

TO THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY
represented by the Presidency and the Vice-Presidency of the Energy Community

In the case ECS-10/18, the Secretariat of the Energy Community against Bosnia and Herzegovina, the

ADVISORY COMMITTEE,

composed of
Rajko Pirnat, Alan Riley, Helmut Schmitt von Sydow, Verica Trstenjak, and
Wolfgang Urbantschitsch

pursuant to Article 90 of the Treaty establishing the Energy Community ('the Treaty') and Article 11(3) of Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty as amended by Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 ('Dispute Settlement Rules 2015'),

acting unanimously,

gives the following

OPINION

I. Procedure

By e-mail dated 26th of June 2020 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-10/18 against Bosnia and Herzegovina. The members of the Advisory Committee received the Reasoned Request and its annexes.

In its Reasoned Request of 26th of June 2020 the Secretariat seeks a Decision from the Ministerial Council declaring that by adopting and maintaining in force Decision No UP/I 03-26-1-42-4/18 of the State Aid Council of Bosnia and Herzegovina of 23 July 2018, deciding that a guarantee issued by the Federation of Bosnia and Herzegovina in favour of the Export-Import Bank of China (hereinafter 'ExIm Bank') to secure a loan of the public utility Elektroprivreda Bosne i Hercegovine (hereinafter 'EPBiH') does not constitute State aid within the meaning of Article 18(1)(c) of the Treaty, Bosnia and Herzegovina fails to fulfil its obligations under Article 18 of the Treaty.

Bosnia and Herzegovina did not submit a reply to the Reasoned Request within the two months period stipulated in Article 31 (1) Dispute Settlement Rules.

Pursuant to Article 32 (4) Dispute Settlement Rules the Advisory Committee has to conduct a public hearing before giving its opinion. According to Article 8 (1) Rules of Procedure of the Advisory Committee of the Energy Community Advisory Committee as amended (RoP) such a public hearing shall take place unless both parties to the case agree that it can be dispensed with. In an e-mail dated 2nd of September 2020 both the Secretariat and Bosnia and Herzegovina were invited to inform the Advisory Committee on whether they considered holding a remote public hearing necessary in this case. The date for the remote public hearing was scheduled for the 9th of October 2020. The Secretariat informed the Advisory Committee on the 3rd of September 2020 that the case would merit a public hearing but deferred the decision

to Bosnia and Herzegovina. Bosnia and Herzegovina replied on the 9th of September 2020 that they believed it was necessary to hold a public hearing.

On the 8th of October 2020 Bosnia and Herzegovina requested a deferral of the remote public hearing scheduled for the 9th of October 2020 for reasons of (i) introduction of new relevant evidence that could not be heard, (ii) absolute breach of rights of defence and due process, (iii) the case not being substantively ready for a hearing or adjudication, (iv) opposition and lack of any legal grounds and/or safeguards for a virtual hearing, and (v) need for general stay of proceedings. The Advisory Committee decided to hold the remote public hearing, but after sorting out the necessary procedural aspects, the remote public hearing was ultimately adjourned to 9th December 2020 and the parties were ordered to file two economists' reports as soon as they were available.

II. Provisions allegedly violated by the Contracting Party concerned

Article 18 of the Treaty reads:

- 1. The following shall be incompatible with the proper functioning of the Treaty, insofar as they may affect trade of Network Energy between the Contracting Parties:
 - (a) all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition,*
 - (b) abuse by one or more undertakings of a dominant position in the market between the Contracting Parties as a whole or in a substantial part thereof,*
 - (c) any public aid which distorts or threatens to distort competition by favouring certain undertakings or certain energy resources.**
- 2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 81, 82 and 87 of the Treaty establishing the European Community (attached in Annex III).*

III. Preliminary Remarks

According to Article 32 (1) Dispute Settlement Rules 2015, the Advisory Committee gives its Opinion on the Reasoned Request, taking into account the reply by the party concerned.

On that basis the Advisory Committee assessed the Reasoned Request and the relevant documents considered in this case and after further consideration following the public hearing came to the following conclusions.

IV. Facts of the case

For the financing of the construction of a new 450 MW unit at the Tuzla thermal power plant (hereinafter "Tuzla 7") the owner of this power plant, EPBiH concluded a loan agreement with ExIm Bank. The Federation of Bosnia and Herzegovina (hereinafter 'the Federation') issued a guarantee in favour of ExIm Bank for the loan granted to EPBiH for the Tuzla 7. The conditions of both the loan agreement and the guarantee agreement and additional relevant documents were set out in the Reasoned Request.

On 11th of July 2018 the Federation of Bosnia and Herzegovina notified the relevant agreements to the State Aid Council of Bosnia and Herzegovina (hereinafter 'SAC'). On 23rd of July 2018, the SAC rendered Decision No. UP/I 03-26-1-42-4/18 (hereinafter 'Decision') which found that the guarantee under the conditions described did not entail State aid. Following the

internal procedure of the Federation of Bosnia and Herzegovina the guarantee agreement was signed by the Federation and the ExIm Bank on the 19th of November 2019.

