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STATE AID ENFORCEMENT LAW IN THE ENERGY SECTOR IN ALBANIA

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Abstract: *In order to ensure compliance with the obligations deriving from different international agreements containing State aid provisions, Albania has adopted a legal framework on State aid. Particularly, the Stabilisation and Association Agreement between EU and Albania expressly requires the country to establish an „operationally independent authority" „entrusted with the powers necessary for the application" of the State aid rules. In this framework Albania has chosen to create a State Aid Commission closely linked to the Ministry of Finance. This paper examines the decisions of the Albanian State Aid Commission in the energy sector. Decisions of the Albanian State aid monitoring authority will be compared with the relevant case law of the Court of Justice of the European Union as well as the Decisions and the soft law, adopted by the European Commission. The analyses shows that the State Aid Commission has approved States aids without due regard to the relevant EU State aid acquis*.

Key words: *State Aid Commission, Energy Community, energy sector, Albania.*

1. Introduction

The supranational enforcement of State aid control by the European Commission is quite unique.[2] The primary European Union (EU) State aid rules are included in the articles 107, 108, and 109 of the Treaty on the Functioning of the European Union (TFEU). Whereas a vast amount of secondary legislation compliments the EU primary State aid law. EU Member States are under obligation to notify in advance the European Commission of any State aid measure they intend to grant. They cannot implement the notified aid measure before the European Commission has approved them.[3]

Differently, from the supranational enforcement of EU State aid rules by the European Commission all the Western Balkan Countries, including Albania are required to create internal State aid control systems, through the Stabilisation and Association Agreements (SAA).[4] Even before, during the EU enlargement

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[2] EFTA Surveillance Authority has similar functions and powers as the European Commission regarding State aid issues. In the framework of the European Economic Area, it monitors State aid granted by Lichtenstein, Iceland, and Norway.

[3] The European Commission can take a position by either declaring the measure compatible with the internal market according to Article 107 TFEU, or by not raising any objections or by considering that the measure is not State aid.

[4] See Article 71 (1)(iii) SAA Albania; Article 73(1)(iii) SAA Montenegro; Article 73 (1) (iii) SAA Serbia; Article 71(1)(c) SAA Bosnia and Herzegovina; Article 69(1)(iii) SAA Republic of North Macedonia; Article 75(1)(c) SAA Kosovo.

rounds in 2004 and 2007,[5] the then EU associate countries had to establish independent bodies equipped with the powers to apply the provisions on State aid. Control of national State aid by national State aid authorities was a new approach, an exception to the supranational enforcement of State aid control by the European Commission (Schutterle, Implementing of the EC State aid control – an accession criterion, 2002). As all Central and Eastern Europe Countries had been centrally planned economies, State intervention and support from public funds was a frequent method of solving problems. In addition, due to a difficult process of economic transition towards a market economy these countries had implemented a lot of restructuring aid (Kuik, 2004).

Albania, having signed the Stabilisation and Association Agreement (SAA) with the EU[6] has committed to adopting the area of State aid to the *acquis communautaire*. The SAA contains a general prohibition on any State aid which distorts or threatens to distort competition by favouring certain undertakings.[7] In the same line with the first paragraph of Article 107 TFEU, which provides the general principle according to which State aid is not compatible with the internal market (De Burca, 2008). The SAA clearly requires the establishment of an „operationally independent authority" „entrusted with the powers necessary for the application" of the State aid rules (Schutterle, State Aid Control in the Western Balkan Countries and Turkey (2005), 2005). This national State aid authority should have, *inter alia*, the competences to authorise or disapprove State aid schemes or individual aid as well as to order recovery of unlawful aid. Further, any practices involving State aid shall be assessed on the basis of the criteria arising from the application of Article 87 TEC (now Article 107 TFEU) and also the interpretative instruments adopted by the Community Institutions.[8] These rules include present and future secondary legislation, frameworks, guidelines and other relevant administrative acts in force in the European Union, as well the case-law of the European courts (Cremona, 2003). The EU Commission, evaluates laws adopted by Albania in the framework of State aid control through Progress Reports published yearly.

Additionally, the Energy Community Treaty (EnCT),[9] entered into force in 2006, provides also State aid obligations, in the energy sector *inter alia* for

[5] In 2004 and 2007, twelve new Member States from Central and Eastern Europe Countries joined the European Union.

