

MEMORANDUM

**TUZLA 7 PROJECT
REVIEW UNDER EU STATE AID RULES OF THE STATE GUARANTEE
GRANTED BY BOSNIA HERZEGOVINA**

The present memorandum examines under the State aid *acquis* the individual guarantee (the “**Guarantee**”) granted by Bosnia Herzegovina for the Tuzla 7 project.

Executive summary

On the basis of the information available, the examination of the Guarantee leads to the conclusion that it constitutes State aid within the meaning of the TFEU and the Energy Community Treaty, which have primacy over the law of Bosnia and Herzegovina.

According to the detailed guidance of the European Commission on proxies relating to guarantees in order to rule out the presence of aid for an individual guarantee, it appears that, among the relevant conditions, the lender does not bear part of the risk, without the specific exemption for services of general economic interest being applicable. In addition, the extent of the Guarantee cannot be properly measured because it is not linked to a specific financial transaction, for a fixed maximum amount, and it is not clear that the borrower pays a market-oriented price.

The Guarantee constituting an aid cannot be implemented before being notified to the State Aid Council of the Federation of Bosnia and Herzegovina in order to examine whether specific exemptions may be applicable to allow its adoption by the Ministry of Finance of the Federation of Bosnia and Herzegovina and its confirmation by its Parliament.

1. FACTUAL BACKGROUND

1. The Tuzla 7 project consists in the financing, design, engineering, procurement, supply, delivery, construction, installation, testing, commissioning, operation and maintenance of a 450MW Unit 7 of the thermal power plant Tuzla of Elektroprivreda Bosna i Hercegovine (“**EPBiH**”). The total investment for the Tuzla 7 project amounts to EUR 786.3 million. The total project value is estimated at EUR 901.3 million (basic investment value + costs of financing during construction).
2. On 27 November 2017, EPBiH and the Export Import Bank of China (“**Cexim Bank**”) entered into a Facility Agreement according to which Cexim Bank, as the lender, will make available to EPBiH, as the borrower, a loan amounting to EUR 613,990,000 for the Tuzla 7 project.

3. According to the Facility Agreement, the loan is secured with an insurance policy contracted with Sinasure, China Export and Credit Insurance Corporation (the “**Sinasure insurance**”). The base of the calculation of the Sinasure premium amounts to EUR 904.84 million and total insurance premium at the rate of 5.31% amounts to EUR 48 million. This must be paid by EPBiH in 3 installments within 2 years. The Sinasure insurance is valid for a period of 15 years.
4. Following the expiration of the Sinasure insurance, in 2032, and in case EPBiH fails to pay its financial obligations under the Facility Agreement, the Guarantee would cover EPBiH default. This results from a Guarantee Agreement to be concluded between the Federal Ministry of Finance for and on behalf of the Federation of Bosnia and Herzegovina (“**FBiH**”) as the guarantor, and Cexim Bank as the beneficiary.
5. On 8 March 2017, the Ministry of Finance of the FBiH first notified the Guarantee to the State Aid Council of Bosnia and Herzegovina (“**SACBiH**”). Following incomplete information, this notification was made again on 11 July 2018, and additional information was submitted to the SACBiH on 20 July 2018.
6. On 23 July 2018, the SACBiH considered that the Guarantee provided by the Ministry of Finance of the FBiH did not constitute State aid within the meaning of the Law on State aid System of Bosnia and Herzegovina (the “**Contested Decision**”).
7. On 17 August 2018, the Ministry of Finance of the FBiH decided to approve the Guarantee. However, in order to enter into force, this decision must still be confirmed by the Parliament of the FBiH.
8. On 25 September 2018, the Association “Aarhus Centre in BiH” and the CEE Bankwatch Network lodged a complaint against the Contested Decision to the Energy Community Secretariat.