On 25th of September 2018, a complaint was submitted by the Aarhus Centre and CEE Bankwatch Network to the Secretariat against Bosnia and Herzegovina for non-compliance with the state aid acquis by the SAC because of the Decision. Case ECS-10/18 was opened by opening letter to Bosnia and Herzegovina on the 26th of March 2019.

On 5th June 2019 Bosnia and Herzegovina indicated that it was interested in a mediation and negotiation process with the Secretariat. A mediation session under the auspices of an independent mediator took place on the 18th September in Vienna. The mediation process failed and it was terminated on 5th December 2019. On 16th January 2020, the Secretariat filed its Reasoned Opinion, setting out in detail the facts and law in respect of the case. Bosnia and Herzegovina did not submit a reply to the Reasoned Opinion by the closing date of 16th March 2020.

The Secretariat subsequently forwarded a Reasoned Request to the Advisory Committee on 26th June 2020. Both parties agreed to the holding of a public hearing on 9th October. However, on the 8th October a request was made by Bosnia and Herzegovina for a deferral of the hearing. The Advisory Committee opened the public hearing on 9th October. However, based on the representations of Bosnia and Herzegovina that a number of economist reports relevant to the case, in particular the Copenhagen Economics report¹ and the Oxera report² had been considered by the Secretariat but not made available to the Advisory Committee, it was decided to adjourn the hearing. Subsequently the Advisory Committee set a date of 9th December 2020 for the public hearing. It required all relevant documents to be filed by 27th November 2020. The Committee also gave the parties the opportunity to provide an explanation of how the economic evidence presented in those reports related to the overall argument of their case.

V. Legal Assessment

The Reasoned Request of the Secretariat alleges that by adopting and maintaining in force Decision No UP/I 03-26-1-42-4/18 of the State Aid Council of Bosnia and Herzegovina of 23rd of July 2018, deciding that a guarantee issued by the Federation of Bosnia and Herzegovina of 23rd July 2018 in favour of the Export-Import Bank of China to secure a loan of the public utility EBiP does not constitute State Aid within the meaning of Article 18(1)(c) of the Treaty, Bosnia and Herzegovina fails to fulfil its obligations under Article 18 of the Treaty.

It should be noted that as the time period for submitting a response to the Reasoned Opinion had closed for Bosnia and Herzegovina on 16th March 2020 only its economists report and its comments and observations upon those reports and those of the Secretariat's economists report could be considered by the Advisory Committee (and equally the economists report from the Secretariat and its comments on the reports commissioned by Bosnia and Herzegovina). Hence, aside from the additional argument and analysis drawn from the economists' reports and the representations made by Bosnia and Herzegovina in respect of those reports the Advisory Committee's assessment is based on the procedural documents submitted by the Energy Secretariat.

¹ *Economic and Legal Analysis of the Guarantee of the Federation of BiH from the Aspect of Valid BiH/FBiH and EU State Aid Regulations*, Copenhagen Economics, Copenhagen, 2020.

² *Assessment of the Guarantee provided to EPBiH for the Tuzla 7 Project*, Oxera Consulting, Oxford, 2020.

Any assessment of the decision of the State Aid Council of Bosnia and Herzegovina in respect of the Tuzla 7 guarantee must be based on whether it complies with Article 18(1)(c) of the Treaty, and thereby on the well-established elements of state aid contained in Article 107 (1) TFEU³. For the State aid to exist all of the following conditions must be fulfilled.

1. An undertaking is granted an advantage
2. By the state or through state resources
3. Which favours certain undertakings or certain energy resources (selectivity)
4. And is liable to distort competition
5. And may affect trade of network energy between the contracting parties

1 An Advantage.

An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention⁴. The European Commission uses the market economy operator test (MEO) to assess whether economic transactions carried out by public bodies take place under normal market conditions and, therefore, whether they involve the granting of an advantage (which would not have occurred in normal market conditions). To establish whether a transaction is in compliance with market conditions, that transaction can be assessed in the light of the terms under which comparable transactions carried out by comparable private operators have taken place in comparable situations (benchmarking). To identify the appropriate benchmark, it is necessary to pay particular attention to the kind of operator concerned, the type of transaction at stake and the market(s) concerned.

Guarantees granted by public bodies to secure a loan may entail State aid if they are not in line with market terms. Any guarantee granted on terms more favourable than market conditions, taking into account the economic situation of the borrower of the loan, confers an advantage on the latter. This is because it enables the borrower to borrow at a rate that would not have been obtainable on the market without the guarantee (or to borrow in a situation where, exceptionally, no loan could have been obtained on the market at any rate).

