Next EU enlargement: Romania and State aid control

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1. Introduction

In December 2004 the final chapters of the accession negotiations with Romania on Justice and Home Affairs (chapter 24) and Competition (chapter 6) (1) were finally closed.

Unlike for most other chapters, mere commitments are insufficient. For the closure of the competition chapter three elements need to be put in place (3):

- The necessary legislative framework;
- An adequate administrative capacity; and
- A credible enforcement record.

The experience with the competition chapter has proven successful so that for future negotiations, depending on the chapter, legislative alignment and a satisfactory track record of implementation of the acquis as well as obligations deriving from contractual relations with the European Union will be the benchmarks for provisional closure.

2. Safeguard clauses

Like for Bulgaria and the other new Member States, safeguard clauses are foreseen in the event of serious shortcomings (under Articles 37, 38, and 39 of the 2003 Accession Treaty).

The Accession Treaty will contain a general economic safeguard clause (cf. Art. 37 of the 2003 Accession Treaty). This general economic safeguard clause applies to situations where ‘difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area’. The safeguard clause would allow the Commission to determine the necessary protective measures. Both, new and current Member States are able to make use of this safeguard clause. The clause can be invoked for a period of up to three years after accession. However, this general safeguard clause was considered insufficient. Hence, the Commission considered that the Accession Treaty should also contain a specific internal market safeguard clause (cf. Art. 38 of the 2003 Accession Treaty).

If a new Member State has failed to implement commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of the internal market, or an imminent risk of such breach, the Commission may upon motivated request of a Member State or on its own initiative, take appropriate measures. The Commission is authorised to take the decisions on the necessary measures. These measures should be limited in time and proportional, whereby ‘priority shall be given to measures, which disturb least the functioning of the internal market and, where appropriate, to the application of the existing sectoral safeguard mechanisms’. Again, the clause can be invoked for a period of up to three years after accession. It is furthermore stated that the safeguard clause may be invoked even before accession on the basis of the monitoring findings and enters into force as of the date of accession. The measures shall be maintained no longer than strictly necessary, and, in any case, must be lifted when the relevant commitment is implemented. They may however be applied beyond the three-year period as long as the relevant commitments have not been fulfilled.

For Romania and Bulgaria, a further safeguard clause was introduced (postponement clause). For both countries, the Council may, on the basis of a Commission proposal, postpone enlargement for one year. The clause can be triggered if, based on the Commission’s continuous monitoring of commitments undertaken by Bulgaria and Romania in the context of the accession negotiations and in particular the Commission’s monitoring reports, there is clear evidence that the state of preparations for adoption and implementation of the acquis in Bulgaria or Romania is such that there is a serious risk of either of those States being

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(1) The views expressed are purely those of the writer and may not in any circumstances be regarded as stating an official position of the European Commission. The author would also like to thank P. Lindberg for his many useful comments.

(2) With two specific transitional arrangements regarding fiscal aid measures (Free Trade Areas and Deprived Areas). These transitional arrangements are modelled after the transitional arrangements applicable for, inter alia, Poland.

manifestly unprepared to meet the requirements of membership by 1 January 2007 in a number of important areas. In principle, unanimity is required (see however the specific safeguards introduced for Romania, described in the next section).

3. Specific safeguards for Romania

The Commission was very critical of the Romanian progress on the competition chapter, in particular as regards the State aid track record and the restructuring of the Romanian steel sector. It had proposed the Council not to close the competition chapter (1).

However, the Council has the final say in these matters. It decided to proceed with the closure but it introduced a series of additional safeguards.

These additional safeguards are linked to the postponement clause and to the so-called existing aid mechanism (2).

3.1. Postponement clause for Romania

Notwithstanding the general conditions triggering the application of the postponement clause and without prejudice to the internal market safeguard clause, the Council may, acting by qualified majority (whereas normally unanimity is required) on the basis of a Commission recommendation and after a detailed assessment in the autumn of 2005 of the progress made by Romania in the area of competition policy, decide to postpone the accession of Romania by one year, if it is based on shortcomings in Romania's fulfilment of specific conditions in the Competition area. These conditions are the following:

(1) Romania must ensure effective control by the Competition Council of any potential State aid, including in relation to State aid foreseen by means of deferral of payments to the State budget of fiscal or social liabilities or deferrals of liabilities related to energy supply.

(2) Romania must strengthen its state aid enforcement record without delay. Romania must ensure a satisfactory enforcement record in the areas of both anti-trust and State aid.

(3) Romania must submit to the Commission by mid-December 2004 a revised steel restructuring plan (including the National Restructuring Programme and the Individual Business Plans) in line with the requirements set out in Protocol 2 on ECSC products to the Europe Agreement and with the conditions set out in the Act of Accession. In particular, Romania must fully respect its commitment not to grant or pay any State aid to the steel mills covered by the National Restructuring Strategy from 1 January 2005 to 31 December 2008, and to fully respect the State aid amounts and the conditions regarding capacity reductions, decided in the context of Protocol 2 on ECSC products to the Europe Agreement (3).

(4) Romania will continue to devote adequate financial means and sufficient and adequately qualified human resources to the Competition Council.

(5) Romania must fulfil the obligations undertaken under the Europe Agreement.

3.2. Existing aid mechanism

3.2.1. Normal operation of mechanism

In order to prevent incompatible aid from being ‘imported’ into the EU on the date of accession, a system was set up for examining measures which were put into effect in the acceding countries before accession and are still applicable after accession (the existing aid mechanism).