2. APPLICABLE RULES

2.1 Energy Community Treaty

9. The Treaty establishing an Energy Community (the “**Energy Community Treaty**”) signed in 2005 between the European Union on the one hand, and several Contracting Parties including the Federation of Bosnia and Herzegovina on the other hand, aims at extending the EU internal energy market rules and principles to countries in South East Europe, the Black Sea region and beyond on the basis of a legally binding framework. According to Article 5 of the Energy Community Treaty: “*The Energy Community shall follow the *acquis communautaire* described in Title II, adapted to both the institutional framework of this Treaty and the specific situation of each of the Contracting Parties, with a view to ensuring high levels of investment security and optimal investments.*”
10. As regards competition rules, Article 18 of the Energy Community Treaty provides that:

“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)."

11. Article 19 of the Treaty further states that: *"With regard to public undertakings and undertakings to which special or exclusive rights have been granted, each Contracting Party shall ensure that as from 6 months following the date of entry force of this Treaty, the principles of the Treaty establishing the European Community, in particular Article 86 (1) and (2) thereof (attached in Annex III), are upheld."*
12. According to the Energy Community Treaty, EU State aid rules aid must therefore be complied with by the Contracting Parties.

2.2 EU State aid rules

13. According to Article 107(1) of the Treaty on the Functioning of the European Union ("**TFEU**"), any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
14. To be considered as State aid within the meaning of Article 107(1) TFEU, a State measure must cumulatively (i) grant an advantage to one or more undertakings, (ii) be selective, (iii) be financed through State resources and be imputable to the State, (iv) potentially distort competition, and (v) potentially affect trade between Member States.
15. As regards aid granted in the form of guarantees, the European Commission adopted in 2008 a Notice on the application of Articles [107] and [108) of the [TFEU] to State aid in the form of guarantees which lays down the criteria under which a public guarantee does not constitute State aid (the Notice on Guarantees, the "**NoG**").¹
16. In 2016, the European Commission also adopted a *Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union*² (the "**NoA**"), which provides a synthesis of the EU case law on the notion of aid, including some interpretation on behalf of the European Commission, without prejudice to the ultimate

¹ OJ C 155, 20.06.2008, pp.10 - 22.

² OJ C 262, 19.07.2016, pp. 1 - 50.

interpretation by the EU courts. Paragraphs 108 to 114 of this NoA discuss more specifically the issue of guarantees.

17. These criteria will be further detailed under Section 3 below.

2.3 Interaction between the various sets of applicable rules

18. According to Article 94 of the Energy Community Treaty:

*“The institutions shall interpret any term or other concept used in this Treaty that is derived from European Community law in conformity with the case law of the Court of Justice or the Court of First Instance of the European Communities. Where no interpretation from those Courts is available, the Ministerial Council shall give guidance in interpreting this Treaty. It may delegate that task to the Permanent High Level Group. Such guidance shall not prejudice any interpretation of the *acquis communautaire* by the Court of Justice or the Court of First Instance at a later stage.”*

19. This principle of interpretation in conformity with the EU case law must also be observed by national authorities as stated by the Energy Community Secretariat:

“Article 18(2) of the Treaty (“Any practices contrary to this Article shall be assessed on the basis of the criteria arising from the application of the rules of Articles ... 87 of the Treaty establishing the European Community [now Article 107 TFEU]” which is displayed in full in Annex III to the Treaty), Article 94 of the Treaty as well as Article 2 of the Dispute Settlement Rules of Procedure establish a strict homogeneity principle as regards the application of EU and Energy Community rules. This principle obliges both national enforcement authorities and the Energy Community Secretariat to ensure equal conditions of competition and a uniform application of State aid provisions throughout the Energy Community, based on precedence established by EU enforcement institutions.” (emphasis added).³

20. It results from the above that, in compliance with the homogeneity principle as regards the application of EU and Energy Community rules, the present case must be analysed on the basis of EU State aid rules.

³ Policy Guidelines by the Energy Community Secretariat on the Applicability of the Guidelines on State Aid for Environmental Protection and Energy 2014-2020, PG 04/2015 / 24 November 2015.

3. APPLICATION OF EU STATE AID RULES TO THE PRESENT CASE

21. The five cumulative criteria for a State aid measure to qualify as State aid under Article 107(1) TFEU are examined hereafter with respect to the Guarantee in question.
22. As far as a guarantee is concerned, the European Commission has concentrated on the first condition of “advantage”. In order to facilitate the assessment of whether normal market conditions are met for a given guarantee measure, the European Commission has set out a number of sufficient conditions for the absence of aid. Individual guarantees are covered by point 3.2 of the NoG.

