



UDC: 338.24+346.5(497.11:4-672EU)
https://doi.org/10.22182/spt.18212018.5
Manuscript received: 02.09.2018.
Accepted for publishing: 30.10.2018.
Original scientific paper

Serbian Political
Thought No. 2/2018,
Year X,
Vol. 18
pp. 69-87

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The Institutional Setting for State Aid Control in Serbia and the Long Road to “Operational Independence”²

Abstract

According to the Stabilisation and Association Agreement concluded with the European Union, the process of the integration of the Republic of Serbia into the European Union includes an obligation to introduce rules on the control of state aid in the country and for that purpose to establish an *operationally independent* authority entrusted with the powers necessary to implement in full the state aid rules on a national level. The aim of this paper is to examine models of state aid control mechanism that have been developed in various EU Member States, which were required to establish such control mechanisms as part of the EU accession process, and to consider challenges and prospects of reforming Serbian institutional setting. The paper concludes that the identification of the appropriate form of institutional setup for state aid control must take account of national specificities - particular the stage within the transition process reached by the country in question, the level of economic transformation undertaken before enactment of reforms, the role of independent bodies within the legal system as well as the overall societal and political context.

Key words: institutional reforms, operationally independent body, EU State Aid standards, conditionality requirements, EU integration.

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- 2) Part of the research is result of the work on the PLAC project funded by the European Union and project Perspectives of implementation of European Standards in Serbian Legal System supported of Serbian Ministry for Education, science and technological development. Part of the research was carried out at the University of Bologna with support of JoinSEE PENTA programme and at the Center for Constitutional Studies and Democratic Development (CCSDD) with funding from Sir Richard May Balkan Programme. Author would like to thank prof. Lucia Serena Rossi, prof. Justin Frosini and Dr Vladimir Medjak for their valuable comments and support.

Introduction

The introduction of state aid control is a crucial factor in the transformation of former planned economies, in which government involvement and the role of business was one of the crucial features of the system (Gros, Steinherr 2004).³ The Stabilisation and Association Agreements (SAAs) concluded over the past decade between (potential) candidates and the European Union and its Member States require candidate countries to develop an “operationally independent” body charged with controlling state aid granting. Institutional design and detailed procedural rules are left to the individual candidate countries (prospective Member States). The standard of “operational independence” is still to be fully defined in EU legislation but is being gradually elaborated by European Commission.⁴ This concept of “operational independence” is of both theoretical and practical interest, having been envisaged mainly as in order to avoid prescribing for future Member States how they must institutionally organise certain tasks, rather allowing them to put in place arrangements that are in keeping with their respective constitutional and administrative traditions. On a theoretical level, it is an intriguing task to examine the constitutive elements of the operational independence, whilst in practical terms it is challenging for decision makers to create models that are capable of complying with the (relatively vague) EU integration conditionality criterion. Comparative analysis points to three main types of institutional setup for state aid control: control by a body that is part of or linked to the Ministry of the Economy and Finance; state aid control by a body that is also a competition authority; finally, and most infrequently, an independent authority. This will be addressed in more detail further in the paper.

Within the context of the process of the integration of Republic of Serbia into the European Union, and according to the signed SAA,⁵ Serbia undertook *to establish an operationally independent authority vested*

3) For an analysis of the transition from a planned to a market economy, see *inter alia*: Gros, Steinherr (2004).

4) In the connected area of competition protection, see further: European Commission, Commission Staff Working Document Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues *Accompanying the document* communication from the commission to the European parliament and the council Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, {COM(2014) 453}.

5) Stabilisation and Association Agreement between the European Communities and Their Member States of the one part, and the Republic of Serbia, of the other part, “*Official Gazette Of RS-International Agreements*”, No. 83/2008 signed on 29.4.2008.

with the powers necessary for the full implementation of state aid control on national level. Serbia must ensure that the state aid authority is operationally independent and that it has the powers and resources that are necessary for the full and proper application of EU State aid rules. In this regard, the Law on State Aid Control (OG RS 51/2009) established the Commission for State Aid Control (CSAC).

