undertakings to which special or exclusive rights have been granted. It also requires any laws passed to be in line with the EU acquis. This is monitored by the Ministry for European Integration.

B. Competition Law

The Law on Competition (LC) 2010/03-L-229 entered into force on 21 October 2010 replacing the 2004 law. The Law applies to all undertakings engaged in an economic activity within, or having economic effect within, the territory. It is based on EU standards and includes provisions relating to cartels, abuse of a dominant position and merger control.

The Law on Internal Trade (Law No. 2004/18: LIT) also contains provisions regarding competition. Furthermore, Arts. 21 and 22 of the Law on Energy (Law No. 2010/03-L84: LE) provide for competition rules in the energy sector. In addition, the Law on the Energy Regulator (Law 2010/03-185: LER) requires the regulator to monitor competition and to ensure that there is no abuse of dominant position and no cross-subsidization in the energy markets.

---


\(^{125}\) The Central European Free Trade Agreement 2006, signed on 19 December 2006 in Bucharest, entered into force on 26 July 2007 for five countries: Albania, Montenegro, Former Yugoslav Republic of Macedonia, Moldova, and UNMIK; on 22 August 2007, they were joined by Croatia, on 24 September 2007 by Serbia, and on 22 November 2007 by Bosnia and Herzegovina. Art. 21 CEFTA sets forth obligations in the field of State aid. Art. 21 (1) CEFTA provides for a general prohibition of State aid which essentially reproduces Art. 107 (1) TFEU. Pursuant to Art. 21 (4) CEFTA, the principles developed under Art. 107 TFEU shall be applicable in order to assess State aid. In Art. 21 (7) the transparency principle is laid down by inter alia reporting annually and providing information upon request concerning State aid.

\(^{126}\) Modelled according to Art. 107 (1) TFEU.
C. State aid Law

A draft law on State aid has been prepared and is currently in its final stages. Final comments have been received from the European Commission and are in the process of being implemented in the draft in advance of its submission for adoption by the Government. The law is expected to enter into force on 1 January 2012.

The draft law sets out which State aid is prohibited and which might be permissible, as well as the mechanisms for approval or disapproval and claiming back ineligible aid. It does not apply to aid in the sector of agriculture and fishery, social aid, aid given after natural disasters or de minimis aid (below €30,000 over a 3-year period as long as it is not export-related; Art. 5). State aid may be deemed permissible if it is to promote economic development especially in poor areas or where there is serious unemployment, to promote an important project, or to promote culture and heritage but in each of those instances cannot distort international competition or cause the institutions to contravene international trade agreements (Art. 6).

The Law sets out the administrative role of the State aid Office which is to receive and analyse applications (Art. 9), as well as the obligation for an annual report from this Office and provisions for approval and supply of budgets (Arts. 19 and 20). The law provides that the State aid Commission has the decision-making authority (Art. 10) and for rules on State aid notification (Art. 12; see below), assessment (Art. 13), actions against unlawful aid which primarily include recovery and claiming of interest (Art. 15), transition rules for existing aid schemes which can be grandfathered by submission of the details (Arts. 17 and 19), and appeal rules (Art. 18). The Law also foresees that secondary legislative acts will be passed by the Ministry of Finance within six months of the law’s promulgation.

D. Energy / Electricity Law


Under the LEI, the public supplier of electricity is required to purchase entire quantities of electricity produced from renewable energy sources (with certificates of origin) under fixed guaranteed prices, on the basis of the agreement on mandatory take-off of electricity concluded between a producer and a public supplier. As explained below, rules issued by the Energy Regulator further provide for the subsidy of any price difference via a Renewable Energy Fund.

Under the LER, any measures set by the Energy regulator must be non discriminatory (Art. 14) and ensure proper competition while any measures preventing competition are prohibited (Art. 1.3.5). Art. 15 prohibits the abuse of a dominant position by operators on the energy market. Further, the LER specifically states that any energy deliveries must be priced on a full cost-recovery basis with any cross-subsidies between consumers being eliminated by 2014 (Art. 40). Any subsidies provided to so-called vulnerable consumers must be “targeted and transparent [...] in such a way as shall be least likely to distort competition in the supply of energy.”

127 See also Energy Community Secretariat, Report of the implementation of the aquis under title II of the treaty establishing the Energy Community, January 2010, at p. 19.
Art. 13 of the 2008 Law on Publicly Owned Enterprises (No. 03/L-087) stipulates: “Except as specifically provided otherwise by the present law, every POE [Publicly Owned Enterprise] and its officers and directors shall be subject, without exception, to the same laws, regulations and sub-normative acts that govern privately owned business organizations. Notwithstanding the foregoing, it is specifically provided that the Special Chamber of the Supreme Court shall have exclusive jurisdiction over any insolvency, liquidation or reorganization proceedings involving a POE.

Without prejudice to the foregoing, it is specifically provided that a POE shall be fully subject to any legislation establishing special obligations and requirements, including regulatory requirements, for participants in the industry or sector in which the POE conducts its business activities.” Except as otherwise specifically provided in the law, every POE shall also be subject to and comply with any element of applicable law that applies to private enterprises.

The following laws, forming part of the framework of the energy sector in compliance with the EU Directives and Regulations for the establishment of competitive electricity markets, and their application in practice have been identified as possibly raising issues under the State aid provisions:

- Law on Mines and Minerals (No. 03/L-163): Although this law foresees the use of lignite fields through a competitive tender and the payment of royalties for all lignite use, in practice the public electricity company has received some advantages as it has been permitted to pay royalties late and has privileged access to existing lignite fields.

- Law on Excise Duties 2003: Excise tax is not applied to heavy fuel oil, which is used as an initial fuel for electricity generation in Power Plants, or for mazut used for district heating. The procedure is simply that the importing entity (i.e. the district heating company and the public energy company KEK) notes on their customs form that the fuel is heavy fuel oil for their own use. The aim is to reduce the cost of fuel because of the need to support district heating and the public electricity company which are currently not financially viable companies due to low levels of bill collection. The same applies for other industries which use this fuel.

- Law on District Heating (No. 03/L-116): There are two district heating companies – in Pristina and Gjakova/Djakovica – which are still state-owned and subsidised in practice via the municipalities’ budget or the central Government budget due to problems with consumer bill collection rates.

E. Other legislation

The existing legal basis in the area of energy efficiency is completed by secondary legislation from the Ministry of Infrastructure (MI) and the Energy Regulator (ERO) in the form of administrative instructions (AI). The measures with relevance to State aid are:

- Rules on the establishment of a system of certification of origin for electricity produced from renewable energy sources of 29 December 2010, setting out how companies can obtain renewable energy certificates.

- Rules on the support of electricity for which a certificate of origin has been issued and procedures for admission to the support scheme, setting out the details of the
arrangements under which public suppliers must buy from and prioritise renewable energy suppliers under 10-year power purchase agreements. It provides for the establishment of a Renewable Energy Fund to compensate the public supplier for the difference between the amount paid to the renewable energy suppliers (from which it has a purchase obligation) and market costs from other suppliers. This Renewable Energy Fund is financed from a surcharge at the transmission level on all supplies of electricity within the country. The ERO sets the amount of the levy at an amount to ensure that there are sufficient funds in the Renewable Energy Fund. The renewable energy suppliers must provide a bank guarantee to ensure compliance with the rules. This regulation also provides that for supplies to the public electricity operator, renewable electricity suppliers are exempt from the annual fees that would otherwise apply.

- Rules on principles for the calculation of tariffs in the electricity sector (Pricing Rule) and on tariff methodologies provide for a non-discriminatory tariff system and specifically prohibit cross-subsidies of customer classes and provide that the full costs must be recovered when setting tariffs. As an exception, there may be a “social tariff” for public suppliers, requiring them to charge domestic customers with low incomes or consuming small amounts of electricity at lower rates. Such rates may be set below the cost of delivery to such customers, with the difference being compensated by tariffs imposed on other domestic customers consuming above average amounts of electricity or on higher incomes being charged above the cost of delivery to them. In practice the Ministry of Social Welfare determines a group of relevant customers who are families of either 1999 war invalids or those in severe economic deprivation. The budget then allocates a sum to the public electricity supplier KEK for those families so that they are supplied with energy on a lower cost basis.

- Rules on conditions for determination of eligible consumers for 2009 permit customers above a certain consumption level to buy directly from any energy supplier at a negotiated price instead of a regulated price.

In the annual budget, the Ministry of Finance has traditionally provided for a subsidy to the public electricity company (most recently in the form of a low interest loan of up to € 70 million). The Ministry and the municipality have also given grants to the Pristina district heating company (in 2010, more than € 800,000 when the hospital and schools had been without heating for several weeks). This budget is approved annually by the Parliament.

2. Institutional framework

A. Authority responsible for competition law enforcement

Art. 20 LC sets up the Competition Commission (KCC) in order to ensure the enforcement of the LC. The KCC became operational in February 2009 and currently has a staff of four.\textsuperscript{128} It is in the process of being expanded.

B. Authority responsible for State aid law enforcement

No authority competent in State aid control has yet been established. The draft State aid law expected to take effect in 2011 envisions the establishment of two authorities for the control

\textsuperscript{128} Energy Community Secretariat, Report of the implementation of the \textit{acquis} under title II of the treaty establishing the Energy Community, January 2010, at p. 19.
of State aid. The decision-making body will be known as the State aid Commission (Art. 10) with the Ministry of Economy and Finance in the Chair. The final implementation of the State aid Commission is, however, not decided yet. An administrative unit tasked with controlling the grant of State aid will be known as the State aid Office (Art. 9) and will be established within the Ministry of Economy and Finance.

a. Institutional design and organisational set-up

The draft law provides that the State aid Office will be within the Ministry of Economy and Finance and that the State aid Commission will meet on an ad hoc basis and comprise five members appointed on the proposal of the Ministry of Economy and Finance, the Ministry of Justice, the Ministry of European Integration, and the Ministry of Communities and Return. It has not yet been settled whether the fifth nominating body will be civic society (and then it is not clear which body of civic society) or the Parliamentary Assembly opposition. The Ministry of Finance will be the Chair of the State Aid Commission.

b. Level of independence

Since the Ministry of Finance and Economy is most likely going to make most of the applications (as it is usually the grantor to public entities), receive them (as part of the State aid Office) and then decide on them, it is effectively applicant, administrator and jury. In light of these factors, it may be seriously questioned whether the State aid enforcement mechanism, once implemented, will be sufficiently independent from government organs.

c. Investigative and decision-making powers

Notifications are made to the State aid Office and must be laid out on the relevant form (Art. 12.2 of the draft State aid law). The Office may ask for additional information within 15 days of receipt of the application for aid (Art. 12.1) to complete the application and this must be provided within 15 days. It may also ask for subsequent information from relevant persons (Art. 13.2). A decision on an application must be taken within 60 calendar days for new aid, 30 working days for aid to special industries where the Aid was previously approved by the Commission and 20 working days for other amendments to existing schemes (Art. 13).

In the case of aid which has not been approved the Office initiates the procedures on unlawful aid again within 15 working days (Art. 15). The provider must stop granting aid on receipt of a request to do so. The Commission can then order recovery of the aid plus interest (Art. 15.7). The amount of interest is not stated. The Commission may also revoke a decision approving State aid if wrongful information is provided (Art. 16). The Commission may also require suspension of aid (Art. 15.4) or changes to bring the aid in line with the Law. The provider of the Aid must provide a report on the expenditure within two months of the calendar year end to the Office (Art. 19.1) in the format provided. A general report on all aid in the previous year is provided by the Commission to the Government on 30 June (Art. 19.2). The State aid provider must state the aid in its budget as a separate item (Art. 20).

d. Application of EU State aid rules and practice

The draft law expressly provides that when applying the law in both substance and procedure the case law of the EU Court of Justice and European Commission shall be followed.
Notification requirement: Notification must be made in writing to the State aid Office. However, at present there is not sufficient public information available concerning the exact legal requirements which will relate to the notification of prospective State aid measures.

Exemptions from notification or authorisation: The following types of aid are exempt: aid to agriculture and fishery, aid of a social character (covering probably payments for electricity to the social cases by the Ministry of Labour and Social Welfare), aid for damages caused by natural disasters or for special cases related to national security, de minimis aid given to an undertaking which does not exceed € 30,000 over any three year period, irrespective of the form of the aid or the purpose for which it was granted and provided it is not granted for export-related activities or is not conditioned on the use with domestic products vis-à-vis those imported and the beneficiary is not an undertaking in financial difficulty.

Ex ante authorisation and stand-still principle: There must be prior approval of aid. This includes notification of any existing aid regimes which must be notified within six months of the law being passed. The Commission then proposes measures to align those schemes with the law, which may include suspension measures or investigation or the imposition of conditions (Art. 17).

Transparency and publicity: The recipient of the aid must provide a report on the expenditure within two months of the calendar year end to the Office (Art. 19.1). A general report on all aid in the previous year must be provided by the Commission to the Government on 30 June (Art. 19.2)

e. Sanctions and remedies

If suspension does not of itself address the issue, the sanctions are an order to return the State aid plus interest (Art. 15.1) There are no sanctions specifically in the Law against directors etc. for fraudulent claims. The applicant can appeal against the Commission’s decision in court. Stakeholders may make complaints and may be heard by the Commission but the administrative court will not usually hear third party stakeholders.

f. Role of other public authorities

The Energy Regulatory Office (ERO) has been established. The ERO must ensure that there is no discrimination in the energy market and that tariffs are on a full cost-recovery basis without cross-subsidy (except in the case of renewable energy and social cases). It would have been expected that the Competition Authority might have some advisory or decision-making role as the issues are also ones of competition law but this is not the case under the Competition Law.
PART II: STATE AID INVENTORY

I. ALBANIA

1. General information

State aid in the Albanian energy sector is primarily granted in the form of tax relief, grants and lower input prices. Furthermore, there is State aid granted in the form of rental of real estate under preferential conditions and prices, as compared to the fair market value of the real estate or other item, in order to increase economic growth and development.

2. State aid inventory

According to Art. 35 (1) LSA, the providers of State aid were obligated to report, within six months of the entry into force of the LSA on 1 January 2006, all existing aid schemes to the SAD. The obligation for the draft inventory of the existing schemes comes from Art. 71/6 of the Stabilisation and Association Agreement (SAA) which stipulates that “Albania will draft an all-inclusive inventory of the State aid schemes created before the establishment of the authority referred to in paragraph 4 and ensure compatibility of these aid schemes with the criteria referred to in paragraph 2 of this Article within a period not more than four years since entry into force of this Agreement.”

Albania issued a Report on the inventory of existing State aid schemes in Albania pursuant to Art. 71/6 SAA. This inventory does not focus on State aid in the field of electricity companies but gives an overview of State aid schemes in general. Moreover, Albania provided the State aid annual reports for 2007, 2008 and 2009. There is currently no English version of the State aid annual report of 2009.

According to the Inventory of existing State aid schemes in Albania as well as the State aid annual reports for 2007 and 2008, the existing State aid schemes reviewed by SAC in the electricity sector are the following:

A. Decision No. 25 of 2 May 2008

Decision No. 25 of 2 May 2008 on the excise duty exemption for fuel oil used for electricity generation from thermopower plants with a capacity not less than 5 MW aims to generate alleviations for undertakings investing into generation facilities. The measure intends to ensure the fulfilment of the energy needs of the country, in the form of a reimbursement of excise duties for the use of fuel oil. The scheme was justified on the basis that domestic production of electricity is mainly based (to the extent of 97%) on hydropower resources. As a result of harsh weather conditions and the inability to meet energy needs, in recent years, Albania has experienced a profound energy crisis. This scheme aims at creating favourable

---

132 Approved by DCM No. 635, dated 23 July 2010.
133 Approved by DCM No. 45, dated 16 January 2008.
conditions for building new generation facilities, increasing the diversity of energy sources and reducing dependence on the supply of electricity from hydropower. The fuel oil shall be used only for energy generation from power plants with a capacity of not less than 5 MW. Given that this is considered to be operating aid, the SAC approved it on the basis of the conditions that (i) the reimbursement shall not exceed 80%, whereas the remaining 20% shall be contributed by the beneficiary, (ii) the assets shall be new, environmentally friendly and based on modern technology, and (iii) the aid shall not be cumulative.

B. Decision No. 27 of 18 August 2008

Decision No. 27 of 18 August 2008 introduced the following amendments to Decision No. 25 of 2 May 2008 (see above): until 1 December 2014, the reimbursement shall not exceed 100%; as from 1 January 2015, the reimbursement shall not exceed 80%, whereas the remaining 20% shall be contributed by the beneficiary.

C. Decision No. 19 of 1 November 2007

Decision No. 19 of 1 November 2007 on the existing scheme of Law No. 7973 dated 26 July 1995 on concessions, repealed by Law No. 9663 dated 18 December 2006 On concessions aimed originally at promoting investments for the development of productive activity and services, through concessionary agreements of different forms in sectors such as the chromium industry, the production of electrical power by local hydro-power plants, water pipelines etc. The legal basis for granting the aid was the Law On concessions (No. 7973, dated 26 July 1995 - specifically Art. 14) and this was repealed and replaced by the new Law On concessions (No. 9663, dated 18 December 2006).

The 1995 Law On concessions provided for different forms of state support for the concessionary companies, such as exemptions from taxation on profits, customs duties, taxes on circulation and taxes on imports. While the Law generally provided for the forms of support, exemptions were considered on a case-by-case basis and individual concessions were granted only after the approval of the Assembly of Albania and on the basis of a separate law or agreement, also ratified by Parliament. The majority of concessionary agreements in Albania have been concluded following the procedures of an unsolicited offer, mainly from foreign private investors. In practice, however, available evidence indicates that investments were not in fact carried out at the level foreseen in the approved projects, regardless of the sector involved.

However, there were no accurate data or forecasts on the expected economic impact from HPP (hydro power plants) under the concession agreements, the gap in energy which needs to be covered by them, the impact they would have on the development of remote areas, the scale of investments or revenues they would generate, as well as other indicators linked to them, such as employment to be generated. Moreover, the majority of the agreements did not foresee sanctions for non-compliance with the obligations of the concession. Even in the cases where provision was made for sanctions in the concession agreement, and there has been subsequent infringement, the state authorities have not imposed any sanctions in practice.