3.1 Advantage

23. 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 intervention.⁴
24. In order to determine whether an advantage is being granted through a guarantee, the “market economy operator” (MEO) test should be carried out. According to this principle, economic transactions carried out by public bodies do not confer an advantage (and therefore do not constitute aid), if they are carried out in line with normal market conditions. With respect to loans and guarantees on loans provided by the State, the EU case law has developed the “private creditor test” whereby the behaviour of a public creditor is compared to that of hypothetical private creditors that find themselves in a similar situation.
25. On the basis of this EU case law, the European Commission has developed detailed guidance on proxies relating to guarantees in the NoG in order to rule out the presence of aid for an individual guarantee such as the Guarantee in the present case. According to these principles, *“it is normally sufficient that the borrower is not in financial difficulty, that the guarantee is linked to a specific transaction, that the lender bears part of the risk and that the borrower pays a market-oriented price for the guarantee”*.⁵
26. Each of these four conditions is examined below with respect to the Guarantee.

a) The borrower should not be in financial difficulty

27. According to the 2014 Guidelines on State aid for rescuing and restructuring firms in difficulty (the “**R&R Guidelines**”),⁶ an undertaking is considered to be in difficulty when, without intervention by the State, it will almost certainly be condemned to going out of business in the short or medium term.
28. A limited liability company such as EPBiH will be considered to be in difficulty where more than half of its subscribed share capital has disappeared as a result of accumulated losses. This is the case when the deduction of accumulated losses from reserves (and all other

⁴ See, for instance, judgment of the Court of Justice of 11 July 1996, *SFEI*, C-39/94, EU:C:1996:285, paragraph 60; see also the NoA, paragraphs 66 *et seq.*

⁵ NoA, paragraph 114, referring to the NoG.

⁶ OJ C 249, 31.07.2014, p.1.

elements generally considered as part of the own funds of the company) leads to a negative cumulative amount that exceeds half of the subscribed share capital.⁷

29. According to EPBiH Audited Financial Statements for 2016 and 2017, the subscribed share capital and accumulated loss were as follow:

(000 KM)	2016	2017
Subscribed share capital	2,236,964	2,236,964
Accumulated losses	0	0

30. Based on the above figures, it can be concluded that EPBiH is not an undertaking in difficulty within the meaning of the R&R Guidelines. This first criterion is therefore fulfilled.

b) The guarantee must be linked to a specific financial transaction

31. This means that the extent of the guarantee can be properly measured since it is granted for a specific transaction, for a fixed maximum amount and limited in time.

32. In the present case, the Guarantee:

- is linked to a specific financial transaction, i.e. the loan granted by Cexim Bank to EPBiH for the Tuzla 7 project;
- is provided for a fixed amount, i.e. KM 1,606,583,304.40 (principal and interests);
- is limited in time - the Guarantee will run from the expiration of the Sinosure insurance, in 2032 until the end of the repayment period in 2037.

33. However, it should be noted that the decision of 17 August 2018 of the Ministry of Finance of the FBiH to approve the Guarantee and the Contested Decision consider that the Guarantee also covers “*other associated costs under the Agreement on a Credit Line*”. There are also other kinds of financing costs mentioned by the guaranteed loan for which it is not specified whether they are covered by the Guarantee.

34. As these other “associated costs” and financing costs are not clearly defined, it cannot be considered that the amount of the Guarantee is fixed and linked to the underlying loan only. This criterion is therefore not met.

c) The lender should bear part of the risk

35. This condition means that the guarantee should not cover more than 80 % of the outstanding loan or other financial obligation so that the lender will effectively bear part of the risk. The European Commission justifies this condition as follows: “[...] *if a financial obligation is wholly covered by a State guarantee, the lender has less incentive to properly assess, secure and*

⁷ See paragraph 20 of the R&R Guidelines.

minimise the risk arising from the lending operation, and in particular to properly assess the borrower's creditworthiness" (paragraph 3.2. c) NoG). To this end, due attention should be given to the two following aspects:

"- when the size of the loan or of the financial obligation decreases over time, for instance because the loan starts to be reimbursed, the guaranteed amount has to decrease proportionally, in such a way that at each moment in time the guarantee does not cover more than 80 % of the outstanding loan or financial obligation,

- losses have to be sustained proportionally and in the same way by the lender and the guarantor. In the same manner, net recoveries (i.e. revenues excluding costs for claim handling) generated from the recuperation of the debt from the securities given by the borrower have to reduce proportionally the losses borne by the lender and the guarantor. First-loss guarantees, where losses are first attributed to the guarantor and only then to the lender, will be regarded as possibly involving aid" (ibidem).

