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*State Aid Authorities in South-East Europe: developments
and challenges*

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1. Introduction

Since 1993, the Copenhagen European Council, has agreed on the conditions to be met by the applicant countries before they can join the European Union (EU). The so-called “Copenhagen criteria” require the countries, which want to join the EU to satisfy the political and economic criteria¹.

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¹ The European Council stated: “Membership requires that the candidate country has achieved the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for the protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces with the Union. Membership presupposes the candidates’ ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.”

However, for the South-East Europe (SEE) countries,² formal EU membership conditions have emerged only after the Zagreb summit of November 2000, when the Stabilisation and Association Program (SAP) for the Western Balkans was launched.³

Further, according to the conclusions of 2003 Thessaloniki European Council every SEE country has the perspective to join EU.⁴

The Stabilization and Association Agreements (SAA) are a very important element of the SAP process from the legal point of view. The main objectives of the SAAs are to support the efforts of SEEs to strengthen their democracy and the rule of law, to contribute to political, economic and institutional stability in these countries and also to support transition into a functioning market economy which is integrated into EU's internal market. In the framework of the SAP process, the Stabilization and Association Agreements between the SEE countries the EU have been signed.⁵ At present, the SEEs are at different stages of EU integration.⁶

² The expression SEE is used to indicate the countries of the Balkan Peninsula which have not joined EU yet: Republic of North Macedonia, Albania, Serbia, Montenegro, Bosnia and Herzegovina (BiH), Kosovo.

³ European Commission: Final Declaration Zagreb Summit 24 November 2000, <http://ec.europa.eu/enlargement>. Accessed September, 2019.

⁴ European Council of Thessaloniki, 16-6-2003, Presidency Conclusions Thessaloniki Agenda: Moving towards European Integration, <http://ec.europa.eu/enlargement>. Accessed September, 2019.

⁵ The SAA between the European Communities and their Member States and the Republic of North Macedonia was signed on 26. 03. 2001.

Although the long EU pre-accession phase, the SEEs have been working on the approximation of their national laws with *acquis communautaire*. In particular, in the view of the obligations included in the Stabilisation and Association Agreements, the SEEs have all established internal State Aid control systems. All SAAs contain a general prohibition on any State aid which distorts or threatens to distort competition by favouring certain undertakings, modelled according to Article 107 Treaty on the Functioning of the European Union (TFEU). EU State aid rules have been part of the Treaty of Rome 1957, aiming to avoid national protectionism and subsidy races between Member States that would undermine free competition in the internal market.⁷

The SAA between the European Communities and their Member States and the Croatia was signed on 26. 03. 2001 and entered into force on 1.2.2005.

The SAA between the European Communities and their Member States and the Republic of Montenegro was signed on 15.10.2007 and entered into force on 1.5.2010;

The SAA between the European Communities and their Member States and Republic of Albania was signed on 12.6.2006 and entered into force on 1.4.2009;

The SAA between the European Communities and their Member States and the Republic of Serbia was signed on 29.4.2008 and entered into force on 1.2.2010;

The SAA between the European Communities and their Member States and the Republic of Bosnia and Herzegovina was signed on 16.06.2008 and entered into force on 1.06.2015;

The SAA between the European Union and their Member States and Kosovo entered into force on 1.4.2016

⁶ Accession negotiations started with Montenegro and Serbia respectively in 2012 and 2013; North Macedonia and Albania were granted the EU candidate status respectively in 2005 and 2014; Bosnia and Herzegovina and Kosovo are EU potential candidates.

⁷ K. Bacon, *European State Aid Law* (Oxford University 2013), p. 4.

Differently, from the supranational enforcement of EU State aid rules by the European Commission, all South-East Europe countries have to establish national State monitoring authorities. Even before, during the EU enlargements rounds in 2004 and 2007, the then EU associate countries had to establish independent bodies equipped with the powers to apply the provisions on State aid. During the EU pre-accession phase the SEE countries have to fulfil three conditions: legislative alignment, an adequate administrative capacity of controlling State aid and credible enforcement record.⁸

This article will investigate the institutional position of the State aid enforcement authorities in the SEE countries. It will be argued that the institutional set-up of the inter-governmental State Aid Commission introduced the SEE countries is inadequate. The analysis shows what kind of risks arise/arouse with regard to the independence of the first State aid authorities introduced in the SEE countries. The evaluation is based on State aid laws in SEE countries, Annual Reports of the national State aid authorities as well as on the progress reports issued every year by the European Commission evaluating laws adopted by the SEE countries in the framework of competition and State aid control and their implementation. The mapping of the types of State aid authorities in the SEE countries introduced/replaced since the signature of the SAAs, the continuous reforms of State aid rules in the SEE countries

⁸ M. Blauburger, "Compliance with Rules of Negative Integration" (2019) 16, *Journal of European Public Policy* 1, 1035.

and the attempt to understand their effects are a complex endeavor. This article is a first step in this direction.

