

# Capacities and independence of state aid institutions

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## Introduction

Provision of state aid to various entities, whether under a scheme or as individual aid, is categorized as permitted and prohibited state aid. Regulation of prohibited state aid is particularly important, due to the negative impact it may have on the development of competition in a sector, creating a dominant position for a given entity and closing the market for other players. Thus, the work and independence of institutions in addressing individual aid and schemes of state aid are highly important for the country's economy. They strive to preserve public money and protect market competition.

Kosovo and its neighboring states, Albania, Montenegro, Serbia, and Northern Macedonia, are signatories to the Energy Community Treaty (ECT). The treaty provides for the obligations of the parties to transpose the European Union (EU) acquis on electricity, competition and the environment in the signatory countries' legislation. In relation to state aid, Article 18 of the Treaty, which is similar to Article 107 of the Treaty on the Functioning of the European Union (TFEU), requires members to the ECT to prohibit any state aid that impairs competition and affects energy trade between the Contracting Parties.<sup>1</sup> In addition, as signatories to the Stabilization and Association Agreement (SAA), pursuant to Article 75(c) of this Agreement, these States shall not support entities through state aid if it affects competition<sup>2</sup>. The Free Trade Agreement for Southeast Balkan Countries (CEFTA), to which these countries are also signatory parties, also prevents the provision of state aid which distorts competition and harms trade between member states<sup>3</sup>. The responsibility to prevent state aid also stems from national laws that the states have adopted.

Failure to evaluate state aid projects by institutions has a number of costs. States may face lawsuits in local courts by injured parties from sectors where state aid was provided. This may result in damages to the state budget, as parties would be compensated for all losses they incurred as a result of the distorted competition. The court may also annul the contracts and seek restitution of the provided aid in order to restore competition in the internal market. It also constitutes a breach of agreements signed by these states, such as the SAA. Consequently, allowing state aid schemes in these countries can complicate the negotiation process for EU membership.

In this report, GAP Institute compares the institutional framework on state aid in Kosovo and the neighboring countries, with a focus on Kosovo's institutional activities in energy projects. The report highlights the financial dependence on government of several state aid institutions on Western Balkan, which may also result in a conflict of interest of such institutions when performing evaluations and making decisions. Also, the analysis of the performance of state aid institutions in Kosovo, with a focus on energy projects, indicates that these institutions are not considering the "Kosova e Re" power plant project, in relation to the presence of state aid. The report recommends that state aid institutions address all projects for which there is indication of state aid presence, in particular the "Kosova e Re" power plant project, as one of the largest infrastructure projects in the country since the war.

1 State Aid and Effectiveness of State Aid Control Rules in the Electricity Sector under the Energy Community Treaty. Source: <https://bit.ly/2QD8Nv2>.

2 Stabilization and Association Agreement between the European Union and Kosovo. Article 75(c). Source: <https://bit.ly/2UKEuAY>

3 CEFTA. Agreement amending and extending the Central European Free Trade Agreement. Article 21. Source: <https://bit.ly/2tsinq6>.

## (In)dependence of state aid institutions

The functioning and status of institutions dealing with state aid issues in Kosovo differs from a number of other Western Balkan countries. State aid institutions are designed in different forms in these countries, some with some departments assessing schemes or individual aid, operating as institutions under the government, and an independent decision-making body, and others where both institutions operate independently or entirely under the government.

In Kosovo, institutions working the field of state aid include the State Aid Department (SAD), and the State Aid Commission. SAD operates under the Ministry of Finance and is tasked with evaluating schemes and proposals for state aid, collecting data on state aid, and establishing a state aid register. The State Aid Commission, on the other hand, functions as a decision-making body on state aid schemes. Members of this commission are appointed by the Assembly of Kosovo.

In Albania, issues related to state aid, both evaluation and decision-making, are carried out by institutions that operate or are selected by the government. Specifically, the State Aid Directorate, whose staff works in the ministries of the field of economy and meets only as needed, drafts decisions on State Aid for the Commission and maintains the State Aid Register. Whereas the State Aid Commission is a decision-making body and is appointed by the Council of Ministers and is chaired by the Minister of Economy<sup>4</sup>.