The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the borrowing undertaking and a drain on the resources of the State

In order to determine whether an advantage is being granted through a guarantee the CJEU has confirmed that the assessment should be based on the principle of an investor operating in a market economy⁵. In order to support the assessment process as to whether the market economy operator principle is fulfilled the European Commission has set out in its Notice on the Application of (then) Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (hereafter the Notice)⁶ a number of sufficient conditions for the absence of aid. These conditions are:

- (a) The borrower is not in financial difficulty
- (b) The extent of the guarantee can be properly measured when it is granted

³ *In respect of the Energy Community. Article 18(1)(c), and in respect of the TFEU, Article 107.*

⁴ *Commission Notice on the Application of Articles 87 and 88 of the EC Treaty to State Aid in the form of guarantees, OJ 2008 C-155/10, 20th June 2008 (hereafter the Commission Notice on Guarantees).*

⁵ *Case C-482/99 France v. Commission (Stardust).*

⁶ *Ibid.*

- (c) The guarantee does not cover more than 80% of the outstanding loan or other financial obligation
 - (d) A market orientated price is paid for the guarantee
- a) The borrower is not in financial difficulty

In order to decide whether a borrower is in financial difficulty it is necessary to rely upon the Guidelines on State Aid for Rescuing and Restructuring Non-Financial Undertakings in Difficulty⁷. Those Guidelines define an undertaking in difficulty as one that without the intervention of the state will face exiting from the market in the short or medium term if at least one of the three following instances occurs⁸:

- In the case of a company with limited liability, where more than half of its subscribed share capital has disappeared due to accumulating losses
- Where the undertaking is subject to collective insolvency proceedings or fulfils the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors.
- In the case of an undertaking that is not a SME, for the past two years:
 - the undertaking's book debt to equity ratio has been greater than 7.5,
 - the undertaking's EBITDA interest coverage ratio has been below 1.0

The borrower in this case is EPBiH. EBPIH is a joint stock company with limited liability.

Therefore all three of the conditions listed above have to be assessed in order to exclude the possibility that EPIB is an undertaking in financial difficulty.

The Bosnia-Herzegovina State Aid Council took the view in its decision that based on the indicators in EPIB's balance sheets and the full financial results of 2015-2017 the company is not in difficulty. This view is supported by the economic study undertaken on behalf of the government of Bosnia-Herzegovina by Copenhagen Economics. In that report it was contended that the subscribed share capital of EPBiH remained stable with zero accumulated losses between 2016 and 2017. The Copenhagen Report also noted that EPBiH was not under collective insolvency proceedings and had almost no standing debt⁹.

On the other hand the initial critique of the Secretariat in its Reasoned Request focussed on the third limb of the Commission's Guidelines. It raised concerns as to whether EPBiH's book debt to equity ratio were in fact greater than 7.5 and that its EBITDA were below 1.0. The Secretariat also raised additional concerns in respect of the quality of the audited consolidated financial statement of EPBiH for 2017. The external independent auditors stated in the financial statement that they do not give a true and fair view of the financial position of EPBiH. The Secretariat therefore argued that any conclusions regarding the financial situation of the company cannot be based on the financial data deployed by the SAC in its decision.

It also argued that given the lack of reliable data in EPBiH's financial statements, the SAC was not in a position to draw conclusions as to whether EPBiH is subject to collective insolvency proceedings or fulfils the criteria under the law of Bosnia and Herzegovina for being placed in collective insolvency proceedings at the request of its creditors.

⁷ *Guidelines on State Aid for Rescuing and Restructuring Non-Financial Undertakings in Difficulty*, OJ 2014 C-249/1, para 114.

⁸ *Ibid*, para 20.

⁹ *Copenhagen Economics, op cit*, 15-16.

However, the economists' report provided by Oxera at the request of the Secretariat supports the contention of Bosnia & Herzegovina that EPBiH is not in financial difficulty as defined by the Commission's Guidelines¹⁰.

Even after an extensive and robust analysis of the underlying financial data the Oxera report concludes that even when fully taking into the concerns raised by the external auditors the debt to equity ratio did not rise above 7.5 nor was the EBITDA interest coverage ratio below 1.0. .

In respect of whether EPBiH was subject to collective insolvency proceedings the Advisory Committee takes the view that the Secretariat provided insufficient evidence to draw that conclusion. It also notes that the detailed economic analysis of the Oxera report as to the underlying solvency of EPBiH underpins the contention of the government of Bosnia and Herzegovina that EPBiH was financially stable¹¹.

The Advisory Committee concludes therefore that in respect of the first of the four conditions set out in the Commission's Notice¹² as to whether the borrower is in financial difficulty, that condition is not sustained and does not support the Secretariat's contention that the guarantee provided by Bosnia and Herzegovina constitutes state aid.

b) The extent to which the guarantee can be properly measured when it is granted.

This provision of the Commission Notice requires that the guarantee must be linked to a specific financial transaction for a fixed maximum amount and limited in time.

The SAC Decision states that the EPBiH Agreement and draft decision of the Government of the Federation on the issuance of the Guarantee Agreement is related to a specific financial transaction, to a fixed amount and a fixed period.