[6] The Stabilization and Association Agreement (SAA) between Albania and the European Community and the EU member states was signed on 12 June 2006 and entered into force on 1 April 2009.

[7] See Article 71 (1)(iii) SAA Albania; Article 73(1)(iii) SAA Montenegro; Article 73 (1) (iii) SAA Serbia; Article 71(1)(c) SAA Bosnia and Herzegovina; Article 69(1)(iii) SAA Republic of North Macedonia; Article 75(1)(c) SAA Kosovo.

[8] See Article 71 (2) SAA Albania.

[9] The text of the Treaty establishing the Energy Community is available at: https://www.energy-community.org/legal/treaty.html Assessed September 2021.

Albania, as one of the contracting parties.[10]Pursuant to Article 18 of the EnCT „any public aid which distorts or threatens competition by favouring certain undertakings or certain energy products“ is prohibited in the energy sector. The implementation of the treaty is entrusted to the Secretariat of the EnCT. In case of infringement of the Treaty the Secretariat can start investigations. Although the Secretariat cannot impose sanctions, it can bring the case to the Ministerial Council of the Energy Community. The latter can among others withdraw the rights of voting from the contracting party which is in breach of the treaty obligations.[11]

Finally, the Central European Free Trade Agreement (CEFTA)[12] where Albania is a party provides also State aid obligations. Pursuant to Article 21 of CEFTA 2006 is modelled according to Article 107 TFEU.[13] However, the review competence rests with the Members States. Accordingly, it depends on the willingness of a CEFTA Member State to challenge other Member States, which are considered to allow State aids at internal level. Further, the agreement provides for the mutual withdrawal of the trade concessions.

In order to ensure compliance with the obligations deriving from different international agreements containing State aid provisions, Albania has adopted a legal framework on State aid. Further, in implementing its EU obligation to establish an „operationally independent“ State aid monitoring authority, Albania has chosen to create a State Aid Commission closely linked to the Ministry of Finance. The paper examines the decisions of the Albanian State Aid Commission in the energy sector. The analyses shows that the State Aid Commission has approved States aids without due regard to the relevant EU State aid *acquis*.

2. The Energy Community Treaty - State aid obligations

The Energy Community Treaty (EnCT) which entered into force in 2006, aims to expand EU's internal energy market towards South-East Europe and beyond. The contracting parties, *inter alia* Albania, are required to implement the *acquis communautaire* on energy, environment, competition, and renewables, before their accession to EU.

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[10] At present, the parties to the Treaty are the European Union and nine Contracting Parties, namely Albania, Bosnia and Herzegovina, Georgia, Kosovo, North Macedonia, Moldova, Montenegro, Serbia, and Ukraine. Armenia, Norway, and Turkey are observers. Romania, Bulgaria, and Croatia ceased contracting parties after accession in the European Union. Moldova and Ukraine became contracting parties in 2010, whereas Georgia joined the Energy Community in 2016.

[11] Articles 67, 90, 92 Treaty Establishing the Energy Community.

[12] CEFTA 2006: Central European Free Trade Agreement, between Albania, Bosnia and Herzegovina, Bulgaria, Croatia, North Macedonia, Moldova, Montenegro, Romania, Serbia and Kosovo. Three original signatories, Bulgaria, Romania and Croatia, have withdrawn after accession in the European Union. The text of the agreement can be found in: https://cefta.int/legal-documents/. Accessed September 2021.

[13] Article 21 Central European Free Trade Agreement (CEFTA 2006).

Chapter IV of Title II of the EnCT provides the *acquis* to be implemented in the competition and State aid area, by the contracting parties. Pursuant to Article 18 EnCT „any public aid which distorts or threatens competition by favouring certain undertakings or certain energy products" is prohibited in the energy sector. Further, the same article provides that any practices involving State aid shall be assessed on the basis of the criteria arising from the application of Article 87 TEC (now Article 107 TFEU). Article 107 TFEU is attached in annex III of the EnCT. The EU State aid law refers to the notion of State aid in Article 107 of the TFEU (ex-Article 87 TEC), but it does not define it (Baudenbacher, 1997). This Article lays down the test for State aid.[14] It covers both aids given to public undertakings and aid given to private firms. The first paragraph provides the general principle according to which State aid is not compatible with the internal market; the second paragraph provides the exceptions for the situations when State aid may be deemed compatible with the internal market and the third paragraph provides certain types of aid when it may be deemed to be compatible with the internal market.[15]

Article 19 EnCT, expressly refers to Article 106 (1) and (2) TFEU and which are attached to EnCT in its Annex III. Particularly, Article 106 (2) TFEU emphasis scrutiny of the role of State aid to fund public services. This provision is seen as an exception, derogation to competition rules as far as necessary for the provision of the „services of general economic interest" (Szyszczak, 2011). Whereas Article 94 EnCT, provides that any term or other concept used in EnCT derived from EU law shall be interpreted in line with the case law of the European Union courts.