2. State aid control system - the EU Eastern enlargement

The supranational enforcement of State aid control by the European Commission is quite unique.⁹ The primary 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.¹⁰

⁹ EFTA Surveillance Authority has similar functions and powers as the European Commission with regard to State aid issues. In the framework of the European Economic Area it monitors State aid granted by Lichtenstein, Iceland and Norway.

¹⁰ On May 2012 the European Commission adopted a Communication setting out an ambitious reform of the State aid which has resulted in the revision of several State aid documents such as the “Enabling Regulation” through Council Regulation No 733/2013 of 22 July 2013 amending Regulation (EC) No 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, OJ 2013 L204/11, Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ 2014 L187/1, Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ 2013 L 352/1 Guidelines on regional State aid for 2014-2020, OJ 2013 C209/1, Guidelines for the application of State rules in relation to the rapid deployment of broadband network, OJ 2013 C 25/01, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ 2014 C249/01, Framework for State aid for research and development and innovation, OJ 2014 C198/01, Guidelines on State aid for environmental protection and energy, 2014-2020 OJ 2014 C200/01, Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ 2014 C188/02, Guidelines on State aid to promote risk finance

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.¹¹

Differently, during the Eastern enlargement¹² all Central and Eastern Europe Countries (CEE) had to establish national State aid monitoring authorities. 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.¹³

As all CEE 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

investments, OJ 2014 C19/04, Guidelines on State aid to airports and airlines, OJ 2014 C99/03. Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, Official Journal of the European Union C262/1, 19.7.2016.

¹¹ 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.

¹² In 2004 and 2007, ten new Member States from Central and Eastern Europe Countries joined the European Union. In 2004, Cyprus, Malta, Hungary, Poland, the Slovak Republic, Latvia, Estonia, Lithuania, the Czech Republic and Slovenia joined the European Union. Whereas in 2007, Romania and Bulgaria joined the European Union.

¹³ P. Schutterle, "Implementing of the EC State aid control – an accession criterion" (2002) 1 EStAL.

lot of restructuring aid.¹⁴ Under these conditions the European Commission through the Europe Agreements (EAs)¹⁵ concluded with CEE countries introduced a ban on State aid corresponding to Article 107 TFEU.¹⁶

Moreover, the implementing rules adopted by CEE countries provided for the establishment of national State aid monitoring authorities.¹⁷ During the EU pre-accession phase also a credible enforcement record of the national State aid monitoring authorities was required.¹⁸ In the framework of the obligations provided by the EAs all CEE countries adopted State aid legislation and established national monitoring authorities. The effectiveness of State aid control in CEE countries can

¹⁴ K. Kuik, "State Aid and the 2004 Accession – Overview of Recent Developments" (2004) 3 EStAL.

¹⁵ The European Integration of the Central and Eastern European Countries (CEECs) has been initiated with the so-called Europe Agreements (EA) and has been complemented by the pre-accession strategy. The EAs, as one of the tools for structuring accession, aimed at establishing a political dialogue among the Association Council Bodies and gradually introduce a free trade area to liberalise trade and provide for co-operation in areas such as competition law, environment, education and training and contained provisions on free movement of persons, establishment and supply of services to Member States and candidate countries.

¹⁶ For more on state aid control as provided by the Europe Agreements see: M. Cremona, "State Aid Control: Substance and Procedure in Europe Agreements and the Stabilisation and Association Agreements" (2003) 9 European Law Journal, p. 265-287.

¹⁷ M. Cremona, "State Aid Control: Substance and Procedure in Europe Agreements and the Stabilisation and Association Agreements" (2003) 9 European Law Journal, p. 265-287.

¹⁸ *Blauberger* (n.8).

be explained by a clear timeframe of EU membership for these countries.¹⁹ These countries adopted State aid laws only at a mature stage of the negotiations due to increased pressure.²⁰ Thus, once EU accession became a realistic political option for the candidate States the establishment of a pre-accession national State aid control system was likely to become a success story as the pre-accession national State aid control.²¹

3. State aid obligations. Stabilisation and Association Agreements and beyond

Following the example of the Eastern enlargement the European Commission introduced an internal system of State aid control also in the Stabilisation and Association Agreements (SAAs) concluded with the SEE countries. By signing the Stabilisation and Association Agreements, all SEE countries have committed themselves to adopting the area of State aid to the *acquis communautaire*. All SAAs contain a general prohibition on any State aid which distorts or threatens to distort competition by favouring certain undertakings.²² In the same line with

¹⁹ M. Botta, "State Aid Control in South-East Europe: The Endless Transition" (2013) 1 EStAL, p. 83-94.

²⁰ M. Cremona (n 17), p. 286.

²¹ A. Birnstiel and H. Heinrich, "State aid in the accession countries", in E Szyszczak (ed), *Research Handbook on European State Aid Law* (Edward Elgar 2011) at 53.

²² 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.

the first paragraph of Article 107 TFEU, which provides the general principle according to which State aid is not compatible with the internal market.²³

Further, any of the abovementioned SAA-s 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) and also the interpretative instruments adopted by the Community Institutions.²⁴ 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.²⁵

In addition, an important obligation for all SEE countries pursuant to the respective SAAs would be the establishment of an independent body which will have the powers to apply the provisions on State aid.²⁶ The SAAs clearly require the establishment of an “operationally independent authority” “entrusted with the powers necessary for the application” of

²³ *De Burca, EU law text, cases and materials*. Oxford University Press, 2008 p.1092.