In Northern Macedonia, the Commission for Protection of Competition has the authority to handle state aid cases. However, the Commission's main scope does not include the issue of state aid, and doesn't have sufficient staff for this purpose<sup>5</sup>. In Serbia, following the amendments to the State Aid Act in 2019, the State Aid Control Commission became an independent institution, reporting only to the Assembly. The State Aid Council will be set up and operate under this institution, and is obligated to adopt and prepare decisions for the commission<sup>6</sup>. In Montenegro, following the legislative changes in 2018, the powers to monitor and control state aid have been transferred to the Competition Agency, where new institutions, specifically the State Aid Council, have been set up to adequately address the issue<sup>7</sup>.

4 Assembly of Republic of Albania. Law on State Aid. Source: <https://bit.ly/2OzNsj3>.

5 Dušan V. Popović. Institutional framework of state aid bodies in South Eastern Europe. Page 73. Source: <https://bit.ly/2Sul6Yw>.

6 Parliament of Serbia. Law on State Aid Control. Source: <https://bit.ly/2OByLfo>.

7 Assembly of Montenegro. Law on Protection of Competition 2018. Source: <https://bit.ly/39hpErW>.

**Table 1. Institutional Framework of State Aid Institutions in Kosovo, Albania, Serbia, Montenegro and Northern Macedonia**

	<b>Institution responsible for evaluating schemes and individual aid</b>	<b>Functioning of the institution:</b>	<b>Status:</b>	<b>Decision-making institution</b>	<b>Functioning of the institution</b>
<b>Kosovo</b>	State Aid Department	Part of the Ministry of Finance	Permanent Staff	State Aid Commission	Appointed by the Assembly where members do not hold public office during the mandate
<b>Albania</b>	Directorate of State Aid	Part of ministries covering economic affairs	Ad-hoc, as needed	State Aid Commission	Appointed by the Council of Ministers, where the Chair of the Commission is the Minister responsible for economic affairs
<b>Montenegro</b>	Council as part of the Agency for Protection of Competition	Independent Institution	Permanent Staff	State Aid Council	
<b>Serbia</b>	Council as part of the State Aid Commission	Independent Institution	5 year term	State Aid Commission	Appointed by the Assembly where members do not hold public office or private positions during the mandate
<b>Northern Macedonia</b>	Commission for Protection of Competition	Independent Institution	Permanent staff	Commission for Protection of Competition	

Unlike Albania, an advantage of Kosovo when setting up its State Aid Commission, with its members elected by the assembly rather than ministers of government, is that it avoids a potential source of interest. This is because ministries can be potential donors of prohibited state aid themselves, and this can affect their objectivity in making decisions. However, the functioning of the State Aid Department within the Ministry of Finance (MF) affects the independence that this institution may have, and it may particularly be treated as a conflict of interest in cases when dealing with schemes or individual aid provided by MF or other ministries. Therefore, an operational reorganization and independence of SAD would also be important, opting for a format similar to that of Serbia, Montenegro or Northern Macedonia. However, it is important that the independence of these institutions is supported with sufficient budget and staff, as in the case of Serbia and Montenegro.

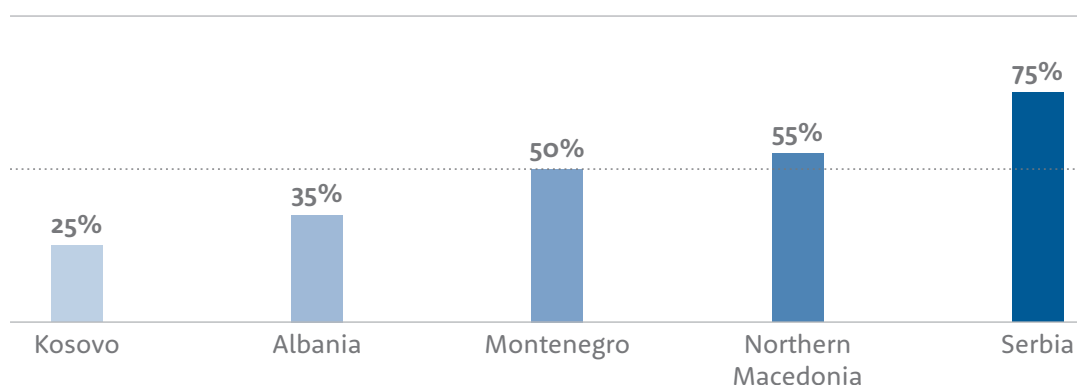
Overall, a higher commitment of the five states in the Western Balkans towards the independence of state aid institutions is visible, although the institutional framework they chose to achieve this goal differs. Initially, all states have established state aid institutions as part of the government. However, over time, with the exception of Albania, they amended their state aid laws. As Table 2 shows, countries such as Serbia and Montenegro managed to achieve full independence for these institutions, as they report directly to the assembly and have sufficient staff. Whereas, in the case of Northern Macedonia, despite the fact that the state aid institution was given independence in its operation, it remains without sufficient staff, and state aid is not a priority of the institution under which it operates. In Kosovo, there is partial independence of state aid institutions, as SAD is still part of the Ministry of Finance.

