Existing aid and enlargement

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Every new accession to the EU and its internal market necessarily brings about questions of how to integrate the acceding countries into the Community’s unique system of state aid control. The forthcoming accession of up to ten countries is no exception. Among the issues to consider, the appropriate treatment of aid measures granted during the pre-accession period and continuing beyond accession require particular attention. This article seeks to give an overview of the main elements of the Commission proposals to the EU Member States for their negotiations on the terms of accession with the 10 acceding countries (i.e. Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia). Member States largely endorsed the line advocated by the Commission.

The Treaty principles on existing aid

When devising its approach to pre-accession aid measures in the acceding countries, the Commission’s overriding goal was to devise and set up a system ensuring that competition in the internal market is not distorted (1). In the Community, state aid regulation is based on the centralised monitoring of selective public support by the supranational Commission — a system that ensures that the same substantive standards are being applied with regard to all EU Member States. The position regarding a new Member State is however different. The competence of the Commission to ensure that the aid granted by that State complies with common market principles arises only, ratione temporis, as from that State’s accession to the Community. In the absence of the Commission’s review, there is some risk that the continuation of certain pre-accession aid measures that are incompatible with these common market principles would lead to distortions of competition.

Such a scenario would indeed be the likely outcome if the new Accession Treaty were not to make provision for an effective vetting procedure of pre-accession aid measures: in the absence of special rules for the accession scenario, the general provisions on existing aid of the EC Treaty would apply. Under these rules, all aid measures that pre-date accession and continue to be operated thereafter, including those allowing for particularly distortive operating aid, would automatically qualify as ‘existing aid’ measures within the meaning of Article 88(1) of the EC Treaty.

In essence, the corollary of qualifying a state aid measure as ‘existing aid’ — as opposed to ‘new aid’ — is that the Commission can only alter it as for the future. Under the procedure applicable in such cases, the Commission may propose ‘appropriate measures’ (i.e. modifications to or the abolition of the aid measure) to the Member State concerned, pursuant to Article 88(1) of the EC Treaty. This implies in particular that aid amounts disbursed in the past under existing aid measures are protected from an order of recovery. The current state aid rules limit the possibility of recovery to ‘unlawful aid’ which is a different category of aid from ‘existing aid’: unlawful aid are those measures that are put into effect in a Member State in contravention of the notification and standstill obligations arising out Article 88(3) of the EC Treaty. (3) These obligations only apply to new aid, but not to existing aid. Hence, in a nutshell, the importance of the distinction between new aid and existing aid is that the latter enjoy better legal protection. They benefit from a less intrusive system of state aid control, in particular without a risk of recovery.

At the recent Copenhagen European Council of 12-13 December 2002, EU Member States confirmed their invitation to the 10 acceding countries to join the EU on 1 May 2004. In view of this forthcoming ‘big bang’, the Commission would probably have to simultaneously propose a large number of appropriate measures after accession, in order to remedy distortions of competition resulting from the continued application of incompatible aid. Such a cumulation of procedures would not only draw heavily on the Commission’s resources, but would also present a scenario which would take, realistically speaking, many years to complete. Due to these unavoidable delays, such a

(1) See Article 3(g) of the EC Treaty.
(3) Apart from Article 88(3) of the EC Treaty, these obligations are also laid out in more detail in Articles 2(1) and 3 of Regulation (EC) No 659/1999.
‘post accession’ approach to pre-accession aid would thus not efficiently remedy distortions of competition.

The key objective of the Commission was therefore to propose a framework that would offer an incentive to the acceding countries to align, where necessary, their aid regimes with common market principles already during the pre-accession period. The Commission could then, after accession, focus its resources on the remaining cases, and deal with them in an expeditious manner.

Accession of Austria, Finland and Sweden

Looking for suitable models, the approach to existing aid taken for the accession of Austria, Finland and Sweden — all former Member States of the European Economic Area (‘EEA’) — provided the basic elements of a solution. The Commission then adapted these elements to the particular circumstances of the current accession.

The 1994 Act of Accession provides that all state aid decisions taken by the EFTA Surveillance Authority (‘ESA’) before the date of accession, and which would fall under Article 87 EC Treaty as a result of accession, shall remain valid. Therefore, aid measures approved by the ESA are, for all practical purposes, considered as existing aid without further questions being asked. Consequently, the appropriate measures procedure would be the only avenue available to the Commission, if it wanted to change such measures for the future.

Why was the EU then prepared to consider ESA state aid decisions as per se equivalent to those of the Commission? The explanation to this arguably lies in two cornerstones of EEA state aid control. To begin with, the ESA implemented a state aid policy in the EEA during the pre-accession period which essentially followed the substantive standards of the Community state aid policy. Secondly, the state aid monitoring function in the EEA territory is entrusted to a supranational authority (ESA) modelled closely on the Commission. This combination, i.e. the application of Community substantive standards and a Community-style monitoring system, made it possible to recognise ESA state aid decisions as on a par with those of the Commission.