The Secretariat accepts that the guarantee is linked to a specific financial transaction: the loan is granted by Exlm Bank to EBBiH on the basis of the Loan Agreement.

However, the Secretariat also noted that under the Loan Agreement there were a range of additional expenses and costs which could not be determined in advance. These included for example, under paragraph 13 of the Loan Agreement an obligation making EPBiH liable to compensate the Exlm Bank for increased costs incurred by the Bank as a result of the introduction of or any change in the interpretation, administration of the application of any law or regulation or compliance with law or regulation. In addition, under paragraph 16 the EPBiH is obliged to pay the transaction expenses, amendment costs and enforcement costs relating to the loan. Furthermore, in paragraph 4.2 of the Guarantee Agreement provides that Bosnia and Herzegovina's obligations shall extend to any variation, increase, extension or addition of or to the Loan Agreement. The implication of this latter condition is that the coverage of the guarantee may vary in case of later amendments to the Loan Agreement.

The obligations to pay the costs and expenses in paragraphs 16 and 13 of the Loan Agreement and paragraph 4.2 of the Guarantee Agreement cannot be determined in advance. The State Aid Council and Copenhagen Economics in its report provided by the government of Bosnia and Herzegovina takes the view that these additional costs would be negligible compared to the amount of the loan¹³. There are two difficulties with this argument the first is that the

¹⁰ *Oxera Report, op cit*, 9-18.

¹¹ *Oxera Report, op cit*, 18.

¹² *Commission Notice on Guarantees, op cit*.

¹³ *Copenhagen Economics, op cit*, 16

Commission Notice has no express provision setting out a de minimis rule in respect of costs and expenses that cannot be properly measured. Secondly, it is clear that costs and expenses that can be potentially incurred may not be marginal, specifically in relation to paragraph 13 of the Loan Agreement and paragraph 4.2 of the Guarantee Agreement. The former, would involve the full liability to the bank for the costs any amendment to the law or any regulation, and the latter, would involve full liability for any variation, extension or addition of the Loan Agreement. Both of these provisions involve potentially significant additional costs which cannot be determined and estimated in advance.

The Secretariat also points to the concern that the repayment period may not in fact be limited to its 20 year time period. Paragraph 6 of the Guarantee Agreement provides that its obligations shall continue 'until final payment in full of all amounts owing by [EPBiH] under the [Loan] Agreement and total satisfaction of all [EPBiH's] actual and contingent obligations under the [Loan] Agreement'. Given the possibility of potential additional payment obligations as discussed in paragraphs 16 and 13 of the Loan Agreement, the guarantee may extend beyond the express 20 year repayment period. Therefore the guarantee is not limited in time.

Given the reasoning above it is difficult therefore for the Advisory Committee to come to any other conclusion that although the guarantee is linked to a fixed amount at the level of the principal amount and interest on the loan, that significant additional costs may be incurred which were unknowable at the date of the execution of the loan. And furthermore, given paragraph 6 of the Loan Agreement, read with the other additional costs and expenses for which Bosnia and Herzegovina are responsible for under that Agreement the guarantee is not in fact limited in time. As a consequence, the Advisory Committee finds that Bosnia and Herzegovina are in breach of the second condition of the Commission's Notice, in that the extent of the guarantee cannot be properly measured when it was granted.

- c) The guarantee does not cover more than 80% of the outstanding loan or other financial obligation

The third condition of the Commission's Notice is that a guarantee does not cover more than 80% of the outstanding loan. Under the Notice however the 80% limitation does not apply to a guarantee granted to finance a company whose activity is solely constituted by a properly entrusted service in the general economic interest (SGEI), and when this guarantee has been provided by the public authority having put in place this entrustment. The Notice also provides that if the company receiving the guarantee provides other SGEI's or other economic activities the 80% limitation will still apply.

The State Aid Council of Bosnia and Herzegovina stated in its decision that the guarantee covered 100% of the loan. However, the SAC argued that the SGEI exemption permitting a guarantee covering 100% of the loan applies as EPBiH performs a service of general economic interest. This is defined in the Decree on Conditions for Granting State Aid in the form of Payments for Carrying out Public Services by Economic Subjects to whom the Execution of Services of a General Economic Interest are Entrusted. It argued that EPBiH was entrusted with the performance of a SGEI through the licence issued by the Regulatory Commission for Energy in the Federation of Bosnia and Herzegovina (FERK) for electricity production; the FERK licence for electricity distribution; the decision of the government of Bosnia and Herzegovina in respect of the provision of a universal service obligation and role of reserve supplier; the FERK permit for electricity supply and the FERK decision on the approval of EPBiH on the proposal of the price of the public supplier for the provision of a universal service.

The Secretariat in response argues that in the first instance the government Decree setting out the terms for state aid for SGEIs on which the SAC relied in its decision deals in fact with the question of compensation for the provision of SGEI's which do not constitute state aid under certain conditions. In this particular case, however, the guarantee is not issued as a

compensation for the provision of any service but instead to support EPBiH in securing the finance for a particular generation project. As a consequence, the Decree is not relevant to the question of whether the guarantee constitutes state aid.