In the 2006 Law On concessions, the basic procedure for the selection of the concessionaire, whether on the basis of a solicited or an unsolicited offer, is the competitive procedure. Direct negotiation is envisaged as only applying in special cases and upon the approval of the Council of Ministers. At the same time, the new Law clearly determines the institutional
scheme, powers and responsibilities, as well as the relevant procedures. This is intended to promote a higher level of transparent practice in new concession agreements, with the technical and financial documentation, projections and the financial scheme for administration of the concession, monitoring and control mechanisms for the implementation of the contract being clearly provided for in the Law. The 2006 Law On concessions provides the possibility for the Council of Ministers to offer concessions for local or foreign investors at the symbolic price of €1 as an incentive for investments in strategic sectors (including energy production and distribution). Under its Decision No. 19 of 1 November 2007, the SAC decided that:

- For every concession agreement that follows the negotiation method, a specific SAC approval has to be obtained prior to the conclusion of the contract.

- With regard to any assets provided at less than market price, their real value has to be calculated by independent experts and, on this basis, the contribution of the beneficiary to the financing of the initial investment, at least 25% of the total amount, has to be determined. In any of the cases where a concession for the utilisation of such assets does not follow open tender procedures, the contract cannot be concluded without prior approval of the SAC.

- The Licence and Contract Management Department at the Ministry of Economy, Trade and Energy (METE) shall report on the data concerning the implementation of all aid schemes under the Law On concessions, by 31 March each year based on the previous financial year.

- The Licence and Contract Management Department at the METE shall keep all data on the aid schemes and individual aids for a period of ten years from the date of the conclusion of the last concession agreement in the framework of the implementation of this Law.

D. Decision No. 17 of 16 July 2007

According to Decision No. 17 of 16 July 2007 on the deferral of VAT payment for imported machinery and equipment and for electrical power imported by KESH Sh.a. (Albanian Power Corporation), VAT payments may be deferred for a period of twelve months from the date of import of machineries, equipment or - due to the energy needs of the country - energy. The scheme has been approved for an unlimited term. The scheme aims to improve the financial situation of state owned enterprises through the establishment of mechanisms for the payment of delayed obligations. The scheme mostly covers the water supply/sewage system companies, mostly with regard to late payment of the energy supplies of KESH.

E. Decision No. 660 of 12 September 2007

Under the decision of the Council of Ministers No. 660 of 12 September 2007, the ownership of water supply/sewage system companies should be transferred from the central government to local government authorities. Under this decision, the overdue obligations of such companies, until the moment of the transfer, shall be sustained by the state budget. Currently the transfer process has not been completed, and several water supply/sewage system companies still remain owned by the central government. This decision thus provides for a state subvention towards the electricity distributor. Under Art. 4 of the LSA, providing for the prohibition of State aid, this subvention is to be regarded as a State aid measure.
F. Other support measures

Access to public property, raw materials or any type of infrastructure to undertakings active in the electricity sector at below-market prices or on any other preferential basis:

Law No. 9663 On concessions, as amended, establishes that for some particular economic activities, including electricity, in particular instances, for the promotion of investments for the economic development of the country, the Council of Ministers may offer concessions for the symbolic price of €1 to local or international investors. The Council of Ministers, upon proposal of the Minister responsible for economy, approves the list of assets that will be given on concession to the extent that the economic activities are considered a promotion of investments for the economic development of the country.

Regulation fixing or otherwise influencing electricity generation prices or retail electricity tariffs:

Law No. 9072 established the Albanian Energy Regulatory Entity (ERE) as the responsible institution for setting tariffs in all regulated activities carried out by the licensees in the electric power sector. Under Law No. 9072, the ERE, among others, has the competence to set, regulate and review wholesale and retail tariffs and the terms and conditions of service of electric energy proposed by a licensee or review them according to circumstances; to protect the interests of consumers of electric energy concerning tariffs by assuring that such tariffs are in accordance with recognised rate-making principles; and that other conditions of service such as quality, efficiency, reliability and security of electric energy supply are reasonable according to the circumstances.

Under the LPS (Art. 26 and following), ERE is the responsible institution for setting tariffs in all regulated markets as well as for all activities carried out by the licensees in the electricity sector. ERE is obliged to develop and approve a regulation on the procedures and methodologies through which it will approve, modify or disapprove the tariffs, terms and conditions of electric power services. Tariffs shall be fair and reasonable in accordance with recognised principles, non-discriminatory, based on objective criteria, and determined in a transparent manner. Costs shall be recovered from each customer category in proportion to the costs of serving that category. Different tariffs may be established for each customer category taking into account the season, the time of day (day or night), the time of peak, medium or base usage or similar parameters. Under the LPS, ERE should review tariffs submitted by a licensee by taking into account:

- Costs for the generation or purchase of electricity;
- Operational costs, maintenance costs and repair, including depreciation expense;
- Costs to maintain back-up and regulating capacities required for reliable electricity supply;
- Costs of fuel supply and maintaining fuel stocks;
- Costs of environmental protection;
- Costs for salaries, wages and similar expenses;
- Taxes and other fiscal duties provided for by the Albanian legislation;
- License and regulatory fees as provided for by this law;
• The return on the invested capital, taking into account the business risk and capital costs;
• Cost of compliance with the public service obligations as provided for by this law;
• Costs of energy saving programs.

ERE shall not include excessive or unreasonable costs imprudently incurred as the result of licensee inefficiencies. No tariff change increasing charges to consumers can be requested more than once within a financial year, except when the ERE permits such a filing upon a showing of good cause.\textsuperscript{135}

**Purchase obligations on customers of undertakings active in the generation of electricity for fixed or minimum amounts of electricity, and/or at fixed or minimum prices:** The Law No. 9470 dated 2 February 2006 On an addition to Law No. 8527 dated 23 September 1999 On the privatization of the local hydropower plants,\textsuperscript{136} states the right of KESH to enter into power purchase agreements with such power plants according to the price fixed by ERE. This provision is *de facto* applied as an obligation. The law does not provide for any minimum or maximum amounts of electricity to be purchased by KESH.

Nevertheless, considering that KESH has a dominant position in the market, this redirects to Art. 673 of the Albanian Civil Code which states that undertakings in a dominant position are obliged to contract with anyone who seeks a contract within its field of activity, according to the laws and commercial customs. The conclusion of a contract can therefore not be refused without a legal reason. Depending on the market price for electricity at a given time, the price set by ERE for these types of agreements may lead to a subsidization of KESH for such power purchases, if the market price is higher than the price set by ERE. However, no details have been made available about the implementation of these rules in practice.

Another notable case is the obligation of the public retail supplier (OSSH) under the market model to secure the electricity necessary for the supply of tariff customers by the public wholesale supplier (KESH). OSSH is a company with state participation. It was 100\% state owned until 2009 when 76\% of the company was sold to ÇEZ A.S. Considering that OSSH may not purchase electricity directly from traders, this can be interpreted as an imposed obligation of OSSH to purchase from KESH (in the capacity of Wholesale Public Supplier) all electricity needed for the supply of tariff consumers (i.e. families). If the average market price is higher than the tariff set by ERE, KESH will be subsidized for the cost of the sale of energy. On the other hand, given the constant aim of the regulator to keep consumer tariffs at low levels, OSSH will benefit from tariffs for electricity purchases which are lower than the market price.

**Direct (reimbursable or non-reimbursable) grants of public funds to undertakings in the electricity sector in order to help them cover operational costs, or in order to promote investment in generation capacity, network infrastructure, renewable energy sources or any other purpose related to the electricity sector:** The Albanian Parliament has approved the Law No. 9379, dated 28 April 2005, On energy efficiency. This law provides for the creation of an energy efficiency fund to promote investments on energy

\textsuperscript{135} An English version of the different transmission tariff methodologies is published on the ERE website at http://www.ere.gov.al

\textsuperscript{136} Local hydropower plants (HPPs) with installed capacity below 2 MW.
efficiency to be created by the Council of Ministers and administrated by the Energy Regulatory Entity. In practice this fund has not yet been approved. The annual plan of the Ministry of Economy, Trade and Energy for 2010 contains a proposal for a new law on energy efficiency, in line with the EU legislation. Additionally, the Albanian government is elaborating a new law on renewable energy. The present draft presents a more precise framework on renewable energy; however, it is yet unclear when such law is expected to be approved. Pursuant to the draft of the Renewable Energy Law, a renewable energy fund shall be established. This fund shall be financed \textit{inter alia} by annual contributions from the state budget and shall be used for financing projects that support the use of renewable energy, providing incentives for them.

**Tax relief to undertakings active in the electricity sector in order to promote energy efficiency or energy from renewable sources, promote regional development in less developed regions, or for any other purpose:**

- Law No. 8987 of 24 December 2002 On favourable conditions for the construction of new sources of electricity generation provides the exception for custom duties of goods imported for the purpose of building new generation capacities, with at least 5 MW of installed capacity, through the incineration of liquid or solid materials, as without limit for other renewable generating sources. Moreover, an excise duty reimbursement scheme for fuel used for energy generation is provided. In application of the above law, DCM No. 839 concerning terms and procedures for reimbursement of paid excise and establishment of facilitating procedures for the construction of power plants with installed capacity not less than 5 MW was approved on 5 December 2007;

- Law No. 7928 of 27 April 1995 On Value Added Tax provides for a VAT payment deferral scheme for the import of equipment for new investments (including energy projects) as well as for VAT on import of energy by the public company KESH Sh.a. Pursuant to DCM No. 559 of 16 August 2006 on VAT deferral for imported machinery and equipment, as well as power imported by KESH Sh.a., VAT is deferred for six to twelve months (and for projects with a longer investment period, i.e. energy projects, up to the start of business operations);

- Law No. 8405 of 17 September 1998 On urban planning provides that the municipality tax on the financing of urban planning studies for significant projects, including energy projects, amounts to 0.1% of the investment value compared to 1% payable for other constructions.

- Law No. 9632 of 30 October 2006 On local taxes system provides that for significant projects, including energy projects, the infrastructure’s impact on new constructions is 0.1% of the investment value compared to between 1 and 3% applied to other projects (2 – 4% for Tirana), but not less than the costs of the damaged infrastructure.

**Cancellation of debts or preferential redemption of debts incurred by undertakings in the electricity sector:** State funds were designated for several years to support KESH, the public generation company which accumulated considerable debts and losses from its activity in the past years. The Decision of the Council of Ministers No. 559 of 13 October 2001 indicates the last publicized state intervention to support KESH with funds from the annual budget.
Specific assistance for producers of electricity from renewable sources or co-generation (combined heat and power) facilities, in order to compensate these producers for higher costs: As a general consideration, specific assistance schemes for renewable energy generators are not fully detailed in the Albanian legislation.

Mandatory State participation in equity regarding undertakings in the electricity sector: Based on Art. 13 of Law No. 9072, only a State owned company can hold a license for energy transmission. No other provision for mandatory State participation in equity regarding undertakings in the electricity sector has been identified. Nevertheless, KESH Gen, which currently has a dominant position in the power producing market, is state owned. This selective support measure may be regarded as State aid, depending on the exact terms of the State participation. Details of this measure could not be found for the purpose of this report.

Preferential rights or special support for public undertakings in the electricity sector: With regard to special support to public undertakings in the electricity sector – as mentioned above – as recently as 2001, the government provided state funds from the annual budget to help the public undertaking KESH. In addition, the Republic of Albania has acted as guarantor for several agreements with banks and international organizations financing KESH and/or the Albanian Energy Sector. The specific terms and conditions for these guarantees were not made available for detailed analysis. If the agreements were not concluded on strictly commercial terms, as the aim was to develop, rehabilitate and structure the underdeveloped Albanian electrical energy sector, funds with terms and conditions so favourable to KESH would almost certainly not have been granted by a private investor. For the following agreements the government acted as guarantor of KESH or obtained direct financing and then forwarded it to KESH:

- Guarantee Agreement concerning the loan granted to KESH by Kreditanstalt für Wiederaufbau (KFW), Frankfurt am Main, ratified with Law No. 9393 dated 12 May 2005;
- Agreement with the Government of Italy for the execution of the technical and managing restructuring programme of KESH Sh.a. and the empowerment of the Albanian electro-energetic system ratified with Law No. 9045 dated 3 April 2003;
- Agreement for a development loan between the Republic of Albania and the International Development Association (IDA) for the project of restructuring and rehabilitation of the sector of the electric energy ratified with Law No. 8941, dated 19 September 2002;
- Guarantee Agreement between the Republic of Albania and EBRD for the reconstruction of the energy sector ratified with Law No. 8972, dated 21 November 2002;
- Agreement for a development loan between the Republic of Albania and the International Development Association (IDA) for the project of energy generation and rehabilitation of the sector of the electric energy ratified with Law No. 9256, dated 15 July 2004;

The exact terms and conditions of these agreements were however not made available for the purposes of this report.
II. BOSNIA AND HERZEGOVINA

1. General Information

Bosnia and Herzegovina (BiH) has yet to establish a State aid inventory. There is currently no document which might be considered as a partial State aid inventory nor which may help indicating the amount and kind of State aid.

2. Inventory of National State aid Measures

The following measures were identified as possibly relevant for a closer investigation under the State aid provisions.

A. Foreign Investors Support Fund

The fund was established by the decision of the Council of Ministers in April 2007 and provides for grants for foreign investors by the Foreign Investments Promotion Agency of BiH. Beneficiaries are companies creating new jobs by investing in new products, as well as companies introducing new environmentally acceptable technologies and exporting products. Upon the call announced by the Foreign Investments Promotion Agency of BiH, usually at the end of a business year, eligible investors may apply. The relevant criteria for grants are:

- Number of new employees;
- Level of development of the area where the investment is made (developed, undeveloped or extremely underdeveloped area) in line with the Decision-criteria adopted by the BiH Council of Ministers;
- Investment value;
- Percentage of export participation in total production;
- Environmental impact.

The general aim is to promote investments in BiH. The call for applications is published annually and the total sum of the funds is BAM 2,000,000. Grants are in the range between BAM 50,000 and BAM 300,000 and are to be awarded after review by the panel. Since these grants take the form of payments from public funds available to certain selected companies, in particular foreign investors, they might have to be considered as State aid.

B. Loans provided by the Investment-Development Bank of RS

The Republic of Srpska (RS) Investment-Development Bank has established several credit lines through which it provides financial support to legal entities with registered seat in the Republic of Srpska, no matter in which business sector they are operating. Eligible applicants have to apply through commercial banks and the credit board approves the loan. The conditions under which the loans are granted mainly depend on the ability of the loan taker to repay the funds. Still, the interest rates are lower compared to the rates of the loans normally provided by commercial banks in BiH.

The strategic goals of the bank, and consequently of those credit lines, are the encouragement of investments and the stimulation of development in RS. The bank was founded on
6 December 2006 pursuant to the Law on the Republic of Srpska Investment-Development Bank. The Bank is registered as a joint-stock company which is 100% owned by RS. The amounts range between BAM 30,000 and BAM 5,000,000 per loan, with repayment periods up to 15 years and grace periods from twelve to 24 months with basic interest rates at 5.4%. The Serbian Investment-Development Bank monitors the loans. Since the Investment-Development Bank is 100% owned by the RS Government, this form of loans with favourable interest rates might have to be considered as State aid.

C. Loans provided by the Development Bank of FBiH

The Development bank of FBiH established different credit lines including management of grants provided by the Ministry of Development of the FBiH. The program contributes to the economic development of BiH. The Development bank of FBiH was established pursuant to the Law on the Development Bank. Eligible customers are companies from FBiH who are able to repay loans, no matter in which business sector they are operating in. The conditions under which the loans are granted mainly depend on the ability of the loan taker to repay the funds. Still, the interest rates are lower compared to the rates of the loans originally provided by commercial banks in Bosnia and Herzegovina.

Eligible applicants have to apply to the Development bank of FBiH providing an investment plan, information on its current financial position and the assets of the company. The credit board approves the loan. The amount, intensity and duration of any support provided for by the measure/program range from 50,000 BAM to 500,000 BAM, with repayment periods up to seven years, grace periods up to twelve months and basic interest rates as from 2.32 to 5.45% depending on the credit line which is used. The Bank monitors the loans. As the Investment Bank is 100% owned by the FBiH Government and manages funds granted by the government, this form of loans with favourable interest rates might be considered as State aid.

D. Other support measures

Laws or regulations fixing or otherwise influencing electricity generation prices or retail electricity tariffs: The legislation prescribes that the regulator is in charge of creating methodologies for the determination of prices for the usage of distribution networks and for supplies of tariff buyers. The prices of electricity for tariff buyers are thus regulated and established in accordance with the laws on electricity in FBiH and in the RS, so as to cover the costs in relation to the production of electricity and supply of the electricity. The prices established in accordance with the prescribed methodologies have to be approved by the regulatory bodies of the RS and FBiH, respectively. The tariff methodologies define the process for the determination of tariffs, i.e. tariff elements, categories of consumption and groups of customers, classification of costs, and allocation of costs on tariff elements.

The legislation in BiH does not provide for any form of price supplement to undertakings in the electricity sector, nor imposes any levies on electricity consumers in order to finance regulated tariffs below market prices granted to any category of electricity consumers (e.g. large industrial customers with heavy electricity consumption). However, BiH retains a heritage from the socialist system whereby there are different prices of electricity for commercial entities and households. The prices for households are lower. During privatization publicly owned power utilities were obliged to sell electric power to some large industrial consumers on preferential prices for a certain period of time. This system of cross-subsidies is about to be abolished as it is the country’s obligation in respect to market
opening. This gradual abolition is prescribed by the tariff methodologies. Any remaining cross-subsidies between qualified and non-qualified buyers do not as such constitute State aid.

**Subsidized assistance to consumers of electricity, such as consumers in poor or disadvantaged areas:** In the RS, Government or local communities have granted assistance for pensioners. The Government of RS planned aid in the amount of BAM 8,000,000 for 2010. This amount was paid directly to distributors. The distributor then reduces the debt of each customer eligible for the assistance. Some local communities were granting this kind of support to their citizens.

Within the post-war program of rehabilitation and reconstruction of the country and return of refugees and displaced persons, the state financed reconstruction of the infrastructure, including the rehabilitation of electricity distribution networks for newly built households.

No information was available regarding the mechanism and level of compensation granted by the RS Government to the operators.

**Cancellation of debts or the preferential redemption of debts incurred by undertakings active in the electricity sector:** There is no preferential redemption of debts specifically for undertakings in the electricity sector. In general, governments in BiH have allowed restructuring of debts based on unpaid taxes and contributions.