The challenges associated with the introduction of the system of state aid control in Serbia against the backdrop of enlargement fatigue have been considered elsewhere (Milenkovic 2016: page, Milenkovic 2018), and this paper will focus on what we find the most pressing problem of the Serbian state aid control system: its institutional base. Scholarship on state aid in Serbia is still relatively limited, and this paper aims to fill this gap building on our previous research in the area. The paper is based on literature review, an examination of the Serbian legislative framework along with interviews with officials and experts involved in the regime in Serbia for collecting relevant qualitative data. This enabled to get an insight into the most pressing problems associated with the process of introducing state aid control along with the challenges faced by the institutional structures put in place in order to control and sanction government action in this area. The second part of the paper explores the context of EU conditionality and the European Commission's reporting on the progress of a candidate country. Part three briefly describes the basic legal provisions and the current institutional setting for state aid control in Serbia. In part four a comparative analysis of three different models for the organisation of administrative mechanisms is carried out alongside an analysis of the main features of state aid control bodies. Finally, the fifth part, we discuss how best Serbia might achieve the standard of operational independence for its state aid authority in current societal context.

Setting the scene – introduction of state aid control in the EU pre-accession process and “operational independence” of control body

The integration of countries that were partly or predominantly planned economies has represented a political challenge for the process of EU integration since the late 1980s, when it became clear that political changes were about to occur, which would have far-reaching consequences for both the EU and its Member States (Sedelmemeier and Wallace 2000).⁶

6) For an overview of the relations of the EU with the CEE countries, see *inter alia*: Sedelmemeier and Wallace (2000).

The introduction of the new competition and state aid regimes proved to be particularly challenging in the transition process, as the countries of Eastern and Central Europe were forced to leave behind the legacy of state (over)interference in market relations (Emmert 2003).⁷ Therefore, since the CEE countries had not experienced trade and economic liberalisation after the Second World War,⁸ the approximation of laws in this area has been particularly challenging. All countries acceding to the European Union today are obliged to introduce state aid control regimes. This was envisaged for the Member States that acceded in 2004 and was stipulated in their respective European Agreements (Cremona 2003).⁹ A similar obligation is foreseen for Western Balkan countries through the far-reaching Stabilisation and Association agreements mentioned above. The political, economic and legal transformation of the Western Balkans over the past two decades has been mostly EU-driven. Croatia was the first of the Western Balkan countries to join the EU, whilst in the midst of enlargement fatigue and experiencing slow economic recovery. However, it has been clearly stated by the head of the EU Commission that no further enlargement is foreseen during the mandate of the current Commission, which ends in 2020.¹⁰ As has already been stated elsewhere (Milenkovic, Milenkovic 2013, Milenkovic 2016 and Milenkovic 2018),¹¹ the lack of EU prospects will only create more difficulties for Serbia as elites will not be fully motivated to implement reforms, and therefore conditionality, especially in difficult and challenging fields such as state aid, may well fail to bring results.

The Serbian Stabilisation and Association Agreement contains provisions on the approximation of laws, law enforcement and competition rules in line with the structure of the Treaty on the Functioning of the European Union.¹² According to the SAA, Serbia needs to establish an operationally independent authority vested with the powers necessary

7) For some accounts of the transformation of competition regimes in the region, see *inter alia*: Emmert (2003).

8) However, the former Yugoslavia was a notable exception, with its specific Socialist self-governance system, which was much more open to foreign trade than the countries of the Communist bloc.

9) For state aid provisions in the European agreements and SAAs, see: Cremona (2003). The first reference to State aid *acquis* was in the case of Poland and was made as early as 1991 in the European Agreement. (Paczkowska-Tomaszewska, Jaros, Winiarski 2006: 669).

10) Eubusiness, "Juncker to halt enlargement as EU Commission head", 15 July 2014, <http://www.eubusiness.com/news-eu/politics-juncker.x29>.

11) Milenkovic Milos, Milenkovic Marko (2013 a,b); Milenkovic (2016), Milenkovic (2018).

