I. Introduction — Legal framework

In the context of the latest accession, Annex IV of the Act of Accession (1) established the legal framework for the treatment of State aid put into effect before accession in the then candidate countries. Three categories of State aid measures can be identified: existing aid, so-called past aid and new aid.

The category of existing aid would include measures exhaustively listed in Annex IV, measures put into effect before 10 December 1994 and other measures put into effect before the date of accession and still applicable thereafter to which the Commission did not raise objections pursuant to the so-called interim mechanism procedure, introducing a two-tier review process. After the national authority responsible for the monitoring of the application of the State aid acquis approved the aid concerned, the Commission had the possibility to raise objections within a prescribed period on the basis of serious doubts on the compatibility of the notified measure with the acquis. In such a case, the Commission’s objection would be regarded upon the day of accession as a decision to initiate the formal investigation procedure within the meaning of the State aid procedural regulation (2). On the other hand, if the Commission did not object, the notified measure would be regarded as existing aid from the date of accession.

The category of ‘past aid’ would include measures put into effect before accession and not applicable thereafter.

Finally, the category of ‘new aid’ would comprise measures put into effect after accession.

2. Classification — what effects?

The effects of classification of a measure into one of the above categories (past aid, existing aid and new aid) are of both a procedural and a substantive nature.

First, such classification determines whether the Commission has the competence to act with regard to the measure. Accordingly, the Commission is competent to adopt appropriate measures with regard to existing aid pursuant to Article 88 (1) EC Treaty and to conduct a full assessment of the compatibility of new aid with the common market pursuant to Article 88(2) EC Treaty. In contrast, the Commission has no jurisdiction with regard to measures labelled as past aid. Measures that were put into effect before accession and are not applicable after accession cannot be examined by the Commission, neither under the interim mechanism procedure nor under the procedure laid down in the EC Treaty. The interim mechanism procedure neither requires nor empowers the Commission to review these measures.

Second, such classification will furthermore determine the effects which the Commission will be empowered to trigger by its assessment of these measures. Whereas the procedure governing existing aid is a forward-looking one, and no recovery of illegal aid can be requested in a decision of the Commission regarding existing aid, the Commission is empowered to order recovery of unlawfully granted new aid not compatible with the common market. Logically, past aid escapes any possibility to order recovery. These effects become more apparent e.g. in cases of restructuring aid where the restructuring period begins before and stretches beyond the date of accession and the company in difficulty receives public support both before and after accession. In such a situation, the Commission needs to assess the restructuring process as a whole, covering all measures in support of restructuring. To render the assessment of the effects of the aid on competition as accurate as possible, aid granted before accession (and not applicable thereafter) would be taken into account in the assessment of the necessity and proportionality of the aid, as well as for the determination of compensatory measures. This past aid, however, could not be subject of the recovery order, should the Commission arrive to a negative decision ordering recovery.

Considering these far-reaching consequences, the determination of the moment of granting of the aid and of the applicability of the aid after accession became the central element of the preliminary assessment of cases notified under the interim mechanism. The issue did not become obsolete after the accession as the Commission has received several notifications after 1 May 2004 pursuant to Article 88 EC Treaty. Through these notifications, the new Member States sought to obtain legal

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certainty to the effect that the notified measure is considered as past aid, because granted before accession and not applicable thereafter (1). In such cases the Commission equally has to undertake the preliminary step of clarifying its own competence, i.e. determining whether the measure was indeed granted before accession.

In this respect, the Commission has developed the following criteria. First, a measure is considered to be put into effect before accession if a legally binding act by which the competent national authority undertook to grant the aid was adopted before accession (2). Second, a measure is considered to be applicable after accession if it can still give rise, after accession, to the granting of additional aid or to an increase in the amount of aid already granted, in other words if the precise economic exposure of the State is not known on the date on which the measure was put into effect and is still not known on the date of accession. Any aid schemes that entered into effect before accession and on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings after accession, will be equally considered to be applicable after accession.

3. Case study: Restructuring of some Polish shipyards

In practice, the apparent clarity of these criteria relatively briefly formulated by the Act of Accession was challenged on various occasions. One example is offered by the Commission’s decisions to open the formal investigation procedure with regard to restructuring aid granted to the major Polish shipyards Gdynia Shipyard, Gdansk Shipyard — Gdynia Shipyard Group and New Szczecin Shipyard (3). These decisions illustrate the potential complexity of classifying dozens of measures of numerous public authorities in support of a restructuring process stretching well beyond the date of accession. In the following, the difficulties that the Commission encountered in these cases in determining which measures had been put into effect before accession will be briefly described. As mentioned before, the moment of putting a measure into effect coincides with (a) the issuance of an act (b) by a public authority competent in the matter, (c) which legally binds this authority (d) in the sense that it creates legitimate expectations of the beneficiary under national law.

It is obvious that the question whether an administrative act is issued by an authority entitled to do so and is legally binding is a matter of national law. It was nevertheless recognised in the above decisions that the Commission must be able to examine, especially in border-line cases, these administrative acts and, judging on their form and content, to assess whether they could have given rise to legitimate expectations of the beneficiaries enforceable before a national court of law. This capacity to inspect national administrative acts is indispensable for the exercise of the Commission’s exclusive competence to approve derogations from the general prohibition of State aid. Interpreting extensively the notion of ‘put into effect before accession’ would appear contrary to the principle of restrictive interpretation of all the derogations of prohibitions provided for in the EC Treaty because it could have the effect of preventing the Commission from the exercise of its prerogatives. The Commission therefore required Poland to demonstrate that a legally valid and binding aid granting event took place before accession.