**Assistance for producers of electricity from renewable sources or co-generation (combined heat and power) facilities:** In FBiH, producers of electricity from renewable sources of energy are entitled to minimum guaranteed prices established by the Feed-in Tariff. In the RS, producers of electricity from renewable sources of energy are entitled to preferential prices, the amount depending on the type of the facilities. This incentive is available only for the facilities of installed power up to 5 MW. In FBiH, producers of electricity from renewable sources have priority access to the grid. However, there do not appear to be any regulations in the RS providing for privileged access to infrastructure for producers of electricity from renewable sources. In the RS, public supplier Elektroprivreda RS is required to purchase all electricity produced from renewable sources of energy in the facilities of installed power of up to 5MW. In FBiH, Operator for RSE137 is required to purchase all electricity produced from renewable sources under preferential (guaranteed) prices, calculated in accordance with the prescribed methodology, on the basis of a twelve-year contract on mandatory take-off of electricity.

---

137 The Operator for RSE should be established by June 2011. Until the establishment of the Operator for RSE, its responsibilities will be performed by the public suppliers in BiH- Elektroprivreda BiH and Elektroprivreda HZ HB.
III. CROATIA

1. General information

There are comprehensive and detailed reports on State aid available for the years 2003 to 2009.\textsuperscript{138} These reports on State aid, however, are general reports and do not focus on State aid in the electricity sector in particular.

The report for 2008 shows a significant increase in State aid granted for the environmental protection and energy efficiency:\textsuperscript{139} in 2008, HRK 37,100,000 were granted in total (\textit{de minimis} aid excluded), which is 80% more than in 2007 and 56% more than in 2006. The most commonly used instrument was subsidies and most of the State aid in 2008 was granted by the Environmental Protection and Energy Efficiency Fund. Furthermore, in 2008, the said Fund also granted HRK 13,500,000 of \textit{de minimis} aid, thus, the total amount of State aid granted for environmental protection and energy efficiency was HRK 50,600,000. In the overall structure of horizontal State aid granted in 2008, State aid for environmental protection and energy efficiency accounted for 3.1%.

The general CCA report for 2009 does contain information on State aid in 2009, such as a list of the State aid measures and programs authorised by the CCA in that year. Out of 52 State aid matters resolved in 2009 by the CCA, 26 were related to State aid Programs, six to Individual State aid measures, and 20 to opinions and answering queries of State aid beneficiaries and grantors, giving explanations on State aid provisions, collecting data on State aid, etc.\textsuperscript{140} Furthermore, there was a decrease of 9.1% in the overall amount of State aid granted in 2009, in comparison to 2008, while the most commonly used instrument remained the subsidy (80.65%).\textsuperscript{141}

Croatia has adopted State aid Rules for Reimbursement of Expenses due to the Liberalisation of the Electric Energy Market (Official Gazette, No. 150/08), which are contained in the Commission Communication on the methodology for analysing State aid linked to stranded costs. These rules provide clarification on how the rules of the Treaty shall apply to State aid in the electricity sector in the light of Directive 96/92/EC concerning common rules for the internal market in electricity.\textsuperscript{142}

Given that the gradual transition from largely restricted competition to genuine competition must take place under economic conditions that take account of the specific characteristics of the industry, Art. 24 of the Directive allows Member States to defer the application of some provisions of the Directive for a transitional period to enable them to cope with specific situations.\textsuperscript{143} Therefore, those Member States in which commitments or guarantees of operation given before the entry into force of this Directive may not be honoured on account

\textsuperscript{138} http://www.aztn.hr/o-nama/23/annual-report.
\textsuperscript{141} Program of the Government of the Republic of Croatia for takeover and implementation of EU legislation for 2011, p.54.
\textsuperscript{142} OJ L 27, 30.1.1997, p. 20.
of the provisions of this Directive, may apply for a transitional regime, taking into account, amongst other things, the size of the system concerned, and the level of interconnection of the system and the structure of its electricity industry.\textsuperscript{144}

In order to be regarded as eligible stranded costs that could be recognised by the Commission, commitments or guarantees must satisfy the criteria set out by the Commission in a specific Communication.\textsuperscript{145} The rules laid down in this methodology for State aid intended to offset stranded costs arising from Directive 96/92/EC, apply regardless of the public or private ownership of the undertakings concerned.\textsuperscript{146}

It should be noted that, since Croatia is still not a member of the EU, the above provisions are applied accordingly by the CCA, as the main competent authority for authorisation and control of State aid in Croatia.\textsuperscript{147} Another issue to be kept in mind is the fact that the said Directive belongs to the first legislative package on liberalisation of gas and electricity markets adopted by the EU in the late 1990s, which was subsequently adopted by Croatia, although similar provisions on stranded costs had already been contained in the EA. Namely, the EA defines stranded costs as liabilities and costs that were incurred before the application of the EA and which cannot be fully covered by market-based operation.\textsuperscript{148} Further, it provides that an energy undertaking subject to public service obligations is entitled to compensation (a subsidy) for covering stranded costs.

In order to obtain such compensation, an energy undertaking must propose the amount of compensation within twelve months from the EA coming into effect. The decision on the amount of compensation is made by the Government of the Republic of Croatia, at the proposal of the Ministry, which has obtained an opinion of HERA.\textsuperscript{149} For those reasons, and due to the fact that the second EU legislative package on liberalisation of gas and electricity (which replaced the first one)\textsuperscript{150} was later on implemented in Croatia through amendments to the aforementioned legislation regulating gas and electricity, the said Rules have not been used in practice.\textsuperscript{151} Moreover, Croatia is currently working on the implementation of the third legislative package on the liberalisation of gas and electricity which is planned to be adopted by the Parliament by the end of the first quarter of 2011.\textsuperscript{152}

Furthermore, Croatia has also adopted Rules on State aid for Environmental Protection (Official Gazette, Nos. 98/07 and 154/08), which are contained in the Community Guidelines

\textsuperscript{144} Art. 24 (1) of Directive 96/92/EC.

\textsuperscript{145} A full and detailed list of criteria is set out in the Commission Communication relating to the methodology for analysing State aid linked to stranded costs (Commission letter SG (2001) D/290869 of 6 August 2001).

\textsuperscript{146} Idem.

\textsuperscript{147} Art. 4 CSAA.

\textsuperscript{148} Art. 3 EA.

\textsuperscript{149} Art. 24 EA.


\textsuperscript{151} Oral information from the Ministry of Economy, Croatia.

on State aid for Environmental Protection. Therefore, the CCA will apply these Guidelines in the assessment of environmental aid, thereby increasing legal certainty and the transparency of its decision-making. As provided by the Guidelines, this assessment requires the CCA to balance the positive impact of the State aid measure in reaching an objective of common interest against its potentially negative side effects, such as distortion of trade and competition.

This so-called “balance test” operates in three steps. First, it is assessed whether the aid measure is aimed at a well-defined objective of common interest, i.e. the protection of the environment. Second, whether the aid is well designed to deliver the objective of common interest, i.e. whether the proposed aid addresses the market failure or other objective. Finally, it is assessed whether the distortions of competition and the effects on trade are limited, so that the overall balance is positive. Therefore, depending on the results of this test, the CCA may approve the State aid, declare it incompatible with the common market or take a compatibility decision subject to conditions.

2. State aid inventory

According to Arts. 6 (1) (e) and 17 CSAA, the CCA shall maintain a State aid register. However, in practice, the register is still imperfect, due to the fact that many State aid measures are being granted without submitting them to the CCA for a prior review and authorisation. The result of such practice is the lack of complete information on the introduced State aid measures. Furthermore, the State aid register as such is not publicly available, which is another obstacle to obtaining a systematic overview of the measures. On the other hand, the CCA publishes its decisions on its website, as well as in the Official Gazette of Croatia, which is the source of the following information gathered from all available decisions on State aid within the scope of this report.

A. Decision of 29 July 2008 authorizing certain types of State aid

On 29 July 2008, the CCA enacted a decision by which it authorised State aid in the form of subsidies for small and medium enterprises, Regional aid, State aid for research and development and State aid for training, proposed by the Ministry of the Economy, Labour and Entrepreneurship (Official Gazette No. 94/08). The scheme was based on a proposal of measures for the promotion of the development and the production of equipment for the implementation of renewable energy sources in the processing industry of Croatia.

The decision aimed at eliminating obstacles to the increase of competitiveness in the domestic industry in the field of development and production of equipment and components for the implementation of renewable energy sources. To achieve this goal, State aid was granted to enterprises developing and producing such equipment. A second aim was to execute obligations provided by the international treaties with regard to environmental protection in the energy industry through the promotion of the implementation of programs and projects related to renewable energy sources.

153 Community Guidelines on State aid for Environmental Protection (52008XC0401(03), OJ C 82, 1 April 2008.), 1 / 1.1. (1).

The legal bases were the Energy Sector Development Strategy of the Republic of Croatia (Official Gazette No. 38/02) and the Energy Act (Official Gazette Nos. 69/01, 177/04 and 76/07). The funds for the subsidies came directly out of the budget of the Republic of Croatia. The anticipated amount of State aid for energy efficiency and renewable energy sources to be used in the period from 2008 to 2010 is HRK 14,820,000. The types of State aid authorized are the following:

- Aid to small and medium enterprises to promote initial investment. Justified expenses in this case are expenses of initial investment in material (land, buildings, equipment/machinery) and immaterial assets (technology transfer, know-how, technical knowledge). State aid for initial investment of small enterprises amounts up to 15% of the justified expenses, and for medium enterprises up to 7.5%. However, small and medium enterprises can also qualify for Regional aid, as described below.

- Regional aid for large enterprises may be granted to promote initial investment. In general, the intensity of Regional aid depends on the geographical division to which the enterprise belongs: in North-West Croatia, the maximum intensity of Regional aid for large enterprises is 40%, for medium enterprises 50% and for small enterprises 60% of the justified expenses, while in Middle and Eastern Croatia the maximum intensity of Regional aid for large enterprises is 50%, for medium enterprises 60% and for small enterprises 70% of the justified expenses. Furthermore, the initial investment for which regional aid was granted must stay in the region of the beneficiary for at least five years after the investment ended if the beneficiary is a large enterprise, and three years when it comes to small and medium enterprises. Regional aid cannot be granted to enterprises in the steel industry, enterprises that use State aid for the promotion of their export, for the supply of transport equipment in the transport sector, and for the shipbuilding industry.

- State aid for research and development may be granted for the development of technology and products (development research), as well as for applied research.\(^{155}\) Generally, when it comes to research and development, justified expenses are the costs of instruments, equipment and immovables used strictly and continuously for the purposes of research, costs of advisory and similar services aimed solely at research activities, if they are related to the functioning of the research project, as well as additional and other operative expenses arising directly from research and development. State aid for research and development can amount to up to 50% of the justified expenses for large enterprises, 60% for medium and 70% of justified expenses for small enterprises.

- State aid for training may be granted for general training and for specific training. Justified expenses in this case are the costs of the instructor, travel expenses, other running costs, write-down costs of devices and equipment according to their usage for the purposes of training, costs of consultations regarding the training project, and expenses of the participants in the training project.

The CCA established that the proposed measures were State aid as provided in Art. 3, Paragraph 1 CSAA, since it represented an actual State expenditure, as well as an advantage for the beneficiaries on the market that would not have otherwise been achieved through their regular business activities, granted on a selective basis and with a potential to distort

\(^{155}\) The CCA’s decision on granting State aid (Official Gazette, No. 94/08) includes a comprehensive explanation of what is considered to be a ‘development research’ and what is considered to be an ‘applied research’.
competition, especially in so far it affects the realization of the international commitments undertaken by the Republic of Croatia. Furthermore, the CCA concluded that the proposed measures were encompassed by the exception from the general prohibition of State aid provided in Art. 4 (3) of the CSAA, namely because they are envisaged to promote the economic development of areas where the standard of living is extremely low or where there is serious underemployment, as well as to facilitate the development of certain economic activities and certain economic areas. Finally, the CCA also evaluated the proposed measures as compatible with the State Aid Rules for Small and Medium-Sized Enterprises, Rules on Regional Aid, the Regional Aid Map, the Rules on State Aid for Research and Development and Innovation, and the Rules for Training Aid, and thus gave its authorisation.

B. Decision of 10 June 2010

On 10 June 2010, the CCA made a decision by which it ruled that a request for authorisation of State aid in the form of interest-free loans, subsidies and interest subsidies contained in a program submitted by the Environmental Protection and Energy Efficiency Fund (Official Gazette, No. 80/10) was inadmissible as the aid was de minimis. The program for financing and co-financing of the projects in the field of environmental protection, energy efficiency and the use of renewable energy sources aimed at enhancing waste utilisation and exploitation of the valuable features of the waste, at the promotion of the environmental protection in rural areas, and at the promotion of educational, research and development studies, programs, projects and similar activities in the field of environmental protection.

The legal basis was Art. 10 of the Environmental Protection and Energy Efficiency Fund Act (Official Gazette, No. 107/03), Art. 21 of the Statute of the Environmental Protection and Energy Efficiency Fund (Official Gazette, Nos. 107/03, 73/04, 116/08 and 101/09) and Art. 27 of the Ordinance on the conditions and ways funds of the Environmental Protection and Energy Efficiency Fund are being granted, and criteria for evaluation of the requests for such funds (Official Gazette, Nos. 18/09). Interest-free loans (of maximum HRK 1,400,000), subsidies (of maximum HRK 200,000 per each environmental protection project) and interest subsidies (of maximum HRK 800,000) were envisioned by the scheme. In any event, the maximum aid for each beneficiary of the Program cannot exceed € 200,000 in a period of 3 fiscal years. The duration of the scheme is 1 January 2010 to 31 December 2012.

Prior to receiving State aid, a beneficiary must submit a written and certified statement to the Fund disclosing all de minimis aid it used in the current and previous two years, regardless of the grantor and its level (state, regional or local), so that the upper limit of € 200,000 is not exceeded. In case that this limit is exceeded, the Fund is obliged to perform a recovery of such excessive aid from the beneficiary.

Therefore, since the proposed scheme was considered compatible with the rules on de minimis aid, in particular with Art. 2 of the Rules, which sets out the criteria for aid measures to be exempt from the notification requirement (namely the upper limit of € 200,000 over any period of three fiscal years), the CCA established that the scheme in question met all the criteria and thus evaluated its authorisation as unnecessary. This is remarkable insofar as the CCA itself emphasized that de minimis aid cannot affect the realization of the international commitments undertaken by the Republic of Croatia.
C. Reconstruction and Development Loan Programme

A Loan Programme for the Financing of Projects for Environmental Protection, Energy Efficiency and Renewable Energy Resources\(^\text{156}\) has been introduced by the Croatian Bank for Reconstruction and Development (the Bank). According to this Programme, the final borrowers are the local and regional self-government units, utility companies, companies, craftsmen and other legal entities and natural persons.

The funds provided by the Croatian Bank for Reconstruction and Development could be regarded as state funds, within the meaning of the Law on State aid, for several reasons. The Bank itself was founded by the Republic of Croatia pursuant to the Act on the Croatian Bank for Reconstruction and Development (Official Gazette No. 138/06). The Bank’s share capital was paid up in full from the state budget and the state is jointly and severally liable for all of the Bank's obligations. Finally, when the Bank, upon request of the Government of the Republic of Croatia, authorises a placement/investment below the market value, the state must refund the Bank from the state budget for the difference between the earnings gained by such placement/investment and the earnings that would have been made had the placement/investment been realised according to the market value. Having in mind such specific relations between the state and the Bank, funds provided by the Bank are arguably encompassed by the legal definition of State aid as they can be regarded as bringing about an actual or potential state expenditure, or reduced state income.

The purpose of loans is investment in fixed assets: initial funding, land plots, buildings, equipment and devices. These loans are given via commercial banks or by direct lending. The loan amount is not limited; however, loan applications lower than HRK 100,000 shall not be considered.

Generally, the loan amount depends on the Bank’s financing capabilities, the investment project, the creditworthiness of the borrower and the quality of security offered. The Bank usually finances up to 50% of the estimated investment value, VAT not included. State aid provided by this Programme takes the form of a lower interest rate, i.e. the difference between the reference interest rate (determined individually for each borrower depending on its creditworthiness and the quality of security offered) and the incentive interest rate authorised for the borrower (which is lower than the reference interest rate).

Furthermore, the interest rate depends on the borrower’s category: if the borrowers are investing in a region of special state concern, a hill or mountain area, or the islands, if the borrowers are small or medium enterprises, or if the borrowers have proved their competitiveness by successful sales figures in domestic and/or foreign markets, the interest rate shall be 4% per year, while the interest rate for all other borrowers shall be 6% per year. Nevertheless, should the Environmental Protection and Energy Efficiency Fund approve the interest subsidy, the above interest rates shall be reduced by 2% or by the amount of the approved subsidy. Such aid may be authorised only in cases where the borrower has not already used the maximum allowed amount of State aid for the same justified expenses or the maximum allowed amount of de minimis State aid.

D. Agreement on sale of electricity between HEP and TLM-TVP

On 28 December 2010, the CCA, at the request of HEP d.d., issued a general opinion on the proposed draft of an agreement on sale of electricity to be concluded between HEP d.d. and TLM-TVP d.o.o. in the light of Croatian competition law. After analyzing the proposed model for electricity price formation, the CCA pointed out that the envisaged formula differed from the usual model for electricity price formation to other undertakings in the Republic of Croatia, since the electricity price is not based on the costs of electricity production but rather on the market price of the base aluminium.

The CCA highlighted that the conclusion of such an agreement must not violate provisions of the CA, and, considering that the Republic of Croatia is the sole shareholder of HEP d.d., the sale of electricity to TLM-TVP d.o.o. below market price could represent State aid not covered by the CSAA. It should also be noted that the CCA undertakes proceedings for the evaluation of TLM’s restructuring program, which will, among others, cover and evaluate all aid provided to that undertaking before and during privatization, including possible aid directed to delivery of electricity.\textsuperscript{157}

\textsuperscript{157} http://www.dobarlink.com/Arts/Art-12501.html.
IV. FORMER YUGOSLAV REPUBLIC OF MACEDONIA

1. General information

Each year, the CPC prepares the annual report for the previous year and publishes it on its website. To date, the CPC has published three annual reports (for 2007, 2008 and 2009). The State aid inventory is part of these reports. An English version is only available for 2007, while translations of the reports for 2008 and 2009 are not posted on the website yet.

2. State aid inventory

According to the available annual reports (the list for 2010 contains 53 decisions), there are almost no decisions on State aid granted to the electricity sector.

