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ACADEMIA ISTROPOLITANA NOVA
SVÄTÝ JUR, SLOVAKIA

NEGOTIATING SLOVAKIA'S WAY INTO THE EU

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Slovak Aid

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Foreword

This handbook is the result of cooperation within the framework of project *4B – Bratislava Belgrade Brussels Bridge* executed by Academia Istropolitana Nova, Svätý Jur within the time period of November 2005 to April 2007.

The project was financed within Slovak Official Development Assistance.

The handbook is aimed at project beneficiaries – the Serbian European Integration Office and its staff as well as civil servants of the Serbian state administration participating in Serbia's Eurointegration process and focuses on the aspects of Slovakia's way to the EU.

This handbook can be considered as an extension of the collection of notes and lectures issued within a similar project by the Institute of International Relations and Approximation of Law, Faculty of Law, Comenius University, Bratislava in 2005 under the title *European Union – Support via Experience, Assistance, and Training*. The handbook which you are holding in your hands deals with the accession process of the Slovak Republic from a different point of view, highlighting other facts, such as negotiation experience and presents other practical examples.

The handbook briefly outlines the accession process in general from the EU's standpoint – from concluding the so called association agreements up to the accession to the EU. It reviews the different types of association agreements, gives the legal basis of the accession process, content of membership, entry criteria and selected aspects of the so-far latest accession – of Bulgaria and Romania.

The main part of the handbook deals with the accession process of the Slovak Republic from 1993 up to 1 May 2004 when

Slovakia became an EU Member State. The chapter on Slovakia's way is structured chronologically. The handbook describes some periods of the process in more details, others are mentioned only briefly due to the fact that a lot of information has already been published about the accession process of the Slovak Republic. A lot of information can also be found on the internet, and also in the above-mentioned publication of the Institute of International Relations and Approximation of Law.

To illustrate the accession process in terms of a particular department and a particular negotiation chapter, the handbook gives the example of the Antimonopoly Office of the SR and its negotiation chapter 6 "Competition".

In its last part the handbook deals with the topic of negotiations in terms of their techniques, parties concerned, their expectations, barriers, national coordination issues, etc. The negotiation skills are of crucial importance in the accession process and the Serbian beneficiaries emphasized many times their concern related to the negotiation capacities. The chapter also includes advice on how to prepare and how to conduct accession negotiations, and provides some observations from the 2004 round of negotiations.

The handbook does not elaborate the topic exhaustively, however it is the summary of essential aspects of the accession process, particular experience and we hope it will inspire the readers and give them a new impetus for further cooperation and transfer of the Slovak experience to the Serbian civil servants.

AINova team

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Association and accession

1 Association and accession

1.1 Association

Generally, the Association Agreements are international legal agreements in which contracting parties join, associate to intergovernmental or supranational communities without becoming the members. For an associated partner there are rights and obligations resulting from it.

Contractual association of some non-Member States is a part of the EU foreign policy. The European Union can conclude so called Association Agreements (hereafter AA) thus forming an association including reciprocal rights and obligations, common actions and special procedures with one or more states or international organizations. By concluding AAs, preferred economic relations with the third parties can be established, as well as support political, economic and social processes of transformation or preparation for EU membership.

The term Association Agreement thus becomes quite flexible and its meaning is related to a particular content of the agreement in question. The EU has concluded a lot of AAs with various countries that markedly differ as to their extent and goals.

Due to its character, the AAs can be placed somewhere between the agreements on cooperation and agreements on the country's accession to the EU.

1.1.1 Legal basis

The legal basis of concluding an Association Agreement is stipulated in the Article 310 of the Treaty establishing the

European Community, according to which the EC may "conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure". The article in question defines the association only generally and does not express the explicit difference between the countries which wish to become an EU Member State and other cases of association. According to Article 49 of the Treaty on European Union only a European country can become a Member State. Neither the Treaty on establishing the European Community (hereafter TEC) nor the Treaty on European Union (hereafter TEU) govern expressis verbis concluding European agreements with the prospect of potential EU membership. [1]

In concluding association agreements the Council of the European Union, European Parliament and Commission work together. The Commission can submit recommendations for concluding an Association Agreement and, empowered by the Council, it conducts negotiations. The approval of the agreement requires the qualified majority of the Council and an assent of the European Parliament.

1.1.2 Types of association agreements

Association agreements have been used by the EU in the past as a means to foster increasingly closer economic and, later, political relationships with non-EU Member States. Unlike the first generation of AAs during the 1960s and 1970s with Turkey, Malta and Cyprus, AAs during the last two decades were not only a means of closer cooperation, they also constituted a

[1] Association according to the Article 310 of TEC is necessary to differentiate from Art. 182 TEC – association of overseas countries and territories and from Art. 133 TEC – concluding customs and trade agreements with other states and international organizations.

decidedly marked step towards a later EU membership. The second generation of AAs were the Europe Agreements (hereafter EAs) with the Central and Eastern European Countries (hereafter CEECs[2]) during the 1990s. More recently, the EU has signed a third generation of AAs (Stability and Association Agreements, hereafter SAAs, following the Stability Pact Agreement) with several western Balkan countries[3]. SAAs have been entered with Croatia, the Republic of Macedonia and Albania. At present, the EU is negotiating SAAs with further Balkan countries, namely Bosnia and Herzegovina, Montenegro, and Serbia and Kosovo.

The aim of the following chapter is two-fold, namely, firstly, to review the different generations (i.e. types) of AAs, which have evolved during the past three to four decades in terms of their main purposes and contents as well as, secondly, to review the AAs as an instrument within the EU enlargement process with a particular focus on the latest developments.

1.1.2.1 Association agreements: purpose and different types

In formal terms, an AA is a treaty between the EU and a non-EU country providing a basis for cooperation. AAs typically foresee a commitment of non-EU members to develop political, social, cultural and security policies and are seen as a means to enforce economic cooperation. In response, the EU provides rewards to the non-EU members in form of tariff-free access to some or all EU markets, as well as financial and/or technical assistance. In addition, AAs have evolved into being a first step towards EU membership, in particular since the second generation AAs.

[2] The CEECs comprise Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.

[3] Western Balkan Countries cover Croatia, Republic of Macedonia, Albania, Serbia and Kosovo, Montenegro, and Bosnia and Herzegovina.

In the following, the three generations of AAs as well as AAs entered with countries falling under the European Neighbourhood Policy will be reviewed.