²⁴ See Article 71 (2) SAA Albania; Article 73(2) SAA Montenegro; Article 73 (2) SAA Serbia; Article 71(2) SAA Bosnia and Herzegovina; Article 69(2) SAA Republic of North Macedonia; Article 75(2) SAA Kosovo.

²⁵ M Cremona (n 17).

²⁶ Only the SAA with the Republic of North Macedonia does not expressly provide the obligation for the establishment of an independent State aid authority to enforce the general prohibition on State aids. See Article 71 (4) SAA Albania; Article 73(4) SAA Montenegro; Article 73 (4) SAA Serbia; Article 71(4) SAA Bosnia and Herzegovina; Article 75(4) SAA Kosovo.

the State aid rules.²⁷ These national State aid authorities 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.

Aid transparency is another important obligation provided by the SAAs. Accordingly, each of the national State aid authority of the SEE countries has the obligation to create an inventory of existing state aid schemes, within a period of four/five years.²⁸ In practice, the fulfilment of this condition is not easy, especially within a short time of period.²⁹ Moreover, aid transparency is ensured also by submitting annual reports following the methodology of the European Community on the total amount and the distribution of the aid granted and by providing upon request information on particular individual cases of public aid.³⁰

Another obligation under the terms of the SAAs with the SEE countries is to assess regional aid taking into account that the whole territory will be regarded “an area where the standard of living is abnormally low or

²⁷ The elements related to State aid control included in the Stabilisation and Association Agreements concluded between EU and WB countries are analysed by Peter Schutterle in: *State Aid Control in the Western Balkan Countries and Turkey*, Vol. 2 *EStAL*, 2005, p. 255-263.

²⁸ See Article 71 (6) SAA Albania; Article 73(6) SAA Montenegro; Article 73 (6) SAA Serbia; Article 71(6) SAA Bosnia and Herzegovina; Article 75(6) SAA Kosovo. Only the SAA with the Republic of North Macedonia does not expressly provide this obligation.

²⁹ L. Bieguriski, “Sensitivity of sectors and the need of State aid reforms in economies in transition” (2008) 4 *EStAL*, p. 671.

³⁰ See Article 71 (5) SAA Albania; Article 73(5) SAA Montenegro; Article 73 (5) SAA Serbia; Article 71(5) SAA Bosnia and Herzegovina; Article 69(3) (b) SAA North Macedonia; Article 75(5) SAA Kosovo.

where there is serious underemployment” consequently any development aid could be justified. The SEE countries benefited from this exclusion from the full application of EU state aid *acquis* for a period of four/five years.³¹ On the basis of the SEE countries GDP’s per capita figures, harmonised at NUTS II level the respective state aid authorities of the SEE countries and EU Commission (will) have jointly evaluated the eligibility of the regions as well as the maximum aid intensities in order to prepare the regional aid map. Moreover, a protocol attached to the SAAs provides an exception of five years within which the SEEs can grant aid to the steel sector for restructuring purposes.³²

A strong monitoring authority, the EU Commission, evaluates laws adopted by Western Balkan countries in the framework of State aid control and closely assesses their implementation through annual Progress Reports published yearly for each SEE country.

The SAA-s are the main international engagement demanding the SEE countries to create an internal State aid control system. Additionally, two other international commitments require the SEEs to adopt State aid legislation, namely: the Central European Free Trade Agreement (CEFTA)³³ and Energy Community Treaty (EnCT).³⁴ Participation of

³¹ Excluding Albania which benefited for a period of ten years and Bosnia and Herzegovina for a period of six years. See Article 71 (7) SAA Albania; Article 71(7) (a) SAA Bosnia and Herzegovina.

³² Protocol 1 SAA Albania; Protocol 4 SAA Bosnia and Herzegovina; Protocol 5 SAA North Macedonia; Protocol 5 SAA Serbia; Protocol 5 SAA Montenegro.

³³ CEFTA 2006: Central European Free Trade Agreement, between the SEE countries. The text of the agreement can be found in: <https://cefta.int>. Accessed October 2019.

the SEE-s countries in both CEFTA and EnCT, in particular, encourage SEEs to comply with their obligations also in the view of the future membership in the European Union. SAA-s, CEFTA and the EnCT concluded between EU and the SEE countries provide a general State aid prohibition.

Pursuant to Article 21 of the Central European Free Trade Agreement (CEFTA 2006) “any aid granted by a Party or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain goods shall, in so far as it may affect trade between the Party concerned and other Parties of this Agreement be compatible with the proper functioning of this Agreement”.³⁵ The same Article of the CEFTA requires the parties to evaluate any practices involving State aid on the basis of the criteria provided by Article 107 Treaty on the Functioning of the European Union.³⁶

However, the CEFTA agreement does not require the Members States to establish a national State aid monitoring authority enforcing the abovementioned general prohibition on State aid. The review competence rests with the Members States. Accordingly, it depends on the willingness of a CEFTA Member State to challenge other Member

³⁴ The text of the Treaty establishing the Energy Community is available at: <https://www.energy-community.org/legal/treaty.html> Assessed October 2019.