12) For the relevant provisions see further Article 73 SAA.

for the full application of state aid rules set out in the Treaty within one year from the date of entry into force of this Agreement. This authority shall have, *inter alia*, the powers to authorise state aid schemes and individual grants of aid as well as powers to order the recovery of state aid that has been unlawfully granted. The SAAs require candidate countries to develop “operationally independent” bodies charged with the control of state aid. However, the standard of “operational independence” is not defined by EU legislation, and has not been elaborated in case law. It is also a matter of debate within academia. As has been argued: “the requirement to make the State aid control authority independent is included in the association agreements that associated countries have signed with the EU. However, these agreements do not specify the conditions of guaranteeing such independence, which leaves a wide scope of freedom for national lawmakers. The authority that controls State aid must be independent to be able to make objective decisions authorising aid schemes and executing their applications. Particularly, it means that the authority cannot be dependent upon the organs of administration engaged in the granting process, nor upon the beneficiaries of State aid.” (Biegurski 2012: 569). Although the criteria have not been defined in the area of state aid, the European Commission has elaborated on the elements of independence in the context of competition authorities: “In order to ensure effective enforcement of the EU competition rules, it is generally accepted that NCAs should be independent when exercising their functions. Independence means that the authority’s decisions are free from external influence and based on the application and interpretation of the competition rules relying on legal and economic arguments. In the vast majority of Member States, the NCAs benefit from a certain degree of independence but the extent of their independence and equally the degree of supervision exercised by other state bodies varies. Many NCAs are designated in national law as independent state bodies and formally established as either an administrative authority or an agency. In addition, around half of the NCAs have legal personality.” (European Commission, 2014: 6, para 12). As has been further outlined by the EC: “In terms of accountability, which is generally seen as an important counterpart for a state body’s independence, almost all NCAs are obliged to report on their activities of the previous year, mostly in the form of submitting an annual report to the parliament or (part of) the executive branch. In addition, some NCAs may have to appear before a parliamentary committee or have to submit an annual plan for the upcoming year.” (European Commission, 2014: 6, para 13). Other useful indications from this document include the assertion that: “The vast

majority of NCAs also enjoy operational, organisational and financial independence. Operational independence is foreseen for most NCAs in carrying out their duties, for example, by explicitly excluding interference by, or instructions from, other state bodies or other persons when investigating and deciding on individual competition cases. The large majority of NCAs also decide on their internal organisation and they have a separate budget allocation in the overall state budget for which they have budgetary autonomy to spend. ...” (European Commission, 2014: 7, para 15). Based on feedback received from stakeholders through qualitative research, it is possible for the purpose of CSAC, but also for other independent controllers, to define the following characteristics of “operational independence”: 1. the ability to take decisions independently, free from political interference and freedom from any requirement to seek or receive instructions from any government, or other institution, body, office or entity; 2. the ability to exercise powers transparently and impartially, with appropriate rules on conflict of interests; 3. adequate and stable human and financial resources; 4. full authority over the recruitment and management of staff; 5. a separate annual budget with autonomy over the spending of the budget allocated; 6. management/board selected according to transparent procedures on the basis of merit.

Role and position of the Serbian Commission for State Aid Control

A few measures in the field of state aid were taken over the years prior to the introduction of the regime in the country. The National Reports on State Aid, which Serbia has comprised since 2004, point to a relatively high level of state aid as a proportion of GDP.¹³ Following the enactment of the Law on State Aid (after the process lasted for several years), the basic substantive, procedural and institutional rules were put in place. It was envisaged that the Government would form a State Aid Control Commission entrusted with controlling all individual state aid measures and schemes. According to the law, no aid may be granted without a prior decision by the Commission. The Law on State Aid was adopted in July 2009 and entered into force on 1 January 2010. As was prescribed, the law was to be implemented from that date, leaving very little time for the necessary institutional preparations (Dajkovic 2010).¹⁴

13) For years, it has amounted to more than 2% of GDP as compared to the 0.5% usually granted through subsidies in EU Member States. Reports are available in English at: <http://www.kkdp.gov.rs/eng/izvestaji.php>

14) For the overview of the Law see: Dajkovic (2010).

According to the Law, the members of the Commission for State Aid Control were appointed in December 2009 by a governmental decision only a few days before the planned start date for implementation the new regime in the country. The Law itself largely transposes the provisions of the Treaty on the Functioning of the European Union and defines state aid according to the established approach of the Commission and the Court of Justice. However, there are still a number of changes to be made in order to ensure full alignment with EU law. European Commission 2016: 38) The Law does not contain detailed substantive norms on the types of aid that are compatible/allowed. These are laid down in detail in the Regulation on the Rules for the Granting of State Aid. As was explained by the interviewees who were involved in the drafting of the law, the intention was to keep the law relatively “short and simple” and to allow for the substantive provisions to be amended more frequently in order to ensure compliance in line with regulatory changes in the European Union.