1.1.2.2 Association agreements with Turkey, Malta and Cyprus

The EU (then the EEC) signed the first AAs with Turkey (1963)[4], Malta (1970)[5], and Cyprus (1972)[6]. At that time, the word "association" in the AAs originally neither promised, nor implied that the relationship was intended to result in EU accession, and even the liberalization of trade between the two parties was to be introduced only over a long period. In the AA with Turkey, however, an explicit statement evoking a potential membership was declared.

Turkey originally concluded an AA (the so-called Ankara Agreement) based on trade and cooperation with a view to establishing a customs union with the EU, i.e. the AA was principally based on economic considerations. Entering into force on 1 January 1996, the AA was superseded by the EU-Turkey Customs Union[7]. Similar to the Turkish AA, also the AAs for Cyprus and Malta were planned as means to establish a customs union ideally no longer than ten years after the signature of the AAs. Nevertheless, this ambitious objective was never met.

Besides the economic dimension, the Turkish AA referred to the political objective of an ever closer connection between the Turkish people and the peoples of the Member States. Additionally,

4 OJ 1964, 3687.
5 Council Regulation 492/71/EEC, OJ 1971 L 61/1.
6 Council Regulation 1246//3 of 14 May 1973, OJ 1973 L 133/1.
7 OJ 1996, L 35/1.

Article 28 of the Turkish AA gave the prospect of EU accession.[8] In contrast, the AAs with Malta and Cyprus did not contain any similar clauses on EU membership perspective. However, this did not mean that future EU membership was excluded: All three countries formally applied for EU membership (Turkey in 1987, Malta and Cyprus in 1990). Following the European Councils in Luxembourg in 1997 and Helsinki in 1999, Cyprus and Malta started accession negotiations, whereas Turkey was granted the status of a candidate country at the Helsinki summit in 1999 and started negotiations in 2005. The AAs with Cyprus and Malta became defunct at the time of their accession to the EU in May 2004.

1.1.2.3 Europe agreements with the CEECs

The second generation of AAs, the EAs, were a specific type of AAs between the EU and the CEECs with a particular focus on EU accession. The first EAs between the EU and the CEECs (Poland, Hungary and Czechoslovakia) were signed in 1991 and the last one with Slovenia in 1996. They came into force between 1994 and 1999.[9] With the CEECs' EU accession in 2004 and in 2007, respectively, the EAs became redundant.

[8] Article 28 of the Association Agreement stipulates: "As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community".

[9] The EU signed the first EAs with Poland, Hungary and Czechoslovakia in December 1991. The EA with Poland (OJ 1993 L 348/2 et seq.) and Hungary (OJ 1993 L 347/2 et seq.), came into force on 1.2.1994, and those ones with the Czech Republic (OJ 1993 L 360/2 et seq.) and the Slovak Republic (OJ 1993 L 359/2 et seq.) on 1.2.1995. The EA with Bulgaria (OJ 1993 L 358/3 et seq.), and Romania (OJ 1993 L 357/2 et seq.) were signed in 1992 and 1993, respectively, and both came into force in 1995. The EAs with Estonia (OJ 1998 L 68/3 et seq.), Lithuania (OJ 1998 L 51/3 et seq.) and Latvia (OJ 1998 L 26/3 et seq.) were signed on 12.6.1995 and came into force in 1998. The EA with Slovenia (OJ 1999 L 51/3 et seq.) was signed on 10.6.1996 and came into force in 1999.

EA is a bilateral agreement that fosters a special relationship between the two parties, particularly with a view to accession to the EU. It therefore forms the framework for:

- setting up a political dialogue;
- establishing business relations, particularly within a free-trade area;
- developing economic, cultural, social and financial cooperation;
- aligning national legislation with Community legislation.

The EA also covers the creation of the institutions needed to operate it. As one of the components of the enhanced pre-accession strategy, the agreement and its institutions make a full contribution to the pre-accession process, particularly by monitoring the objectives and priorities identified in the Accession Partnership.

The choice of the name "Europe Agreement" was a clear indication for the signing countries that they were *European* countries[10] and thus, eligible for EU membership. However, the EAs merely proclaimed EU membership as an 'ultimate objective' of the signing parties without explicitly mentioning it. In the first three signed EAs[11], for example, the EU acknowledged that the respective countries wanted to join the EU, but the governments of the EU countries opposing enlargement were able to prevent the inclusion of more formal membership clauses in the final agreements. Nevertheless, after the Copenhagen Summit in 1993, the EAs came to be seen as pre-accession frameworks: The EU officially acknowledged that "the associated countries in central

[10] Article 49 TEU stipulates: "Any European State [...] may apply to become a member of the Union."

[11] The first EAs were signed in December 1991with Hungary, Poland and the then Czechoslovakia.

and eastern Europe that so desire shall become members of the EU. Accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required"[12]. Accordingly, the last part of the quoted summit statement emphasises that accession to the EU is not automatic, but subject to certain conditions being met, and that the AAs should therefore be seen as a framework enabling applicant countries to gradually integrate into the Union. The basis for the prospect of accession was the provision of the Treaty of the European Union, and the criteria specified at the Copenhagen European Council in June 1993 as well as at the Madrid European Council in 1995 comprising the respect for human rights, democracy, the rule of law, the orientation towards market economy and, last but not least, building up of an adequate administrative capacity to implement EC law. Unlike the previous enlargement rounds, the obligations by the EU were, thus, quite clear. The progress was monitored by the EU by means of annual monitoring and evaluation reports.

In recognition of the costs of EU conditionality, the EU committed itself to financial and technical assistance to the CEECs in the AAs. Already during the early 1990s, the EU provided the CEECs with aid and assistance through the PHARE program, for example.[13]

[12] European Council (1993, p. 13).

[13] The program PHARE, initially aimed at Poland and Hungary, was extended as a financial instrument to the former German Democratic Republic, former Czechoslovakia, Bulgaria, Romania and Yugoslavia (amending Council Regulation 2698/90, OJ 1990 L 257/1) in 1990, and to Albania, Estonia, Lithuania and Latvia (Council Regulation 3800/91, OJ 1991 L 357/10) in 1991, as well as to Slovenia in 1992 (Council Regulation 2334/92, OJ 1992 L 227/1), Croatia (Council Regulation 1366/95, OJ 1995 L 133/1) in 1995, and Former Yugoslav Republic of Macedonia in 1996 (Council Regulation 463/96, OJ 1996 L 65/3).

