

# EU Accession Series



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## EU STATE AID LAW (SLOVAK REPUBLIC)

### Introduction

One of the major changes in the legal landscape resulting from EU accession will be in the field of State aid control. State aid law plays a significant role in the Central and Eastern European Candidate Countries and the Slovak Republic in particular. According to European Commission estimates, in 2000, State aid in all Candidate Countries amounted to just under €5 billion. State aid granted by the Slovak Republic in 2000 amounted to approximately €270 million (excluding aid granted in the area of agriculture and fisheries), while in 2002 the total amount of State aid granted decreased to around €150 million. In 2002, nearly 35 percent of all aid in the Slovak Republic was directed to the steel industry, around 25 percent to the automobile industry and 20 percent to the railway transport.

Most of the substantive rules in the Candidate Countries' laws that govern the grant of State financial assistance to private companies have already been aligned with EU principles during the pre-accession process. However, a crucial procedural change will take place as of accession. From 1 May 2004, State aid control will be carried out centrally by the European Commission, rather than by national State aid authorities. These changes will have two major consequences for companies.

#### Key Changes

- First, regarding new aid, the European Commission (rather than national authorities) will conduct a review of its compatibility with the EU rules. Hence, the State aid laws in the Candidate Countries will cease to apply and the State aid offices will lose their competence to review aid. This centralised review by the European Commission is designed to ensure that government financial assistance is scrutinised more vigorously. (In contrast, national authorities might be more open to local or national considerations when reviewing aid.)
- Second, under certain circumstances, EU rules may apply retroactively to aid measures granted before accession, with the consequence that the European Commission may order recovery of such aid.

The Commissioner responsible for competition, Mr. Mario Monti, has repeatedly emphasized that State aid is one of the most sensitive issues in the Candidate Countries. In particular, the Candidate Countries still appear to operate incompatible fiscal aid regimes (tax breaks, tax holidays, tax credits, etc.). Commissioner Monti said, “Investment incentives or any other government support that would be classified as incompatible State aid cannot remain valid after the accession.” Only a limited number of aids will benefit from transitional periods during which the rules will not be applied to them (notably for certain tax exemptions granted to foreign investors).<sup>1</sup>

Below we address the key questions for companies doing business in the Slovak Republic, starting with how the Commission will deal with aid granted prior to accession. We then address the new procedural rules that apply to new aid, before briefly addressing the substantive rules as to when aid is compatible and what avenues are open to companies if a competitor unlawfully benefits from State aid.

## Recovery of Granted Aid: Existing vs. New Aid

In the context of accession, EC law distinguishes between two types of aid, namely so-called *existing aid* on the one hand and so-called *new aid* on the other, the main difference being that only *new aid* must be notified to the Commission and can be subject, if found unlawful, to the recovery procedure. *Existing aid* is only subject to future regulation, i.e., the Commission may ask the Member State to amend or abolish the aid scheme for the future. Hence, if aid that your company received is qualified as *existing aid*, you can be sure to keep what you have already received, although there may be amendments for the future.<sup>2</sup>

According to the procedural rules for the application of the EC Treaty provisions on State aid, *existing aid* is all aid that was put into effect before, and is still applicable after, the entry into force of the EC Treaty in a new Member State. However, the Accession Treaty provides further, narrower criteria, as follows: Aid that has been granted in the new Member States prior to accession and that is still applicable after accession, is only deemed to be *existing aid* if one of the following criteria is met:

- the aid measure was put into effect before 10 December 1994;
- the aid measure falls under the Accession Treaty’s transitional arrangements<sup>3</sup>;

1 In the Slovak Republic, for instance, tax exemptions granted to a motor vehicle manufacturer and a steel mill will be phased out by the end of 2008 and 2009 respectively.

2 For example, in the German and Austrian cases concerning the so-called Anstaltslast and Gewährträgerhaftung for Landesbanken, it was ordered that existing aid in the form of a government guarantee was incompatible with the EC rules and should be phased out.

3 See Section 4 of Annex XIV of the Accession Treaty.

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- the aid measure is explicitly mentioned in an appendix to the Accession Treaty (the so-called “existing aid list”); or
- under a procedure (the so-called “interim procedure”) provided under the Accession Treaty (to apply between entry into force of the Accession Treaty and accession on 1 May 2004), the aid is notified to the national State aid authority and approved by this authority, and no objection has been raised by the Commission within three months following formal notification by the new Member State (the aid is then put on the existing aid list).<sup>4</sup>

If an aid measure (granted pre-accession and still applicable after accession) does not meet any one of the above-mentioned four criteria (i.e., if it is not existing aid), it is considered to be new aid and may therefore be reviewed by the European Commission post accession and subjected to the recovery procedure. As a consequence, it may be important for every company to find out whether State aid has been granted to them after 10 December 1994 and whether it is still applicable after accession. If such aid exists, and does not fall under one of the transitional arrangements contained in the Accession Treaty or does not already appear on the existing aid list, companies may wish to seek to have it reviewed under the interim procedure mentioned above. The interim procedure, however, may not be directly initiated by the beneficiary of the aid. It is the grantor of the aid, i.e., the national government, that notifies the aid measures to the national State aid authority and who is responsible for the fulfilment of the notification obligation. Accordingly, the beneficiary would need to prompt the Slovak government to notify the aid to the Slovak State Aid office.