The Serbian state aid authority is a hybrid body – an independent commission entrusted with control tasks, but without a separate budget or administrative capacity (Transparency Serbia 2015).¹⁵ This body has been entrusted with controlling state aid measures until Serbia’s prospective accession to the European Union, when this obligation will cease to apply and the power to scrutinise state aid measures will transfer to the European Commission. Accordingly, most bodies described further in the text ceased to exist or fundamentally changed their role upon entry in the EU. The Commission has no legal personality, and no budget or separate administrative capacities, but is served by the Ministry of Finance (Department for State Aid) (Milenkovic 2016: page).¹⁶ Members of the Commission are proposed by relevant ministries, along with one member by the Commission for the Protection of Competition, and are appointed for a five-year period according to the governmental decision. This institutional design, under which the Commission is overwhelmingly dependent on the Ministry of Finance (and other grantors of state aid due to the specifics of the appointment procedures), has evidently led to general weakness and difficulties in meeting the standard of operational independence (Botta 2013 and Popovic, Caka 2017).¹⁷

15) For the comprehensive account of problems of the state aid control system see further: Transparency Serbia (2015).

16) For the detailed overview of CSAC and Ministry department competences see further: Milenkovic (2016).

17) This however is not surprising, but is rather recognised as a trend in all countries in the region, see: Botta (2013), Popovic, Caka (2017).

Under the Law (Article 6), the Commission has five members and is set up by the Government. Its members are elected by the Government acting upon proposals from: the ministry responsible for finances; the ministry responsible for the economy and regional development; the ministry responsible for infrastructure; the ministry responsible for environmental protection; and the Commission for the Protection of Competition. Members of the Commission are appointed for terms of five years and may be reappointed. The representative of the ministry responsible for finances is, at the same time, also the Chairperson of the Commission, and the representative of the Commission for the Protection of Competition is the Deputy Chairperson. “Representative” is the very formulation used in the Serbian version of the Law. In our opinion, it reflects the approach taken by lawmakers forming a control body representative of the biggest grantors of aid. The conditions for membership of the Commission are: Serbian citizenship and “at least a university degree”; in addition, members must “possess expert knowledge in the field of state aid, competition, and/or EU legislation.”¹⁸ The Commission is explicitly defined as “operationally independent” and is also entrusted with adopting its rules of procedure. However, it does not have separate budget. The Law provides that funds for the Commission’s activities shall be provided from the budget of the Republic of Serbia, and that the Ministry shall provide the premises and other technical resources for the Commission’s activities. (Article 7)

The current CSAC secretariat is based in the Ministry of Finance within the Department for State Aid. According to the organisational arrangement of civil servants within the Ministry it is envisaged that 8 civil servants/employees will be allocated to the sector. According to data obtained from the CSAC, the Department currently has 8 employees, and was the only one excluded from the mandatory reduction of employees during the implementation of austerity measures from 2014. As the interviewees attest, the Commission, along with the Department as its secretariat, has a constant need for new employees in order to meet the demands of the increasing workload. These officers are charged with handling notifications and preparing draft decisions for the CSAC as well as taking inventories and drafting reports for the Government. As was outlined by a majority of the stakeholders interviewed and some of the members of the CSAC during previous research project carried out by author, even though significant experience has been gained by administrative staff and capacities have been developed, this is still not sufficient to meet the demands of the workload.

18) This provision is becoming obsolete as there is now a critical mass of professionals with expertise in the area of state aid.

The Law did establish mechanisms for resolving conflicts of interest, as members of the Commission are *de iure* representatives of the ministries, which are the largest grantors of state aid. Members are obliged to respect the provisions of the law governing the prevention of conflicts of interest in the discharge of their public functions. Furthermore, it is stipulated that member of the Commission who is at the same time a representative of the grantor or state aid, or the body proposing the regulation establishing grounds for the grant of state aid, may provide additional information within the state aid control procedure but shall not have the right to take part in the decision-making process (Article 21).¹⁹ The interviewees confirm that this rule has been adhered to within the practice of the Commission, although control is still left to the group of “representatives” of the biggest grantors of aid, which need to be controlled.