More fundamentally the Secretariat argues that the SGEI derogation does not apply in this case because it falls outside the scope of the derogation provided in the Commission Notice. That derogation only applies in the case of a 'public guarantee granted to finance a company whose activity is solely constituted by a properly entrusted SGEI, and when this guarantee has been provided by the public authority having put in place this entrustment'¹⁴.

The EPBiH is firstly not properly entrusted with a SGEI as required under the *acquis communautaire*. The State Aid Council lists several SGEI's that EPBiH is allegedly entrusted with, specifically, electricity generation, distribution and supply. However, on closer examination it is clear that distribution is regulated under a different regime than that of a SGEI. Generation and supply activities of the type provided by EPBiH are considered to be economic activities subject to competition under the relevant Directives¹⁵. A licence is required to take up such activities but such a licence does not automatically impose a SGEI. Furthermore, as the Secretariat points out, even if EPBiH had been entrusted with a public service obligation for its generation and supply activities, the State Aid Council did not assess whether it complied with the criteria contained in Directive 2009/72/EC concerning common rules for the internal market in electricity¹⁶, as well as the relevant case law¹⁷. Under this case law, SGEI's or public service obligations must be adopted in the general economic interest and comply with the principle of proportionality; furthermore, they must be limited in time, clearly defined, transparent, non-discriminatory and verifiable and guarantee equal access for electricity companies to consumers.

It is also the case that the State Aid Council bases its finding that the EPBiH has been entrusted with SGEI's on acts of the entity's energy regulatory authority FERK, as well as the decision of the government of Bosnia and Herzegovina imposing obligations in respect of universal service and reserve supplier. However, the guarantee, was granted by the Ministry of Finance. FERK is an independent institution and is therefore not the same authority as the government or a specific ministry. Therefore the alleged SGEI's listed by the State Aid Council were not entrusted by the same authority which issued the guarantee.

It is also clear that EPBiH is not engaged in just one activity that allegedly amounts to a SGEI, but several activities which allegedly constitute SGEI's, as well as other market-based activities such as electricity trade, and import and export of electricity. The Commission Notice provides that an entity that seeks a derogation from the 80% limit must not provide other SGEI's or other economic activities¹⁸.

¹⁴ *Commission Notice on Guarantees, op cit, point 3.1*

¹⁵ *Recital 5 of Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity*

¹⁶ *Incorporated and adapted by Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011*

¹⁷ *See in particular C-265/08, Federutility et al., para. 25 et seq. and C- 121/15, ANODE, para. 42 et seq.*

¹⁸ *Article 137 of the Decree on the Purpose, Criteria and Conditions for the Grant of State Aid in the Federation incorrectly transposes this requirement of the Commission Notice: It requires that the company is exclusively active in the provision of SGEIs (in plural) and does not transpose that the limitation does not apply in case the company provides other SGEIs or economic activities. However, for the purpose of the present assessment, the Commission Notice serves as reference since it interprets Article 107 TFEU and therefore also Article 18 of the Treaty establishing the Energy Community in the case of State aid in the form of guarantees*

Given the evidence, law and argument above the Advisory Committee finds that the guarantee does not fulfil the conditions for the derogation from the 80% rule, and by covering 100% of the financial obligation, does not fulfil the criterion of the Commission Notice.

The Advisory Committee also notes that Commission Notice does permit Bosnia and Herzegovina to make a substantive case for a guarantee above 80%. However, no such claim has been made by the State Aid Council in its decision.

d) A market orientated price is paid for the guarantee

The fourth condition is that a market-orientated price is paid for the guarantee. Risk-taking should normally be remunerated by an appropriate premium on the guaranteed amount. The Commission's Notice states that when the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets, the guarantee does not constitute state aid.

If no corresponding guarantee premium benchmark can be found on the financial markets, the total financial cost of the guaranteed loan, including the interest rate of the loan and the guarantee premium, has to be compared to the market price of a similar non-guaranteed loan. In both cases, in order to determine the corresponding market price, the characteristics of the guarantee and of the underlying loan should be taken into consideration.

According to the Commission Notice, this comparison includes: the amount and duration of the transaction; the security given by the borrower and other experience affecting the recovery rate evaluation; the probability of default of the borrower due to its financial position, its sector of activity and prospects; as well as other economic conditions. This analysis notably allows the borrower to be classified by means of a risk rating. This classification can be provided by an internationally recognized rating agency or, where available, by the internal rating used by the bank providing the underlying loan. To assess whether the premium is in line with the market price, the State can carry out a comparison of prices paid by similarly rated undertakings on the market. In its Notice, the European Commission states that it will not accept that the guarantee premium is set at a single rate deemed to correspond to an overall industry standard.