**Table 2.** Changes to the institutional framework of State Aid Institutions in Kosovo, Albania, Serbia, Montenegro and Northern Macedonia

	Initial Institutional Framework	Institutional Framework after Amendments to the Law:	Independence:
<b>Kosovo</b>	State aid institutions part of the government	State Aid Commission independent, whereas the State Aid Department is part of government	State aid institutions are partially independent
<b>Albania</b>	State aid institutions part of the government	No amendments to the law as of yet	None of the decision-making institutions is independent
<b>Montenegro</b>	State aid institutions part of the government	Council as part of the Agency for Protection of Competition	State aid institutions are independent
<b>Serbia</b>	State aid institutions part of the government	Council as part of the State Aid Commission independent institution	State aid institutions are independent
<b>Northern Macedonia</b>	State aid institutions part of the government	Commission for Protection of Competition	State aid institutions are independent but lacking staff In addition, state aid is not a priority of the institution under which they operate

According to a 2019 report of the Energy Community Secretariat, which assesses the work, independence and capacity of the contracting parties' state aid bodies, Kosovo is rated poorer than its neighboring states. This report calls into question the independence of SAD and the lack of staff and technical resources of the department to implement state aid laws. Specifically, state aid agencies in Serbia had the highest rating, with 75 out of 100%, Northern Macedonia with 55%, Montenegro with 50%, Albania with 35%, and Kosovo with 25%. The report criticizes the small number of cases handled by these institutions, insufficient staff, and questions the independence of some of them<sup>8</sup>. However, it is worth noting that since the publication of this report, SAD in Kosovo has prepared three cases for a decision for the State Aid Commission, while there were also changes to the institutional framework in this field in Serbia.

**Figure 1.** Work, independence and capacities of state aid bodies of Kosovo, Albania, Montenegro, Northern Macedonia, and Serbia, 2019



Source: GAP, based on data from the Energy Community Secretariat

<sup>8</sup> Energy Community Secretariat. Annual implementation plan 2019. Source: <https://bit.ly/374xALW>.

## Work of state aid institutions in Kosovo - the case of “Kosova e Re” power plant

The State Aid Department in Kosovo was established in 2017 and had seven staff members by 2018. Whereas the five-member State Aid Commission was appointed by the Assembly in 2019. The focus of SAD remains on the completion of secondary legislation on state aid, where there were delays in their drafting and adoption based on the European Reform Agenda, and the National Plan for the Implementation of the Stabilization and Association Agreement 2019-2023. Currently, SAD has created an inventory (register) and, on its own initiative and through communication with public institutions, it has identified over 80 current schemes which require a decision by the State Aid Commission. According to the Director of SAD, over 90% of these schemes are categorized as small and eligible state aid, treated under the De minimis Aid Regulation, namely which do not harm market competition and do not create a dominant position for certain entities. Thus far, in three of these cases, the State Aid Commission took decisions to categorize them as eligible aid<sup>9</sup>.

### State aid dilemmas with the “Kosova e Re” power plant project

State aid schemes identified by SAD, which require a decision by the State Aid Commission, do not include schemes or individual state aid in the field of energy. In fact, the project for the construction of the “Kosova e Re” power plant, which is the largest post-war investment in Kosovo (1.3 billion Euro) and is considered to have numerous elements of state aid, is not subject to an evaluation by SAD and the Commission.

In 2018, the Ministry of Economic Development (MED) signed commercial contracts with Contour Global (GenCo) for the construction of the “Kosova e Re” power plant. The signed contracts envisage that Kosovo’s institutions assume obligations (specifically the New Kosovo Electricity Company (NKEC) to be established by the government) of purchasing all the capacity and energy generated by the new 450 megawatt power plant built by GenCo. Government institutions have not notified SAD of the assistance planned to be provided to this entity in the market, despite SAD being in existence in 2018 and the new Law on State Aid, which requires notifying SAD on potential aid providers, in force since 2017.