Finally, the Law contains provisions on reporting (Article 23). Based on the information collected from grantors of state aid, the Ministry (not the Commission) prepares the proposal for the annual report on state aid granted in the Republic of Serbia, which the Commission submits to the Government only (and not to Parliament). The Ministry also specifies in detail the methodology for drafting the annual report, the deadline for the submission of data to the Ministry, and the deadline for the submission of the draft the annual report. By this way, the procedure remains to the great extent Ministry driven. To sum up, the Law has established the “operationally independent” body but without legal personality, separate budget, administration/secretariat and overall dependant on the grantors of the aid. Therefore, it is interesting to study comparative examples from former (and current) EU candidate countries.

State aid authorities during the EU accession process from a comparative perspective

There are in principle three types of institutional settings for state aid control within the transitional context of EU accession.²⁰ Each type of administrative organisation of state aid related tasks has its advan-

19) The Commission may also invite representatives of other authorities, organisations and professional associations to provide further information that is relevant to decision making. In terms of the provision of information, a representative of the grantor of state aid, or the body proposing the regulation establishing grounds for the grant of state aid, who is not a member of the Commission, is entitled to participate in the state aid control procedure in order to provide additional information. (Article 21).

20) Here we mostly concentrate on former candidates who have since joined the European Union.

tages and disadvantages, as the more detailed national studies cited in this paper attest (Botta 2013).²¹ Therefore, in identifying the appropriate form for the institutional structure of state aid control, national specificities must be taken into account – including in particular the stage within the transition process reached by the country in question, the level of economic reforms implemented prior to the enactment of the state aid reforms, the role of independent bodies within the legal system as well as the overall societal and political context.

The first model is one in which the control body is part of or, or linked to, the national Finance/Economy Ministry. This has been a widely used approach in transitional economies. It also reflects the current legislative choice in Serbia. This model has usually included the establishment of a separate Commission in charge of state aid control, with some administrative tasks being carried out by the Ministry of Economy / Finance. A major challenge within this model has been the involvement of the Finance Ministry in certain aspects of the work of the control body, and especially in some monitoring stages and/or the control process. It has been argued that this model introduces a number of risks for independence, mostly due to the fact that members are proposed or appointed by grantors of state aid (Biegurski 2012: 570). Commissions that meet on an *ad hoc* basis, the decisions of which are drafted by supporting offices, may be open to influence (Biegurski 2012: 570). We have identified four examples of this model in current EU Member States that have passed through the transitional process, and a further three in current candidate countries.

Slovenia established the Commission for State Aid Control in 2000, and by the same legal act the State Aid Control Section was established to carry out “specialist, administrative and technical tasks for the Commission” within Ministry of the Economy and Finance (Jagodic Lekocevic, Pelka, Vosu 2004).²² Due to the close cooperation between colleagues from the Serbian and Slovenian Finance Ministries, this model had been used for establishing the Serbian CSAC.²³ Upon accession to the EU, the Commission ceased to exist and remaining national competences were transferred to the Ministry of Finance.

Estonia offers a further example of a new Member State that complied with the obligation under the European Agreement with the European Community by establishing Competition and State Aid divisions

21) Botta assesses that state aid control at national level is unsuitable and pointing to need for a supranational control even before accession, see further: Botta (2013).

22) See further: Jagodic Lekocevic, Pelka, Vosu (2004).

23) The Serbian Government at the time was advised by Slovenian expert.

within the Ministry of Finance. Notifications were made directly to the Minister and the relevant state aid rules were incorporated into the Competition Act (Jagodic Lekocevic, Pelka, Vosu 2004:382).

Hungary established a Monitoring Authority within its Ministry of Finance, which was operational from 1996-1999. The State Aid Monitoring Office (SAMO) was established in 1999 but was also incorporated into the Ministry of Finance (Hargita, Filep 2004: 585), making it a rather unique model, which operated within the core governmental structure until accession to the EU. The same body remained a competent national authority for state aid following accession to the EU in 2004.