In this case Secretariat argues that contrary to the State Aid Council's and the Ministry of Finance's assertion that no corresponding guarantee premium benchmark can be found on the financial markets, premiums for guarantees in other sectors and countries can be taken into account in order to find a "corresponding guarantee premium benchmark on the financial markets". For example, although most decisions of the European Commission are redacted with regard to the exact level of premium of guarantees assessed, the European Commission has found that a premium of above 12% (plus full collateral) is "at least as high as" the market premium, whereas another guarantee in the same case with a premium of above 3% of the guaranteed amount was found to constitute State aid¹⁹. This indicates that in the case at hand, the level of the premium of 3.3% on the principal (amounting to 39,628,382.00 BAM) – even if added to the commission of 0.5% of the sum of the guarantee (amounting to 8,032,916.50 BAM) – is "not at least as high as" the benchmark on the financial markets and thus would not correspond to market terms.

¹⁹ Commission Decision No. 541/2009, State guarantee in favour of Saab Automobile AB; Commission Decision No. 80/2009 – Sweden: State guarantee in favour of Volvo Personvagnar AB

In addition, as far as the comparison of the total financial costs of the guaranteed loan (incl interest rate of the loan and guarantee premium and commission of 3.3% and 0.5%) and the market price of a similar non-guaranteed loan is concerned, the Commission Notice requires that the characteristics of the guarantee and of the underlying loan are taken into consideration.

In this respect, the Federation's Ministry of Finance relies on a "comparison with a similar non-guaranteed loan" in the form of a non-guaranteed loan from the European Bank for Reconstruction and Development, dated 30 October 2013, amounting to EUR 35 mn, with an interest rate of 6-month EURIBOR +3% (hereinafter the "EBRD loan"). It concluded that, compared to the interest rate of the loan at issue, i.e. 6-month EURO LIBOR +2.3%, the difference amounts to 0.7% per annum.

The Secretariat argues that the characteristics of loan taken by EPBiH at issue in the present case and the EBRD loan differ with regard to several of their characteristics, in particular:

- Different nature of the lender: The EBRD is a multilateral developmental investment bank committed to furthering progress towards 'market-oriented economies and the promotion of private and entrepreneurial initiative' as well as to promoting 'environmentally sound and sustainable development'; therefore its loan cannot be considered to constitute a commercial loan²⁰. The ExIm Bank is chartered to implement state policies and is subordinated to the Chinese State Council with its focus on promotion of foreign trade and investment.
- Different nature of the project: The EBRD loan relates to an investment in a different technology (rehabilitation of the hydro power plant Una and putting into operation of hydro power plant Una Annex on the river Una and hydro power plant Vranuk on the river Bosna) with a different aim (development of new hydro power capacities and increase power generation from renewable sources of energy), as well as a different project size (in case of the EBRD loan: total project costs of approx. EUR 88 mn) than the Tuzla 7 project for the construction of a new thermal power plant block. It also needs to be borne in mind that funding of thermal power plant construction is generally not supported any more by public lenders in Europe.
- Different size of the loan: The EBRD loan is much smaller (EUR 35 mn, compared to the EUR 614 mn of the loan at issue).
- Different time: The EBRD loan was granted in 2013 (compared to 2018 with the changes in regulatory environment regarding renewables and thermal power plants and development of costs of projects).
- Different reference rate: The EBRD loan refers to EURIBOR and the loan at issue to EURO LIBOR, i.e. two different interbank exchange rates, so that the difference in rate is not simply the difference between the two numbers.

Furthermore, the Regulation on Accompanying Documentation and Information Necessary in the Procedure of Decision-making on Issuing Federation of Bosnia-Herzegovina Guarantees and the Percentage of Premium and Commission for Issuing Guarantees sets the level of the premium and of the commission. This ignores that the level of the appropriate premium

²⁰ Commission Decision in No.541/2009 – Sweden: State guarantee in favour of Saab Automobile AB, para. 37 "financial costs of similar non-guaranteed debt on the commercial markets"

depends on the circumstances of each case and may not be set for all transactions in a Regulation. Contrary to what is required in the Commission Notice, the guarantee premium is unduly set at a single rate²¹.

In its report tendered in support of the government of Bosnia-Herzegovina Copenhagen Economics sought to identify additional direct and indirect benchmark in support of the government's case. In respect of direct benchmarks it first sought to compare the Tuzla guarantee to that provided by the UK government to a subsidiary of the French energy company EDF for the construction of a nuclear power plant at Hinkley Point. It is correct that the guarantee payment by the UK government was 2.95% and that of the government of Bosnia-Herzegovina was 3.3%²². However, as Oxera, in its report for the Secretariat observes the UK government payment was an annual fee, whereas the payment by the government of Bosnia-Herzegovina was a one-off payment. In addition, the Copenhagen Economics report also did not make any adjustments for the different payment structures. As the Oxera report points if the Tuzla guarantee is compared on a like for like basis with the HP guarantee this would show that that the cost of the guarantee premium in the Tuzla case is significantly below the HP guarantee (a one off guarantee premium of 21% for HP v. a one off guarantee of 3.3% for Tuzla)²³.