With the new power plant in operation, the electricity market in Kosovo will be closed for 20 years, thus blocking the development of any competition and minimizing the potential for liberalization of the energy market. The current electricity supplier (KESCO) and other actors which may start operating in the future, will be obliged to purchase all electricity from NKEC, making it impossible for them to purchase electricity at a lower price in electricity markets for the next 20 years. As a result, this project puts GenCo in an advantageous position over other electricity generators in Kosovo, thus distorting competition. Specifically, it does not provide a level playing field to other producers, such as KEK. The project also envisages that GenCO’s costs of operating the system are charged to the state-owned NKEC, and that GenCo is transferred property under the market value<sup>10</sup>.

Although SAD and the State Aid Commission were recently formed, under Article 13.3 of the Kosovo State Aid Law, they could request assistance from the Energy Community Secretariat (ESC) on the evaluation of the “Kosova e Re” power plant project<sup>11</sup>. As there is no further development on this project to date, the Energy Community Secretariat has recently initiated the procedure to resolve the dispute over the “Kosova e Re” power plant project. SAD raises concerns on the

<sup>9</sup> Interview with Agim Krasniqi, Director of the State Aid Department in Kosovo, January 24, 2020.

<sup>10</sup> Ministry of Economic Development. Commercial Contracts of Kosova e Re power plant project. Source: <https://bit.ly/37iQ6jy>. For more details on the presence of unauthorized state aid in the “Kosova e Re” power plant project please see the GAP analysis “Impact of State Aid on electricity market in the Balkans”. Source: <https://bit.ly/zuAelfX>.

<sup>11</sup> Official Gazette. Law on State Aid. Source: <https://bit.ly/389em91>.



presence of unlawful state aid in the project in question, highlighting as state aid the entry into an agreement with Kosovo institutions to purchase electricity for 20 years, the sale and transfer of state property under market prices, VAT exemptions, and Kosovo's assumption of other charges and expenses<sup>12</sup>. According to the Energy Secretariat, if the project fails to comply with the rules of the Energy Community Treaty, the case may be brought before the Energy Community Council of Ministers. A decision of the Council of Ministers may result in the suspension of Kosovo's voting rights and exclusion from the Council.

The state aid institutions' failure to act in such case creates damages to Kosovo's economy and budget, and may be interpreted as a conflict of interest, where SAD fails to make an analysis of a project initiated by another government institution.



<sup>12</sup> Energy Community. The Energy Community Secretariat initiates the procedure for resolving a dispute with Kosovo regarding the presence of unlawful state aid in the “Kosova e Re” power plant project. Source: <https://bit.ly/2Sppxnz>.

## Conclusions and recommendations

Selecting an institutional framework where state aid institutions are guaranteed independence in their work and government funding, remains an important step for Kosovo and the countries of the region. As a mechanism, independent state aid institutions serve both as a guardian of public money and of free competition in the market. Furthermore, their independence avoids the conflicts of interest when evaluating cases and making decisions. Of the five Western Balkan countries, the format chosen by Serbia and Montenegro in terms of reorganization and operational independence of state aid institutions is more appropriate than that of Northern Macedonia, Kosovo and Albania. In the case of Kosovo, it is important for state aid authorities to evaluate the project for the construction of the “Kosova e Re” power plant, which constitutes an unlawful state aid, thus impairing Kosovo’s budget.

Regarding this issue, it is important to note that:

- State aid institutions should address all projects for which there is indication that there is state aid. Priority should be given to large-scale projects that have high budgetary costs and could damage the budget of Kosovo in the event of a presence of unlawful state aid;
- The State Aid Department (SAD), in addition to sending notices to institutions, requesting disclosure of schemes or individual aid they provide, should take unilateral initiatives, as permitted by law, to evaluate projects which are assumed to involve unlawful state aid;
- The State Aid Department and the State Aid Commission should prioritize the evaluation of the “Kosova e Re” power plant project, and should also request technical assistance from the Energy Community Secretariat for this evaluation.



**Embassy of the  
Kingdom of the Netherlands**

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