The implementation of the treaty is entrusted to the Secretariat of the EnCT. In case of infringement of the Treaty the Secretariat can start investigations. Although the Secretariat cannot impose sanctions, it can bring the case to the Ministerial Council of the Energy Community. The latter can among others withdraw the rights of voting from the contracting party which is in breach of the treaty obligations.[16] The EnCT Secretariat, the guardian of the Treaty, has opened several investigations. Thus, in 2010 an investigation against Bosnia and Herzegovina was opened regarding the failure of the later to adopt State aid legislation.[17] One year later, another investigation was started against Kosovo, again due to lack of adoption of State aid law by Kosovo.[18] Both countries did approve the respective laws on State aid.

[14] Supra note 7, pg. 1086.

[15] Supra note 7, pg. 1086.

[16] Articles 67, 90, 92 Treaty Establishing the Energy Community.

[17] Case 1/10, Dispute settlement procedure initiated against Bosnia and Herzegovina for the failure to adopt State aid legislation. Opened on 22 September 2010.

[18] Case 7/11, Dispute settlement procedure initiated against Kosovo for the failure to adopt State aid legislation. Opened on 9 February 2011.

3. International law in the Albanian legal order

Article 5 of the Constitution provides that Albania should apply international law binding upon it. The way in which the Albanian Constitution has solved the issue of the relationship between international law and national law is closer to the monistic approach. As it will be explained, ratified international agreements are part of the Albanian legal order after being published in the Official Journal, they have supremacy over the national law in case of conflict and they can be directly applied. Article 116 of the Constitution creates a hierarchy between normative acts which are effective in the territory of the Republic of Albania, by placing the ratified international agreements before the national laws. According to Article 122/1 every ratified international agreement constitutes part of the Albanian legal order and can be directly applied except for the cases when it is not self-executing, and its implementation needs issuance of a law. Paragraph 2 of Article 122 recognizes the supremacy of the ratified international agreements over national laws and such agreements prevail over national laws which contradict them. Thus, the Albanian Constitution provides for the supremacy of international law over the national laws and automatically solves problems of conflicts between them in favor of international law. This confirmed supremacy of international law towards national law separates Albania from the solution given by the dualistic countries regarding the relationship between international and national law (Sadushi, 2003).

4. Analysis of the decisions of the Albanian State aid commissio in the energy sector

In Albania the energy production and supply has been a problem.[19] There have been continuous problems in the electricity sector such as the losses in the electricity network and distribution, the low rate of bill collection. The state-owned power generation company KESH in order to provide for the losses and to import energy has taken loans by different banks which have been guaranteed by the Albanian Government. The Albanian State Aid Commission has issued its decisions as follows.

By the end 2011 a loan guarantee was issued to the state-owned power generation company KESH by the Government. SAC ruled that the Government loan guarantee in favour of KESH did not constitute State aid. According to the SAC the State guarantee to KESH does not constitute State aid as it is does not distort competition.[20] The decision is not legally sound and well-reasoned. Related to the individual State guarantees the European Commission first requested that they should be notified for approval. This extreme *per se* approach

[19] Council Ministers' Decision no. 1023, dated 9.7.2008 'On the Approval of the Annual Report "On State Aids for 2007".

[20] Decision of the State Aid Commission, No. 42, dated 11.09.2012 "On the examination of the normative act no. 4, dated 12.2.2011" Amending law no. 10 355, dated 2.12.2011 "On the budget 2011" amended.

was relaxed over time. The Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in form of guarantees provides the conditions when a State guarantee can be assumed to be aid free (European Commission, 1999). In general, in order to determine whether an advantage is being granted through a guarantee the European Commission should base its assessment on the principle of an investor operating in the market economy (the „market economy investor principle" or „MPEI"). If a State intervenes as a market investor, then this will not confer an advantage on a certain undertaking (Hancher & Salerno, 2011).