36. In the present case, as stated above, the Guarantee covers 100% of the loan contracted with Cexim Bank.

37. There is however an exception to the 80% limitation for public guarantees granted to finance a company whose activity solely constitutes a properly entrusted Service of General Economic Interest ("**SGEI**"). This "**SGEI exemption**", which should be construed restrictively like any exception, is expressed as follows:

"This limitation of 80 % does not apply to a public guarantee granted to finance a company whose activity is solely constituted by a properly entrusted Service of General Economic Interest (SGEI) and when this guarantee has been provided by the public authority having put in place this entrustment. The limitation of 80 % applies if the company concerned provides other SGEIs or other economic activities" (ibidem).

38. There are therefore three cumulative conditions for the 80 % limitation not to apply in the present case:

- EPBiH's exclusive activity should be one "properly entrusted" SGEI;
- EPBiH's Guarantee should have been provided by the public authority that entrusted EPBiH with that SGEI;
- EPBiH should not provide any other SGEIs or other economic activities.

(i) EPBiH's exclusive activity should be one "properly entrusted" SGEI

39. The Contested Decision mentions several legal acts on the basis of which EPBiH has been entrusted with SGEIs:

- FERK operating license No. 06-03-734/32/12 of 18.12.2012 for the generation of electrical energy for EPBiH;
- FERK operating license No. 06-03-735/33/12 of 18.12.2012 for carrying out electrical utility activities for the distribution of electrical energy;

- the Decision of the Government of the FBiH of 08.10.2014 on establishing the provider of public/universal services and reserve supplier, Official Gazette of the FBiH No. 84/14;
- FERK operating license No. 06-03-755/143/16 of 16.12.2016 for the supply of first-order electrical energy for EPBiH;
- FERK Decision No. 01-07-304-01/18 of 27.02.2018 on Approval for EPBiH of the proposed price of public supply services for providing universal services (although that this decision seems limited to agree on the public price of the electricity supply).

40. The Contested Decision states that these licences were issued pursuant to Article 16(3) of the Law on Electrical Energy in the FBiH according to which electrical utility operations are to be carried out in the framework of fulfilling public service obligations.

41. This first condition refers to a “proper SGEI”, i.e. a genuine SGEI, which strictly complies with EU State aid rules on SGEI.⁸ The conditions for the entrustment of a SGEI deriving from these texts apply in the present case.

42. It is difficult, without having access to an English translation of each of the legislative texts, to conclude that they strictly comply with the EU requirements for a *genuine and correctly defined SGEI*. It should be nevertheless be recalled that the following cumulative conditions should in particular be met to this end:

- **Need for an entrustment act specifying the public service obligations and the methods of calculating compensation**
 - The legislative act must include, in particular: the content and duration of the public service obligations; the undertaking and, where applicable, the territory concerned; the nature of any exclusive or special rights assigned to the undertaking by the granting authority; the description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation; and the arrangements for avoiding and recovering any overcompensation.
- **Duration of the period of entrustment**
 - The duration of the period of entrustment should be justified by reference to objective criteria such as the need to amortise non-transferable fixed assets. In principle, the duration of the period of entrustment should not exceed the period required for the depreciation of the most significant assets required to provide the SGEI.

⁸ The NoG refers in particular to the Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67), and the Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).

These two texts have been replaced since by: (i) the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.01.2012, pp. 4-14); (ii) the Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid (OJ L 7, 11.01.2012, pp. 3-10), and (iii) the Communication from the Commission - European Union framework for State aid in the form of public service compensation (OJ C 8, 11.01.2012, pp. 15-22).