1.1.2.4 Current association agreements of the EU – Stabilisation and association agreements with Western Balkan countries and European neighbourhood policy agreements

During the last years, the EU signed AAs within two different policy frameworks: the first one addressing the Stabilisation and Association Process of the Western Balkan countries, and the second one the European Neighbourhood Policy[14] (hereafter ENP), foreseen for neighbouring countries to the EU.

- Stabilisation and association agreements with Western Balkan countries

The third generation AAs was instituted by launching so-called Stability Pact Agreements (SPA) in 1999 with the objective to repacify the region after the Kosovo war. At the founding conference, all Western Balkan countries except of Serbia and Montenegro (then FR Yugoslavia) and Moldova participated. Subsequently, Stabilisation and Association Agreements (hereafter SAAs) have been negotiated with all Western Balkan countries.

Table 1 gives an overview on the start of the negotiations of the SAA, their signature date and the entry into force. As shown in the table, SAAs were signed already in 2001 with Croatia and the Republic of Macedonia and in 2006 with Albania, and entered into force with Croatia and the Republic of Macedonia in 2005 and 2004, respectively. Since 2005, the EU is negotiating SAAs with Bosnia and Herzegovina, Montenegro, and Serbia (talks were suspended in May 2006 for not cooperating enough with the UN war crimes tribunal in The Hague).

[14] European Neighbourhood Policy was developed by the EU in 2004, with the objective of avoiding the new dividing lines between the enlarged EU and the EU neighbours. Through the ENP, the EU offers to the neighbouring states a deeper political relationship and economic integration, depending on the effective sharing of common values (European Commission, DG External Relations, 2007).

Table 1: Overview on SAAs

Event	Croatia	Republic of Macedonia	Albania	Bosnia and Herzegovina	Serbia	Montenegro
SAA negotiations start	2000	2000	2003	2005	2005	2005
SAA signature	29. 10. 2001	9. 4. 2001	12. 6. 2006	Expected 2007	Expected 2007	15. 3. 2007
SAA entry into force	1.2.2005	1.4.2004	Pending	-	-	-

Source: According to the European Commission, DG Enlargement (2007).

Differently from the first four EU enlargement rounds[15] and similarly to EU enlargement by the CEECs, the EU has defined a pre-accession strategy for the Western Balkan countries, including compliance with the *acquis communautaire*, its promulgation in the cooperating states' legislation and other formal preconditions.[16]

Each country-specific SAA is tailored according to the needs and capacities of each signatory country. Nevertheless, all SAAs have three main common objectives: the stabilisation and transition to market economies, the promotion of regional cooperation and the prospect of EU accession. By signing an SAA, the Western Balkan countries commit themselves to completing a series of reforms to meet EU standards, with a view to achieving closer association with the EU, and eventual integration into the EU.

[15] Great Britain, Ireland, Denmark entered the EU in 1973, Greece in 1981, Spain and Portugal in 1986, Finland, Sweden and Austria in 1995, CEEC + Malta + Cyprus in 2004, Bulgaria and Romania in 2007.

[16] Preconditions for EU accession is the provision of the Treaty of the European Union, Copenhagen criteria, Madrid criteria, plus economic and political conditions defined at the Council Summit in April 1997. The pre-accession strategy for Western Balkan Countries was further reconfirmed at the Feira Summit and Zagreb Summit in 2000, as well as the Thessaloniki Summit in 2003.

Common commitments of the signing countries concern gradual compliance with EU legislation in a number of areas, the gradual establishment of a free trade area with the EU and cooperation with the EU on issues such as justice, visa, border control, illegal immigration, money laundering, transport, energy, etc. Furthermore, to ensure sustainable stabilisation in the Balkans, a very important issue required by the EU in the SAAs is regional cooperation between signing countries and their neighbours in the region on, for example, trade and free movement of workers, services and capital. This is different from, and additional to, the issues treated in the EAs for CEECs. Overall, the mechanisms of the agreements allow the EU to help countries set priorities and shape reforms to conform to EU models, and to monitor their implementation.

From an incentive perspective, the EU offers a mixture of several trade concessions (Autonomous Trade Measures) as well as financial and technical assistance (Instrument for Pre-Accession Assistance[17]) comprising assistance for transition and institution building, cross-border cooperation, regional development, human resources as well as rural development.

To ensure that the requirements anchored in the agreement will be met, the EU conducts a thorough preparation and negotiation process with the signatory country, and assesses the readiness of each of the "SAA countries" through Annual Progress Reports. The SAA is, therefore, similar to the EA signed with the CEECs in the 1990s, giving them the perspective of EU accession. Although, there is no clear notion of an automatic accession to the EU in

[17] From January 2007 onwards, the Instrument for Pre-Accession Assistance (IPA) replaced a set of European Union programmes and financial instruments for candidate countries and potential candidate countries, namely PHARE, PHARE CBC, ISPA, SAPARD, CARDS and the financial instrument for Turkey. The programme CARDS applied to Albania, Bosnia-Herzegovina, Croatia, Serbia with Kosovo, Montenegro and Macedonia.

the SAAs[18], this perspective is underpinned by the fact, that the relations with the SAA countries are covered by the Enlargement Directorate-General of the European Commission rather than the External Relations Directorate-General covering relations with all states in the world except candidates and potential candidates for membership. Therefore, the SAAs represent the first stage in the accession process for the western Balkan countries, creating a contractual relationship between each of them and the EU.

Croatia submitted its application for EU membership on 21 February 2003, and it was granted EU candidate country status by the European Council on 18 June 2004. The European Council decided on 3 October 2005 to open an accession negotiation process with Croatia. Macedonia applied for EU membership on 22 March 2004 and the European Council granted a candidate country status on 15 December 2005. Albania, Bosnia and Herzegovina, Montenegro and Serbia including Kosovo under United Nations Security Council Resolution 1244 were granted a status of potential candidate countries.

- European neighbourhood policy agreements

In the framework of the European Neighbourhood Policy, the EU concludes AAs falling within the scope of the Euro-Mediterranean Partnership, and Partnership and Cooperation Agreements.

Within the Euro-Mediterranean Partnership, the EU concluded AAs with nine southern Mediterranean countries replacing the Cooperation Agreements of the 1970s.[19] While the AAs vary

[18] For example, Article 8(2) Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part only stipulates that "... The political dialogue is intended to promote in particular: – Albania's full integration into the community of democratic nations and gradual rapprochement with the European Union;".