During 2013, two other loan guarantees were provided by the Government to the state-owned power generation company KESH, in order to import energy and cover the losses of unpaid bills.[21] Another decision approving these loan guarantees was issued by SAC.[22] This time SAC argued that the guarantee does not confer an economic advantage on KESH and as such based on the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, on which it expressly relies, it does not constitute State aid. The decision again lacks a proper analysis. In order to exclude the presence of State aid in the Government guarantees provided to KESH the SAC tries to argue the fulfilment of four cumulative criteria provided by the above-mentioned Notice. According to the Albanian State Aid Commission, KESH is not in financial difficulties, the released guarantee is related to a specific transaction, and the prim and the norm of interest offered by the banks are market-oriented because KESH has searched them in an open market. While arguing that the guarantee doesn't cover more than 80% of the outstanding loan SAC concludes that KESH is entrusted with providing services of general economic interest based on law on power sector.[23] Thus according to the SAC the Government loan guarantee is a compensation for a public service obligation. Public service compensation is not State aid if four cumulative conditions set out by the ECJ in *Altmark* judgement[24] are met. The decision of the SAC does not

[21] According to the European Commission Progress Report of 2014 the government provided loan guarantees worth €83 million or 0.8% of GDP to the state-owned power company KESH to help it survive financial difficulties and enable it to import electricity in late 2013 and early 2014.

[22] Decision of the State Aid Commission No. 46, dated 28.3.2014 examining the Council Ministers' Decision no. 1101, dated 28.12.2013 "On the Approval of the State Guarantee released in favour of Raiffeisen Bank Albania" in the framework of the conditions of the loan contract between this bank and KESH s.a. and also of Council Ministers' Decision no. 1102 dated 28.12.2013 "On the Approval of the State Guarantee released in favour of Intesa Sanpaolo Bank" in the framework of the conditions of the loan contract between this bank and KESH s.a."

[23] The decision refers to the Law no. 9072, dated 22.5.2003 "On Power Sector".

[24] See Case C-280/00, Altmark [2003] ECR I-7747. The four cumulative criteria are: 1) the recipient undertaking has clearly defined public service obligations to perform; 2) the parameters on which public service compensation is calculated are established in advance in a

provide an analysis of these four cumulative criteria. Consequently, SAC has approved the subsidies to KESH arguing that they do not constitute State aid without a correct analysis.

5. Conclusions

This paper analysed decisions of the Albanian State Aid Commission in the energy sector. The Secretariat of the Energy Community, through its annual Implementation Reports analysis the enforcement of State aid law in the contracting parties, in the energy sector. In this framework it also analyses individual decisions of the State aid monitoring authorities.[25]The annual Implementation Reports of the Secretariat of the Energy Community have emphasised the need to improve the quality of the Albanian State Aid Commissions' decision-making and reasoning.[26]

The energy sector in Albania is highly subsidized. However, as analysed in this paper the Albanian State Aid Commission has scrutinised a very limited amount of State aid granted in the abovementioned sector. Consequently, most of the subsidy schemes in the energy sector have been implemented in violation of the duty to notify the Albanian State Aid Commission. Even in the rare cases of enforcement the Albanian State aid authority seems not be willing to apply to the case law of the Court of Justice of the European Union and the decisions of the European Commission in the energy sector.

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transparent and objective manner; 3) the compensation doesn't exceed the costs performing the obligations, taking into account relevant receipts and reasonable profit; 4) the recipient undertakings was chosen to perform a SGEI in a public procurement procedure allowing performance of the services at the lowest cost or, if not, the level of compensation needed is based upon costs of a typical, well-run undertaking with adequate funding.

[25] Energy Community Treaty Annual Implementation Reports are available at: https://www.energy-community.org/implementation/IR2020/reports.html, assessed September 2021.

[26] Energy Community Secretariat, Annual Report on the Implementation of the Acquis under the Treaty establishing the Energy Community, Energy Community Secretariat, 1 September 2012, pg. 33. Energy Community Secretariat, Annual Report on the Implementation of the Acquis under the Treaty establishing the Energy Community, Energy Community Secretariat, 1 September 2013, pg. 84.

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