³⁵ Article 21 Central European Free Trade Agreement (CEFTA 2006).

³⁶ Further, transparency in the area of State aid, is ensured by annual reports, containing the total amount and the distribution of the aid given, submitted by each Party to the Joint Committee. See article 21/7 Central European Free Trade Agreement (CEFTA 2006).

States, which are considered to allow State aids at internal level. Further, the agreement provides for the mutual withdrawal of the trade concessions.

Finally, the Energy Community Treaty (EnCT) is another international commitment concluded by the EU, which requires the SEE countries,³⁷ to adopt State aid laws. The Treaty, which entered into force in 2006, aims to expand EU's internal energy market towards South-East Europe and beyond. The contracting parties are required to implement the *acquis communautaire* on energy, environment, competition and renewables, before their accession to EU.

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.³⁸ The EnCT Secretariat, the guardian of the Treaty, has opened a number of investigations. Thus, in

³⁷ All SEE countries: Albania; Bosnia and Herzegovina, North Macedonia, Montenegro, Serbia, Kosovo have signed the Treaty Establishing the Energy Community. In 2010 Moldova and Ukraine joined the EnCT. Whereas, in July 2017 Georgia joined the EnCT.

³⁸ Articles 67, 90, 92 Treaty Establishing the Energy Community.

2010 an investigation against Bosnia and Herzegovina was opened with regard to the failure of the later to adopt State aid legislation.³⁹

One year later, another investigation was started against Kosovo, again due to lack of adoption of State aid law by Kosovo.⁴⁰ Both countries did approve the respective laws on State aid.

4. Forms of State Aid Authorities in SEE countries

All SEE countries have adopted national State aid laws. Bosnia and Herzegovina was going to be the last SEE country to adopt a State aid law in February 2012. Although, these laws are in line with EU State aid law, further efforts are needed for the approximation with EU law of the secondary legislation adopted in each of the SEE countries.⁴¹ Moreover, these countries have also implemented their obligation to create “operationally independent” State aid authorities as provided by the respective SAAs. As the SEEs are free to choose the ways of organising their State aid control system, at first, they all established State Aid Commissions closely linked to the Ministry of Finance.

At present, after the majority of the SEEs have introduced new laws on State aid, different institutional solutions of organising their State aid control authorities are implemented. Consequently, in Macedonia and

³⁹ Case 1/10, Dispute settlement procedure initiated against Bosnia and Herzegovina for the failure to adopt State aid legislation. Opened on 22 September 2010.

⁴⁰ Case 7/11, Dispute settlement procedure initiated against Kosovo for the failure to adopt State aid legislation. Opened on 9 February 2011.

⁴¹ M Botta (n 19).

Montenegro State aid rules are implemented by the Commission/Agency for the Protection of Competition, in Kosovo and Serbia by a State Aid Commission accountable to the Parliament. Whereas, Albania and Bosnia and Herzegovina continue to assign the task to control and monitor State aid to an inter-governmental State Aid Commission. After accession to EU the national State aid legislations will become obsolete and the role national State aid monitoring authorities will change. It will be the European Commission which will declare State aid compatible with the internal market. The EU rules on State aid will become directly applicable and national legislation will become obsolete. However, most of countries which joined EU during the enlargements rounds in 2004 and 2007 have retained their national State aid control systems, to preserve knowledge and expertise gained during the pre-accession phase.⁴²

4.1. Inter-governmental State Aid Commissions: operationally independent?

The Albanian State Aid Law establishes a decision-making body which is the State Aid Commission (SAC).⁴³ Pursuant to, the 2005 State Aid Law, the SAC is the competent body to evaluate and authorise State aid

⁴² K. Kuick, “State aid and the 2004 Accession – Overview of recent developments” (2004) 3 EStAL, p. 370-371; Jagodic-Lekocevic, “Future role of the former National Monitoring Authorities and existing aid in Slovenia, Poland and Estonia” (2004) 3 EStAL, p. 376.

⁴³ Law on State aid, Official Gazette of the Republic of Albania no. 36/2005.

schemes and individual aid and may also order recovery of unlawful aid.⁴⁴

Additionally, the above-mentioned law establishes a State Aid Department (SAD) as an administrative body, functioning under the ministry responsible for economy. This structure is entrusted with the competence to carry out investigations and prepare proposals for State aid decisions taken by the SAC.⁴⁵ The SAC is composed of five members appointed by the Council of Ministers upon the proposals of the minister of finance, minister of economy, minister of justice and one member from the civil society.⁴⁶ The 2016 cosmetic amendments to the law on state aid, in particular with regard to the guarantees ensuring the independence of the SAC, provided for one member to be proposed by the minister responsible for European integration instead of the minister of economy.⁴⁷

On the other hand, the minister responsible for economy and finance, became the head of the SAC.⁴⁸ Appointed for a mandate of four years,

⁴⁴ Article 17 of the law on State aid, Official Gazette of the Republic of Albania no. 36/2005.