[19] Such AAs are in force between the EU and Tunisia (since 1998), Israel (2000), Morocco (2000), Jordan (2002), Egypt (2004), Algeria (2005), Lebanon (2006) and on an interim basis with the Palestinian Authority (1997). Negotiations with Syria were concluded in October 2004.

from one country to the other, they have certain aspects in common, such as political dialogue, respect for human rights and democratic principles, social and cultural cooperation, cooperation to fight fraud, money-laundering and terrorism, and wide-ranging economic cooperation. The newest generation of AAs with Mediterranean partners are inspired by the EAs in that they link a gradual establishment of free trade with the respective partners' approximation of their legislation to that of the EU as well as the development of the necessary administrative and judicial capacities to apply and enforce these new national laws. However, unlike the EAs and SAAs, the AAs entered with the Mediterranean partners do not call for coordination of foreign or security policies, nor do they provide, directly or indirectly, any kind of perspective for EU membership, as the signing countries – being non-European countries – cannot join the Union under the present EU Treaty.[20]

Lastly, the EU has also concluded Partnership and Cooperation Agreements with former Soviet Union countries.[21] The PCAs focus on economic cooperation and political dialogue. These Agreements remain distinct from the process of enlargement, although it is not prejudged, in particular for European neighboring countries, how their relationship with the EU may develop in future.

1.1.2.5 Conclusion

For the first generation of AAs with Turkey, Malta and Cyprus, the focus was mainly on the economic area and the creation of a customs union between the EU and the signing countries. Political

[20] See Article 49 TEU on principal conditions for the EU membership application.

[21] There are eight Partnership and Cooperation Agreements already in force, namely, with Moldova (1998), Ukraine (1998), Belarus (1997, suspended for non-democracy), Georgia (1999), Armenia (1999), Azerbaijan (1999), Russia (1997), and Kazakhstan (1999).

objectives played a subordinated role and EU membership was rather seen as a long-term vision.

By contrast, the second generation of AAs, the so-called Europe agreements, was highly inspired by EU membership (although initially not being explicitly anchored in the EAs) besides a strong focus on the establishment of functioning market economies and stable democratic systems. However, in order to accede the EU, a wide set of political, economic, legal and administrative conditions was imposed upon the Central and Eastern European countries by the EU. In order to support this change process, the EU assisted the CEECs with financial and technical assistance.

The third generation of AAs with the Western Balkan countries, the so-called Stability and Association Agreements, do – in addition to economic and political objectives similar to the second generation AAs – strongly focus on the stability in the region by means of the EU condition to develop and strengthen sustainable regional cooperation. Although EU membership is outlined in the SAAs in a relatively distinctive way, it can be expected that the EU (pre-) accession process will take longer compared to the CEECs, at least for some of the Western Balkan countries. To reach EU membership, the EU has extended its accession conditions in a more determined and comprehensive way compared to the second generation AAs and they are subject to intensive monitoring.

Although the EU concluded AAs-type contracts under the framework of the European neighbourhood policy with Mediterranean and former Soviet Union countries, they are not directly comparable with previous AA generations, particularly the second and third generation. The reason is that they have a strong focus on economic and political issues, but EU membership is principally not foreseen, at least not for the non-European countries.

1.2 Accession

1.2.1 Legal basis

Accession of a European state into the EU is governed by Article 49(1) of the Treaty on the European Union (hereafter TEU) which at the same time specifies the conditions of the membership. In line with this article, "Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members."

This implies that a state asks for the EU membership, not for the membership in the respective three European Communities. Becoming a member of these Communities arises automatically after acquiring the EU membership.

Article 49 defines the following conditions of the EU membership:

- The applicant must be a European state
- The applicant has to respect Article 6(1), i.e. the fact that the EU is based on principles of freedom, democracy, rule of law and respecting human rights and fundamental freedoms, principles which are common to all Member States; the Union respects fundamental human rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and as they result from constitutional traditions common to all Member States as general principles of the Community law
- The applicant has to follow the requisite procedure

Article 49(2) of TEU implies that conditions of adoption and adjustment of EU founding agreements are the subject matter of an agreement between the Member States and a state asking for

accession. This agreement will be submitted for ratification to all the contracting states in accordance with their relevant constitutional provisions. The EU accession has not been decided by the EU (its bodies, even though they significantly participate in the procedure of the applicant assessment) but the individual Member States. This is just another evidence of non-existence of the EU legal personality.

EU accession, according to Article 49(1) does not mean the membership origination as such in the EU as the EU is not a classic international organization with the legal personality. Only the three European Communities have the legal personality and thus, when speaking about the EU membership, it is considered the membership in these three Communities. This is illustrated also by the fact that some European countries (e.g. Cyprus – 1990, Malta – 1990, Turkey – 1987) applied for membership before the Treaty on EU came into effect, so they asked for the membership in three Communities. At present their application is interpreted in accordance with Article 49(1) as an application for the EU membership en bloc, including the accessing to respective Communities.

1.2.2 Accession process

- Application addressed to the Council
- Opinion of the European Commission upon the request of associated country for the EU membership
- Assent of the European Parliament – absolute majority of all MPs
- Voting in the Council – unanimity

1.2.3 Content of membership

The membership contains reciprocal rights and obligations of both parties: a member and an organization. The rights and

obligations of Member States have a certain structure. Some of them refer to the relations of Member States to the EU and some of them are included in the relation of Member States to the Communities. The membership is a balanced state of rights and obligations of its participants – Member State's obligations correspond to competencies of the EC and vice versa – obligations of the Member State correspond to the rights/competencies of the European Community.

Obligation of loyalty to the EC (meant as European Economic Community) ranks among the most significant obligations. It is anchored in Article 10 of the Treaty establishing EC: Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

This obligation is also called the principle of fidelity of the Member State to the EC. It implies obligations resulting from the primary and secondary law, also the duty to support the EC while performing its tasks as well as a negative duty – *non facere* – to abstain from doing anything which could jeopardise achieving the objectives of the Treaty establishing European Community.

On the other hand, a Member State has a right corresponding with this duty, which is stated as the obligation of the EU to respect national identities of the Member States (Art. 6 (3) of TEU). Following it, Article 5 of TEC can be quoted: "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by

reason of the scale or effects of the proposed action, be better achieved by the Community".