A. Decision No. 10-18/12 of 12 February 2007

Only Decision No. 10-18/12 of 12 February 2007 concerns State aid in the electricity sector. The Decision was enacted by the CPC upon a report from the Ministry of Economy for granting State aid to the public enterprise MEPSO AD. According to the Decision, the State aid amounts to denars 900,000,000 (around € 14,754,098) in the form of a one-time payment out of the public budget. The CPC found this State aid compatible with the regulations of the LCP and LCA and approved it. According to the Decision, State aid was provided to MEPSO AD in order to overcome the difficult electricity situation in the country as a result of increased domestic needs for electricity (by large customers in the Former Yugoslav Republic of Macedonia). At that time, the regional electricity trade market showed a lack of electricity, resulting from the shutdown of AED Kozlodoy in Bulgaria (on 1 January 2007).

B. Additional categories of support measures

Subsidised assistance to consumers of electricity, such as consumers in poor or disadvantaged areas, in order to ensure the supply of electricity to consumers in those areas: In accordance with the obligations of the Social Memorandum in the context of the Energy Community Treaty, the Ministry of Economy, together with the established working group prepared a Social Action Plan. The Social Action Plan was adopted by the Government on 7 September 2009. The Parliament adopted the Law on Social Protection (LPS) on 24 June 2009. In accordance with Art. 10 LPS, it is envisaged that the Government may adopt a program for subsidizing energy consumption and other public services. The program was adopted on 20 July 2010 (published in the Official Gazette, No. 113/2010 of 27 August 2010). The subsidy amounts to denars 600 (approx. € 10) per month. After presentation of the paid energy bill, the households receive the reimbursement from the government. The measure covers the 58,000 most imperilled households and lasted from 1 September 2010 to 31 December 2010. During 2009, the Ministry of Economy provided grants to a total of 500 households that placed solar panels on their homes in the total amount of eight million denars. Each household received no more than € 300. These government programmes were not laid down in a law but were decided by the government depending on the funds available. They were listed in the working programmes of the government on a yearly basis. On 7 September 2010, the government adopted the National program for development of social protection for 2011–2021. This program provides the possibility for the Government to adopt programs of measures to subsidize the consumption of energy in the period of 2011 to 2021. The intention of the government is to adopt such a program each year. According to the Social Action Plan, these State funds were and will be paid directly to the most imperilled
energy consumers. Therefore, the measure did and does not involve any compensation by the Government to the electricity providers.

In addition, according to Art. 107 (2) (a) TFEU, any State aid having a social character (given to individuals, provided that it is granted without discrimination related to the origin of the products concerned) is compatible with the internal market. Since this measure does not impact the choice of the consumers (the electricity distribution for natural persons is not yet liberalized and it is provided by one company – EVN Macedonia), this means that if any State aid is provided to electricity producers under the Social Action Plan, this could still be regarded as acceptable under EU State aid law.

**Purchase obligations on customers of undertakings active in the generation of electricity for fixed or minimum amounts of electricity, and/or at fixed or minimum prices:** The Energy Law provides that the operator of the electricity market in the Former Yugoslav Republic of Macedonia is obliged to purchase all of the electricity produced by “privileged producers” of electricity (production of electricity using renewable resources), as well as the production of electricity of highly qualified combined power plants. According to the Energy Law, the purchase and sale of electricity in the Former Yugoslav Republic of Macedonia is based on the principles of free market and the development of an organized market for electricity in accordance with the principles of transparency, non-discrimination and competition.

**Direct (reimbursable or non-reimbursable) grants of public funds to undertakings in the electricity sector in order to help them cover operational costs, or in order to promote investment in generation capacity, network infrastructure, renewable energy sources or any other purpose related to the electricity sector:** The grant provided to MEPSO AD (approved with the Decision by the CPC) was designed to overcome difficulties caused by the lack of electricity. There are no other grants approved by the CPC. However, according to new LCA such grants fall under State aid if granted to undertakings. Such grants would need to be approved by the CPC. A greater involvement of renewable energy sources (RES) in energy consumption is one of the major strategic objectives of the government in the energy sector. Therefore, guarantees of origin and feed-in tariffs are established in accordance with the EL. The ERC decides on the guaranteed feed-in tariffs which producers of renewable energy receive from the transmission system operator. The Energy Agency decides on the granting of the guarantees of origin for “privileged producers”, a condition for the signing of long-term agreements on guaranteed purchase of their electricity at a certain price (feed-in tariffs). The Energy Agency of the Former Yugoslav Republic of Macedonia issues and maintains a registry of guarantees of origin for electricity produced from renewable energy resources. The status of “privileged producers” who produce electricity from RES can be obtained by certificates from the Energy Agency. The Regulatory Commission establishes preferential tariffs for electricity produced by those providers offering electricity produced from RES. The market operator is obliged to purchase all of the electricity generated from the “preferential producers” of electricity using RES.

**Specific assistance for producers of electricity from renewable sources or co-generation (combined heat and power) facilities, in order to compensate these producers for higher costs:** As mentioned above, the ERC decides on the guaranteed feed-in tariffs which producers of renewable energy receive from the transmission system operator. The Energy Agency decides on the granting of guarantees of origin for “privileged producers” as a condition for the signing of long-term agreements on guaranteed purchase of their electricity at a certain price (feed-in tariffs). The company Sieto concluded a long-term agreement with
the CPC granting the purchase of electricity under preferential conditions for a period of 20 years. Sieto is working in the field of electricity produced from renewable sources (photovoltaic production system). The operator of the electricity market in the Former Yugoslav Republic of Macedonia (state-owned MEPSO) is obliged to purchase all of the electricity produced by “privileged producers” of electricity and highly qualified combined power plants.

Assistance to undertakings active in the electricity sector for the purpose of promoting waste management and/or energy efficiency: Producers of electricity from waste may be awarded the status of “qualified producers”, and once they obtain such status they are entitled to the same incentives as producers of electricity from renewable sources or co-generation facilities which have been awarded this status.

Preferential rights or special support for public undertakings in the electricity sector: According to informal sources, the Former Yugoslav Republic of Macedonia appears to grant preferential rights or special support for public undertakings with regard to (i) guarantees on loans by public undertakings in the electricity sector, (ii) project and program loans in cooperation with financial institutions to undertakings in the electricity sector, and (iii) disbursement of loans incurred by public undertakings in the electricity sector. However, no legal acts regulating these issues, nor programs or other documents related to this issue have been identified.

Preferential rights for public undertakings with regard to the conclusion of concession agreements: The Law on Concession and Public Private Partnership stipulates that the provisions of this law are not applicable in the case where subjects are public enterprises, shareholder companies established by the Former Yugoslav Republic of Macedonia, municipalities etc., and companies in which the Government or the municipalities have direct or indirect ownership of the capital.
V. MONTENEGRO

1. General Information

Montenegro is under an obligation to establish a State aid inventory. According to the Annual Report of the Ministry of Finance 2009, a List of Applied and Granted State Support in 2008 has been established. The inventory of granted State aid is not publicly available.

The Ministry of Finance published an English version of the Annual Report on granted state support for 2009. This report does, however, not specifically focus on State aid to companies in the electricity sector.

2. Inventory of national State aid measures

No measures and programs for public support were identified specifically for the electricity sector. Certain State support mechanisms available to all sectors of the industry were however identified and are enumerated below given that they might apply to the electricity sector as well.

A. Investment and Development Fund of Montenegro

The Investment and Development Fund of Montenegro (IDF) is the legal successor of the Fund for Development of the Republic of Montenegro and is established by the Law on the Investment and Development Fund of Montenegro. The founder of IDF is the Government of Montenegro and the IDF has been operational from 31 March 2010. Sources of the budget of the Republic of Montenegro were used for the establishment of the Fund for Development of the Republic of Montenegro. Activities of the IDF are related to the economic development by approving credits and issuing guarantees in order to provide incentives for establishment and development of SMEs, to offer support to infrastructure projects, to finance projects of local, regional and national importance, and to encourage employment. The official website of the IDF provides the open tender for the use of financial support granted by the IDF. Following types of financial support are available:

- Credit lines in cooperation with banks and their guarantees, including long-term investment loans and short term loans for SMEs;
- Deposit at banks for financing investments of SMEs;
- Micro Funds for financing SMEs;
- Direct Credits;
- Financing of infrastructure and ecology projects.

Beneficiaries are local governments and public companies. The maximum amount of credit is € 750,000 at an interest rate of 5%; the repayment period is nine years including maximum grace period of two years. Security instruments include bank guarantees, mortgage, fiduciary, and bank notes.

159 www.irfcg.me.
Additional incentives are provided for projects in the Northern region of Montenegro, for companies employing more than five new people at least for the repayment period, and for innovations. In accordance with the Law on Control of State aid, the IDF is subject to the obligation to submit the list of planned State aid to the Commission for the control of State aid and obtain its approval in order to be able to grant State aid.

B. Fund for Energy Efficiency

Under the new Montenegrin Law on Energy Efficiency, the project for the energy efficiency should be supported by state funds. The new Law on Energy Efficiency has been adopted and will come into force in May 2011. By that time, by-laws should be enacted which are expected to regulate the manner of financing of energy efficiency projects from the Budget of Montenegro or the budget of local communities and other sources.

According to the information obtained from the website for energy efficiency in Montenegro, the main source for financing this type of projects will be the Fund for Energy Efficiency. This Fund currently is part of the Ministry of Economy as a separate unit in the Budget for which the Law on Budget provided €1,696,959.68 for 2010.

It may be expected that the Fund will become an entirely separate entity in the following years (according to the unofficial information obtained from the Ministry of Economy), similar to the Investment and Development Fund of Montenegro. The website for energy efficiency informs that the Fund for Energy Efficiency shall be financed, together with the Fund for Protection of the Environment, from income generated by eco-fees.

In addition, the Law on Budget mentions the Project of the World Bank for the Energy Efficiency in Montenegro (MEEP), stating that the total amount provided by the loan will be used for the purpose of energy efficiency projects and not within the limit of the Budget provided for Fund of Energy Efficiency for 2010. At this stage, the energy efficiency projects in Montenegro are mainly focused on the public sector since this is the target sector of the MEEP. According to information provided on the website of the World Bank, the total amount of the loan for MEEP is USD 9,400,000 for the period from 9 December 2008 to 31 December 2012.

C. State budget

Under the Law on Budget for 2010, Montenegro will issue guarantees of a total amount of €202,000,000. However, the Law on Budget for 2010 does neither disclose information on the beneficiaries the respective guarantees will be provided to, nor about the loans secured by the guarantees.

D. Other support measures

Access to public property, raw materials or any type of infrastructure to undertakings active in the electricity sector at below-market prices, or on any other preferential basis:

Under the Energy Law, the prices of coal used for generation of electricity are regulated. The prices are calculated by the producers of coal in accordance with the Rules on the Manner of Establishment of the Price of Coal used for Generation of Electricity and approved by the Regulatory Energy Agency. The connection and access to the transmission or distribution

160 www.energetska-efikasnost.me.
grid is equally available to all undertakings in the electricity sector under regulated prices, calculated by the respective system operators in accordance with the prescribed methodology for calculation of prices, and approved by the Regulatory Energy Agency. The only exception are the producers of energy from renewable sources, to whom the Energy Law guarantees priority access and use of the systems for transmission and distribution of electricity.

Guarantees or securities, interest subsidies or other preferential terms on investment, capital or other loans by undertakings active in the electricity sector: The Montenegrin budget for 2010 generally provides for guarantees for loans granted to undertakings, but no guarantees specifically provided to undertakings in the electricity sector were identified.

Regulation of electricity generation prices or retail electricity tariffs: Under the Energy Law prices in the electricity sector can be both regulated and unregulated, depending on whether the electricity is supplied to tariff customers or to qualified buyers. Tariff buyers of electricity are the consumers which are supplied by the public supplier under regulated prices approved by and established in accordance with the methodologies issued by the Regulatory Energy Agency. Qualified buyers may be supplied by the supplier of their choice, under freely negotiable prices. Retail prices of electricity supplied to the tariff buyers (and to the qualified buyers which have chosen to be supplied by the public supplier) are calculated by the public supplier in accordance with the Temporary Methodology for Calculation of Supply Prices for Tariff Buyers, and approved by the Regulatory Energy Agency. Retail prices of electricity for tariff buyers include the following tariff elements: prices of energy, fees for use of the transmission and distribution system, and a supply fee. The amount of the fees for the use of the transmission/distribution grid and for the supply is proportionate to the amount of energy consumed. The public supplier prepares the table containing the above-mentioned tariff elements, allocated to consumption categories (high voltage categories and low voltage categories) and tariff groups (price table). The price table is approved by the Regulatory Energy Agency and the tariffs are set below the market level.

Subsidized assistance to consumers of electricity, such as consumers in poor or disadvantaged areas, in order to ensure the supply of electricity to consumers in those areas: The Energy Law recognizes the status of “vulnerable electricity consumer”. The main characteristic of such consumers is that termination of supply may directly endanger their life and health, due to their social position or health. Under the law, such consumers will be supplied by the public supplier under special tariffs, established in accordance with the methodology for the calculation of prices for vulnerable consumers. The difference in price of electricity supplied to vulnerable consumers and the full price will reportedly be covered by the government. As of now, the methodology for the calculation of the tariffs for vulnerable consumers has not been enacted, so that a detailed analysis of the measure cannot be performed yet.

Purchase obligations on customers of undertakings active in the generation of electricity for fixed or minimum amounts of electricity, and/or at fixed or minimum prices, in order to promote electricity from renewable sources: Under the Energy Law, the market operator (to be established by January 2011) is required to purchase all electricity produced by the producers of energy from renewable sources (as defined by the law) under fixed guaranteed prices on the basis of an agreement on mandatory take-off of electricity concluded between a producer and the market operator. Furthermore, suppliers of electricity are required to take over the electricity produced from renewable sources from the market operator in an amount proportionate to the amount of electricity supplied to consumers.
Tax incentives for investment in under-developed regions: These apply irrespectively of the industry in which the investment is made. Newly established companies in under-developed regions are exempt from the obligation to pay corporate income tax for the period of 3 years starting from the year in which the company was established. Furthermore, companies having production activities in under-developed regions are exempt from corporate income tax according to the proportion of profit generated in such under-developed regions relative to their total profit.

Tax allowances for producers of electricity from renewable sources: Until December 2009, companies which invested in fixed assets for generation of electricity from renewable sources or for energy efficiency were entitled to a tax credit in the amount of 50% of the respective investment. The 2009 amendments to the Law on Corporate Income Tax abolished this incentive. Accordingly, Montenegro does not provide for tax allowances that are available specifically to the undertakings in the electricity sector anymore.

Minimum guaranteed prices for production of electricity: Qualified producers are entitled to minimum guaranteed prices established by the Incentives Regulation.

Assistance to undertakings active in the production of energy from waste, or to promote energy efficiency: Other than the feed-in tariff which is generally available to producers of energy from waste (as defined by the relevant laws), no specific incentives are granted for the purpose of promoting waste management. The new Montenegrin Energy Efficiency Law prescribes certain incentives aiming at the promotion and stimulation of energy efficiency:

- Products and services with a higher ratio of energy efficiency will have an advantage in the public procurement procedures.

- The law further provides the possibility that the entities involved in the production of electric energy and heat from renewable sources may use the funds intended for projects for the increase of energy efficiency, provided that such entities use such energy/heat for their own purposes, that they do not use the feed-in tariff and that the electric energy produced is not intended for sale.

- Entities which use technologies, or produce or sell products which contribute to the increase of energy efficiency may be granted special incentives including tax, customs and other incentives as may be established by separate regulations (no such regulation has been issued yet).

Long-term purchase agreements with preferential conditions awarded by the State/public undertakings in the electricity sector: Producers of electricity from renewable sources, cogeneration and waste are entitled to conclude a 12-year agreement on mandatory take-off of electricity with the market operator; as noted above, the market operator has not been established yet (scheduled for January 2011). Until the establishment of the market operator, these agreements should be concluded with the public supplier of tariff buyers (the EPCG). According to the State budget for 2011, the Government plans to spend €26,700,000 on subsidies for the production and the provision of services within the program for development of energy, mining and industry. The budget for 2011 does not further elaborate on the specific beneficiaries or the projects these funds will be spent on. According to the Ministry of Economy, these funds should be used as subsidies for payment of electricity consumed by, inter alia, aluminium smelters in Podgorica (CAP).
Preferential rights or special support for public undertakings in the electricity sector: Apart from specific types of state support identified in the state budget for 2010 (state guarantees for loans) available to public undertakings in various sectors, there do not appear to be any types of special state support granted specifically to undertakings in the electricity sector.
VI. SERBIA

1. General information

Regarding State aid notifications in the field of energy, the CSAE has received notifications only from the Autonomous Province of Vojvodina - Provincial Secretariat for Energy and Mineral Resources. The CSAE adopted decisions upon these notifications which are available in Serbian language on the website of the Ministry of Finance, within the category State aid - subcategory Sessions of Commission for State aid Control.

To date, the CSAC does not appear to have received any notifications concerning State aid in the electricity sector. Annual reports on State aid granted in previous periods (2006-2009) are available in Serbian and English language on the website of the Ministry of Finance, within the category State aid – subcategory Reports on State aid granted and these reports do not contain any data on State aid granted in this period in the electricity sector.

In line with Art. 39 of the Interim Agreement on Trade and Trade Related Matters between the EU and Serbia, obligations related to State aid control do not apply to public undertakings. Considering the fact that all companies in the electricity sector in the Republic of Serbia are public enterprises, in the period of three years following the entry into force of this agreement, rules defined in the Law for State aid Control and its following by-laws shall not apply to the electricity sector. In the following period, the Department for State aid Control will produce the inventory of regulations which served as a basis for State aid granting prior to the entry into force of the Law on State aid Control and its by-laws.

2. State aid inventory

Serbia is under an obligation to establish a State aid inventory, but has not yet prepared an official inventory on State aid measures in the electricity sector. The inventory provided below is primarily based on research of Serbian regulation providing for incentives to commercial entities (private and public), both general and sector-specific. The Report on State aid granted in 2009 is available. The following national aid measures have been identified as possibly affecting the electricity sector:

A. Loans granted by the Environmental Protection Fund

Loans at lower interest rates (compared to market rates) for investment in projects which promote the use of renewable sources of energy (RSE) were available until 31 December 2010 on the basis of a Public Invitation for Granting of Loans of the Environmental Protection Fund. Potential beneficiaries are commercial entities with their registered seat in Serbia investing in projects which promote the use of RSE. However, it was not possible to obtain a list of beneficiaries for the purpose of publication in this study.

Loans were provided on the basis of a public invitation issued by the Environmental Protection Fund. Funds of the Environmental Protection Fund are provided, inter alia, from the state budget. The potential beneficiaries had to submit their applications to the Fund. The

---

162 The total amount available for the loans under this public invitation was up to RSD 200,000,000. The loans were available until distribution of the respective amount, but not later than 31 December 2010.
Managing Board of the Fund decided on the submitted applications on a monthly basis. On the basis of the respective decision, the Fund and the Fund for Development concluded an agreement with the beneficiary, regulating mutual rights and obligations in relation to the respective loan.