⁴⁵ Article 18 of the law on State aid, Official Gazette of the Republic of Albania no. 36/2005.

⁴⁶ Article 16, paragraph 2 of the law on State aid, Official Gazette of the Republic of Albania no. 36/2005.

⁴⁷ Official Gazette of the Republic of Albania no. 47/2016.

⁴⁸ At present, the Minister for Finance and Economy, the biggest grantor of aid, is the head of the State Aid Commission, as the Ministry of Finance and that of the Economy merged in 2017.

members of the SAC should be professionals who have experience in the field of economy. Although the 2005 State Aid Law expressly provides that the SAC is independent while performing its duties the independence of the SAC shows weaknesses. The presence of the minister responsible for economy as the head of the SAC and the presence of one member from the ministry of finance, two biggest grantors of aid, raises questions about the conflict of interest.

Further, the members are working only part-time for the SAC as they are usually civil servants working for ministries or for other institutions. Also the approval of the annual reports of the SAC by the Council of Ministers might affect the independence of the State Aid Commission as well. Moreover, the State Aid Department, located in the structure of the ministry responsible for economy depends on it.

This ministry is likely to be the main granter of aid, which can raise questions about the objectiveness of the proposals prepared by SAC and so about the objectiveness of the decisions of the State Aid Commission itself. The operational independence of the Albanian State Aid Commission has been continuously criticised by the progress reports issued by the European Commission for Albania.

The most recent EU Commission Progress Report concluded that the Albanian SAC could not “be considered an operationally independent authority” an express condition provided by the Stabilisation and Association Agreement between Albania and EU.⁴⁹

⁴⁹ European Commission: Albania Report, COM (2019) 260 final, SWD 215 p. 62-63.

In Bosnia and Herzegovina, the Law on State Aid System was adopted in February 2012. Pursuant to Article 7 of the 2012 Law on the System of State Aid, the State Aid Council (SAC) is in charge of controlling and monitoring State aid in the country. The SAC evaluates and authorises State aid schemes. It can also order recovery of State aid and launch *ex-officio* investigations, as well as perform the subsequent assessment of the State aid granted.⁵⁰

The eight members of the State Aid Council are appointed by the Council of Ministers, by the governments of the entities and *Brčko District*. Appointed for a period of four years, member of the SAC should be well-known experts in the field of economics and law. A secretariat supports the Council in expertise, technical and legal assistance.⁵¹ Although, the abovementioned Secretariat, is not part of any ministry, it suffers from lack of necessary administrative capacity to fulfill its duties.⁵²

Moreover, the independence of the SAC established in Bosnia and Herzegovina shows weaknesses not only with regard to the nomination of its members, which make it depended on Government, particularly aid-granting ministries, but also with regard to its financing. Provided by

⁵⁰ Article 10 of the Law on the System of State Aid, Official Gazette of the Republic of Bosnia and Herzegovina No. 10/2012.

⁵¹ Article 7 of the Law on the System of State Aid, Official Gazette of the Republic of Bosnia and Herzegovina No. 10/2012.

⁵² European Commission: Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union, COM (2019) 261 final, SWD (2019) 222, p. 101-102.

the 2012 on State Aid System Law to be financed in equal parts by the Council of Ministers, *Republika Srpska* and the Federation of Bosnia and Herzegovina,⁵³ the State Aid Council never received the total financing contribution from the *Republika Srpska*. Consequently, the 2019 opinion of the EU Commission assessing the application of Bosnia and Herzegovina for membership in the European Union, required the country to “ensure that the State Aid Council is operationally independent and obtains adequate financing, including outstanding contributions from the *Republika Srpska* entity”.⁵⁴

4.2. Competition Authorities charged with State aid control

North Macedonia was going to be the first country, among the countries analyzed in this article, to adopt a law on State Aid Control. The 2003 Macedonian State Aid Law provided for a State Aid Commission as the administrative capacity for the control of State aid.⁵⁵ Pursuant to Article 9 of the above-mentioned law, the Macedonian SAC was appointed by the Government upon proposal of the Ministry of Economy (two members) and Ministry of Finance (one member). Whereas, administrative-professional tasks were performed by the Ministry of

⁵³ Article 9 of the Law on the System of State Aid, Official Gazette of the Republic of Bosnia and Herzegovina No. 10/2012.

⁵⁴ European Commission: Commission Opinion on Bosnia and Herzegovina’s application for membership of the European Union, COM (2019) 261 final, SWD (2019) 222, p. 101-102.

⁵⁵ Law on State Aid, Official Gazette of the Republic of North Macedonia No. 24/2003.

Economy. Less than two years later, the EU Commission was very critical about the independence of the Macedonian State Aid Commission. Pointing the weaknesses of such institutional design the 2005 EU Progress Report concluded that it was impossible for the SAC to enforce the State aid rules independently.⁵⁶ The Macedonian SAC did depend on the Government in terms of its membership and also financially. The three part-time members of the SAC, represented the two biggest grantors of aid. Moreover, SAC did not have its own offices and did depend financially from the Ministry of Finance.