This implies that the EC bodies which are identical with the EU bodies are obliged to respect legitimate national interests of the Member States.

The other important rights and obligations concerning the EU membership include: bindingness of the EC/EU law in relation to the law of the Member States (supremacy/primacy), obligation to respect fundamental human rights and freedoms, principle of equal treatment, principle of flexibility, principle of closer cooperation etc.

1.2.4 Accession criteria

At the **Copenhagen summit** in June 1993 the European Council pointed out as follows: "the countries in Central and Eastern Europe that so desire shall become members of the Union. Accession will take place as soon as a country is able to assume the obligations membership by satisfying the economic and political conditions".

The Copenhagen summit set out the following criteria for gaining the EU membership:

- The stability of institutions guaranteeing democracy, the rule of law, respect for human rights, protection of minorities (**political criteria**),
- A functioning market economy, as well as the capacity to cope with competitive pressure and market forces in the single market of the Union (**economic criteria**)
- The ability to assume the rights and obligations arising from Community law, including the adherence to the aims of political, economic and monetary union (**ability to take over *acquis communautaire*).**

It is not a comprehensive summary of the so called accession criteria, as in addition to the Copenhagen criteria, at the Madrid summit in December 1995 the European Council defined other ones – complementary criteria, which are inevitable for starting the EU accession procedure. The Madrid summit highlighted the fact that a candidate country is obliged to adjust its administrative structures to ensure trouble-free implementing the EU policy. In other words – approximation of law itself is not sufficient unless there is adequately ensured its applying in practice through realization of the approximated legislation in legal relations and enforcement.

The stated facts were also highlighted at the **European Council summit in Luxembourg** in December 1997: transposition of *acquis* into the national law of an associated country is a necessary, however not sufficient prerequisite for the genuine application of the *acquis*.

Neither the EC legislation has been introduced out of nothing. It arises out of the legal system of each Member State and in some cases from the framework of international law.

The Commission held the view that for associated countries the primary challenge in taking-over legislative of the internal market does not lie in technical adjustment of texts of legal measures to be identical with the Community texts (transposition), but in adjustment of administrative systems and administrative capacities which are requisite to ensure functioning of legislation.

1.2.5 The latest accession so far – Bulgaria, Romania

So far the latest accession of Bulgaria and Romania in 1.1.2007 had its own development. These countries got reassurance that the EU takes them into account when planning the enlargement at the time of communication of big enlargement in 2002. The EU representatives offered them the precise timetable and requested the obligation to improve the judiciary systems and to reduce the corruption as well as other reforms.

In 2006, a year before the accession date, it was not sure that the countries were really ready to join but the EU could not have negated its previous statements. On the other hand the EU must keep its standards regarding the enlargement because of other countries interested in the EU accession. The solution came with the so called safeguard clauses.

The safeguard clauses are incorporated in the Protocol concerning the conditions and arrangements for admission of the Republics of Bulgaria and Romania to the European Union[22].

The postponement clause says that the accession of Bulgaria and Romania could be postponed by one year to 1 January 2008. However the conditions were not the same for Bulgaria and Romania. While in the case of Bulgaria it was necessary that the Council acted unanimously on the basis of a Commission recommendation, in the case of Romania, if there would have been observed shortcomings in the fulfilment of commitments listed in the Annex, it was sufficient that the Council acted by qualified majority. The reason for this was the state of readiness of those two countries at the end of negotiations in 2004. (The situation was slightly different in 2006 – Bulgaria seemed to be less ready while in 2004 it was Romania who was found to be less ready for accession.) This was the clause which was available before accession.

Of course now, after their accession it is more important what kind of instruments the EU can use currently towards Bulgaria and Romania in the case of their failure to be in compliance with the rules. The Accession Treaty provides the legal basis for taking protective measures against them in area of the economy, the internal market and in the area of justice, security and freedom within the period of 3 years after accession. (These clauses are included also in the Accession Treaties of 10 Member States joining in 2004. However it was never really discussed to use them.)

[22] OJ L 157/29, 21.6.2005

As for the economic area, the measures can be taken when a Member State has temporary economic difficulties experienced in one or more sectors as a result of inclusion of new members in the single market.

Regarding the single market area, the EU has the alternative to penalize the Member State and also to force it to comply with the EU *acquis communautaire*. Actually, for application of these instruments the EU does not need to use the clauses set in the Accession Treaty as a legal basis.

Firstly, the Court of Justice can run the infringement procedure against Member State failing to fulfil its obligations. The procedure can be closed by the period penalty payment or/and a lump sum.

Secondly, as a Member States Bulgaria and Romania know that the money flow from the EU budget can be stopped if they mishandle it because of corruption. As well as the financial means coming from the Structural Funds which can be used as a warning tool towards those states.

The measures which could be taken in regard to the justice area (these countries have difficulties with their judiciary systems) are connected more with the trust among Member States (the justice matters are managed in the regime of intergovernmental cooperation). Bulgaria and Romania can be punished in the way that the decisions of their courts on the EU law cases may not be recognized by the other Member States courts. They can be also excluded from common activities of other Member States within the 3rd pillar.

The Treaty on EU sets a legal basis for taking measures against Member States in the case of breach of the principles of freedom, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States[23]. According to the next Article of the Treaty[24] the Member State in which there is a clear risk of a serious breach of principles mentioned in previous sentence, can be even punished with the suspension of voting rights in the Council.

[23] Art. 6 of the Treaty on EU
[24] Art. 7 of the Treaty on EU

2

The Slovak way

2 The Slovak way

Slovakia's accession process into the EU cannot be perceived only as enumeration of technical steps which led to its EU membership. Each of the candidate countries experienced a lot of particular problems and the accession process was a result of political, economic and social circumstances at a particular time period. Without naming these particular circumstances the description of the entire process would not be complete and understandable. Therefore the possibility of using the Slovakia's experience in the accession process of other candidate countries remains more on the level of inspiration than in its replication.

The Slovak Republic's Eurointegration process started after political changes in former Czechoslovakia which occurred late in 1989.

2.1 Years 1993-1995

2.1.1 Europe agreement

The official name of the document representing the first formal step to the Slovakia's entry into the EU was Europe Agreement (hereafter EA) establishing the association between the Slovak Republic on one side and European Communities on the other side. (The original Europe Agreement concluded between the EC and the former Czechoslovakia was not ratified in consequence of separation of the Czechoslovak federation and therefore it did not come into force.)