The loan could be granted in the amount up to RSD 40,000,000 with an annual interest rate of 3%. The repayment period is up to five years (quarterly instalments), with a grace period of up to one year. The Fund monitors whether the loans are used for the purposes they were granted for. The monitoring is performed both regularly and by analysis of the final report (submitted by the beneficiary within 30 days following the finalization of the project).

If the beneficiary fails to comply with the monitoring requirements, the Fund may terminate the agreement, in which case the beneficiary will be required to pay back the received amounts, along with the default interest.

### B. Guarantees provided to electricity undertakings

Under the Law on Budget for 2010 (Official Gazette, No. 107/2009), Serbia will issue the following guarantees:

<table>
<thead>
<tr>
<th>Guaranteed for</th>
<th>Purpose of the Loan</th>
<th>Amount of the Guarantee</th>
<th>Guarantees are issued for the benefit of the entities listed below</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Public Enterprise Elektroprivreda Srbije</td>
<td>Purchase of system for measuring and calculation of electricity</td>
<td>€ 40,000,000</td>
<td>European Bank for Reconstruction and Development</td>
</tr>
<tr>
<td>2. Public Enterprise Elektroprivreda Srbije</td>
<td>Purchase of system for measuring and calculation of electricity</td>
<td>€ 40,000,000</td>
<td>European Investment Bank</td>
</tr>
<tr>
<td>3. Public Enterprise Elektroprivreda Srbije</td>
<td>Environmental protection measures within energy sector-revitalization of HPP Zvornik</td>
<td>€ 70,000,000</td>
<td>KfW Entwicklungsbank (German Development Bank)</td>
</tr>
<tr>
<td>4. Public Enterprise Elektroprivreda Srbije</td>
<td>Desulphurization of fuel gases in TPP Nikola Tesla</td>
<td>€ 200,000,000</td>
<td>Foreign governments</td>
</tr>
</tbody>
</table>
C. Loans provided to electricity undertakings

Under the Law on Budget for 2010, Serbia will provide the following project and program loans in cooperation with financial institutions:

<table>
<thead>
<tr>
<th>Beneficiary</th>
<th>Project/Program</th>
<th>Amount</th>
<th>In cooperation with</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. TE-KO Kostolac (subsidiary of PE Elektroprivreda Srbije)</td>
<td>Revitalization of Block B2</td>
<td>€ 50,000,000</td>
<td>Export-Import Bank of China</td>
</tr>
<tr>
<td>2. TE-KO Kostolac (subsidiary of PE Elektroprivreda Srbije)</td>
<td>Revitalization of Block B1</td>
<td>€ 100,000,000</td>
<td>Export-Import Bank of China</td>
</tr>
<tr>
<td>3. TE-KO Kostolac (subsidiary of PE Elektroprivreda Srbije)</td>
<td>Desulphurization of TE-KO Kostolac</td>
<td>€ 100,000,000</td>
<td>Export-Import Bank of China</td>
</tr>
<tr>
<td>4. TE-KO Kostolac (subsidiary of PE Elektroprivreda Srbije)</td>
<td>New excavation Drmna</td>
<td>€ 600,000,000</td>
<td>Export-Import Bank of China</td>
</tr>
</tbody>
</table>

The loans are awarded from the State budget. More detailed information on the award procedure for these loans and on their terms and conditions including the interest rate was not made available for the purpose of this report.

D. Repayment of loans by electricity undertakings

Under the Law on Budget for 2010, Serbia will repay the following loans incurred by the public undertakings within the electricity sector:

<table>
<thead>
<tr>
<th>Public Undertaking/ Purpose of the Loan</th>
<th>Amount of the Instalment for the year 2010</th>
<th>Repayment</th>
<th>Creditor:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. PE Elektroprivreda Srbije/ Urgent reconstruction of energy sector</td>
<td>€ 3,477,723</td>
<td>7 March 2016</td>
<td>European Bank for Reconstruction and Development</td>
</tr>
</tbody>
</table>
According to the Law on Budget for 2010, in the year 2011, Serbia will begin repayment of the following loans:

<table>
<thead>
<tr>
<th>Public Undertaking/ Purpose of the Loan</th>
<th>Amount of the Loan</th>
<th>Repayment</th>
<th>Creditor:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. PE Elektromreze Srbije/ Reconstruction of energy sector</td>
<td>€ 25,272,102</td>
<td>10 November 2028</td>
<td>European Investment Bank</td>
</tr>
<tr>
<td>2. PE Elektroprivreda Srbije/ Environmental protection measures in lignite thermo power plants</td>
<td>N/A</td>
<td>30 June 2018</td>
<td>KfW Entwicklungsbank (German Development Bank)</td>
</tr>
</tbody>
</table>
Again, detailed information on the award procedure for these loans and on their terms and conditions including the interest rate was not made available for the purpose of this report.

E. Subsidies granted by the Autonomous Province of Vojvodina

Under the Resolution on Budget of the Autonomous Province of Vojvodina for 2010, the Provincial Secretariat for Energy and Mineral Resources will grant subsidies for promotion of the use of renewable energy sources to the private sector in the amount of RSD 15,000,000. As it appears, the respective subsidies have been awarded to a project developing use of solar energy for preparation of hot water in campuses throughout Vojvodina. The project is however not within the electricity sector.

F. Other support measures

Subsidized assistance to consumers of electricity: The social support system in Serbia does not solely provide for a specific support mechanism for consumers of electricity, but rather for general support to socially endangered categories of the population, by granting them funds from the State budget. These State funds are paid directly to the endangered individuals. Also, the public electricity supplier (EPS through its subsidiaries) allows discounts to socially endangered consumers of electricity, as long as they settle their electricity bills timely. The list of the consumers entitled to the discount is prepared by the social welfare centres. One group of the consumers is entitled to a 35% discount for the monthly consumption of up to 450 kWh for tariff element “active energy”, while the other group is entitled to a 35% discount for the monthly consumption of up to 350 kWh for tariff element “active energy”. According to the Energy Agency, there is no compensation paid to the electricity providers for their services, and hence no State aid involved. However, this remains to be verified.

The Social Action Plan, published in the Official Gazette of BiH No. 35/10 on 3 May 2010 inter alia provides for the protection of socially vulnerable categories of electric power consumers. There are two activities mentioned: the development of the Program of assistance to socially vulnerable households – electric power consumers, and the Promotion of energy efficiency in households. The deadline for the implementation of these activities was June 2010.

According to the Ministry of Foreign Trade and Economic Relations coordinating the plan, RS has taken certain steps towards implementation of the action plan while FBiH has not started yet. RS developed the Program of assistance to socially vulnerable households - electric power consumers (as set out in the BiH chapter). In general, the implementation of the action plan is late when it comes to the deadlines established by the plan.

Purchase obligations on customers of undertakings active in the generation of electricity for fixed or minimum amounts of electricity, and/or at fixed or minimum prices: Under the feed-in tariff, the public supplier of electricity is required to purchase all of the electricity produced by the producers of energy from renewable sources under fixed guaranteed prices, on the basis of the agreement on mandatory take-off of electricity concluded between a producer and a public supplier.

Direct (reimbursable or non-reimbursable) grants of public funds to undertakings in the electricity sector in order to help them cover operational costs: In 2008, the Autonomous Province of Vojvodina granted RSD 20,000,000 in a non-refundable grant to
Elektrovojvodina (subsidiary of EPS on the territory of Vojvodina) for the project Decrease of losses of electricity in the distribution grid.

**Tax relief to undertakings active in the electricity sector in order to promote energy efficiency or energy from renewable sources, promote regional development in less developed regions, or any other purpose:** There are no tax incentives available exclusively to undertakings within the electricity sector, apart from general tax incentives available to undertakings in all sectors and hence not selective.

**Cancellation of debts or the preferential redemption of debts incurred by undertakings active in the electricity sector:** No such possibility is provided specifically for the electricity sector. The Decree on Rules for the Granting of State aid provides for a general possibility to grant State aid to companies facing difficulties, provided that such aid is used for corporate recovery or for corporate restructuring. The Law on Tax Procedure and Administration prescribes that the Government may decide to write off taxes and auxiliary tax claims, owed by the entity undergoing the process of corporate restructuring. The law does not distinguish between electricity undertakings and other undertakings.

**Assistance to undertakings active in the electricity sector for the purpose of promoting waste management and/or energy efficiency:** There are no specific incentives for the improvement of energy efficiency. Other than the feed-in tariff which is generally available to producers of energy from waste (as defined by the relevant laws) no specific incentives are granted for the purpose of promoting waste management.

**Grants, tax relief or other financial aid or incentives to undertakings in the electricity sector for the purpose of offsetting costs related to social security contributions, the employment of former unemployed workers, or for providing employment training:** There are no incentives for the purpose of offsetting costs related to social security contributions, the employment of former unemployed workers, or for providing employment training aimed exclusively at undertakings in the electricity sector. Serbia does provide subsidies for the employment of unemployed individuals, and relief from payment of social security contributions to undertakings provided they employ ‘difficult-to-employ’ individuals. These types of aid are not available to public undertakings.

**Support to undertakings which are in the privatization or restructuring process:** The Law on Privatization prescribes that the Privatization Agency commences the restructuring process if it finds that the state or socially owned capital of the entity undergoing the privatization cannot be sold without previous restructuring of the capital. The restructuring process may include, *inter alia*, a total or partial write-off of the main debt, interest and other related claims, and discharge of the total or partial debt in which case the claim is settled from the funds obtained from privatization (“discharge”).

**Long-term purchase agreements with preferential conditions awarded by the State/public undertakings in the electricity sector:** Producers of energy are entitled to conclude a twelve-year agreement on mandatory take-off of electricity with a public supplier of electricity (EPS) under which the qualified producers are entitled to sell their electricity to the public supplier.
VII. UNMIK (under UN Security Council Resolution 1244)

1. General Information

There is neither an annual report, nor an inventory on State aid in UNMIK. However the subsidization of publicly owned enterprises and also the Socially Owned Enterprise, Trepça (which is a large energy user), has been part of the budget plan during 2008, 2009 and 2010. Within these companies, the public energy company (KEK) has been the main beneficiary of these subsidies during this period. In 2009, KEK received subsidies in the amount of € 64.2 million and also received a loan of € 100 million which was spent in part.

In 2010, KEK received a loan from the Government of € 60 million of which about € 35 million had been spent within the first 9 months. In addition to KEK, among the publicly owned enterprises there are several other companies which have enjoyed financial support of some kind during 2009, such as KOSTT, the Railways, the two district heating companies (which received about € 500,000 subsidies for fuel purchases in early 2011), public companies for water and waste management, and Trepça, a socially owned enterprise in the mining sector. The type of support may be anything from waiving taxes or penalties, provision of extra time to pay taxes or, in the case of Trepça, not requiring full mining royalties to be paid on minerals.

Subsidies granted by the Government in 2009 to publicly owned enterprises were worth € 75.1 million, or about 2% of the GDP. However, the latest fiscal projections suggest continued decline in the level of subsidies to public enterprises during the next term, mostly due to national budget constraints. The Government commitment to private sector involvement in the power generation sector and the privatization of distribution and supply divisions will enable the gradual reduction of subsidies for these companies from 2012 (privatizations are unlikely to conclude until then). As a transition to the phasing out of subsidies, the Government is changing its support to KEK into almost entirely a loan-based support. Subsidies granted by the Government for publicly owned enterprises in 2009 were € 75 million including the import of electricity. In addition to this there is the soft loan to KEK which will be renewed also in the 2011 budget.163

2. State aid inventory

Apart from the subsidies to publicly owned enterprises detailed above, the following measures were identified as containing elements of State support to stakeholders in the electricity sector.

A. Subsidized assistance for categories of consumers

Under a Memorandum of Understanding (MoU) between the Ministry of Labour and Social Welfare (MLSW), the Ministry of Economy and Finance (MEF) and KEK, particular categories of consumers can benefit from subsidies. Those are vulnerable customers, e.g. the very poor, war victims and invalids, who are not able to pay electricity bills, as specified by the MLSW. These customers pay less for their electricity than the standard tariff and the Pricing Rule of the Energy Regulator foresees this. The state budget allocates a sum to the public electricity supplier KEK for the socially vulnerable customers so that they are supplied

energy at a lower cost basis. The total amount of the subsidy is, however, determined by the Ministry of Finance. There is no benefit for KEK as the amount of funds received from the state budget equals the amount of discount the socially vulnerable customers receive. Accordingly, the measure appears on its face consistent with the criteria for compensation for public service obligations as established by the European Court of Justice in the *Altmark* case.

**B. Additional categories of support measures**

**Preferential access to public property, raw materials or infrastructure to certain electricity companies:** The arrangements for lignite usage include a concession fee and a royalty fee as well as expropriation costs for any land owners. The access to new lignite fields, including as part of the proposed LTPAP World Bank supported tender process for a new power plant, will be through a tendering procedure. However, KEK was given access to the lignite fields without a tender. In practice, KEK has been granted some concessions in the past in relation to the payment of royalty fees, etc. The distribution arm and its infrastructure are also the subject of an open tender launched in January 2011.

**Guarantees or securities, interest subsidies or other preferential terms on investment, capital or other loans:** It is possible that the Government will have to provide some sort of financial or other guarantee (perhaps with World Bank or IFC support) to the future investors for the privatization of the distribution and supply entities as well as to facilitate the building of new power plants. Presently, for KEK and the district heating companies, the Government provides subsidies and subsidized loans for some of their capital investments and for operational purposes (mainly related to purchases of electricity from imports or subsidizing the purchase of mazut for district heating when the Pristina company has cash flow/collection problems).

**Regulation of electricity generation prices or retail electricity tariffs:** Specific rules issued by the Energy Regulatory Office include the Tariff Methodology and the Electricity Pricing Rule. These are usually issued on a three-year basis with scope for openings for additional review. The above mentioned documents *inter alia* deal with the determination of generation and retail electricity prices. The tariffs are regulated through a cost-plus methodology where the ERO establishes on an annual basis the reasonable operating and depreciation costs (based on the reporting by the entities), as well as a reasonable level of allowed return on the Regulated Asset Base for the regulated utilities. The assumed cost of capital (WACC) also takes into account the country risk and company risk.

**Levies on electricity consumers in order to finance regulated tariffs below market prices granted to any category of electricity consumers:** The ERO Law prohibits cross-subsidy between different customer categories (Art. 46.2f of the ERO Law), but the Pricing Rule envisages an element of cross-subsidy between very low level consumption and low income domestic consumers and higher income consumers. Also there is arguably some cross-subsidy between business customers versus domestic customers as the tariff for businesses is higher irrespective of consumption. ERO has undertaken certain measures in the past to reduce the level of cross-subsidy. This is limited, however, due to heavy affordability concerns for vulnerable household customers and the perception that business customers can pay more.

**Tax relief to undertakings active in the electricity sector:** Excise tax is not applied to heavy fuel oil, which is used as an initial fuel for electricity generation in power plants, or for
mazut used for district heating. The entity administering this subsidy is in effect the Customs Authority. The procedure is simply that the importing entities (for example the district heating company and KEK), note on their customs form that the fuel is heavy fuel oil, or mazut, for their own use. The aim is to reduce the cost of fuel because of the need to support companies such as district heating companies and KEK, which are currently not financially viable due to low levels of bill collection. The same applies for other industries which use this fuel. It is regarded as an industrial rather than a consumer product.

Cancellation of debts or the preferential redemption of debts incurred by undertakings active in the electricity sector: There is no such legal provision although in practice it is possible that in the future the Government might write off loans to KEK.

Purchase obligations on customers of undertakings active in the generation of electricity for fixed or minimum amounts of electricity, and/or at fixed or minimum prices: Under the tariff rules, the public supplier of electricity is required to purchase all of the electricity produced by producers of energy from renewable sources (with the certificate of origin) under fixed guaranteed prices, on the basis of the agreement on mandatory take-off of electricity concluded between a producer and a public supplier. This is done under a ten-year power purchase agreement. The ERO then administers a Renewable Energy Fund which compensates for the difference between the purchase price and the price of energy in the market. This Renewable Energy Fund is comprised by a mark-up of the transmission price paid by other energy suppliers.

Long-term purchase agreements with preferential conditions awarded by the State to public undertakings in the electricity sector: It is possible to apply to the regulator to become a privileged or eligible customer able to buy at non-regulated prices in advance, if the customer is connected to 10KV and has the appropriate measuring equipment, and if there is no negative impact on other customers, no creation of an irrational market and no increase in the general annual losses of KEK. There are currently only two privileged customers, the Sharrcem cement factory and the Nickel plant. The Nickel plant’s electricity contract with KEK (which was negotiated in 2006 as part of the privatization of the Nickel plant) is reported not to fulfil the above conditions but is believed to expire in 2011. Long-term tariffs for sales by public generators (currently only KEK) to public suppliers to meet demand from non-eligible customers are usually set out in these power purchase agreements and negotiated every five years. Long-term power purchase agreements (up to ten years) with priority tariffs are allowed only for renewable electricity generated from small hydropower and wind installations. Recently, no such long-term agreements were reported to have been concluded between KEK/KOSTT and eligible customers. Sharrcem has not concluded such a long-term agreement either. Instead the customers are given prices published on the web site. However, more detailed information would be required to be able to assess whether this practice can be deemed to be in full compliance with the State aid rules by lifting any cross-subsidization of public or privileged undertakings on the electricity market.

Preferential rights or special support for public undertakings in the electricity sector: Art. 3.3.8 of Law No. 03L-222 On Tax Administration permits the Director of Tax Administration to enter into agreements with public entities to permit the writing off or postponement of tax where this is beneficial for a smooth privatization or where it is necessary for the continued functioning of an entity which is of strategic importance. This has been used in the past to permit public entities to pay VAT on a cash basis (actual receipts) rather than on an accruals basis. This is of tremendous support to the public energy companies (KEK and the district heating companies) because there is a high percentage of
bad debts/non-payment and so from a cash-flow perspective it is highly preferable to use a cash basis. The Administrative Instruction No. 15/2010 specifically foresees in Art. 5 reduced VAT payment amounts or the use of a cash basis payment in subsection 2.2.2.4, and subsection 2.2.2.5 covers recognizing bad debts for example for corporate tax purposes. Ordinarily, under the local tax law, it is difficult for a bad debt to be recognized.
PART III: EU STATE AID RULES AND ELECTRICITY

I. Treaty provisions on State aid

1. Prohibition under Art. 107(1) TFEU

Art. 107 (1) TFEU reads as follows: Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

The notion of “aid” is not defined by the Treaty. However, the case law of the European Commission and European Courts has shaped this notion and developed the basic structure of State aid law. The general principles underlying EU State aid law are published by the European Commission in its Vademecum on State aid rules (Vademecum). As explained in the Vademecum, State aid rules apply to measures which fulfil all of the criteria laid down in Art. 107 (1) TFEU, detailed below.