Latvia established a State Aid Surveillance Commission in 1997. It was an “independent collegiate institution: not subject to any Ministry and consisted of 13 representatives delegated by different institutions who met whenever needed to consider notified State aid projects” (Bednar 2005: 267). Following the first phase in which the Commission had a permanent secretariat within the Ministry of Finance (with competence similar to a department within a Serbian ministry), “on January 2002 an independent State Aid Control Division/Department was created and acted as secretariat to the Commission” (Bednar 2005: 268).²⁴ The institutional setup of state aid control has changed since accession to the EU; today, the national point of contact for state aid in Latvia is again the Ministry of Finance.²⁵ Such experience in institutional transformation from 2002 onwards may be useful for Serbian decision makers in order to achieve the standard of “operational independence”. As regards the current candidate countries Montenegro (Lagzdina, Kurtagic, 2015)²⁶ and Albania,²⁷ both have opted to establish state aid commissions with tasks partially done by the Ministry of Finance.

The second most frequently used institutional option was the competition authority as a state aid authority, which has also been a widely used institutional option within the transitional context. It is claimed to have a number of advantages (Biegurski 2012: 569). As the protection of competition is regularly ensured by an independent authority with its own legal personality, an administrative structure separate from the central administration and an independent budget, this forms a solid

24) However, no further data are available in the literature on the exact composition and organisation of this independent secretariat.

25) The list of all current national state aid contact points in Member States is available at: http://ec.europa.eu/competition/state_aid/overview/contacts.html.

26) For an overview of the challenges see: Lagzdina, Kurtagic, (2015)

27) Gjevori points to similar problems faced by the Albanian State Aid Commission to those of the CSAC in Serbia, questioning this concept of “independence within government”. (Gjevori 2014: 18).

basis for creating an independent “watchdog” to oversee the grant of state aid in the country.

In Lithuania the Competition Council (Competition and Consumer Protection Office before 2000) was entrusted with state aid control. This autonomous body was also charged with drawing up procedural rules and criteria for accessing state aid in the country. After accession to the EU, this body has retained its role in the notification procedure (Bednar 2005: 269-271).

In Poland, prior to accession, state aid control was carried out by the President of the Office for Competition and Consumer Protection (appointed as an authority in 2000), whose term was fixed but which was also subordinated to the Prime Minister (Paczkowska-Tomaszewska, Krzysztof, Krzysztof 2006: 669-670).

In Romania, state aid control was entrusted to an autonomous authority – the Competition Council – from 1999, but with some tasks performed by the Competition Office within the Ministry of Finance. Many similarities with Serbia can be observed within that period with regard to the weak track record and EC complaints (von Borriers 2006: 510-511).

The Czech Republic is another country which charged its Office for the Protection of Competition with the function of state aid control prior to accession to the European Union; after accession, this office became the central national authority for coordination, advice, consultation, and monitoring in the area of state aid (Bednar 2005: 265).

Croatia serves as a valuable comparative model for examination, as it was the first state from former Yugoslavia that opted to implement its state aid control requirement through the Croatian Agency for Competition in 2003.²⁸ According to the Law, the Agency had very broad powers; it was deciding on the compatibility of state aid through *ex ante* and *ex post* control and also had the power to order the repayment of unlawful aid. Upon accession to the EU, the competences in this area were transferred to the Ministry of Finance (Botta 2013:88-90).²⁹ In addition to Croatia, Macedonia is the only country of the WB region that has opted for entrusting state aid control to the Commission for the protection of Competition since 2006, having previously used the model of 3 members state aid commission aided by the Ministry of finance (Biegurski 2012: 568).

28) Law on State Aid, Official Gazette no 140/05. According to the interviewees, the example of the Croatian institutional setup is regularly pointed to, unofficially, as a useful example for the remaining candidate countries from the Western Balkans, including Serbia.

29) For a detailed account of the work of the competition agency in Croatia in the field see: Botta (2013:88-90).

The third model – an independent state aid authority – has been the least widely used among the former EU accession countries. According to available data, authorities with considerable independence and responsibility solely for state aid control were only introduced in Slovakia and Cyprus. Slovakia established its Office for State Aid in 1999³⁰ which was a separate agency for state aid control (Biegurski 2012: 571).³¹ According to the Slovakian Law, the State Aid Office was set up as the body of the state administration responsible for the review, evaluation and approval of state aid, control of its provision and the keeping of records in relation to state aid.