What were the concrete instances in these cases where the Commission encountered problems in determining whether final legally binding aid granting decisions where adopted before accession?

a) Determination of the granting event when it consists of a series of legal acts of several public authorities

Under the applicable Polish legislation certain public liabilities can be restructured by way of a write-off. In order to accomplish this, a central authority coordinating the restructuring (the Industrial Development Agency) has to issue a specific type of decision (the so-called restructuring decision). This decision in turn requires a prior approval of the concrete public authorities whose receivables are to be written off (the granting authorities). The restructuring decision subsequently forms the basis for the actual restructuring, which consists of (1) the sale of the beneficiary’s assets by another company called the operator, (2) the reimbursement to the public creditors of the part of their receivables not to be written off from the revenue generated from the sale of these assets and

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(1) No notifications under the interim mechanism were possible after the accession, when the Article 88 EC Treaty procedure started to apply also to the new Member States.
finally (3) the issuance of decisions by the granting authorities to write off the remaining receivables. The process being rather complex, the first task was to determine which step would create the proverbial ‘point of no-return’, creating the entitlement of the beneficiary for its debts to be written off. The Commission first concluded that this decisive aid granting event is the issuance of the restructuring decision, the following steps being merely acts of implementation leading to the payment (in this case write-off), where no discretion is left to the granting authorities. On the basis of the information available at the time of the opening, the Commission then considered that, although the Industrial Development Agency did issue a decision concerning the restructuring process in question, this decision seemed to lack some essentialia negotii, formal and material requirements qualifying it as a ‘restructuring decision’ capable of directly creating legal effects. The Commission expressed doubts whether the beneficiary could have derived from this decision legitimate expectations under national law that the restructuring of its public debt would be realised.

b) Informal commitments

For some measures like guarantees or capital injections it was claimed that the possibility to grant this support was discussed in meetings between the beneficiaries and the granting authorities, whether on a bilateral level or within various working groups (e.g. Shipbuilding Industry Team, a forum assembling stakeholders from both the government and the industry side). The Commission did not accept any oral agreements not supported by evidence as aid granting events.

c) Commitment of a public authority acting as a shareholder of the beneficiary I

With regard to a capital injection by the State Treasury, which is an important shareholder of one of the investigated shipyards, it was argued that the State Treasury took on the commitment to inject additional capital at the moment when its representatives, sitting on the Supervisory Board of that shipyard, agreed with the restructuring plan presented to that Board by the company’s management. The restructuring plan incorporated, among other things, the possibility for the company to receive a capital injection from the State Treasury. The Commission assessed whether the decision of a public entity, in its capacity as owner of a public enterprise, to approve the restructuring plan can be considered to be the decision of the same public entity, in its capacity as state authority, to grant the State aid provided for in that restructuring plan.

First, the Commission examined whether the approval of the restructuring plan by the Supervisory Board is indeed a decision binding upon the owners of the beneficiary and on the basis of the available evidence expressed doubts that the Supervisory Board would be empowered, without further acts of the shareholders being indispensable, to adopt decisions, which would have financial repercussions on the owners and which the owners would then be obliged to execute. Second, the Commission questioned whether a restructuring plan approved by the beneficiary’s shareholders would create a positive obligation on the State Treasury, as one of the shareholders, to grant the aid. In other words, the Commission was not convinced that it was possible to assimilate the actions taken by the State as a market player and actions taken by the State in pursuance of various public goals, such as employment and regional policy.

d) Commitment of a public authority acting as a shareholder of the beneficiary II

The State Treasury, as the shareholder of one of the shipyards, declared in a shareholders’ meeting, which took place some months before the accession, its readiness to realise a capital injection. Minutes from this shareholders’ meeting evidence this commitment. According to national commercial law, the amount of a capital increase has to be filed with the competent registry court within six months from the date of the resolution on such increase. The Commission observed that these procedural steps had not been taken in the prescribed period and therefore expressed doubts whether the alleged commitment of the State Treasury, which indeed preceded the accession, was still a relevant legal act capable of producing legal effects without any further steps being indispensable.

4. To be continued …

It was mentioned earlier that the determination of the moment of the granting of the aid has important jurisdictional consequences. Hence the interest for the Commission to establish this moment accurately. It can be seen from the above examples that this determination may involve questions related to national administrative, commercial and company law. Particular difficulties were observed where a public authority performed a dual function as, firstly, the owner of the beneficiary and, at the same time, the granting authority.

Undoubtedly, the review by the Commission of legal acts adopted under national private or public law in the context of its competence in the area of
State aid is not a frequent sight. These instances, however, occasionally are present in the State aid legislation and are potentially problematic, especially if important legal consequences are attached. Therefore it would be useful to take into account the practical difficulties in applying criteria linked to national law in a Union of 25+ Member States, in particular in the preparation of the future enlargements and thereto related transitional procedural arrangements in the area of State aid control.