A. Transfer of State resources

State aid rules cover measures which have been granted or imposed by a public authority and which involve a transfer of state resources (including national, regional or local authorities, public banks and foundations, and the like). The term “aid” goes far beyond a mere subsidy. Financial transfers which constitute an aid can take many forms besides grants; loan guarantees, accelerated depreciation allowances, capital injections, tax exemptions and interest rate rebates all can constitute State aid.

The first condition is further construed to catch also indirect forms of State aid. Not only financial support from public entities but also from publicly controlled undertakings is covered by this requirement. However, mere control by public authorities is not sufficient. The measure must be adopted in the framework of a government (i.e. policy) decision. It must hence go beyond a decision which could equally have been taken by a private entity (so-called imputability to the State). Furthermore, it is not sufficient that the financial advantage is conferred by the State. In addition, it must come from the public budget. Therefore, an obligation for energy suppliers to partially compensate a fixed minimum purchase price for electricity coming from renewable energy sources imposed on electricity distributors does not represent an aid. Since the money flows from one private entity to another there is no (direct or indirect) payment by the State involved. However, the mere transformation of a public into a private entity is not sufficient to deny the State aid character of a measure.

164 Available at http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html#vademecum.
168 See in this regard the Commission decision N446/2008 at paras 40-41, which dealt with the situation where financial support to energy suppliers was given by a private entity (which had been formerly public) that held an exclusive licence granted by the public authorities.
B. Economic advantage

The second criterion is that the aid measure must confer an economic advantage to the recipient which he would not have received in the normal course of business. While grants, loan guarantees, and tax exemptions obviously fulfil this criterion, the Vademecum also lists “less obvious” examples of transactions satisfying this condition, such as privileged access to infrastructure, the ability to buy or rent publicly owned land at less than the market price (or sell land to the State above the market price), or the ability to obtain risk capital from the State on more favourable terms than those which it would receive from a private investor.\(^{169}\)

However, public support measures are considered not to be advantageous if the four following criteria are fulfilled: \(^{170}\) (1) The beneficiary must be entrusted with a clearly defined public service provision. (2) The parameters for calculating the compensation payments must be established in advance in an objective and transparent manner. (3) The compensation must not exceed the cost incurred in the discharge of the public service taking into account the revenues earned with providing the service (the compensation may, however, include a reasonable profit). (4) The beneficiary is chosen in a public tender or compensation does not exceed the costs of a well-run undertaking that is adequately equipped with the means to provide the public service. In the electricity sector, the Commission found these conditions to be met by a measure guaranteeing the security of supply. \(^{171}\)

C. Selectivity

The third requirement is that the aid must be selective, and hence affect the balance between certain firms and their competitors. This criterion of selectivity is what differentiates State aid from so-called “general measures” applying without distinction to all undertakings active in a Member State (or Contracting Party), such as nationwide fiscal measures. An aid scheme is generally considered selective, if the authorities administering the scheme enjoy a degree of discretionary power. A scheme will also be considered selective if it applies only in certain parts of the territory of a Member State (e.g. regional aid schemes). \(^{172}\)

D. Effect on competition and trade

The final criterion is that the aid must have an actual or potential effect on competition and trade between Member States. In order to fulfil this criterion it is sufficient to show that the aid beneficiary is involved in carrying out an economic activity and that it operates in a market in which there is trade between Member States.

2. Exemptions under Art. 107(3)(c)

In principle, aid measures satisfying all of the above criteria are incompatible with the common market, and thus prohibited. State aid may, however, be exempted from the general prohibition if it falls within Art. 107(2) or Art. 107(3) TFEU. Art. 108 TFEU provides that Member States must notify any plan to grant State aid to the European Commission, and

\(^{169}\) Vademecum, page 6.


\(^{171}\) Commission decision of 24 April 2007, C7/2005, para. 112 (Germany/Altmark Trans).

\(^{172}\) Vademecum, page 6.
confers the Commission the power to decide whether the aid measure qualifies for one of the available exemptions or whether the Member State must abolish or alter the aid measure.

As noted in the Vademecum, the two most common grounds for exemption clauses are those of Art. 107(3)(a) TFEU (covering aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment); and Art. 107(3)(c) TFEU (covering aid to facilitate the development of certain economic activities or certain economic areas, where such aid does not adversely affect trading conditions contrary to the common interest), with the latter being the main exemption relied upon in the context of the electricity sector.
II. State aid enforcement in EU electricity markets

Several particularities arise in the EU State aid enforcement in the electricity sector, such as stranded costs, regulation of end-user tariffs, environmental protection, research and development, and public service obligations.

1. Stranded costs

The notion of stranded costs refers to a phenomenon that can be observed in the course of the liberalization of former monopolized markets. Prior to the liberalisation, the incumbents (formerly controlled by the state) have made investments in the form of commitments or guarantees which they would not have undertaken in a competitive environment. These costs were recovered via the monopoly rent, i.e. supra-competitive prices. In the new liberalized competitive environment, however, this recovery is no longer possible. Such costs can, for example, arise in cases of inefficient means of power generation such as coal-fired plants. Stranded costs can - among others - take the form of long-term purchase contracts, investments undertaken with an implicit or explicit guarantee of sale, and investments undertaken outside the scope of normal activity.\(^{173}\)

Stranded costs do not only appear in the electricity sector, but also in any other liberalized market. However, the critical importance of electric power to the EU economy requires a special treatment of the Member States’ reaction to stranded costs. Therefore, in order to ensure security of supply and maintain a certain level of environmental protection, certain compensatory measures may be compatible with the State aid rules.

When issuing the first liberalization directive in the electricity sector, the legislator was aware of the potential negative impact of stranded costs on consumer welfare if the companies concerned were not able to amortize their stranded costs.\(^{174}\) Consequently Art. 24 of Directive 96/92/EC gave the Member States the possibility to partly postpone the liberalization process (by application for a “transitional regime” to the Commission). This provision reads as follows:

1. Those Member States in which commitments or guarantees of operation given before the entry into force of this Directive may not be honoured on account of the provisions of this Directive may apply for a transitional regime which may be granted to them by the Commission, taking into account, amongst other things, the size of the system concerned, the level of interconnection of the system and the structure of its electricity industry. The Commission shall inform the Member States of those applications before it takes a decision, taking into account respect for confidentiality. This decision shall be published in the Official Journal of the European Communities.

2. The transitional regime shall be of limited duration and shall be linked to expiry of the commitments or guarantees referred to in paragraph 1. The transitional regime may cover derogations from Chapter IV, VI and VII of this Directive. Applications for a transitional

---


\(^{174}\) I.e. the risk that the undertakings concerned might pass on the cost of their non-economical commitments or guarantees to their customers.
regime must be notified to the Commission no later than one year after the entry into force of this Directive.

3. Member States which can demonstrate, after the Directive has been brought into force, that there are substantial problems for the operation of their small isolated systems, may apply for derogations from the relevant provisions of Chapter IV, V, VI, VII, which may be granted to them by the Commission. The latter shall inform the Member States of those applications prior to taking a decision, taking into account respect for confidentiality. This decision shall be published in the Official Journal of the European Communities. This paragraph shall also be applicable to Luxembourg.

However, this provision only allowed the Commission to derogate from certain provisions laid down in the directive and not from the State aid rules. This led to the rejection of several measures by the Commission on the grounds of a potential conflict with Articles 107 and 108 TFEU. Consequently, a notification under the State aid system was necessary. This is probably why Art. 24 of Directive 96/92/EC was used only rarely.

The majority of Member States preferred to grant State aid means to compensate the losses. This practice led the Commission to publish a Communication relating to the methodology for analysing State aid linked to stranded costs.\footnote{Communication relating to the methodology for analysing State aid linked to stranded costs, Commission letter SG(2001) D/290869 of 6 August 2001; available at http://ec.europa.eu/competition/state_aid/legislation/stranded_costs_en.pdf., p. 3.} This document aimed at a clarification on how the Commission planned to apply the State aid rules (in particular the Articles 107 (3) (c) and 106 (2)) to compensation practices related to stranded costs. As the methodology refers explicitly to Article 24 of Directive 96/92/EC which was not upheld in Directive 2003/54/EC, its legal value today is not certain. However, it reflects the Commission’s perspective on stranded costs. Consequently, despite these legal changes, the Commission’s approach can be considered as unchanged.

For the commitments or guarantees to be considered as stranded costs, the Commission set up requirements.\footnote{See in more detail \textit{ibid.}, p. 3 \textit{et seq.}} Thus, only those costs can be compensated that have been incurred prior to liberalization. There must be a cause-and-effect relationship between the entry into force of Directive 96/92/EC and the difficulty that the undertakings concerned have in honouring or securing compliance with the respective commitments or guarantees. In addition, the commitments or guarantees must be irrevocable. Obligations between companies belonging to the same group cannot be exempted. The Commission takes the view that this kind of aid “normally qualifies for the derogation under Art. 87(3)(c) if it facilitates the development of certain economic activities without adversely affecting trading conditions to an extent contrary to the common interest.”\footnote{\textit{Ibid.}, p. 6 (emphasis added), Art. 87 ECT is now equivalent to Art. 107 TFEU.}

For any stranded costs to be exempted by the Commission, they must fulfil the criteria established in the above mentioned Communication. The underlying principle of the Commission’s assessment is that the distorting effects of such an aid must be counterbalanced by a contribution to an attainment which could not be achieved through ordinary market forces.\footnote{\textit{Ibid.}, p. 5.} The objective of general interest in this case is the liberalization of...
the electricity market. The contribution is considered to be the facilitation of the transition for the respective companies from a monopolized to a liberalized market.

Such commitments or guarantees of operation are normally referred to as “stranded costs”. They may, in practice, take a variety of forms: long-term purchase contracts, investments undertaken with an implicit or explicit guarantee of sale, investments undertaken outside the scope of normal activity, etc. In order to rank as eligible stranded costs that could be recognised by the Commission, commitments or guarantees must satisfy the following criteria:179

- The commitments or guarantees of operation must predate 19 February 1997, the date of entry into force of Directive 96/92/EC;
- The existence and validity of such commitments or guarantees will be substantiated in the light of the underlying legal and contractual provisions and of the legislative context in which they were made;
- Such commitments or guarantees of operation must run the risk of not being honoured on account of the provisions of Directive 96/92/EC, i.e. they must consequently become non-economical on account of the effects of the Directive and must significantly affect the competitiveness of the undertaking concerned;
- Such commitments or guarantees must be irrevocable;
- Commitments or guarantees linking enterprises belonging to one and the same group cannot, as a rule, qualify as stranded costs;
- Stranded costs are economic costs that must correspond to the actual sums invested;
- Stranded costs must be net of the income, profits or added value associated with the commitments or guarantees from which they arise;
- Stranded costs must be valued net of any aid paid or payable in respect of the assets to which they relate;
- Wherever stranded costs arise from commitments or guarantees that are difficult to honour on account of Directive 96/92/EC, calculation of the eligible stranded costs will take account of the actual change over time in the economic and competitive conditions prevailing on the national and Community electricity markets;
- Costs depreciated before the transposition of Directive 96/92/EC into national law cannot give rise to stranded costs;
- Eligible stranded costs may not exceed the minimum level necessary to allow the undertakings concerned to continue to honour or secure compliance with the commitments or guarantees called into question by Directive 96/92/EC;

• Costs which some undertakings may have to bear after the time horizon indicated in Art. 26 of the Directive (18 February 2006) cannot, as a rule, constitute eligible stranded costs within the meaning of this methodology.

Therefore, the Commission may accept as compatible with Art. 87(3)(c) of the EC Treaty State aid designed to offset eligible stranded costs which satisfy the following criteria: 180

• The aid must serve to offset eligible stranded costs that have been clearly determined and isolated;
• The arrangements for paying the aid must allow account to be taken of future developments in competition;
• The Member State must undertake to send to the Commission an annual report that, in particular, describes developments in the competitive situation on its electricity market;
• The regressive nature of aid intended to offset stranded costs will be viewed favourably by the Commission when making its assessment;
• The maximum amount of aid that can be paid to an undertaking to offset stranded costs must be specified in advance;
• In order to avoid any accumulation of aid, the Member State will undertake in advance not to pay any rescue or restructuring aid to undertakings that are to benefit from aid in respect of stranded costs.

These factors are however not exhaustive. There will be always an examination of the concrete circumstances of each case, e.g. State aid granted to a small network with a low degree of connectivity is less probable to harm competition.

The Member States are in principle free to determine the financing mechanism. Nevertheless, the financing arrangements must be in compliance with the objectives of secondary legislation (i.e. the electricity directives) and the Union interest. For example, the aid must not be financed by a levy on electricity transit between Member States. It must be stressed that the above-mentioned Communication is only to be considered in the context of Art. 107(3)(c). If the conditions are not met there is still the possibility to obtain an exemption based on Art. 107(3)(a). 181

The Commission accepted stranded cost schemes at several occasions. Portugal notified a scheme which intended to compensate the operators of three power plants built prior to 1997 which would not have been sufficiently efficient to be able to face competition. 182 In the course of liberalisation, the Portuguese authorities abolished long-term power purchase agreements whereby the publicly owned electricity network operator purchased a guaranteed amount of electricity from the three electricity suppliers at a guaranteed price that covered a series of investment costs.

180 Ibid.
181 Ibid., p. 8 (this was e.g. partly the case in decision C36a/2006, para. 141).
182 IP/04/1123.
The Commission acknowledged that if the investments involved had not been compensated in any manner, in view of their size, they would have jeopardised the viability of the undertakings concerned. Since the investments undertaken by the beneficiaries were irrevocable, according to the Commission, there was no alternative to recover an investment in a power plant than to operate it. The scheme was limited to costs which a power plant’s income was insufficient to cover. Consequently, the Commission found the compensations not to exceed what was necessary to repay the shortfall in investment costs repayment over the asset’s lifetime, including where necessary a reasonable profit margin. In particular the computation of the maximum value of the compensations was based on a number of economic assumptions, including a base market price equal to the price that would be offered by a new entrant using a combined cycle gas turbine. In case the actual market price was lower than this price, only the (lower) market price was to be taken into account for the calculation of the compensation. In the Commission’s view, this mode of computation reflects economic costs that correspond to the actual sums invested. The Commission therefore decided not to raise any objections.

In another proceeding regarding Italy, the Commission declared grants that covered the construction costs for power generation plants built before 1997 as well as the costs linked to a “take-or-pay” contract for Nigerian gas to be compatible with the State aid rules. The grants concerning power generation plants were restricted to a period of four years. The total compensation granted had a limit of € 850 million. The grants concerning costs linked to the “take-or-pay” gas contract aimed at compensating for the costs incurred by ENEL due to the fact that the company could not use this gas in Italy as was originally foreseen. The compensation was capped at € 1,465 million. The grant was destined solely for the gas that was used for electricity generation purposes.

Since the second electricity directive 2003/54/EC did not carry forward Art. 24 Directive 96/92/EC, after the accession of the new Member States in 2004/2007, stranded costs were dealt with exclusively under State aid schemes.

2. Regulation of end-user tariffs

In the electricity sector, social policy factors play an important role. Therefore the regulation of end-user tariffs always bears the risk of an inadequate influence on the competitive structure for the sake of the protection of national interests. While it is compatible with the respective legal provisions to regulate end user tariffs in order to guarantee consumers energy at an affordable price, there is a considerable risk of abuse. Member States may be tempted to maintain a low price level for industries with a high energy consumption to give them a competitive advantage. The concern is in particular whether these regulated prices will still allow for competition to evolve. Prices below the competitive level hinder new players from entering the markets because they cannot recover the entry costs. This will affect as well the security of supply because it represents an obstacle to necessary investments in the infrastructure. The competition problems raised by artificially low regulated tariffs were highlighted by the conclusions of the Commission’s energy sector inquiry.

Similarly, these tendencies cause also State aid issues. Some Member States have established systems through which the artificially low prices for big industrial customers are refinanced.

\[183\] IP/04/1429.

by a parafiscal tax imposed on all electricity consumers. The Commission is sensitive to this topic and initiated several investigations in this area during the last years. The question in these cases is whether the aid in question falls under the provision of Art. 107 (3) (c) TFEU. It must be mentioned, however, that State aid rules only come into play when these tariffs are applied to companies as end-users. The regulation of household tariffs on the other hand is not affected by these issues. Since a household is not a commercial entity, State aid rules do not apply to them.

In the only decision so far delivered, the Commission found the Italian scheme not to comply with the requirements set up by Art. 107. Here, Italian law established a preferential electricity tariff for certain Italian companies. These companies were receiving compensation from a state fund, equivalent to the difference between the market price of electricity and the preferential tariff. The fund was originally set up in 1962 to compensate the expropriation of a hydroelectric power plant. In the Commission’s view, the prolongation of the electricity tariff until 2010 constituted operating aid because it could no longer be considered compensatory in nature and its only effect was to improve the beneficiaries’ competitive position.

The pending French case concerns the particular situation on the French electricity market. French consumers can buy their electricity either on the liberalised market or on the regulated market. On the regulated market, they buy the electricity from distributors designated by the French State at regulated prices. The regulated prices are currently considerably lower than the electricity prices on the liberalised market. Since the beginning of 2007, clients who had left the regulated market can return to it and pay electricity prices above the original regulated prices, but still below the market prices. The system appears to be financed mainly by the state-owned company Electricité de France (EDF) and by parafiscal contributions levied on all French electricity consumers and administered by the state. The Commission’s concern is the potential distortion of competition entailed in tariffs which are applicable to medium and large companies, and can take effect mostly in the markets for products made by energy-intensive companies.

Finally, the Spanish case deals with artificially low regulated tariffs for energy intensive large and medium industries. In the Commission’s view, these regulated tariffs might have provided significant amounts of operating aid to these industries and, to a certain extent, to the electricity incumbents, who might have been over-compensated by the Spanish state and could have made an abnormal profit on the arrangements. The low tariffs led to a deficit of € 3.8 billion in the electricity system, which is supposed to be paid back over 14 years by adding a new charge to the electricity bill of all Spanish consumers. The Commission considers this to be a potential distortion of competition in the product markets of the energy intensive large and medium industries. It has doubts about the compatibility of the potential aid, which had the effect of providing a guaranteed profit to the electricity incumbents who offered these industrial tariffs. In these proceedings, the Commission explicitly raises the above-mentioned possible foreclosure effects of regulated tariffs. Potential new suppliers may have been prevented from entering the Spanish electricity market and the scheme may have prompted some recent market entrants to discontinue their activities in Spain.