In Cyprus the specific model of state aid control was introduced within the context of the EU integration process in 2001; the body charged with the task of controlling state aid was the Office of the Commissioner for Public Aid (Andreou 2005: 27).³² This institution is a very valuable comparative example as it is still operational, albeit with a different role following the accession of Cyprus to the European Union. The Office is headed by a Commissioner (for public/state aid). The Cypriot Commissioner for State Aid Control is an “independent government official”. He/she is appointed by the Council of Ministers in consultation with the Parliamentary Committee on European Affairs, and has a term in office of six years.

In the Western Balkan region, only Bosnia and Herzegovina has opted to establish a fully independent institution for state aid control – the State Aid Council of BiH. The council is served by its own secretariat.³³

As experiences from the previous rounds of enlargement indicate, there are numerous challenges in achieving operational independence when the state aid body is located within or connected to the government, and therefore the position of regulator with independent legal status (irrespective of whether it is entrusted with powers in only one or more regulatory fields) and a clearly defined mandate may be an important guarantee of the achievement of the policy goals envisaged by association treaties. Both the interviewees and a study of the compar-

30) Law No.231/1999.

31) For some criticism of the functioning of institution see: Biegurski (2012: 571).

32) Public Aid Control Law (Law 30(I)/2001) which entered into force on 30 April 2001 following the decision of the Council of Ministers no.53.538 of 11 April 2001. On 29 April 2004 the State Aid Control (Amendment) Law of 2004 was passed and the Commissioner's title was changed from Commissioner for Public Aid to Commissioner for State Aid Control, and the name of institution was changed to Office of the Commissioner for State Aid Control. See further: www.publicaid.gov.cy/; (Andreou 2005: 27).

33) See further: www.szdp.gov.ba/en/.

ative literature indicate that it is of the utmost importance for the state aid authority to demonstrate competence, integrity *vis-à-vis* grantors, and persistence in pursuing agendas that might be at odds with political interests and also to act according the goals of competition policy as defined by the *acquis* and the respective national legislation.

How to achieve the standard of operational independence of the state aid authority within a given societal context: some findings from qualitative research

In this part we examine how this criterion of operational independence can be achieved in the Serbian context. The results of our research indicate that the current model has significant shortcomings and has reached its limits in ensuring the independence of the watchdog body (Milenkovic 2016 and Milenkovic 2018).³⁴ Therefore, further exploration is needed into the options for the new institutional setup of state aid control, taking account of two models previously used that included autonomy of the authority from the state aid grantors: control by the competition authority or oversight of state aid by an independent body. At this point, we stress that no specific model for the administrative organisation of state aid control body can guarantee the success of an independent authority in scrutinising grantors' actions. Based on this comparative analysis and the qualitative research results, and having regard to the political, legal, and societal context in the country, we consider the establishment of a state aid authority with both operational and organisational independence to be the most appropriate model.³⁵

What are the main features of a position of the state aid authorities and how can their independence be secured? As our research points out, it is of the utmost importance to ensure separate legal personality for the state aid authority, either by tasking this control to competition authorities (which have a similar position in many European legal systems) or by establishing separate administrative organisations with legal personality. This feature of independence should be combined with other attributes including but not limiting to: 1. separate budget, 2. fixed term appointment of the individual or collective body leading the organisation, 3. conflict of interest provisions preventing interference by the central government and other grantors of state aid, and 4. separate administrative service/secretariat.

34) See further: Milenkovic (2016, 2018).

35) Here we depart to some extent from the opinion in Milenkovic (2016) where we argued that powers should be transferred to the competition authority.

The Serbian commission has already been defined as independent by the Law on State Aid Control and this status only needs to be strengthened through a few legislative changes. This could include granting legal personality, the establishment of a separate budget and own secretariat entrusted with all of the specialist, administrative and technical tasks necessary for the operation of the Commission, the election and release from the position of the CSAC members, who should be accountable to the Parliament.

Although the competence of the state aid authority changes significantly following the country's accession to the EU (with the transfer of the powers to the European Commission), the administrative capacities of the SA authority may continue to perform an advisory role and independently oversee the preparation of notifications to the European Commission and the implementation of block exemptions by the (new) Member State authorities.