State aid control during the pre-accession period

In comparison, state aid control in the current group of acceding countries can only pass the first of these two tests. It is true that all candidate countries have over the last years installed national state aid monitoring authorities. These authorities have more recently also by and large aligned their decisional practice with the substantive standards used by the Commission. This unparalleled development resulted from the insistence of EU Member States, as early as December 1994, that candidate countries start introducing an effective state aid policy as part of their preparations for accession to the EU. This demand was subsequently included in the EU Common Positions on the accession negotiations in the competition chapter. These documents stipulate uniformly that candidate countries must demonstrate a credible record of national state aid enforcement before negotiations could be concluded. In addition, most candidate countries are already during the pre-accession phase under a legal obligation to implement a domestic state aid policy in accordance with the principles of the acquis, pursuant to a provision in their respective Europe Agreements.

However, the acceding countries with their national state aid monitoring authorities do not satisfy the second of the two characteristics mentioned above, namely the supranational organisation of state aid control. Therefore, it was deemed necessary to task the Commission as the appropriate supranational body with the mission of screening the decisions taken by the national state aid monitoring authorities. This effectively added a second layer to the filtering process of pre-accession aid.

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(2) As is confirmed by a reference to Article 172 Act of Accession, contained in Article 1(b)(i) of Regulation 659/1999.
(3) See Article 172(5) Act of Accession.
(6) Conclusions of the Essen European Council of 9 December 1994, Annex IV: ‘…In the context of future accession, satisfactory implementation of competition policy and state aids control in the associated countries is of special importance,…’
(7) See, for example, Article 63(1)(iii) and (2) of the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other, OJ L 348 of 31.12.1994, p. 1.
However, it was recognised that the national bodies are the first instance of review. Therefore the Commission would not need to carry out again a supplementary, fully fledged review of these measures, and the substantive test could be lighter than the one employed within the Community. In practice, therefore, the Commission’s task is to weed out incompatible pre-accession aid that escaped the national authorities’ first review.

It should be emphasised that the different standard of state aid control used for the purposes of accession should, in all likelihood, prevent parties from within the Community from relying on the fact that the Commission did not object against a pre-accession measure. A failure to object against a pre-accession aid cannot set a precedent for actors in the common market.

The Commission proposal

Building on the cornerstones of such a two-tier review system, the Commission proposal to the EU Member States thus comprises the following elements:

1. Only those aid schemes and individual aid put into effect in a new Member State before the date of accession and still applicable after that date that fulfil the following cumulative condition shall be regarded as existing aid upon accession:
   i. the aid measures were assessed by the national State aid monitoring authority and found to be compatible with the acquis, and
   ii. the Commission raises no objection against these measures on the ground of serious doubts as to their compatibility with the common market.

2. All measures which constitute state aid and which do not fulfil both conditions shall be considered as new aid upon accession for the purpose of the application of Article 88(3) of the EC Treaty. In practice this implies that if a new Member State wishes to continue an aid measure although it has not passed the two-tier review process, the qualification of the measure as new aid makes it notifiable to the Commission upon accession. More crucially, as ‘new’ aid, such a measure also falls under the standstill clause. Hence the new Member State would have to immediately discontinue the operation of the measure upon accession, and would only be able to resume it if and when the Commission authorises the aid. The continuation of such a measure without prior Commission approval makes the aid unlawful, and potentially exposes it to a recovery order.

3. There are only 2 exceptions to this general approach. First of all, this approach is evidently set aside where the Accession Treaty contains a specific transitional arrangement as lex specialis. Typically, such a transitional arrangement in the field of state aid will expressly authorise a new Member State to continue a specified aid measure for a certain period of time beyond the date of accession despite its incompatibility with the common market. Secondly, the Commission proposed to include a clause in the draft Accession Treaty pursuant to which aid measures put into effect before 10 December 1994 (1) shall be regarded upon accession as ‘existing aid’ per se. These ‘grandfather measures’ thus do not have to be reviewed under the two-tier review process described above. This last proposal was motivated by the desire to put old and new Member States on an equal footing to the extent possible.

4. Finally, the scope of application of the two-tier review process needs to be highlighted. On the one hand, both aid to the coal sector and aid supporting fisheries products and products derived therefrom fall within the remit of this process. On the other hand, there are two notable exceptions:

   - As with the previous accession (2), state aid to agricultural products is subject to a separate regime. This differentiated approach reflects the fact that the large majority of acceding countries does not currently exercise a meaningful monitoring of public support to the agricultural sector. This lacuna is justified by the exemption of agricultural policy from the scope of the pre-accession association agreements. Without a history of national monitoring of state aid in the agricultural field, already the first tier of the envisaged review mechanism is missing.

