Accession negotiations brought to successful conclusion

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Last autumn was critical for the whole enlargement process. A historic result was finally confirmed in the Copenhagen summit in December 2002 on the enlargement of the European Union with 10 new member states set to join in May 2004. For competition policy, the year 2002 also witnessed a conclusion of the negotiations with the remaining six candidate countries, i.e. Cyprus, the Czech Republic, Malta, Slovakia, Poland and Hungary. With Estonia, Latvia, Lithuania and Slovenia, the negotiations on competition were provisionally closed already in late 2001. These results are to be certified upon signature of the Accession Treaty in Athens in April this year.

For Bulgaria and Romania, the Copenhagen summit confirmed specific roadmaps in order to advance their accession process. On the basis of intensified efforts and increased assistance, further progress can be expected with these countries also in the field of competition policy. With Turkey, the start date of the overall negotiations is still open: it was agreed in Copenhagen that if the European Council in December 2004, on the basis of a report and a recommendation from the Commission, decides that Turkey fulfils the political criteria for the membership, the European Union will open accession negotiations with Turkey without delay.

Approach in the competition negotiations

Based on the membership criteria established already 10 years ago by the European Council held also in Copenhagen, the Candidate Countries have been required, before accession, to fulfil both the so-called political and economic criteria. In the political field, this requires that a candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. The economic criteria call for the countries to demonstrate the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. This ‘economic criterion’ of the accession negotiations was in the field of competition policy translated into a principle whereby the Candidate Countries can be regarded to be ready for accession only if their companies and public authorities have become accustomed to a competition discipline similar to that of the Community well before the date of accession.

This has led the EU to conduct the negotiations not only on the basis of commitments by the Candidate Countries, but also based on a verification of a concrete enforcement of the rules. Therefore, the negotiations on competition proved more prolonged and demanding than possibly anticipated in the beginning.

In the course of the process, the Candidate Countries were first requested to translate their commitments to accept the competition acquis in domestic legislation already prior to accession. Secondly, evidence of an adequate administrative capacity was required, ensuring the ability to implement the legislation. Thirdly, the record of concrete day-to-day enforcement of the competition disciplines had to show a high degree of similarity with the enforcement practice in the EU.

Concretely, the EU deemed it necessary that three elements be in place before the competition negotiations could be closed:

— the necessary legislative framework;
— an adequate administrative capacity; and
— credible enforcement record of the acquis in all areas of competition policy.

It would obviously be impossible for any of the Candidate Countries to accomplish full application of the EU competition rules from one day to the next. The insistence on adjustment well before accession stems not only from the willingness on the EU side to preserve the internal market discipline after enlargement. What was also considered necessary was to avoid an abrupt application of the competition rules that — in the absence of a solid pre-accession preparation — would be difficult to withstand for the companies in the Candidate Countries.

It should be stressed that the obligation in the competition field to follow the EU modelled competition rules, as far as the Candidate Countries from Central and Eastern Europe (1) are concerned, was not simply ‘invented’ for the purposes of the negotiations. Indeed, in the area of competition policy, the bilateral Europe

(1) Including Bulgaria and Romania, but excluding Cyprus and Malta.
Agreements the EU had concluded with each of the ten Candidate Countries from Central and Eastern Europe, have already provided a solid legal basis for the accession preparation.

As to the control of State aid, a basic principle in each of the Europe Agreements reflects Article 87 of the EC Treaty providing that any State aid which threatens to distort competition is incompatible with the Agreements insofar as these practices may affect trade between the Community and the associated country. As to the antitrust rules, the Europe Agreements equally reflect Articles 81-82 of the EC Treaty by providing that all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition, as well as an abuse by one or more undertakings of a dominant position, are incompatible with the Agreements insofar as they may affect trade between the Community and the associated country.

A basis to assess practices contrary to these principles is the criteria arising from the application of the Community competition rules, i.e. Articles 81, 82 and 87 of the EC Treaty. Furthermore, the Europe Agreements have also specifically obliged the Candidate Countries to approximate their competition legislation with that of the European Union.

The Agreements have overall constituted an essential pre-accession instrument in the competition field, by establishing a clear yardstick to be followed which has significantly helped to steer the accession process forward. The legal frameworks established under the Europe Agreements have furthermore facilitated internal law making and the setting up of State aid and antitrust authorities. In the absence of such frameworks necessary preparatory efforts could have been, in many of the countries, significantly delayed.