Accordingly, the 2006 amendments to the Law on State Aid provided for the transfer of the competence to monitor and control of State aid to the Macedonian Commission for the Protection of Competition.⁵⁷

The EU commission would assess such a transfer of powers as “an important step forward to ensure an independent state aid authority”.⁵⁸ The Macedonian Commission for the Protection of Competition (CPC) is established by the legal provisions on competition as an independent authority having a legal personality.⁵⁹ Moreover, the

⁵⁶ European Commission: Analytical Report for the opinion on the application from the former Yugoslav Republic of Macedonia for EU membership, COM (2005) 562 final, SEC 1425, p. 68.

⁵⁷ Law on State aid control, Official Gazette of the Republic of North Macedonia 70/2006.

⁵⁸ European Commission: The former Yugoslav Republic of Macedonia Progress Report, COM (2006) 649 final, SEC 1387, p. 30.

⁵⁹ Article 26 of the Law on Protection of Competition, Official Gazette of the Republic of North Macedonia no. 136/11.

president and four members of the CPC are appointed by the Parliament and the CPC is accountable to the Parliament.

In 2018, through a new law on State aid, also Montenegro was going to transfer State aid control to its Agency for Protection of Competition.⁶⁰

In order to integrate also State aid control, the Montenegrin Agency for Protection of Competition (APC) did undergo an internal re-organization.⁶¹ Although operationally independent⁶² the members of the APC are appointed by the Government.⁶³ Again the EU Commission would assess integration of State aid control within the Agency for Protection of Competition an essential step for Montenegro “to meet the SAA requirement on the operational independence of the State aid authority”.⁶⁴

For more than a decade, the responsibility to control and monitor State aid in Montenegro, was given to a State Aid Control Commission

⁶⁰ Article 5 of the Law on State Aid Control, Official Gazette of the Republic of Montenegro No. 74/09 and 57/11.

⁶¹ A new Council of the Agency is established composed of President and two members: one for competition and one for State aid. Additionally, the director of the Agency will have two deputies: one for competition and one for State aid. See Law on the Protection of Competition, Official Gazette of the Republic of Montenegro No. 44/12 as amended in 2018 Article 20b.

⁶² European Commission: Montenegro Report, COM (2018) 450 final, SWD 150, p. 58.

⁶³ Article 20b of the Law on the Protection of Competition, Official Gazette of the Republic of Montenegro No. 44/12 as amended in 2018.

⁶⁴ European Commission: Montenegro Report, COM (2019) 260 final, SWD 217 p. 63.

(SACC).⁶⁵ The members of the SACC were appointed by the Government nominated by the ministry and state administration bodies in charge of economic development, sustainable development and maritime affairs and transportation (three members) and by the association of employers (one member).⁶⁶ Additionally, the chairperson was nominated by the Ministry of Finance. The members of the SACC were appointed for a period of four years with the right to be re-appointed. Having its offices within the Ministry of Finance, the later would also perform professional and administrative work as regards the SACC.⁶⁷

It was difficult for the SACC to be independent while its membership created potential conflict of interest and while it was assisted by a department within the Ministry of Finance. This administrative capacity for State aid control did not satisfy the commitment of “an operationally independent authority”, an express condition of the SAA.⁶⁸

⁶⁵ For more on State aid control in Montenegro see: D. Lagzdina and S. Kurtagic, “Challenges of Montenegro in the field of State aid” (2015) 4 EStAL, p. 522-527.

⁶⁶ Before, the 2009 Montenegrin State aid Law provided for a State Aid Commission appointed by the Government, charged with the implementation of the State aid rules. In the same line, the 2011 State aid Law abolishing the above-mentioned law, gave the responsibility to control and monitor State aid to a State Aid Control Commission (SACC). The 2011 State aid law decreased only the number of the members of the SAC.

⁶⁷ Articles 11 & 12 of the Law on State Aid Control, Official Gazette of the Republic of Montenegro No. 74/09 and 57/11.

⁶⁸ European Commission: Montenegro Report COM (2016) 715 final, SWD 360, p.38.

4.3. Other recent institutional approaches

Other institutional approaches to control and monitor State aid are recently introduced in Serbia and Kosovo. In the case of Serbia, by beginning of October 2019, the Parliament of the Republic of Serbia approved a new Law on State Aid.⁶⁹ Pursuant to the 2019 State Aid Law, the Commission on State Aid Control will obtain legal personality. Other guarantees are provided by the above-mentioned law in order to ensure the independence of such Authority. The CSAC will be responsible to the Parliament, to which it will submit its annual reports. The CSAC will be composed of the “President of the Council” and the “Council”, who are elected by the Parliament, through public competitions. Pursuant to the 2019 State Aid Law, expert services within the CSAC, are managed by the Secretary General. The employees’ status of civil servant will allow them to perform their functions objectively, fully and impartially.