Secondly, Copenhagen Economics in its report sought also to rely upon a public guarantee provided by Bosnia and Herzegovina in 2010 as a market benchmark²⁴. However, as the Oxera report explained no state aid enforcement existed in the country at the time, which make it difficult to see how its terms can be considered to be representative of the market. In addition, no evidence has been put forward to establish that this guarantee has been provided on market terms Furthermore, the 2010 public guarantee and the Tuzla guarantee may not be directly comparable due to differences such as the relevant market sector of the beneficiary²⁵.

Copenhagen Economics in support of the government of Bosnia and Herzegovina also considered a number of indirect benchmarks of the guarantee based on allegedly comparable transactions not subject to a guarantee²⁶. In its paper for the government of Bosnia and Herzegovina it constructed a benchmark based on financial data available in the public domain (the Damodaran benchmark). However, as Oxera in its report makes clear Copenhagen Economics made a number of inappropriate conceptual choices in the construction of this benchmark, such as the use of an after-tax rate whereas the appropriate rate to use in this context would be a pre-tax rate, consistent with the nature of the interest payments on the loan. Correcting for this would overturn the reports' conclusions. In addition, as the Oxera Report makes clear the Copenhagen Economics constructed benchmark relies on outdated data and fails to control for a number of important characteristics, such as maturity of the loan and country-specific risk, and therefore it cannot be relied on in order to determine the appropriate guarantee price in the case at hand²⁷.

Furthermore, as the Oxera Report also makes clear Copenhagen Economics reliance on a loan provided to EPBiH by a consortium of commercial banks in 2020 for the Tuzla project was inappropriate. It represented ex post information that would not have been available at the time of the State Aid Council's assessment. In addition, as this loan was provided to EPBiH after the ExIm loan and the guarantee, this significantly reduces the risk borne by the banks, which means that it is not possible to compare the terms of both loans. Finally, the amounts of the

²¹ Commission Notice on Guarantees, *op cit*, point 3.1.

²² Copenhagen Report, *op cit*, 19-20

²³ Oxera Report, *op cit*, 24-25

²⁴ Copenhagen Report, *op cit*, 20

²⁵ Oxera Report, *op cit*, 27

²⁶ Copenhagen Report, *op cit* 20-25

²⁷ Oxera Report, *op cit*, 29-30

two loans were not comparable and the conclusions drawn are very sensitive to minor changes to the underlying parameters²⁸.

The Secretariat also observed that the State Aid Council in its Decision, based its assessment on the fact that EPBiH will pay a premium for the Sinasure insurance of 92.3 mn BAM and that the Federation will also ensure other insurance instruments such as EPBiH promissory notes and a first-rate mortgage on the entire real estate of the Tuzla 7 project “as well as other measures aimed at mitigating the risks connected to the guarantee”. However, the premium paid for the Sinasure insurance cannot be added to the guarantee premium and commission and thereby included in the financial costs of the guarantee because it does not constitute remuneration to the State for issuing the guarantee, but is paid to Sinasure for providing an insurance to the ExIm Bank. Furthermore, the insurance is an additional instrument and would not liberate the guarantor of its obligations. Finally, the other insurance instruments would need to be evaluated as to their value in order to be properly included in the risk assessment.

Given the argument considered above the Advisory Committee holds that contrary to the assessment of the State Aid Council in its Decision, the guarantee is not remunerated in the form of a market-oriented premium, as required by the Commission Notice.

It therefore follows that the SAC’s assessment in the Decision is not in accordance with the Commission Notice insofar as the guarantee does not fulfil the three of the four cumulative conditions to exclude the existence of State aid is incorrect.

The Commission Notice states that failure to comply with any one of the four conditions does not mean that the guarantee must automatically be regarded as State aid (point 3.6). What is then required in fact is for the guarantee needs to be assessed on the basis of the general criteria defining State aid. Since the State Aid Council excluded the existence of State aid based on the fulfilment of the above listed four conditions, it did erroneously not assess the other criteria defining State aid.

As far as the first criterion of the general criteria defining State aid is concerned, the granting of an advantage, the conditions of the Commission Notice facilitate the assessment of whether the market economy operator principle is fulfilled for a given guarantee. Drawing upon the argumentation set out above the Advisory Committee holds that the conditions for assessment on whether the market economy operator principle are not fulfilled, and that the guarantee at issue in the present case confers an advantage within the meaning of Article 18(1)(c) of the Treaty.

2. State Origin.

The granting of an advantage directly or indirectly through State resources and the imputation of such a measure to the State are two separate and cumulative conditions for State aid to exist, but may be considered together as they both relate to the public origin of the measure in question²⁹.

²⁸ *Oxera Report, op cit 31-32*

²⁹ *Commission Notice on the notion of State aid, OJ 2016 C-262/1, para 38; Cases C-482/99, France Commission (Stardust), para 24; T-351/02 Deutsche Bahn v. Commission para 103*

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State³⁰. Here the guarantee at stake is granted by the Federation's Ministry of Finance (approved by the Parliament) and is therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid³¹. State resources include all resources of the public sector, including resources of inter-State entities (decentralized, federated, regional or other)³². Funds of the Federation, an entity of Bosnia and Herzegovina, constitute State resources.