The purpose of this mechanism is to provide Acceding Countries and economic operators with legal certainty as regards State aid measures that are applicable after the date of accession. If a measure is qualified as ‘existing aid’, it benefits from a special protection against actions from the Commission — such an ‘existing aid’ can only be modified for the future through a special procedure laid down in Chapter IV of the procedural regulation 659/1999 (4). When the Commission considers that an existing aid scheme is not or no longer compatible with the common market, it shall inform the Member State concerned and may issue a proposal for appropriate measures, including the amendment or abolition of the scheme. If the Member State accepts, the appropriate measures become binding. If the Member State refuses, the Commission must open the

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(3) See in this edition of CPN, article from Lienemeyer, M, ‘State aid for restructuring the steel industry in the new Member States’.
formal investigation procedure. The final decision following the opening will become binding on the Member State.

Procedural regulation 659/1999 contains the following definition of ‘existing aid’: (i) pre-treaty or pre-accession aid; (ii) aid authorised by the Commission or Council; (iii) aid deemed to be authorised in accordance with Art. 4(6) (so-called ‘Lorenz’, where the Commission has not adopted a decision within two months for a notified aid); (iv) aid for which the limitation period has expired; (v) aid that did not constitute aid at the time when the aid was put into effect.

For the 2003 accession (like for the accession of Austria, Finland and Sweden (1)), aid pre-existing accession did not automatically get "existing aid" status.

Annex IV.3 of the 2003 Accession Treaty provided for three different types of measures which were put into effect before accession and are still applicable after accession, which will be regarded as existing aid.

- The first one covers aid measures put into effect in a new Member State before 10 December 1994 (2).

- The second one consists of a list of State aid measures attached to the Accession Treaty. A list of 223 existing aid measures was attached to the 2003 Accession Treaty. The list was established on the basis of an assessment by the national State aid monitoring authority finding them compatible with the acquis, followed by a special screening of the measures by the Commission.

- The third type of existing aid covers other measures submitted to the Commission after the finalisation of the Accession Treaty list, which were assessed by the national State aid monitoring authority prior to accession and found to be compatible with the acquis and to which the Commission did not raise an objection. This so-called ‘interim procedure’ was necessary, in order to extend the existing aid mechanism to the period between the finalisation of the Accession Treaty and the date of accession.

All measures still applicable after the date of accession which constitute State aid and which do not fall under one of the previous categories shall be considered as new aid upon accession.

This mechanism does not apply to agriculture (production, processing and marketing of agriculture annex-I products) and transport. Both agriculture and transport work with a positive lists of aids put into effect before and still applicable after accession which need to be submitted within a certain period after accession — all measures which are on the list are regarded as existing aid for a period of three years. Fisheries follow the general regime.

In principle, the same mechanism will apply to both Romania and Bulgaria.

3.2.2. Specific provisions for Romania

For Romania, however, it is stipulated that there will be no list with existing aid measures attached to the accession treaty and no application of the interim procedure, until the Commission concludes that Romania’s state aid enforcement record has reached a satisfactory level. In practice, the timing no longer allows for any list with existing aid measures for Romania (3) to be included in the Accession Treaty.

Furthermore, the interim procedure will only start running once the Commission accepts that Romania’s state aid enforcement record has reached a satisfactory level. In practice that means that only cases with a positive assessment by the Romanian Competition Council after the date set by the Commission as being the date that Romania’s enforcement record is satisfactory can be submitted.

Such a satisfactory level shall only be considered to have been reached once Romania has demonstrated the consistent application of full and proper State aid control in relation to all aid measures granted in Romania. In particular for restructuring cases, for regional aid cases and for decisions relating to services of general economic interest, it has been spelled out in detail in the EU Common Position which specific points need to be assessed by the Romanian Competition Council.

(1) See Art. 172 of the Act of Accession.

(2) Date of the Essen European Council, since at this European Council on 9 and 10 December 1994 each associated country was invited to empower a single authority to monitor and control all State aids in an independent way, on the basis of transparent legislation, and as uniformly as possible. The European Council also stressed the importance of satisfactory implementation of State aid control in the context of future accession.

(3) Such a list for the Accession Treaty containing 3 aid measures, has been prepared for Bulgaria.
The ‘suspension’ of the existing aid mechanism is in fact the logical consequence of an unsatisfactory enforcement record, since one of the criteria for submitting the aid measures is a finding of compatibility with the acquis by the national State aid monitoring authority. Naturally such a finding is not relevant if the quality of decision-making is unsatisfactory.

Furthermore, the special provisions for Romania allow the Commission to also recover incompatible aid granted in the pre-accession period between 1 September 2004 and the date fixed in the Commission decision that the enforcement record has reached a satisfactory level. Such a Commission decision establishing a failure by Romania to control its State aid can, therefore, have drastic consequences for the beneficiaries.

4. Conclusion

The Council has introduced very strong safeguards to ensure that Romania fulfils all obligations in the field of State aid control.

The postponement clause clearly constitutes a ‘last resort’ option, although the specific references to certain competition requirements (1) and the majority voting mean that the ‘fuse is quite short’. However, the specific provisions introduced in the existing aid mechanism may prove to be as effective to push Romania to quickly respect its obligations in field of State aid control. Not being able to have aid considered as ‘existing aid’ will act as a considerable disincentive for investors as it creates legal uncertainty. In addition, State aid granting authorities may become more sensitive to the serious implications of not playing by the rules, which should reinforce the position of the Romanian Competition Council in enforcing State aid rules. The special provision regarding the recovery of incompatible aid also constitutes a powerful incentive for all those involved to ensure that the rules are respected.

With these additional safeguards in place, the Competition Chapter with Romania could finally be closed, so that in April 2005 the Accession Treaty with both Romania and Bulgaria can be signed.

(1) Similar provisions exist for Justice and Home Affairs.