– **Compliance with Union public procurement rules**

- The responsible authority, when entrusting the provision of the service to the undertaking in question, should have complied or committed to comply with the applicable Union rules in the area of public procurement. This includes any requirements of transparency, equal treatment and non-discrimination resulting directly from the Treaty and, where applicable, secondary Union law.

– **Amount of compensation**

- The amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit.

– **Unbundling**

- Where an undertaking carries out activities falling both inside and outside the scope of the SGEI, the internal accounts must show separately the costs and revenues associated with the SGEI and those of the other services. Where an undertaking is entrusted with the operation of several SGEIs because the granting authority or the nature of the SGEI is different, the undertaking's internal accounts must make it possible to verify whether there has been any overcompensation at the level of each SGEI.

43. It is not possible draw conclusions, on the basis of the information available, on the question whether the SGEIs listed by the Contested Decision are genuine and correctly defined SGEIs in accordance with these EU law principles.

44. In any event, irrespective of the exact response to that question, it remains that EPBiH is entrusted, pursuant to separate legal acts (different mandates, different conditions and objectives), with more than one SGEI, covering in particular the generation, the supply and the distribution of electricity.

45. It results from the above that this first strict condition does not appear to be met.

46. The two other cumulative conditions to benefit from the SGEI exemption are not fulfilled either.

(ii) EBPIH's Guarantee should have been provided by the public authority that entrusted EBPIH with that SGEI

47. The Guarantee must have been provided by the public authority having put in place this entrustment.

48. However, it appears that the SGEIs listed above were entrusted by FERK, which is the Regulatory Commission for Energy of the FBiH, a regulatory body independent from the government of the FBiH, while the Guarantee is provided by the Federal Ministry of Finance.

49. That condition is therefore not met.

(iii) EPBiH should not provide any other SGEIs or other economic activities

50. The third condition requires that EPBiH does not provide other SGEIs or other economic activities.

51. It results from the above that EPBiH has been entrusted with three SGEIs: (i) the generation, (ii) the supply and (iii) the distribution of electricity. In addition, and this is not disputed by the Contested Decision, EPBiH carries out other economic activities, for example the sale of electricity on the market and coal mining.
52. This third condition is therefore not met.
53. It should be emphasised that the Contested Decision is solely based on the law of the Federation of Bosnia and Herzegovina, which does not provide for the second and third conditions to benefit from the SGEI exemption. However, as explained under Section 2 above, in order to comply with the homogeneity principle regarding the application of EU and Energy Community rules, EU State aid rules should take precedence over the law of the Federation of Bosnia and Herzegovina in case of conflict of interpretation.
54. Finally, in addition to the above conditions, it should be noted that, as mentioned above, the Guarantee should also be “degressive” over time in order to be proportionate to the progressive reduction of the amount of the loan to be reimbursed. This condition is even more important in the present case since the Guarantee is destined to apply only following the expiry of the Sinasure insurance, in 2032. At that date, the absolute amount of the loan will have considerably reduced (with 15 years of reimbursement of capital and interests) together with the risks associated. However, it does not appear that this element was duly considered by the Guarantee and the Contested Decision.

(iv) Conclusion

55. It results from the above that EPBiH does not meet the three conditions to benefit from the SGEI exemption.
56. It should be recalled here that the European Commission states as follows in that case:
- “If a Member State wishes to provide a guarantee above the 80 % threshold and claims that it does not constitute aid, it should duly substantiate the claim, for instance on the basis of the arrangement of the whole transaction, and notify it to the Commission so that the guarantee can be properly assessed with regards to its possible State aid character”* (paragraph 3.2. c) NoG).
57. However, as such elements were not provided in the present case, it must be considered that the lender does not bear part of the risk as required by the NoG.

d) A market-oriented price should be paid for the guarantee

58. The existence of the advantage is sufficiently evidenced by the examination made thus far. However, even if most of the relevant financial information is missing to allow a detailed examination of the present last condition, it is possible to provide the following guidance (as resulting in particular from paragraph 3.2. d) NoG).
59. If 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 contain 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.