This Agreement was signed on 4 October 1993 in Luxembourg and came into effect on 1 February 1995, after ratification by national parliaments of the EU Member States and the National

Council of the Slovak Republic. The agreement was concluded for indefinite period with the possibility to cancel it by any of the parties by a form of notice. In the Slovak Republic it was published in the Collection of Laws as an Announcement of the Ministry of Foreign Affairs No. 158/1997, two years after having taken effect. [25]

To clarify the status of the EA it is necessary to point out the fact that from the beginning it could not be the source of the domestic legal order (and thus directly effective in the Slovak Republic's territory) because before 1 July 2001 the Constitution of the SR did not include the so called general reception clause (only a clause concerning agreements on human rights and fundamental freedoms) in relation to all international agreements ratified and declared in a way stipulated by law and European agreement was thus "a legal norm of another legal system". The general reception clause existed before 1 July 2001 only in case of international agreements on human rights and fundamental freedoms which were ratified by the SR and declared in a way stipulated by law. The question of reception of international agreement provisions was at that time the subject of many professional discussions and there was a question to what extent the Europe Agreement was binding for subjects of the domestic law – i.e. mainly for natural persons and corporate entities. However, in several particular legal regulations there existed a special – particular reception clause stipulating the use of provisions of law unless international agreements stipulate otherwise. In other words: international agreements, including the Europe Agreement, have priority over those legal norms of the internal law which are in contradiction with them.

The Europe Agreement concluded with Slovakia had a similar structure as the EAs of other associated countries. The primary

[25] The Czech Republic signed the Europe Agreement on 4 October 1993, came into force on 1 February 1995, however immediately was published in the Coll. of Laws under No. 7/1995.

importance of association consists in the development of market economy principles with a prospect of approaching to the EU internal market (forming the free trade area, approximation of existing and future legislation mainly in the following areas: customs law, company law, including accounting, banking law, tax law, law concerning intellectual and industrial property, protection of economic competition, consumer and health protection, technical norms, transport, environment). The Europe Agreement primarily focused on measures concerning the internal market with a view of taking-over the entire *acquis communautaire*.

The EA included a preamble, political and commercial part and Annexes which set out trade regime with so called sensitive items (steel, textile, agricultural produce) which were limited by the EU side regarding their volume. In the political part of the agreement there was highlighted the fact that both of the parties expressed their mutual will to continue in the process of harmonisation and in political dialogue, as well as in cooperation in the area of culture, science and technology. In terms of business, the standard objective of EA was confirmed – forming the free trade area between the EU and the SR. The concessions which both sides agreed to provide to each other with the aim of gradual elimination of tariff as well as non-tariff barriers in the reciprocal exchange of goods are also included in this part. The concessions had an asymmetric character, i.e. at the beginning the EU opened its markets to Slovak export more than the SR did to the import from the countries of the former "European 15". The commercial part also modified a lot of sensitive items, customs tariffs and preferential links.

Fulfilment of the Europe Agreement was supervised by the Association Council established within its framework. The Association Council also reviewed other bilateral or international issues of the common interest. It was comprised of the Council of European Union members – Ministers of Foreign Affairs,

a representative of the European Commission and the Slovak Minister of Foreign Affairs. In cases defined by the Europe Agreement the Council could adopt decisions binding for both parties. The Association Council held sessions once a year in Brussels or Luxembourg. The meetings themselves were more of a formal nature, however, a good occasion to review the development of relations for the previous year, or interpreting issues on the highest political level.

The body supporting the Association Council, the Association Committee, consisted of the representatives of the EU Council, European Commission and the Government of the SR on the level of the senior officials. They were also meeting once a year alternately in Bratislava and Brussels for one day. For specific areas of cooperation between the EU and SR there were created Association Subcommittees comprising representatives of the Commission's General Directorates and departmental ministers in the SR. The subject mater of the meetings was a discussion on particular problems in relations between the SR and EU in the area in question. Later the Subcommittee meetings focused more on monitoring the SR progress in approximation of legislation in the area covered by the Subcommittee. Gradually the subcommittees' structure changed so that they reflected the division of the EU legislation according to negotiation chapters. This system also included the EU and SR Joint Parliamentary Committee. In fact, it did not have any powers in terms of practical impact on fulfilling the agreement, however it had a significant position from the political point of view. It was meeting twice a year.

This agreement was unique in its character, content as well as strategic economic and political significance for the Slovak Republic. The preference framework of the Association Agreement to the benefit of the SR, which was manifested in particular by faster proceeding in customs tariffs reduction for exports from

the SR to the EU as compared to rate adjustments for import from the EU to the SR is stipulated in Article 68. According to this article, the companies in the SR were allowed to access the markets of EC public procurement enjoying the treatment that would not handicap them in comparison with the EC companies, from the date of taking effect of the Association Agreement; such an access to the markets of the SR's public procurement would be gradually enabled to the companies of the Community not established in the SR, at the latest by the termination of the transitional period (10 years).

The practical use of the Association Agreement and meetings of its bodies gradually decreased. Particularly after the membership talks, a new accession mechanisms were introduced, like screenings and others, and the core of contacts between the SR and EU moved to these forums.

In parallel, the institutional prerequisites for ensuring the increasing tasks concerning the SR integration into the EU started were built. The Government Decree of the SR No. 137/1995 imposed the obligation for ministers and heads of the other state administration bodies to create departments of European integration within the framework of their functions. Their primary scope was supposed to be regulation and coordination of Eurointegration activities within the given department. In a view of insufficient execution of the Decree in question and increasing package of tasks, the Government of the SR adopted Decree No. 90/1996 which readjusted reinforcement of European integration departments and their establishment where they were missing. The complex of arrangements of institutional provision of the European integration at the expert level was completed by the Decree of the Government of the SR No. 52/1999 which imposed an obligation to "roof" activities of the European integration, approximation of law and technical assistance of PHARE within one department, preferably a section.

2.1.1.1 Legislative solution to approximation of law – approximation regulations

The so-called Approximation Regulations meant a compromise in the process of approximation of the SR's law with the EC/EU law. It is a type of a legal measure originated on the grounds of needs of the accession process which had not existed before. The adoption of an approximation regulation meant by-passing of the parliament and taking the legislative action only by the government.

The approximation as such was an international obligation of the Slovak Republic pursuant to the European Association Agreement concluded between the European Communities and their Member States on one side and the Slovak Republic on the other side.