The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. A firm and concrete commitment to make State resources available at a later point in time is also considered a transfer of resources. A positive transfer of funds does not have to occur; foregoing State revenue is sufficient³³. Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources³⁴. The creation of a concrete risk of imposing an additional burden on the State in the future, by a guarantee or by a contractual offer, is sufficient³⁵.

Since the State, through the Federation's Ministry of Finance, effectively takes over the risk of paying for EPBiH's obligations under the Loan Agreement without receiving a market-oriented premium, the guarantee at issue drains State resources³⁶.

By issuing the guarantee, the State effectively gives a firm and concrete commitment to step in for the payment obligations of EPBiH and to make State resources available to that end if it proves necessary. By not charging an appropriate premium to remunerate this taking over of the default risk, the State foregoes revenue which it would get under normal market conditions. Therefore, the Advisory Committee holds that the guarantee is attributable to Bosnia and Herzegovina and involves State resources.

3. Selectivity

Not all measures which favour economic operators constitute State aid, but only measures which grant an advantage in a selective way to certain undertakings or certain energy resources³⁷. Measures of purely general application which do not favour certain undertakings or certain energy resources do not fall within the definition of State aid³⁸. When Contracting Parties adopt ad hoc positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), such measures usually have a selective character, as they reserve favourable treatment for one or a few undertakings³⁹.

The guarantee at issue in the present case clearly identifies as EPBiH as the ultimate beneficiary of the support by enabling it to borrow at a rate that would not have been obtainable

³⁰ Commission Notice on the notion of State aid, *ibid*, para 39

³¹ Commission Notice on the notion of State aid, *op cit*, para 47

³² Commission Notice on the notion of State aid, *op cit*, para 48

³³ Commission Notice on the notion of State aid, *op cit*, para 51

³⁴ Commission Notice on the notion of State aid, *op cit*, para 51. See also case C-83/98P *France v. Ladbroke Racing Ltd*, para 48-51.

³⁵ Commission Notice on the notion of State aid, *op cit*, para 51. See also, case C-200/97 *Ecotrade*, para 41.

³⁶ Commission Notice on the notion of State aid, *op cit* para 51, and Commission Notice on Guarantees, *op cit*, point 2.1.

³⁷ Commission Notice on the notion of State aid, *op cit*, para 117

³⁸ Commission Notice on the notion of State aid, *op cit*, para 118

³⁹ Commission Notice on the notion of State aid, *op cit*, para 126. See also Case C-15/14P *Commission v. MOL*, para 60 *et seq.*

on the market without the guarantee (or to borrow in a situation where, no loan could have been obtained on the market at any rate) and therefore selectively favours one specific undertaking.

4. Distortion of competition

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes. A distortion of competition is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition⁴⁰.

EPBiH is active in generation, distribution and supply of electricity which is subject to Directive 2009/72/EC, as incorporated in the Energy Community. The aim of the Directive is to liberalise and integrate the Energy Community's energy markets. In this context, any support by the State which favours specific undertakings is contrary to the aims of market liberalization and runs counter the liberalization efforts. As the guarantee at issue in the present case relates to a project for the generation of electricity which is an activity open to competition from the perspective of the Treaty, the State support threatens to distort competition.

5. Effect on trade

According to well-established case law, it is not necessary to establish that the aid has an actual effect on trade between Contracting Parties but only whether the aid is liable to affect such trade⁴¹. Public support can be considered capable of having an effect on trade between Contracting Parties even if the recipient is not directly involved in cross-border trade. For instance, the subsidy may make it more difficult for operators in other Contracting Parties to enter the market by maintaining or increasing local supply⁴².

As the guarantee relates to a project for the generation of electricity and there is substantial cross-border trade in electricity between Bosnia and Herzegovina and the neighbouring markets, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

⁴⁰ Commission Notice on the notion of State aid, *op cit*, para 187.

⁴¹ Commission Notice on the notion of State aid, *op cit*, para 190. See also Case C-518/13 *Eventech v. The Parking Adjudicator*, para 65.

⁴² *Eventech*, *ibid*, para 67.

e) Conclusions

The Advisory Committee therefore considers that Bosnia and Herzegovina by adopting and maintaining in force Decision No UP/I 03-26-1-42-4/18 of the State Aid Council of Bosnia and Herzegovina of 23 July 2018, deciding that a guarantee issued by the Federation of Bosnia and Herzegovina in favour of the Export-Import Bank of China to secure a loan of the public utility Elektroprivreda Bosne i Hercegovine does not constitute State aid within the meaning of Article 18(1)(c) of the Treaty, Bosnia and Herzegovina fails to fulfil its obligations under Article 18 of the Treaty.

Done in Vienna on 15th November 2021

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, President