60. 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. This 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 should notably allow the borrower to be classified by means of a risk rating. The Commission will therefore not accept that the guarantee premium is set at a single rate deemed to correspond to an overall industry standard.
61. If the relevant financial information is missing to conduct the required detailed assessment, it should be noted that the Contested Decision only refers, as a benchmark transaction, to a 2013 loan from the European Bank for Reconstruction and Development (“**ERBD**”) for EUR 35 million for the construction of one hydropower plant and the rehabilitation of a another existing hydropower plant. The old character and the very different scope and extent of that loan as compared to the underlying loan of the Guarantee do not make this transaction an appropriate benchmark transaction.
62. In addition, it is not disputed that a number of large international and EU-based financial institutions would not have financed the Tuzla 7 project (see section 2.3.4. of the Contested Decision) since they no longer finance coal power plants. The SACBiH should therefore have conducted a particularly complex counter-factual analysis to assess the market oriented price of the Guarantee. This had not been done and could not have been done within the very limited time between the last financial information delivered by the FIBH to SACBiH and the date of the adoption of the Contested Decision.
63. Based on the above, it can be concluded that the Contested Decision did not properly assess whether a market-oriented was paid as (i) the ERBD decision does not constitute a relevant benchmark and (ii) it failed to conduct a proper counter-factual analysis. It is therefore not proven that the fourth condition of the NoG is fulfilled.

e) Conclusion

64. It results from the above that the four cumulative conditions set out by the NoG to rule out the presence of State aid for an individual guarantee are not met in the present case.
65. It must therefore be considered that the first condition to qualify as State aid, i.e. the existence of an advantage, is fulfilled. It will be examined below whether the remaining conditions of the existence of State aid are also met.

3.2 Selectivity

66. This condition does not raise any issue in the present case since the Guarantee is clearly destined to one single undertaking, EPBiH.

3.3 Financing through State resources and imputability to the State

67. *“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 undertaking and a drain on the resources of the State”* (section 2.1 NoG).

68. As consistently held by EU case law, a guarantee complies with the condition of transfer of State resources even if no transfer of resources is made when the guarantee is not activated. Indeed, as the NoA states: *“A firm and concrete commitment to make State resources available at a later point in time is also considered a transfer of State resources”* and *“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 sufficient for the purposes of Article 107(1)”* (paragraph 51 NoA).

69. In addition, it is clear that the Guarantee is imputable to the State concerned, the FBiH (decision of the Ministry of Finance to be confirmed by the Parliament).

3.4 Distortion of competition and effect on trade of Network Energy between the Contracting Parties

70. The Energy Community Treaty provides for the condition of distortion of competition and for a specific condition on the effect on trade: the effect on the trade of Network Energy between the Contracting Parties (and not the trade between Member States under Article 107(1) TFEU). However, the second of these conditions should be interpreted in a similar manner, *mutatis mutandis*.

71. The NoA recalls the EU case law in this regard and states that *“These are two distinct and necessary elements of the notion of aid. In practice, however, these criteria are often treated jointly in the assessment of State aid as they are, as a rule, considered inextricably linked”* (paragraph 186 NOA).

72. In the present case, it is sufficient to note that these conditions are legally presumed once the previous conditions are fulfilled: *“[...] distortion of competition within the meaning of Article 107(1) of the Treaty 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, competition”* (paragraph 187 NoA).

73. Regarding the condition on the effect on trade, it is noted that *“[...] it is not necessary to establish that the aid has an actual effect on trade [of Network Energy between the Contracting Parties] [...] but only whether the aid is liable to affect such trade. In particular, the Union Courts have ruled that ‘where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-[Union] trade, the latter must be regarded as affected by the aid’.”* (paragraph 188 NoA).

4. CONCLUSION

74. Against the above background, it can be concluded that the Guarantee constitutes State aid within the meaning of Article 107(1) TFEU and of Article 18 (c) of the Energy Community Treaty. The Contested Decision does not comply with these provisions in concluding to the contrary.

75. Therefore, the SACBiH should examine the compatibility of the Guarantee under State aid rules. The Parliament of the FBiH is therefore not in a position to lawfully confirm the Guarantee at this stage.

Brussels, 4 March 2019