In terms of the European law, the way how the associated countries take over the EC/EU legal acts was, basically, left on them. However, no domestic barriers of constitutional legal character were accepted as an "excuse" in case of non-fulfilling these obligations.

With regard to the fact that according to the Slovak legal order any obligations can be imposed only by law and the legislative process was too slow, inflexible and time-consuming, it was necessary to find a satisfactory solution to keep the speed of the integration efforts of the SR. The purpose of adopting the approximation regulations was to accelerate the legislative process and adopt the essential legal regulations in the process of law approximation.

In 2001 the Constitution of the SR was amended in a way that enabled the Government of the SR to issue Decrees of the government also for executing the Europe Agreement on Association. Following the Constitution, it is the right of the government to issue approximation regulations, not its

obligation. It is possible to impose obligations via approximation regulations.

Whilst the Constitution of the SR enacted the constitutional basis for adopting approximation regulations, particular conditions of their adoption were included in the Act No. 19/2002 Coll. of 18 December 2001 laying down conditions for issuing approximation regulations of the government of the Slovak Republic.

In terms of legal force, an approximate regulation has the character of the Decree of the Government of the SR, even though in line with the Constitution of the SR it is possible to impose obligation by it. Such a regulation cannot be contrary to the law. Since there is a regulation of lower legal force than the law, it is impossible to alter or cancel the law by an approximation regulation. It is possible by an approximation regulation to empower the relevant body for issuing an implementing legal act.

Issuing the approximation regulations was anticipated in particular before the Slovakia's entry into the EU. In overwhelming majority it related to cases of taking over directives which are the legal acts of the Communities' bodies that are binding as for the objective to be achieved and leaving the selection of forms and means how to achieve this aim on Member States. In the stage before the Slovak Republic joined the European Union, however, also EC regulations were approximated in this way, in addition to directives. The reason was the fact that preparation for the EU membership also required taking-over regulations which were not directly applicable in the Slovak Republic at that time.

Approximation regulation can be issued in all the fields set in the European Agreement, especially in these fields of law:

a) customs law,
b) bank law,
c) administration of accounts and taxes of companies,
d) intellectual property,

e) safety of workers,
f) finance services,
g) protection of customers,
h) technical standards and norms,
i) use of nuclear energy,
j) transport,
k) agriculture,
l) environment.

On the other hand, approximation regulation must not be issued in:

- basic human rights and freedoms

- state budget

- creation of a new state authority

- establishing new competences of a state authority

- another objects which have to be regulated only by constitution or law.

To summarize the advantages of using the approximation regulations, it is a shorter legislative process, faster transposition of directives and involvement of competent experts only.

2.1.2 Copenhagen accession criteria

As stated before, the so called Copenhagen Accession Criteria were political, economic, included the ability to take over the *acquis communautaire*, and were later complemented with the requirement to sufficiently adjust the administrative structure of a Candidate Country. Slovakia was not meeting political criteria in one period of the accession process, and more about the fulfilling the first three criteria can be found in the next chapters.

Regarding the fourth condition – creation of an effective structure of the state administration, practically it involved creation

of legal conditions for establishing new institutions (within 2000 – 2002 there were established e.g. Public Procurement Office, State Aid Office, National Agency for Regional Development[26]) or transformation of already existing institutions, above all ensuring their independent status, solving jurisdictional interdepartmental conflicts, ensuring personnel support (recruitment of expert staff – lawyers, economists, police officers), education (professional and language preparation, as well as preparation for negotiations, i.e. negotiation skills), equipment (appropriate hardware and software, specialized literature) and allocating financial funds for these activities.

In the documents concerning the progress of the SR in fulfilling the accession criteria (so called Regular Monitoring Reports from 1998 to 2002 when the last regular report was published) the European Commission repeatedly highlighted that there should not be just adjusting administrative structures in Member States structures at the ministerial level but also towards the subordinate structures – local administration bodies, as well as local self-government bodies since all of these organs issue acts which have to be in accordance with legal norms of the higher legal force.

Judiciary was a distinctive chapter. In addition to subjects responsible for creating legislation (committees of the National Council of the SR, members of Parliament, Government, Government Departments and other central bodies of the state administration, local administration bodies, local councils) there are also courts which are intensively engaged in application and interpretation of law, thus ensuring the unity of legal order. With the exception of discussing the independence of judges by cancellation of a 4-year trial period for judges, there was only

[26] The Public Procurement Office was established by the Act of the National Council of the SR No. 263/1999 Coll. on public procurement as amended as of 1 January 2000. The State Aid Office was established by the Act No. 231/1999 on state aid as of 1 January 2000.

little said about the competence of courts to apply the *acquis*. One aspect was the knowledge of Community law, another was the ability to actually apply its principles. Along this line, more interest should have been oriented towards the practice of the European Court of Justice (ECJ) since the ECJ decisions are a source of secondary law of the EU, in addition to regulations, directives, recommendations and opinions. Originally the approximation process focused exclusively on directives or regulations which were mistakenly considered to be the comprehensive list of the EU legal acts. If an associated country counts with its membership in the EU, ECJ resolutions must be taken into consideration during its preparation for entry.

2.1.3 Pre-accession strategy

In 1994 at the summit in Essen, the EU adopted the so called pre-accession strategy for the Countries of Central and Eastern Europe (CEECs). This strategy was founded on four basic elements:

1 **Fulfilment of Europe Agreements** (see the previous chapter)

2 **Forming a so-called structured dialogue between the EU and associated countries**

The structured dialogue represented a communication framework between the EU and associated countries, whose content involved establishing close institutional links in areas of common interest (associated countries become more familiar with EU's decision methods and mechanisms) via regular meetings at various levels – the level of Heads of States and Governments of associated countries and the EU Presidency and Ministers of Foreign Affairs, Justice and Home Affairs as well as European Commissioners responsible for the mentioned areas. Other priorities of mutual cooperation included e.g. fight against organized crime, exchange of information on asylum and

immigration issues. Gradually also other departmental ministers and commissioners started to meet. The Associated countries were thus allowed to participate in the EU activities even before the accession negotiations began.

3 Preparation of candidate countries for integration into the EU Single market

In November 1995 the Government of the Slovak Republic was delivered the White Book on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the EU. Following the White Book, 23 working groups were established and were responsible for implementing the EC/EU legislation into the legal order of the Slovak Republic.