In 2017, also Kosovo introduced a new law on State aid. Pursuant to the 2017 State Aid Law, in Kosovo, the function of a State aid authority, is divided between: the State Aid Commission and the State Aid Department.⁷⁰

The members of the State Aid Commission (SAC) will be appointed by the Parliament of the Republic of Kosovo, instead of the Government.

⁶⁹ Law on State Aid Control, Official Gazette of the Republic of Serbia No. 73/2019.

⁷⁰ Articles 8 and 9 of the Law on State Aid, Official Gazette of the Republic of Kosovo No. 3/2017.

The five members of the State Aid Commission, with expertise in the field, are appointed for a mandate of three years, with the possibility of being re-elected. Pursuant to the abovementioned law being a member of the SAC is not compatible with any public function or political appointed position. Also the approval of the annual reports of the SAC by the Parliament is another element which increases its independence. The SAC adopts itself the working regulation defining its organization, decision-making procedure and also measures against conflict of interest. However, a remark can be made about the Department of State Aid which is transferred from the Competition Authority to the Ministry of Finance. As mentioned above, the Ministry of Finance is likely to be one of the main grantors of aid, so the independence of the Department of State Aid is questionable. Moreover, strong working relationships between the State Aid Commission and the Department of State Aid will be required in order to ensure progress in the decision-making process. Before, State aid rules in Serbia and Kosovo were implemented by State Aid Commissions closely linked to the Government. The 2009 Serbian State Aid Law had established a two-tier State aid controlling system.⁷¹ The State Aid Commission (SAC) was the decision-making body and the State Aid Department, within the Ministry of Finance, was the administrative body of this two-tier system. Pursuant to, the abovementioned law the SAC was appointed by the Government upon

⁷¹ For more on the 2009 State Aid Law in Serbia see: *Dojković*, Comments on the new State Aid Law in Serbia in the context of Serbia's accession to EU, Vol 2 *ESTAL* 2010, p. 347-360.

proposal of the Ministry of Finance, Ministry of Economy, Ministry of Infrastructure, Ministry of Environmental Protection and the Commission for Protection of Competition. Headed by the representative of the Ministry of Finance, the members of the SAC, experts in the field of State aid, competition, EU law, were appointed for a term of five years with the right to be re-elected.⁷² The weaknesses of such composition with regard to the independence of the CSAC were remarkable, as the members of the SAC were generally appointed by ministries which grant aid. Additionally, lack of a separate budget or separate administrative capacity negatively affected the operational independence of the CSAC.⁷³ Consequently, the EU Progress Report clearly stated in May 2019 that “the CSAC cannot be considered as operationally independent” an obligation provided by the Stabilisation and Association Agreement between EU and Serbia.⁷⁴

In Kosovo, pursuant to the 2012 State aid law the State aid Commission, the decision-making body, was appointed by the Government under the proposal of Ministry of Finance, for a mandate of four years. The SAC chaired by the Minister of Finance, was composed of four members respectively: the Minister of European Integration, the Minister of Trade

⁷² See Article 6 and 7 of the Law on State Aid Control, Official Gazette of the Republic of Serbia No. 51/2009.

⁷³ M Milenkovic, “The transformation of State aid control in Serbia and EU conditionality” (2018) 1 EStAL, p. 66-79.

⁷⁴ European Commission: Serbia Report, COM (2019) 260 final, SWD 219, p. 64.

and Industry, the chair of the Association of the Municipalities of Kosovo and one representative from the civil society.⁷⁵

Additionally, the State Aid Office within the Competition Authority, was entrusted with the competence to control notified State aid measures, prohibit aid, accomplish *ex post* control of aid and the recovery of illegal aid. The EU Commission would voice its concerns with regard to the operational independence and impartiality of the Kosovo SAC, asking for new law on State aid.⁷⁶ According to the 2016 EU Commission Progress Report no decisions were rendered since the Law on State Aid had entered into force.⁷⁷

5. Final remarks

Fulfilling their international commitments, the SEEs have made progress by adopting their Laws on State Aid control. However, the establishment of a legal base is necessary but not a sufficient step towards creating an effective State aid control system. In implementing their obligation to establish an “operationally independent” State aid monitoring authority, the first choice of all SEEs was the establishment of State Aid Commissions closely linked to the Government/Ministry of Finance. In this institutional model the link between the Government and State Aid

⁷⁵ Article 8 and 7 of the Law on State Aid, Official Gazette of the Republic of Kosovo Nr. 13/2011.

⁷⁶ European Commission: Kosovo Report, SWD (2015) 215 final, p. 41.

⁷⁷ European Commission: Kosovo Report, COM (2016) 715 final, SWD 363 p. 48.