There are also some disadvantages to this option within the given legal and social context. The creation of new public agencies has ceased to be a preferred policy option for Serbian governments over the past few years, even though there are a large number of such regulatory and control institutions in the Serbian administrative system, which were established between 2001 and 2012 (Milenkovic and Milenkovic 2013b).³⁶ If given full independence, this option would in practice require the establishment of a new institution, most probably the transfer of administrative staff from the Ministry and the adoption of new internal rules of conduct. It would also raise other standard issues and potential challenges associated with the establishment and (re)commencement of the work of the institution. The appointment of members is an important feature of the independence of the institution. As the current CSAC members are appointed by the government, their position may not be considered to be sufficiently independent. Therefore, the election of the Commission members by Parliament, preceded by a parliamentary hearing, would be a more suitable option.

The legal transformation of transitional societies is commonly achieved by transferring or introducing models and norms that have already been implemented within the same regulatory areas in different countries. However, in Serbian case, the existing domestic model of the Commission for the Protection of Competition (CPC) could be used to redefine the position of the CSAC, since it has already been positively evaluated by the European Union in the context of EU integration. As the CPC already displays some important features of independence, this

³⁶ See further Milenkovic and Milenkovic (2013b).

paper outlines those that could be used to enhance it and fulfil the criterion of operational independence. According to the Law, the CPC is an independent and autonomous organisation exercising public powers in accordance with this Law. The Commission has a status of a legal entity. The Commission is accountable for its work to the National Assembly, which elects president and members and to which it submits an Annual Report on its activities (Article 20). Therefore, this body represents a viable domestic model which can be used for reconfiguring the state aid authority. The transfer of powers to the CPC at this moment might compromise the exercise of core antitrust powers and therefore it is better to use its expertise and experience in order to establish a new independent state aid authority. Finally, similarly to Competition authority, it would be advisable to members of the state aid authority to commit themselves full time to this public post and not to engage in other work.³⁷

Concluding remarks

Serbia has come a long way in transforming its legal system within the context of EU integration, and there is no doubt that the state aid regime in Serbia is a direct consequence of the EU's influence, and a prime example of conditionality put into practice. Even in the context of enlargement fatigue and given the distant membership prospects, there is value in introducing this control system into the economies of the Western Balkans, including that of Serbia. It comes as no surprise that (successive) governments have worked on harmonising national legislation with the EU *acquis*, although have not made any extra efforts to introduce a new competitive dynamic into the transitional market. This would require both the Government to be restraint and the development of a culture of integrity and impartiality by control institutions. Given the available EU assessments, and on the basis of the law as it currently stands, it may be concluded that the existing administrative arrangement as provided by the Law does not meet at least four out of six standards of "operational independence" outlined in part two.

As outlined in part four, no specific model for the administrative organisation of state aid control authorities is able to provide a guarantee of the success of the independent authority in scrutinising grantors' actions. Models need to be contextualised and adapted accordingly in

37) Save for professors and researchers, which are traditionally exempted and whose core work in parallel is usually considered compatible with positions in regulatory bodies.

each country. The goal of the operational independence of the CSAC (or any other body entrusted with state aid control) can only be achieved if the conditions are created for the state aid control mechanism to act professionally, basing its decisions on expertise and by enhancing the role of the control body in this area. Although independent institution model has rarely been used, compared to the other policy options it appears to be more suitable within a given societal context. Considering that the CPC is already a functional model within the Serbian system, and that its track record is viewed positively, it could be used alongside comparative best practice examples in order to redefine the CSAC position. Since the model of the CPC was recommended as a good example upon which the rearranged CSAC could be structured, it would also be beneficial to draw on the experience gained in the development of the CPC, including internal acts, administrative practices, etc. in expanding the capacities of the state aid control mechanism. Whatever institutional setting is chosen the state aid authority to demonstrate its independence from grantors, competence in the field and willingness to pursue control in line with the criteria set by the *acquis* and the relevant national legislation even when needed to confront with the Government actions.

Finally, this analysis is concluded by pointing to the potentially intriguing concept of “operational independence” as developed through the work of the European Commission, which deserves greater attention in the EU and administrative law scholarship. The vagueness of the concept however allows for different constitutional and administrative traditions to adapt newly emerging regulatory functions within their respective legal and political contexts.

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