## Notification to the European Commission of New Aid

### *When to notify*

State aid is, in principle, incompatible with the common market. However, the EC Treaty stipulates a number of cases in which State aid could be considered acceptable (the so-called “exemptions”). Supervision of State aid at the EU level is based on a system of *ex ante* authorisation. Under this system, Member States are required to notify the Commission of any plan to grant or alter State aid in advance of the grant of aid. (This is akin to the current regime in the Slovak Republic where any aid schemes and *ad hoc* aid measures that contain State aid elements have to be notified to the Slovak State Aid Office prior to their implementation.)

<sup>4</sup> For the transport sector, the Accession Treaty provides that aid that has been granted in the new Member States prior to accession and which is still applicable thereafter is only deemed to be existing aid until the end of the third year after the date of accession, provided such aid is communicated to the Commission within four months of the date of accession.

But what government measures amount to State aid and thus need to be notified? State aid can take many forms: not just direct grants or tax exemptions, but also loan guarantees, sales/leases of public land below market price, accelerated depreciation allowances, public-private partnerships, and privileged access to State infrastructure. In legal terms, the elements that constitute State aid are (i) the conferral of an advantage from which the undertaking would not have benefited in the normal course of business; that (ii) favours certain undertakings or certain goods (as opposed to general measures that apply to all undertakings or goods); that is (iii) granted by the State or through State resources (including private or public intermediate bodies established by the State); and which has (iv) the effect of distorting competition between Member States of the EU (this is normally the case when the beneficiary operates in a market in which there is trade between Member States).

The only exceptions to the general rule that all measures that meet the above criteria have to be notified in advance to the Commission are (i) if the aid measure falls under a so-called block exemption regulation (which sets out categories and conditions of aid that are automatically exempt, such as aid to small and medium-sized enterprises, training aid and employment aid), (ii) aid that is *de minimis* (i.e., under €100,000 over any period of three years), or (iii) an aid measure is granted within an aid scheme that has itself been approved by the Commission (no new notification is necessary). In all other cases, State aid must not be granted without the approval of the Commission.

### State Aid Check-list

- Does the proposed State financial assistance fall outside the (wide) scope of the Commission's definition of State aid?
- Is the aid *de minimis*?
- Is the aid part of an existing aid scheme (for instance, for regional development)?
- Does the aid fall under a block exemption regulation?
- If the answer to one of these questions is "yes," the financial assistance can be granted without prior notification to the Commission. In all other cases, the aid has to be notified.

### **What are the criteria for approving State aid?**

There are a number of grounds on which State aid may be allowed. The Commission most often determines cases on the basis of four principal categories of aid, namely (i) State aid for horizontal

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objectives (such as employment aid, aid for undertakings in deprived urban areas); (ii) *ad hoc* rescue and restructuring aid; (iii) regional aid (aid for disadvantaged regions)(All new Central and Eastern European Member States will be eligible regions.); and (iv) State aid for specific sectors (such as coal mining, transport, etc.).

## ***The notification procedure***

The Commission has two months from receipt of the notification to examine the proposed aid. The notification is made by the Member State, not by the beneficiary. If the Commission decides not to raise any objection, the aid measure concerned can be implemented. This decision is published in the Official Journal of the EU. Where the Commission has doubts regarding whether aid measures comply with State aid rules, it carries out a formal investigation during which third parties and all Member States are invited to provide observations. The formal procedure, which may take up to 18 months, is relatively rare. For instance, in 2000, only 12 percent of the cases were decided after the formal investigation procedure. And only in 7 percent of the cases in 2000 did the Commission make a negative decision.

If the aid has already been granted in the case of a negative decision, the Commission will require the Member State concerned to recover the aid (plus interest) from the beneficiary. The Commission will not take into account arguments that the beneficiary had legitimate expectations to the aid other than expectations that have been prompted by the Commission itself.

## **What Can You Do If Your Competitor Receives Illegal State Aid?**

Companies have the option to submit complaints to the Commission about potential illegal State aid. In the event that such a complaint is substantiated, the Commission's Directorate-General for Competition will investigate the complaint.

If the Commission approves an aid granted to a competitor and a company can show that it is directly and individually concerned by such aid measure, it may challenge the Commission decision before the European Court of First Instance.

A company may also challenge the validity of an aid given to a competitor in the national courts of the Member States. Claims for damages are, however, rare.

This situation contrasts with the current situation in the Slovak Republic, where third party competitors would face difficulties with challenging a decision of the Slovak State Aid Office whereby it cleared an aid scheme or individual aid measures to be lawful. On the other hand, third parties may challenge State aid measures implemented without the prior clearance of the State Aid Office or provided despite a previous negative decision.

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## Conclusions

In conclusion, companies operating in the new Member States need to analyse any proposed financial assistance in terms of its legality under the EU rules and the Commission's likely approach. State aid adjudged to be illegal may be recovered from the recipient, often a heavy burden for companies to bear. Regarding aid that has already been granted, companies may need to determine whether it would be advisable to seek to have this aid measure put on the existing aid list prior to accession. Companies also need to be familiar with the procedures used to challenge aid granted to another company, either before the Commission, the European courts or national courts.

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