Commission was to the detriment of the independence of the State Aid Commissions. The later, were mainly collegial bodies appointed by the Government. As a rule, representatives of the Ministry of Finance and of the Ministry of Economy the two biggest grantors of aid were members of the above-mentioned State Aid Commissions. This raised questions about the conflict of interests in conducting functions by such members as well as about the independence of the entire State aid authority. No party should influence the appointment or dismissal of the members of these administrative bodies of controlling of State aid. Moreover, the analysis did show that other important dimensions related to the independence of the above-mentioned administrative authorities enforcing State aid rules in SEEs such as financial and human resources independence, were not fully guaranteed. The financial independence would minimize the influence of grantor or beneficiaries of State aid. On the other side, human resources should allow the abovementioned State Aid Commissions to gather process and distribute information which is needed for the authorization of State aid.

The analysis of the annual reports on the progress towards accession in the European Union of the SEE countries shows that all SEEs have common problems in enforcing State aid rules. Most of the State aid schemes in SEEs are being implemented without being scrutinised before by the already established administrative capacities for State aid control. On the other hand, all the SEEs State aid monitoring mechanisms have approved all draft State aid schemes notified to them. More, the abovementioned Authorities have very rarely initiated *ex-officio*

investigations meaning that they have not challenged many major aid schemes. Importantly, State aid recovery decisions are almost missing. Recently many of the SEEs did change their laws on State Aid control. While providing further alignment with the EU State aid law, they also introduced new institutional designs for their State aid monitoring authorities. Presently, rules on State aid control in SEEs are implemented by: independent Commission/Agency for the Protection of Competition (Macedonia and Montenegro), by State Aid Commission accountable to the Parliament (Kosovo and Serbia) and lastly, by inter-governmental State Aid Commissions (Albania and Bosnia and Herzegovina). Renewing hopes for a better implementation of the State aid rules, the recent legal solutions protect the independence of the State aid authorities.

However, implementation of the State aid law in Macedonia from the Commission for the Protection of Competition (CPC) since 2006 leaves more questions than answers with regard to the establishment of an effective State aid system in the SEE countries. The 2010 Macedonian State aid law⁷⁸ is largely compatible with the EU State aid *acquis*.⁷⁹ Further, bylaws have also been approved by the CPC during the years,

⁷⁸ Law on State Aid Control adopted on 13.11.2010. Official Gazette of the Republic of North Macedonia No. 145/10.

⁷⁹ European Commission: North Macedonia Report, COM (2019) 260 final, SWD 218.

continuing the harmonisation with the *acquis* secondary legislation.⁸⁰ Additionally, the Macedonian Commission for the Protection of Competition is established by the legal provisions on competition as an independent authority having its own legal personality. Its president and four members of the CPC are appointed by the Parliament and the CPC is accountable to the Parliament. Although, analyzing EU Commission's Progress Reports and the Annual Reports issued by the CPC, the problems in particular with regard to the implementation of State aid rules in Macedonia become evident. In particular, the number of the notifications with regard to the draft State aid schemes is low. The most recent EU Commission screening through its Progress Report of 2019 observes that important State aid schemes are being implemented without being investigated by the CPC.⁸¹ Even before pursuant to the EU Commission, the *ex-ante* control performed by the CPC was partial due to the low number of the notifications.⁸² Additionally, many times draft State aid schemes are notified after they have started being implemented.⁸³

⁸⁰ The Macedonian Commission for Protection of Competition: Annual Report 2018 p. 30, available at <http://kzk.gov.mk/en/category/annual-reports/>. Assessed November 2019.

⁸¹ European Commission: North Macedonia Report, COM (2019) 260 final, SWD 218.

⁸² European Commission: the former Yugoslav Republic of Macedonia Progress Report, COM (2009) 533 final, SEC1335.

⁸³ European Commission: the former Yugoslav Republic of Macedonia Progress Report, COM (2007) 663 final, SEC1432.

At the end of the EU accession negotiations, the SEEs should have established, *inter alia*, rules on State aid fully approximated with the EU *acquis*, as well as a credible State aid enforcement record. However, presently even the SEEs which have opened the EU accession negotiations have not yet started negotiations with regard to the competition chapter, which includes also State aid. In this phase of the enlargement, the approach of the European Commission *vis a vis* State aid monitoring process of the SEE countries is not accompanied by a strong pressure of compliance. Thus, the Albanian State Aid Commission enforcing State aid rules since 2006 has repeatedly been considered by the EU Commission not operationally independent, an express condition of the SAA with Albania. However, State aid rules in Albania continue to be implemented by the same State Aid Commission established since 2006.

The former President of the EU Commission would clearly state back in 2014 that there was not going to be any further enlargement until 2019.

⁸⁴ At present, taking into consideration the economic and political situation in the EU, accession of the new Member States does not seem likely in the near future. Increasing the length of the EU pre-accession phase for the SEE countries negatively affects the establishment of an effective State aid enforcement system in the EU candidate countries. The EU Eastern enlargement showed the Central and Eastern Europe

⁸⁴ https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en.pdf (last assessed November 2019)

Countries were willing to establish a successful State aid control system only, after EU accession became a realistic political option. Consequently, the incentive given to the Governments of the SEEs countries to restrain themselves from granting State aid might be a clear timeframe of the European Union membership. Until then, State aid rules in the SEE countries risk being enforced through isolated (independent) State Aid Monitoring Authorities, rarely notified about draft State aid schemes.