   - A similar exception applies to aid to the transport sector in view of the different speeds at which various transport sectors are gradually opening up to competition in the course of liberalisation.

   (1) I.e. the day following the Essen European Council where the EU had clarified its expectations in the field of state aid.
   (2) See Articles 138 et seq. of the 1994 Act of Accession.
The procedural framework

Once Member States had tentatively endorsed the cornerstones of the Commission proposal on the treatment of pre-accession aid, the Commission elaborated, in a second step, a proposal for a procedural framework to implement this policy. For reasons of chronology, this proposal envisaged two subsequent procedures:

The Commission proposal foresaw in the first instance that a list be attached to the draft Accession Treaty of those measures that had passed the two-tier review process mentioned above. The measures contained in this list would thus be regarded as existing aid upon accession for the purposes of the application of Article 88 of the EC Treaty. The list would be an integral part of the Accession Treaty, and would as such constitute primary Community law.

The chronology of the ratification process required however that special provision be made also for the considerable period between the finalisation of the draft Accession Treaty, and the actual date of accession. This interim period is expected to stretch over more than 12 months. Just like the current Member States, the acceding countries are entitled to grant new aid measures during this interim period, as long as these new grants respect the relevant acquis. Provided that the relevant national state aid monitoring authority finds these measures to be compatible with the acquis, and the Commission does not raise an objection on the grounds of serious doubts as to the compatibility of the measure with the common market, these measures have to be qualified as ‘existing aid’ as well.

However, since the draft Accession Treaty will soon be finalised and then undergo ratification by present and future Member States, such measures cannot anymore be included in the list of measures attached to the Treaty. Therefore, in order to preserve the coherence of the screening system until the very eve of accession, an interim procedure which is self-contained had to be set up.

Interim procedure

This interim procedure foresees, in its draft form, the following elements:

1. To the extent that a new Member State wishes the Commission to examine an aid measure under this interim procedure, it shall provide the Commission regularly with (i) a list of existing aid measures which have been assessed by the national state aid monitoring authority and which that authority has found to be compatible with the acquis, and (ii) any other information which is essential for the assessment of the compatibility of the aid measure. The Commission provides a reporting format to this effect.

2. If the Commission does not object to the existing aid measure on the ground of serious doubts as to the compatibility of the measure with the common market, within 3 months of the receipt of complete information on that measure, the Commission shall be deemed not to have raised an objection. These rules were evidently inspired by similar provisions contained in the state aid procedural regulation for the present Member States (1). It has to be pointed out that as long as the information provided by the acceding country on a given aid measure remains incomplete, the 3 months-period is not triggered.

3. A Commission decision to object to a measure under this interim procedure shall be regarded as a decision to initiate the formal investigation procedure (2) within the meaning of the state aid procedural regulation. However, if such a decision is taken before the date of accession, the decision will only come into effect upon the date of accession. The delay in the entry into force of such decisions is necessitated by the fact that possibly by the time the Commission adopts its decision to object to a certain aid measure, the legal base for this decision, namely the Accession Treaty, may not yet have entered into force. It is safe to assume that the Commission will publish its decisions to object to certain measures pursuant to this interim procedure in the Official Journal (3).

Conclusions

At the time of writing, it is expected, although not yet certain, that the eventual Accession Treaty will contain the rules on existing aid as sketched out above. This continuing legal uncertainty notwithstanding, the Commission and the acceding countries are already actively implementing the

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(1) See Article 4(5) of Regulation 659/1999.
(2) See Articles 4(4), 6, 13(1), 16, 19(2) and 26(2) of Regulation 659/1999.
(3) Such a publication would indeed be obligatory if Article 26(2) of Regulation 659/1999 were to be applied, by analogy, to this interim procedure for pre-accession aid. Arguably, such an analogy may be assumed due to the general reference to the ‘formal investigation procedure’ of Regulation 659/1999 contained in the draft Accession Treaty.
envisaged policy. In particular, at the end of 2002 a list was transmitted to the EU Member States which contained those measures that had successfully passed the two-tier review process discussed above; this list is intended to be included in the Accession Treaty in its final form. With the drafting of the Accession Treaty almost completed, the focus is now shifting to the proper implementation of the interim procedure.

The Commission proposal on existing aid offered acceding countries a carrot and a stick: legitimate grants of aid and those that are properly converted so as to ensure compliance with common market principles, benefit from the protected status as existing aid after accession. On the other hand, promises of aid that do not respect common market principles have to be swiftly notified as new aid; otherwise, such measures are exposed to the threat of recovery.

The first experiences with this approach demonstrate that indeed considerable efforts have been and are being undertaken by the acceding countries to bring their present aid regimes and individual aid into line with the requirements of the acquis. In this sense, the strict policy on incompatible aid after accession as outlined above appears to have provided a sufficiently strong incentive to acceding countries. As a result, potential distortions of competition in the future enlarged common market could be substantially reduced already during the pre-accession phase.