185 See the prohibition decision against Italy on fixed tariffs for certain companies (C36a/2006) and the open proceedings against Spain (C3/2007) and France (C17/2007).
3. **Environmental protection**

Another issue at stake in the electricity sector is the potential conflict between State aid rules and environmental protection. The EU legal framework promotes environmental protection and renewable energies. Consequently, the Commission has issued Guidelines on State aid for Environmental Protection in 2001 which have been reviewed in 2008. Although environmental aid measures may be based upon Article 107 (3) (b) or (c), the Guidelines focus on how the Commission will assess the possibility to exempt the aid under Art. 107 (3) (c). The Guidelines follow just like the above-mentioned Communication for stranded costs the approach inherent in Art. 107 (3): The contribution of the aid to the attainment of environmental protection is balanced against its negative impact on competition and the internal market.

Three kinds of energy related subjects fall within the application of the guidelines: “renewable” energy sources, cogeneration and energy saving. The Commission definition of renewable energy entails the following non-fossil energy sources: wind, solar, geothermal, wave, tidal, hydropower installations, biomass, landfill gas, sewage treatment plant gas and biogases.\(^{187}\) Cogeneration means the simultaneous generation in one process of thermal energy and electrical and/or mechanical energy.\(^{188}\) However, not all cogeneration plants, but only “high-efficiency cogeneration”\(^{189}\) may be supported under the Guidelines regime.

If the aid is given to an eligible category, the Guidelines distinguish between investment aid (i.e. compensation of extra investment costs to be borne) and operating aid. For investment aid, the aid intensity shall in principle not exceed 60% of the eligible investment costs. Nonetheless, in case that they are granted to small enterprises, they can amount up to 80%. Where the investment aid is granted in a genuinely competitive bidding process, the aid may even amount up to 100%.\(^ {190}\) The calculation of eligible costs depends on the concrete category. For renewable energies, they are limited to the extra investment costs borne by the beneficiary compared to a conventional energy source with the same capacity.\(^ {191}\) In case of cogeneration, only the extra investment costs necessary to realise a high-efficiency generation plant as compared to the reference investment may be taken into consideration.\(^ {192}\) For energy savings, the eligible costs are limited to the extra costs necessary to achieve energy savings beyond the level required by the EU standards.\(^ {193}\)

For operating aid in case of renewable energies, the Commission leaves several options to the Member States. Thus, the compensation of the difference between the cost of producing energy from renewable energy sources and the market price of the form of energy concerned may be granted via feed-in tariffs as well as via green certificates and tenders.\(^ {194}\)

---


\(^{188}\) Guidelines, p. 22.

\(^{189}\) According to the criteria of Annex III to Directive 2004/8/EC.

\(^{190}\) Guidelines para. 104, respectively 116, respectively 97.

\(^{191}\) Guidelines, para. 105.

\(^{192}\) Guidelines, para. 117.

\(^{193}\) Guidelines, para. 98

\(^{194}\) Guidelines para. 107 et seq.
The Commission has for instance rejected a specific provision of the revised Green Electricity Act of Austria that would have provided for a partial exemption of energy intensive businesses to buy green electricity, which is more expensive than normal “grey” electricity.\(^{195}\) Companies whose incremental costs from the consumption of green electricity exceed 0.5% of their net production value could have applied to the Austrian energy regulator for derogation from the obligation to purchase green electricity. If the derogation was granted, energy intensive businesses could have been partly exempted from their share of extra costs for green electricity. Instead, the remaining enterprises and private households would have had to buy an additional amount of the more expensive green electricity. The Commission concluded that if the measure had been authorised, smaller electricity consumers would have had to pay higher energy bills to compensate for the subsidies granted to a number of large energy consumers.

Regarding cogeneration, operating aid may be granted either to undertakings distributing electric power and heat to the public where the costs of producing such electric power or heat exceed its market price or for the industrial use of the combined production of electric power and heat where it can be shown that the production cost of one unit of energy using that technique exceeds the market price of one unit of conventional energy.\(^{196}\) Operating aid for energy saving must be limited to compensations for net extra production costs due to the investment, taking account of benefits resulting from energy saving, and must not exceed five years.

The Commission acknowledged the specific situation caused by the economic and financial crisis and its particular impact on environmental protection. In order to prevent undertakings from ignoring more expensive investments in environmentally friendly products, it allowed in principle subsidized loans designed to encourage green products.\(^{197}\) However, being aware of the possible negative impact on competition, the Commission set up certain restrictions for these loans.\(^{198}\) The aid must relate to investment loans for financing projects consisting of the production of new products which significantly improve the environmental protection. The aid must be necessary for launching a new project and the aid may be granted only for projects in view of early adaptation to, or going beyond future EU standards. The loans had to be granted on 31 December 2010 at the latest. Concerning the calculation methods for the loans, the Commission accepts an interest rate reduction of 25% for large companies and 50% for SME. This interest rate applies during a maximum period of two years following the grant of the loan. Finally, these loans may only be given to firms which were not in difficulty on 1 July 2008.

### 4. Research and development

The promotion of ecologically friendly energy production implies also a higher degree of investment into the respective technologies. According to the Barcelona strategy adopted by the European Council in 2002, Member States are required to spend 3% of their GDP on Research and Development. One of the possible instruments to implement this goal is the grant of State aid. Consequently, certain measures might be exempted if they comply with the


\(^{196}\) Guidelines para 119.

\(^{197}\) Communication from the Commission - Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis; OJ 2009 C 16/1.

\(^{198}\) Ibid, p. 7.
rules laid down by the framework for research, development and innovation (R&D&I). This framework sets up the conditions for aid to be exempted from EU State aid rules. The aid must address a clearly defined market failure. It must be proportionate, i.e. well tailored to only tackle the concrete deficit and not go beyond. There will be also a balancing test carried out in order to assess whether anti-competitive effects will be weighed out by the benefits achieved by the measure.

A recent example for the application of these principles is the Commission decision concerning the French Solar Nano Crystal program. The aid at issue was granted to a research program on the generation of photovoltaic energy. The Commission held that the program remedied certain market failures, such as the fact that the environmental benefits of the research cannot be adequately used by the company and the difficulties to obtain financing due to the high risks of the project.

According to the decision, the program would entail benefits for the environment, since it aimed at reducing CO2 emissions and the EU’s energy dependence by 2013. Regarding the anti-competitive effects, the Commission found the aid to have a limited negative impact given its relatively small amount and the fact that it has to be paid back. The impact on competition in general was considered to be limited as the aid beneficiary was a small player on a market which was expected to expand.

A more concrete Communication concerning the relation between State aid and Research and Development was published by the Commission in 2006. This document clarifies the legal conditions under which tax relief may be granted in order to promote innovation. Member States have different options of how to shape their tax systems in this regard. In any case, the tax incentives have to be easily accessible to any suitable applicant, the administrative costs should be kept low, and the concrete provisions should be stable over a certain period of time in order to ensure predictability for the undertakings.

5. Public Service Obligations under Art. 106 (2) TFEU

Art. 106 (2) only applies subject to the application of the more specific provisions in Art. 107 (2) and (3). Only if the aid in question fails to fall under these provisions, one can think of Art. 106 (2). This provision applies to public financial help given to undertakings that carry out a service of general economic interest. In that case, the Member States may compensate these companies for the extra costs incurred by this service. However, this compensation must not go beyond the actual costs borne by the service provider.

To benefit from this provision, undertakings must have been entrusted with a service of general economic interest. The parameters for the cost calculation are sufficiently precisely determined and the compensation is neither disproportionate nor does it distort competition. This has been specified by a framework issued by the Commission concerning the calculation of the permitted compensation for the provision of a service of general economic interest.

---

201 C-53/00, Ferring, para. 32.
The reimbursable costs may cover all variable costs caused by the service provision, an appropriate percentage of the fixed costs, and an adequate rate on the invested capital.

The rare situations in which the exemption of Art. 106 (2) applies are aid measures with the purpose to guarantee the security of electricity supply. In such exceptional cases, Member States are allowed to subsidize certain unprofitable national energy sources (usually coal) to ensure a certain level of energy supply. However, to fall under Art. 106 (2) the beneficiary must be entrusted with a service of general economic interest and the subsidized indigenous energy source must not exceed 15% of the overall national electricity consumption.

The Commission had to decide on these issues on two occasions. Both cases dealt with compensation payments for costs that had been considered stranded by the respective governments. In both decisions, the Commission held that neither Article 24 of Directive 96/92 nor Article 107 (3) (c) were applicable. Nevertheless, the aid measures were declared compatible with EU Law on the grounds of Article 106 (2).

One case concerned a Spanish compensation payment system which compensated higher costs deriving from indigenous energy sources. Prior to the liberalisation process, Spanish electricity tariffs had been regulated and now payments were carried out in order to compensate the historical investments that had become non-economic due to the opening of the markets. The system was financed by a levy on the regular price which in the end was paid by consumers. Although not falling within the derogation of Article 107 (3) (c) TFEU, the measure at issue was considered to be a compensation for a service of public economic interest and could be derogated on the basis of Article 106 (2).

The second decision concerned a compensation payment of € 132 million for a lignite-fired plant in Austria. The payments were financed by consumers. However, there might have been factors which could have established imputability on the public authorities. Leaving this issue open, the Commission found that the measure was justified for being a compensation for the provision of a service of general economic interest.

203 The importance of security of supply in the electricity sector is stressed by Recital 26 and Art. 3 of the Directive 2003/54/EC.
204 See in this regard also the Council Regulation (EC) No. 1407/2002 of 23 July 2002 on State aid to the coal industry which however is based on Art. 107 (3) (e) and therefore applies within the framework of Art. 107.
207 NN49/1999, paras. 110-130.
III. Assessment of State aid rules and practice in the Energy Community

The seven Contracting Parties considered in this study exhibit a broad range as regards the level of implementation of the acquis on State aid. In the absence of a central monitoring authority empowered to assume the role played by the Commission concerning the enforcement of State aid rules in the EU Member States, each Contracting Party of the Treaty has been largely left to its own devices when designing and implementing a viable institutional and legal framework in the field of State aid.

Certain Contracting Parties have tasked the domestic competition authorities with State aid enforcement, while others have established State aid units within government ministries. As observed by the Secretariat in its 2010 Annual Report on the Implementation of the acquis, the former approach seems better suited to ensure the independence and effectiveness of State aid enforcement. Still other Contracting Parties have, for various reasons, yet to adopt State aid legislation.

Moreover, several of the Contracting Parties have yet to liberalize their electricity markets, meaning the state-owned incumbents still benefit, or are eligible to benefit, from a number of exclusive and/or special rights which have a clear impact on competition in the electricity markets within the Energy Community. As liberalization proceeds, a strong, independent State aid enforcement mechanism will become increasingly important to ensure that support measures of these types are phased out (or at least made subject to open, transparent and vigorous enforcement of the State aid rules) in order to ensure the effective integration of electricity markets within the territory of the Contracting Parties, and between the Energy Community and the EU.

The assessments of each Contracting Party’s level of implementation below, and the recommendations which follow, are based on an examination of the data received from the national experts designated by the Secretariat, and the local counsels engaged in compiling the study. A large proportion of the data comes from oral, informal interviews with the national experts, and from the research of the various firms acting as local counsel, with or without assistance from the national experts. While we have strived for maximum accuracy and detail in seeking the factual data necessary to put together the study, we caution that the data contained in the study, and therefore necessarily our conclusions below, are subject to the accuracy of the data supplied to us by the national experts and local counsel.

1. ALBANIA

Albania appears to have a functioning State aid enforcement regime in place, with a recently amended Law on State aid in (LSA) which applies to both private and public undertakings, and a number of legislative acts adopted by the State Aid Commission (SAC) and modelled according to the relevant EU State aid provisions. These include both horizontal rules required for the general implementation of a State aid monitoring system with a functioning authority and relevant competences, and certain rules of relevance for the electricity sector, such as the ones for environmental protection and public service compensation, for instance. This can be seen as evidence of serious efforts by Albania to comply with the obligations arising from the accession to the Energy Community Treaty.

The sector-specific law for the electricity sector can be seen as generally contributing to the same goal. The provisions on tariff setting methodologies and compensation for public service obligations appear to be in line with the EU acquis in so far as they strive for a pro-
competitive environment on the electricity sector with objective and non-discriminatory conditions for existing (and potentially new) market players and regulatory safeguards for consumers. This is in line with the overriding objectives of EU State aid law.

The institutional framework in place for assessing new and existing State aid schemes divides responsibilities between the SAC as the decision-making body, and the State aid Sector (SAS) as the fact-finding and technical-administrative unit charged with controlling State aid. The LSA provides for defined duties and responsibilities for the SAS and prescribes its operational independence from the SAC when carrying out its duties. Procedures related to reporting and information flow between the SAS and SAC are clearly defined in law and implementing regulations, and by all accounts are respected in practice. These procedures and regulations may help to ensure a certain degree of independence of the SAS from the SAC.

However, it has to be stressed that the SAS and the SAC are not part of the competition authority which might be considered as more independent from political influence than a Ministry. The SAS is part of the administrative structure of the Ministry of Economy, Trade and Energy (METE) and the same Minister serves as Chairman of the SAC, while the other members are appointed by the Council of Ministers. The relationship of both bodies to METE may therefore raise doubts as to the full independence in practice from the government.

The investigative and decision-making powers for monitoring State aid are generally devised according to the standards of the EU acquis. This notably includes the obligation of every potential provider of State aid to submit a notification to the SAS and the power by the SAC to order, with an executive title, the recovery of illegally granted State aid. However, the overall efficiency of the implementing tools and enforcement practice can still be improved. In particular, procedural rights of undertakings in State aid proceedings are not yet provided for in the LSA.

Albania has published annual reports on State aid and an Inventory of existing State aid schemes. However, the overall awareness of the legal framework for monitoring State aid and of the importance to comply with the specific obligations set out therein appear to be still underdeveloped. There appear to be only a limited number of decisions concerning State aid in the electricity sector, although the State aid inventory in Part II of this report indicates that a wide range of support measures have been given to undertakings active in the electricity sector in the past.

The individual State aid measures granted in Albania generally appear to be in line with the relevant EU legislation and enforcement practice, although not all of them were identified with a sufficient degree of detail that would be required to carry out a full-fledged legal assessment. In particular, the decisions No. 25 of 2 May 2008 and No. 27 of 18 August 2008 concerning excise duty exemptions for power plants using renewable sources can be deemed to fall under the specific rules on State aid for environmental protection, while decisions No. 19 of 1 November 2007, No. 17 of 16 July 2007 and No. 660 of 12 September 2007 would have to be assessed under the general principles provided for in Art. 107(3)(a) and/or (c) TFEU.

The same holds true for the more specific support measures under the Albanian energy law. Due to the lack of precise information on the exact form and level of compensation by the Albanian government for these support measures, it has not been possible in this report to carry out such assessment.
2. **BOSNIA AND HERZEGOVINA**

BiH is currently in a state of non-compliance with the Treaty as it has not yet enacted primary legislation on State aid. Continued disagreement over the structure of the State aid enforcement framework and the division of competences between the state and the entities (in particular Republic of Srpska) has prevented the enactment of the federal State aid law well past the announced target date of 1 July 2010. BiH has been criticised for this delay and urged by the EU to adopt the State aid legislation. On 21 September 2010, the Energy Community Secretariat initiated a dispute settlement procedure against BiH pursuant to Arts. 6 and 16 of the Rules of Procedure for Dispute Settlement.

The failure to pass the State aid law was due to the lack of agreement between representatives of the Republic of Srpska and the Federation of Bosnia and Herzegovina. Consequently, the draft law was renamed the State aid System Law, whereby the Republic of Srpska and the Federation of Bosnia and Herzegovina will have competences over State aid while the State aid Council of Bosnia and Herzegovina will have a coordinating role. However, given the clear-cut obligation under the Energy Community Treaty since 1 July 2006 to implement the EU acquis on State aid into national law, this step is still outstanding and should be forcefully pursued.

For its part, Republic of Srpska has enacted a State aid law on entity level but has taken no steps towards implementation or formation of a regulatory body. The progress of BiH in implementing a State aid law also applying to its electricity sector lags behind the efforts in most other Contracting Parties of the Energy Community. Consequently, the implementation of a primary legislation on State aid as well as an effective State aid enforcement is a key issue for the implementation of the acquis in BiH in compliance with the Treaty.

Both FBiH and RS have adopted sector-specific legislation in the energy sector aimed at opening up the previously monopolized electricity markets for competition. In particular the provisions on cost-based tariffication methods aim at preventing the cross-subsidization of privileged undertakings and thus pursue a similar goal to the State aid rules. However, these procedures can not entirely replace a State aid enforcement system and should not be viewed as a substitute.

Given that the adoption of a federal State aid law is still outstanding, the establishment of an independent authority for monitoring State aid is still missing as well. In BiH, the role of the Council of Competition (CC) encompasses some general oversight over State aid, and in RS the State aid Commission foreseen in the 2009 State aid law has not yet been set up. This is largely unsatisfactory from the standpoint of compliance with the county’s obligations under the Energy Community Treaty. In addition, the distribution of competences between the federal level and the entities under a new law remains yet unclear. This issue should therefore be forcefully pursued as well.

In addition, BiH has not yet established a State aid inventory despite the fact that a number of support measures were adopted, some of them of general scope, but also with relevance for the electricity sector. According to the information available, some of them can be deemed to contain elements of State aid. However, in the absence of a legislative State aid monitoring system so far, these measures have not been assessed by a dedicated national authority. On the contrary, the sector-specific provisions for the electricity sector are being monitored and enforced by the competent energy regulators at federal level as well as in the entities, although not always according to the same standards.
3. CROATIA

Croatia has a State aid law in place since 2005 and an implementing regulation since 2006, reflecting, in this field, its status as a relatively advanced candidate country to join the EU. Its State aid law defines the notion of State aid and lays down a general prohibition of State aid modelled on Article 107 TFEU and on the other relevant EU acquis in this field, including possible exemptions from the general prohibition of State aid, rules on de minimis aid and rules on environmental aid. Croatia also has adopted rules governing the compensation for stranded costs in the course of the liberalization of the energy markets. In addition, Croatia has enacted primary and secondary sector-specific rules for the electricity market, setting up a dedicated energy regulator.