**Assessment in view of conclusion of the negotiations**

The Commission has recurrently evaluated, on the basis of the above mentioned three elements and for each country, whether the situation would allow for the provisional closure of the negotiations. Before the negotiations could be closed, an assessment was carried out showing the degree to which the Candidate Countries actually meet these requirements. The results of this assessment and the consultations on the requested transitional arrangements were the key elements of the recommendations the Commission submitted to the Council on the conclusion of the negotiations.

The Commission’s assessment showed that all ten acceding countries have, in the context of the accession process and in accordance with their obligations under the pre-accession agreements, adopted basic legal frameworks for competition policy and set up competition authorities to implement this legislation.

As regards the area of antitrust, the EU was able to conclude that the competition laws of the Candidate Countries contain the main principles of the Community antitrust rules, as regards restrictive agreements, the abuse of dominant position and the merger control. Therefore, a satisfactory level of approximation with the acquis has thus been achieved in these countries. Furthermore, it was concluded that the countries’ administrative capacity to ensure the implementation of the antitrust acquis is satisfactory. The EU also concluded that the record of enforcement of the competition authorities has reached a satisfactory level.

In spite of the satisfactory efforts, there obviously remains room for further work in most countries. In particular, continuous attention should be paid to ensuring a level of resources with which the authorities are in a position to further develop their activities. Furthermore, work should continue to further strengthen the enforcement, in particular with a view to focusing on own initiative investigations and on cases that may be important for the market structure, such as cartels.

As regards State aid policy, the countries have adopted national legislation on the control of aid as well as established monitoring authorities to oversee the implementation of the legislation. On the basis of the actions taken by the Candidates, the EU side concluded that the national State aid control frameworks contain the main principles of the Community State aid policy and that a satisfactory level of approximation with the acquis has thus been achieved. As in the antitrust area, the countries’ administrative capacity for the implementation of the State aid rules was found to be satisfactory.

However, development of a proper enforcement system has been markedly slower in the State aid field than in the antitrust. Many of the countries started proper enforcement activity only from 2001 onwards. Despite this belated start, the national State aid authorities are now screening systems of public assistance in order to determine whether or not they constitute State aid as defined under Article 87 of the EC Treaty and whether they are compatible with the acquis. By the end of the
year 2002, it was possible, therefore, to conclude that the ten countries in question have started to control State aid in line with criteria comparable to those of the European Union.

Results and problem areas

Reflecting the above progress, the closure of the negotiations was in all countries a consequence of the satisfactory efforts undertaken to adopt appropriate legislation, to set up relevant authorities to ensure implementation as well as to actually establish a record of enforcement of the competition rules.

The negotiations did go in great length in ensuring that the Candidate Countries’ competition regimes as well as various State aid measures in use in the countries comply with the acquis. Requests for transitional periods were approached with the aim of preserving the integrity of the internal market after enlargement, while at the same time allowing to constructively address specific problem areas of the Candidate Countries. For instance, where identified State aid measures were deemed to be incompatible with the EU acquis, countries were at the first instance required either to abolish these measures or align them. In some rare cases consultations, on fiscal aid, on restructurining aid to the sensitive industries, have resulted in special limited transitory arrangements (cf. below for details by country). The final review and adjustment of aid schemes is still underway in the framework of the existing aid procedure (see adjacent article).

In the context of the negotiations, two types of aid measures proved particularly demanding. The first group consists of fiscal aid regimes incompatible with Article 87 of the EC Treaty consisting of tax breaks, tax holidays, and tax credits that are used to attract foreign investments, as well as off-shore arrangements. A second important issue concerned aid practices used to bail out ailing industries. These measures, consisting of e.g. tax arrears or loan guarantees, have the potential of jeopardising the proper economic restructuring of some of the key sectors of the Candidate Countries’ economies. As such, these aid measures risk seriously delaying the preparation of the Candidate Countries for their full integration to the internal market.

As far as the first group of measures, fiscal aid, is concerned, the Commission helped and worked together with the countries in finding arrangements whereby these aid measures can be brought into line with the acquis within a reasonable period of time. A solution has in most cases been found whereby these incompatible measures will be converted and modified into aid arrangements that are in close conformity with the principles of the acquis and particularly the Community Guidelines on regional aid.

As regards the second group of measures, public support for certain problem industries (e.g. the steel sector), the EU agreed in exceptional circumstances to conditionally authorise restructuring aid against, inter alia, a guarantee to reduce production capacity of the recipient firms. While the aim has been to give the recipient firms ‘a last chance’ for viable restructuring, the required cuts in capacity are intended to ensure that they would not be given an undue advantage at the expense of competitors — in the old and new Member States — that operate without such aid.

In conclusion, the above has to be recognised as a very good end result, particularly seen against the formidable challenge by the countries to build up a competition discipline.

Another important result of the process should not be overlooked: players in the market as well as public authorities in the Candidate Countries have become increasingly aware of the competition policy framework, both in the national and the Community context. This can be expected to bear fruit in the coming years helping to overcome challenges relating to the full integration of companies of the acceding countries into the enlarged internal market.

National administrations and businesses are now familiar with the constraints imposed by the State aid discipline (but also with the benefits it brings about) in attempting to achieve a level-playing field in the internal market. Finally, the accession is also set to coincide with the entry into force of the modernised EU antitrust rules. The experience of applying Community style antitrust rules will help the Candidate Country authorities to meet the challenges that will undoubtedly arise out of the decentralised application of Article 81 of the EC Treaty.

Summary of special arrangements (transitional periods) country by country

The negotiations on transitional arrangements were conducted on the basis of the principle that they must be strictly limited in scope and duration. Estonia, Latvia, Lithuania and Slovenia had not requested any transitional arrangements. The
resulting transitional arrangements for the remaining six countries address specific circumstances as follows:

**Cyprus**

— Phase out of incompatible fiscal aid for offshore companies by the end of 2005 (so-called International Business Enterprises).

**The Czech Republic**

— Restructuring of the steel industry to be completed by 31 December 2006.

**Hungary**

— Phase-out of incompatible fiscal aid for SMEs by the end of 2011.

— Modification of incompatible fiscal aid for large companies into regional investment aid; the aid will be limited to a maximum of 75% of the eligible investment costs if the company started the investment under the scheme before 1 January 2000, and to 50% if the company started the investment after 1 January 2000. In the motor vehicle industry the aid is further limited, and set at a level that corresponds to 40% of the maximum aid ceiling.

— Phase-out of incompatible fiscal aid for offshore companies by the end of 2005.

— Phase-out of incompatible fiscal aid granted by local authorities by the end of 2007

**Malta**

— Phase-out of incompatible fiscal aid for SMEs by the end of 2011.

— Phase-out of operating aid under the Business Promotion Act by the end of 2008.

— Modification of incompatible fiscal aid for large companies into regional investment aid; the aid will be limited to a maximum of 75% of the eligible investment costs if the company has obtained the entitlement for the tax exemption before 1 January 2000, and to 50% if the company has obtained the entitlement for the tax exemption after that date up until 30 November 2000.

— Aid for restructuring of the shipbuilding sector during a restructuring period lasting until the end of 2008.

— Adjustment of the market in the importation, stocking and wholesale marketing of petroleum products under Article 31 of the EC Treaty by the end of 2005.

**Poland**

— Restructuring of the steel industry to be completed by 31 December 2006.

**Fiscal aid (special economic zones)**

— Phase-out of incompatible fiscal aid for small enterprises by the end of 2011.


— Modification of incompatible fiscal aid for large companies into regional investment aid; the aid will be limited to a maximum of 75% of the eligible investment costs if the company has obtained its zone permit before 1 January 2000, and to 50% if the company has obtained it between 1 January 2000 and 31 December 2000. In the motor vehicle industry the aid is further limited, and set at a level that corresponds to 30% of the eligible costs.

**State aid for environmental protection**

— for investments that relate to standards for which a transitional period has been granted under the negotiations on Environment and for the duration of that transitional period, whereby the aid intensity is limited to the regional aid ceiling (30%-50%) with a 15% supplement for SMEs;

— for existing IPPC installations covered by a transitional period under the negotiations on Environment, aid up to 30% intensity until end 2010;

— for the IPPC-related investment not covered by a transitional period under the negotiations on Environment, aid up to 30% intensity until 31 October 2007;

— for large combustion plants, an aid intensity of 50% was agreed for investments that relate to a transitional period granted under the negotiations on Environment.

**Slovakia**

— Fiscal aid to a beneficiary in the motor-vehicle manufacturing sector to be discontinued by the end of 2008; the aid will be limited to a maximum of 30% of the eligible investment costs.
— Fiscal aid to one beneficiary in the steel sector to be discontinued at the end of 2009 or when aid reaches a pre-determined amount, whichever comes first. The objective of the aid is to facilitate the ordered rationalisation of excess staffing levels, the resulting total cost being comparable to the aid.