The enforcement of State aid law has been entrusted to a division within the Croatian Competition Agency (CCA), which is an independent legal person with public authority and can autonomously and effectively perform its activities within the scope of its competences. Further rules are in place to ensure that members of the Competition Council, the ruling body of the CCA, do not maintain conflicts of interest or behave in a manner which compromises the independence of the CCA. In sum, Croatia therefore seems to have achieved a high level of legislative implementation in the area of State aid.

There currently appears to be no full State aid inventory publicly available in Croatia as foreseen under the State aid law. However, there are detailed annual reports published by the CCA setting out the types and amounts of State aid granted and the relevant decisions taken by the authority. Therefore, the main support measures identified in this report are related to the decisions published on the CCA website and it has proven difficult to identify additional measures adopted in support of electricity undertakings which possibly contain elements of State aid.

The decision of 29 July 2008 on certain support measures for producers of equipment for renewable energy generation was based on different legislative grounds, none of which was specific to the electricity sector. The decision of 10 June 2010 concerning projects in the field of environmental protection, energy efficiency and promotion of renewable energy sources was mainly based on the de minimis rule and thus not sector-specific either. The two other support measures specifically listed in this report have not been the subject of CCA decisions under the State aid provisions and would need to be assessed in greater detail.

4. FORMER YUGOSLAV REPUBLIC OF MACEDONIA

The Former Yugoslav Republic of Macedonia adopted a new Law on State Aid in November 2010, replacing the previous law of 2004 and intending to establish more effective control over State aid and enhance the conformity of the State aid law and procedure with the standards of the EU as envisioned in the Energy Community Treaty. The new State aid law applies to all public and private undertakings engaged in economic activities.

The new law introduces improvements in monitoring, more detailed rules on assessment and procedure, notably with regard to investigations into the existence and legality of State aid, and the recovery of such illegal State aid. The law also stipulates that a regular evaluation of State aid with impact on trade between the Former Yugoslav Republic of Macedonia and the EU shall be made. According to the law, new secondary legislation for the implementation of the primary rules will be enacted within six months, i.e. by mid-May 2011. This has not yet
been achieved, so that the previous rules remain applicable. These developments should be further monitored in view of their compliance with the country’s obligations under the Energy Community Treaty.

The Former Yugoslav Republic of Macedonia has also adopted a new Energy Law in February 2011, replacing the previous law of 2004. New secondary legislation shall be enacted within 18 months. The new law gives more powers to the regulator, but still fails to provide for genuine independence, given that all five members of this body will be chosen by the Parliament upon proposal by the Government. The new law also seeks to transform the artificially low social electricity price to a market price, through a number of decisions leading to price increases. This should be viewed as a step into the right direction in terms of compliance with the Energy Community Treaty, insofar as it eliminates any cross-subsidization benefitting the historical electricity providers and thus improves the conditions of competition. These developments should be monitored closely.

On the basis of these recent developments in the field of legislation, it is to be expected that the Former Yugoslav Republic of Macedonia will continue to adapt its State aid and sector-specific energy rules to the respective EU standards through the progressive adoption of further instruments in line with those of the EU.

Since 2006, the enforcement of State aid law has been entrusted to the Commission for Protection of Competition (CPC), the national competition authority. The CPC is an independent entity, autonomous in its work and decision-making, although a certain level of political influence can not be totally excluded, given that its members are elected by the Parliament. The investigation and decision-making powers are rather well developed along the lines of the EU acquis in this field. This includes notably a notification and authorisation requirement under the stand-still principle, procedural rights of companies concerned, recovery of State aid granted illegally and judicial appeals against CPC decisions.

However, it appears that the resources allocated to the CPC remain limited. Although the system currently can be deemed to operate relatively well, administrative efficiency and the quality of enforcement could be enhanced with additional funding, as well as training and awareness programmes aimed at raising the visibility of the State aid enforcement units and of the legal obligations on potential providers and recipients of State aid.

As part of its Annual Report on State aid, the CPC regularly publishes inventories on State aid. According to the 2009 report, there appears to be a qualitative improvement of the collaborations with the providers of State aid compared to the previous years. Furthermore, certain Ministries appear to become increasingly aware of the State aid procedures, as it can be concluded from the increasing number of ex ante opinions on State aid issues by potential providers of support measures.

Thus far, in practice, State aid granted to undertakings active in the electricity sector appears to be limited, despite the fact that a relatively wide range of support measures is theoretically available under the national energy laws, e.g. in the form of purchase obligations at fixed or minimum prices, guarantees of origin and feed-in tariffs for electricity produced from renewable sources and other preferential rights for electricity producers. The only State aid measure formally approved by the CPC in 2010 concerned a one-time direct payment to the public electricity transmission system operator to overcome a situation of increased electricity needs. This appears to be in line with the general principles under Art. 107(3) TFEU.
5. MONTENEGRO

Montenegro’s Law on State aid Control (LSAC) was adopted in 2009 and repealed the previous law of 2004. This law contains most of the relevant provisions required for the proper implementation of the obligations under the Energy Community Treaty, including a definition of State aid following the relevant EU principles and the general rule of prohibition with the possibility to grant exemptions. Secondary legislation was adopted as well covering certain aspects of notifications and assessment of State aid measures.

Sector-specific rules for the electricity sector were adopted in 2010 providing for the establishment of an energy regulator with specific powers in the field of tariffication and promotion of renewable energy sources, especially for wind power, which may have the effect of support measures to certain electricity providers. These measures, once they are adopted, would have to be scrutinized more closely under the LSAC.

The LSAC has led to the establishment of the State Aid Control Commission (SACC) consisting of eight members from various government bodies with a chairperson proposed by the Ministry of Finance, all of them being appointed by the government. The administrative and technical tasks in support of the authority’s decision-making powers are entrusted to a Department for the Preparation of State Aid (DPSA) within the Finance Ministry. These institutional arrangements appear less than optimal from the point of view of ensuring the independence of the State aid authority. It would arguably be preferable to vest the competition authority with enforcement powers in the field of State aid.

The investigative and decision-making powers of the SACC are relatively well developed with regard to information requests with legal deadlines and the requirement of an *ex ante* authorisation together with a stand-still provision. However, there appear to be no provisions on the procedural participation by the undertakings concerned nor on the recovery of illegally granted State aid. This should be followed-up in view of full compliance with the obligations under the Energy Community Treaty.

There does not appear to be a systematic State aid inventory published by the relevant authorities, only an annual report on State aid granted in 2009 is available. Moreover, publicly available information on the work of the SACC and the DPSA is rather limited, as the DPSA does not yet have a website in operation. This may lead to a lack of transparency and of commitment to raising public awareness of the legal obligations under State aid law. Accordingly, the resources currently allotted to the State aid enforcement mechanisms are still relatively limited.

The support measures granted so far in Montenegro were not specific to the electricity sector, but rather had a more general scope. Several national funds recently set up or about to be set up to support the economic development and energy efficiency in Montenegro apply to the electricity sector as well. However no information is available about their assessment under the national State aid rules.

Other support measures may result from the decisions taken by the national energy regulator under the sector-specific framework for the electricity sector, e.g. regarding preferential or below-cost electricity tariffs for certain users or any long-term purchase obligations at fixed or minimum prices. Any such measures would have to be scrutinized under the State aid rules in view of their compliance with the Energy Community Treaty.
6. **SERBIA**

Serbia adopted State aid legislation only in 2009, coming into force on 1 January 2010. The State aid law (LSAC) essentially transposes Article 107 TFEU and introduces the relevant mechanisms and procedures into national law, including notably the definition of State aid and the general rule of prohibition of any State aid which distorts or threatens to distort competition. Secondary legislation was adopted as well for the sake of implementing the more general provisions of the LSAC. In that respect, Serbia appears to be in compliance with its obligations under the Energy Community Treaty.

However, the law does not yet apply to public undertakings, despite Serbia’s obligation to enact such provisions under the Energy Community Treaty, so that most if not all undertakings active in the electricity sector in Serbia are, for the moment, excluded from its application. This appears to be due to Art. 39 of the Interim Agreement on Trade (IAT) between the EU and Serbia which stipulates that “by the end of the third year following the entry into force of this Agreement, the principles set out in the EC Treaty, with particular reference to Art. 86 shall apply in Serbia to public undertakings and undertakings to which special and exclusive rights have been granted.” This apparent contradiction should be addressed. It might turn out that the bilateral agreement (IAT) concluded later than the multilateral Energy Community Treaty can be seen as justifying such an exception for public undertakings until 1 February 2013.

The sector-specific energy law entered into force already in 2004 and the energy regulator has powers to adopt measures, e.g. in the field of price setting, promotion of investment and competitive markets and energy efficiency, which might entail selective advantages to certain companies and thus be relevant under the State aid rules.

The institutional framework in force since 2010 designates the Commission for State aid Control (CSAC) as the decision-making body for State aid in Serbia, with the technical-administrative role played by a Division for Control of State aid subordinated to the Department of Economy and Public Enterprises within the Ministry of Finance. The CSAC is not an independent authority, but a governmental body set up and funded directly by the Government of Serbia. While the CSAC is not bound to agree with the Division’s recommendations, it appears that in practice the CSAC has never disagreed with any draft decision of the Division for Control of State Aid.

This as such may not be criticized, but the overall institutional set-up appears to be less than optimal for an efficient State aid monitoring in Serbia, given the persisting links between the providers of State aid and the relevant control instances. The clear subordination of the body charged with the technical and administrative aspects of State aid enforcement and procedure to a government ministry, rather than the entrustment of these tasks to the national competition authority, raises doubts as to the level of functional independence of the State aid enforcement regime from government bodies. It would arguably be preferable to vest the CPC with enforcement powers in the field of State aid.

The investigative and decision-making powers of the two competent State aid authorities are fairly well developed and detailed. They provide for both *ex ante* control of intended support measures with a stand-still obligation and *ex post* control of measures already granted. The control is subject to legal deadlines and includes procedural rights for the companies concerned. However, the fact that no sanctions are foreseen in the law in case of illegal State aid should be addressed, as the need may arise in the future to act in such a case.
Despite its obligation under the Energy Community Treaty, Serbia has not yet published a State aid inventory. Reports about State aid cases are available but contain only information about general support measures not specific to the electricity sector, such as the fund for environmental protection, under which specific loans were available until the end of 2010 for the promotion of renewable energy sources. However, there was no information available about the assessment of the support scheme under the LSAC.

The fact that electricity providers are mainly public operators which are excluded from the scope of the LSAC, may help to explain this observation. It therefore appears that Serbia provides wide-ranging support in the form of guarantees, soft loans and debt repayment to public enterprises active in the electricity sector. It must be observed that these types of support measures directly foreseen in the annual budgets may have to be phased out as Serbia progressively implements the EU acquis on electricity and competition and proceeds towards the liberalization of its electricity market.

7. **UNMIK (under UN Security Council Resolution 1244)**

UNMIK currently is not in compliance with its obligations set out in the Energy Community Treaty, as it has not yet enacted any legislation on State aid. However, a draft law on State aid has been prepared in the meantime and reviewed by the European Commission. It is currently expected that the law may be enacted and enter into force during the first half of 2011 and this legislative project should be pursued further.

The draft law sets out which State aid is prohibited and which might be permissible, as well as the mechanisms for approval or disapproval and claiming back ineligible aid, except for de minimis aid. However, State aid may be accepted to promote economic development or important projects, unless it distorts competition or international trade. The draft law also sets out the role of the State aid Office to receive and analyse applications and to publish annual reports. The draft law further provides that the State aid Commission has the decision-making authority and may take action against unlawful aid by claiming recovery with interest. Finally it is provided in the draft law that secondary legal acts will be passed by the Ministry of Finance within six months of the law’s promulgation.

Certain sector-specific measures recently taken in the field of electricity provide for support to the public supplier having to purchase minimum quantities of electricity from renewable sources at guaranteed prices, by way of compensation for difference to the market price from a specific fund. While these measures have to be taken in respect of the non-discrimination principle, it may become necessary to review them under the State aid rules once they come into force. The same holds true for the other support measures identified in the report.

Given that the State aid law has not yet been enacted, there is currently no authority responsible for monitoring the implementation of the State aid rules. The draft State aid law foresees the establishment of two separate bodies, responsible for the decision-making and for the administrative tasks. The latter is planned to be part of the Ministry of Economy and Finance, which naturally limits its degree of independence from the government. This issue might therefore have to be followed-up on. The planned enforcement powers and rules of procedure generally appear to be in line with the EU acquis, but their implementation in practice would also have to be monitored in view of its compliance with the country’s obligation under the Energy Community Treaty.
Regarding the support measures as such, there are no annual reports or State aid inventories yet. It appears that UNMIK still provides wide-ranging financial support in the form of direct subsidies to public enterprises active in electricity and district heating, in particular to KEK. It must be observed that these types of support measures may have to be phased out in the longer term while progressively implementing the EU acquis on competition and energy and proceeding towards the liberalization of the electricity market. This issue should be followed-up with a close monitoring in light of the new legislation to be enacted.

Among the more specific support measures to electricity providers that were identified in this report, some were adopted by the energy regulator under the sector-specific provisions. While the latter should prevent discrimination and cross-subsidization for the benefit of the historical operator, especially the effects of the tariff regulation and of preferential long-term power purchase/supply agreements on the market should be monitored under the State aid provisions once adopted, so as to avoid any unjustified distortions of competition to the detriment of market players or electricity customers.
IV. Recommendations

As noted above, the seven Contracting Parties evaluated in this report are at various levels of implementation of the EU "acquis" on State aid, in general and with particular regard to the electricity sector. While some of them have made impressive progress in the last few years, all of the seven need to continue to strive for improvements in the amount of resources devoted to State aid, the raising of awareness both among the public and within State institutions of the obligations to which each Contracting Party is subject under the State aid laws, and in the level of transparency and openness of the State aid enforcement mechanism. Apart from these general considerations, in view of the varying degrees of progress in the individual Contracting Parties, it is difficult to prescribe general, ‘one-size-fits-all’ recommendations. The following brief observations therefore individually address each Contracting Party covered by the report.

Albania should be commended for having achieved a relatively well-functioning State aid enforcement regime with a detailed legal framework closely modelled on EU legislation and an active, competent administrative authority able to assess new and existing aid schemes. One possible area of concern identified in the course of the study may be the lack of independence of the State aid enforcement apparatus, as both the decision-making body and the administrative unit are closely linked with the Ministry of Economy. In the long term, Albania should aim for the transfer of State aid enforcement powers to the national competition authority. In addition, the implementing rules for the monitoring process of State aid measures can still be improved, notably by granting procedural rights to the companies concerned by any State aid investigations. Finally it appears to be necessary to increase the overall level of awareness in Albania about the State aid rules so that more of the support measures would actually be brought to the attention of the competent authorities.

Bosnia and Herzegovina is currently not in compliance with its obligations under the Energy Community Treaty and must therefore strive to reach a political agreement between the federal level and the entities on the draft State aid law as soon as possible, and take steps to begin its implementation and build the administrative structure necessary to enforce the law immediately upon its taking effect. In order to achieve this as a high priority, effective engagement from lawmakers at both the state and entity levels is needed. Due to the delays in the enactment of State aid legislation, the enforcement practice is currently underdeveloped as well. This leads to the fact that a number of support measures granted in the country’s electricity sector have not been assessed according to the required legal standards. This situation may lead to distortions of competition which should be avoided in the interest of the overall functioning of the electricity market for the benefit of both the industry and households.

Croatia has a relatively detailed and extensive State aid enforcement record built on legislation based on the EU model. Moreover, State aid enforcement in Croatia is entrusted to the national competition authority and not to a body responsible to a government ministry, thereby helping ensure that State aid enforcement remains independent from political influence and based on principles of free and open competition, rather than subject to any protectionist political considerations. However, the overall transparency of the enforcement system is not sufficiently developed. Croatia should now strive to establish a comprehensive State aid inventory and to increase the amount of information on State aid in Croatia available to the public and other stakeholders.
The Former Yugoslav Republic of Macedonia has achieved a high level of implementation of the EU State aid acquis. The country has recently amended its State aid legislation and shown a willingness to update its practices and secondary legislation to reflect EU standards. Further steps should be taken as envisioned by way of secondary legislation in the course of 2012. The enforcement of these provisions has been entrusted to the independent competition authority rather than to a body attached to a government ministry which should be welcomed in view of the greater degree of independence of the State aid enforcer as compared to other Contracting Parties. On the whole, the Former Yugoslav Republic of Macedonia is to be commended on its State aid enforcement record and should strive to continue to increase resources made available to ensure effective enforcement. In parallel, the resources devoted to State aid enforcement should be increased in terms of staffing and training, so that the overall awareness of the State aid system can be improved and more individual State aid cases can be handled.

Montenegro has recently made some progress in its implementation of the EU State aid acquis by adopting new primary and secondary legislation in line with its obligations. While some of the necessary procedures are in place, they should be supplemented by procedural rights for companies and by powers to recover illegal State aid with an executive title. In addition, the independence of the State aid authority should be further strengthened. Information available on its State aid enforcement record in energy, and in the electricity sector in particular, is however limited. Montenegro should therefore strive to increase the resources devoted to State aid enforcement, as well as the level of transparency and awareness of State aid obligations within the political institutions and among the public.

Serbia has only had State aid legislation in place since the beginning of 2010, making it difficult to assess its enforcement record. Especially undertakings active in the electricity sector are still excluded from the application of the law by virtue of being publicly owned. This exception considerably limits the overall efficiency of the State aid enforcement system and should be swiftly phased out. Public undertakings shall come under the ambit of the Law on State aid by February 2013 but nothing prevents Serbia from anticipating this date in order to comply with its obligations under the Energy Community Treaty. In doing so, Serbia should strive to reduce the level of support provided to its public electricity undertakings in preparation for the liberalization of the electricity market. One other area of concern identified in the report is the lack of independence of the State aid enforcement apparatus, as both the decision-making body and the administrative unit are closely linked with the Ministry of Finance. Serbia should therefore ideally transfer the State aid enforcement powers to the national competition authority and also introduce a sanctions regime providing for the recovery of illegal State aid.

UNMIK (under UN Security Council Resolution 1244) must strive to reach agreement on the draft State aid law as soon as possible, and take steps to begin its implementation and build the administrative structure necessary to enforce the law immediately upon its taking effect. Additionally, the continuing support in the form of direct subsidies to the electricity sector is an area of concern which must be addressed in advance of the coming liberalization of the electricity market.