Along with essential documents adopted at the level of the Government of the SR, the *National Programme for Aligning the Legal System on the Slovak Republic with EC/EU law in the Internal Market Area* (better-known as National Programme for the Internal Market) was approved by the Government Decree No. 99 of 4 February 1997.

National programme for the Internal Market structurally represented a mirror image of the White Book since it included 23 essential areas of the EC/EU law relating exclusively to the internal market. This National Programme was gradually updated by the government and later replaced by the National Programme for Adopting *Acquis Communautaire* (NPAA). The basic difference between the National Programme for Internal Market and National Programme for Adopting *Acquis Communautaire* lay in the fact that NPAA: 1. came from the document Partnership for Accession (not only from the White Book); 2. dealt with the approximation of the entire *acquis communautaire* (not only the internal market legislation); 3. considered the 3-pillar structure of the EU, i.e. internal market, common foreign and security policy and cooperation in the area of justice and internal affairs. The first version of NPAA was

approved by the Government of the SR on 26 May 1998.

4 Assistance to candidates through the PHARE programme

The PHARE programme originally came into existence as an immediate reaction to problems related to structural changes in Poland and Hungary, later it became one of the fundamental elements of the pre-accession strategy. Via PHARE the EU provided the partner countries with grants for assistance in the process of transformation of economy and democracy reinforcement. Within PHARE the community know-how was transferred to the beneficiary countries, including advising and training. Great importance was assigned to supporting the associated countries in the sphere of legislation harmonization, technical harmonization, including instruments and procedures of enforcing their application in practice as well as supporting reforms and judiciary.

On 27 June 1995 the Prime Minister of the Government of the SR V. Meciar at the European Council session in Cannes submitted the official application for the membership of the SR in the EU to the French president Jacques Chirac. The application was supplemented by the Memorandum of the Government of the SR declaring the strategic goal of the Slovak Republic to be the attainment of the EU membership approximately in 2000.

2.2 Years 1996 –1997

In early November 1996 the Government of the SR received a so called demarche from the EU – the Resolution of the European Parliament on the necessity to respect human rights and democracy in Slovakia.

On 16 July 1997 the European Commission submitted to the European Parliament its Opinions on the applications of 10 Central European and Baltic states for the EU membership. It recommended starting the accession negotiations for the EU

enlargement with 6 countries – Czech Republic, Estonia, Hungary, Poland, Slovenia and Cyprus. Slovakia together with other associated countries was not given such a recommendation. The EU Council in December summit in Luxembourg confirmed the Commission's standpoint.

2.3 Year 1998

On 30 March 1998 15 EU Member States and 11 applicant countries – Bulgaria, Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Romania, Slovakia, Slovenia – represented by Ministers of Foreign Affairs launched the EU accession process. The Slovak Republic was represented by Vice Prime Minister and Chairman of the Government Council for EU Integration Jozef Kalman. He presented fundamental documents of the process of approaching the EU – the Accession Partnership and National Programme for the Adoption of *Acquis Communautaire* in the Slovak Republic – to the EU Commissioner for External Affairs, Hans van der Broek. A day later on 31 March the accession negotiations with 6 candidate countries started in London. The remaining 5 countries formed the so called second group with individual approach in the frame of the Accession Partnership. As regards Slovakia, the EU focused on the support of political criteria in which Slovakia was falling behind (instability of constitutional institutions, shortcomings in the functioning of democracy...).

Already in several days – on 3 April 1998 with presence of 10 associated countries an analytical examination (*acquis* screening) which is a part of the enlargement process was launched.

From 25 to 26 September 1998 the elections to the National Council of the Slovak Republic took place. Jan Marinus Wiersma, rapporteur of the European Parliament for the SR participated as an observer. Mikuláš Dzurinda became a new Prime Minister. During his first visit to Brussels (the first foreign visit after elections)

Commissioner Hans van der Broek offered Slovakia formation of a high level working group with the aim to assist in re-starting and supporting Slovakia's preparation process for joining the EU.

The Regular Report of the European Commission on the progress made by the SR (Progress Report) towards the EU accession and the Composite Paper 1998 stated that the country's economy was close to the market economy though inadequate intervention of the previous government did not establish a functioning market environment. As a result of the Report the European Council at its summit on 11 – 12 December 1998 did not recommend opening direct negotiations on the EU accession with any of the candidate countries of the second group including Slovakia. At the same time the Council asked the Commission to elaborate progress reports on candidate countries for the Helsinki EU summit in December 1999.

2.4 Year 1999

The post-election period reflects a fundamentally different attitude of the new government towards the declared interest in the EU membership. With help of the High Level Working Group (led by the Deputy Director General of the Commission Francois Lamoureux and the Chief Negotiator of the SR Ján Figeľ) substantial changes were made in the fulfilment of political and economic criteria set out by the European Council in Copenhagen. Among the *Political Criteria* were – harmonization of the election law with the findings of the Constitutional Court and the conduct of the local elections (December 1998), direct presidential elections (May 1999 – termination of a 15-month period of the vacancy in Presidency), with the result of stabilisation of the political system. The adoption of the Law on the Use of Minority Languages in Official Communications brought into conformity the legislation with the Slovak Constitution, with international standards and recommendations of the OSCE, the Council of

Europe and the European Commission. To fulfil the *Economic Criteria* efforts of the Working Group concentrated on ensuring the macroeconomic stability and restoring internal and external economic balance. Important decisions were adopted in the area of effective restructuralisation and privatisation of the banking sector and strengthening of financial discipline in the enterprise sector. The State Aid Law was adopted, the Law on Technical Requirements and Product Conformity, the Public Procurement Law – all were the measures for improvement of the functioning of internal market as recommended by the European Commission.

On 29 September 1999 the State Secretary and Chief Negotiator with the EU Ján Figeľ officially announced the decision of the Slovak Government on the closure of V1 and V2 units of the nuclear power plant in Jaslovske Bohunice in 2006 and 2008. Their shut down was one of the preconditions for inviting the SR to the accession negotiations.

The progress was reflected in the second Regular Report published on 13 October 1999. The EC Report confirmed a considerable development in many areas and ranked Slovakia practically among the states of the first group of negotiating candidate countries.

On 10 December 1999 the summit of Member States in Copenhagen decided to invite Slovakia to the negotiations on the accession. At the same time two groups of candidate countries seized to exist. It was decided to start individual negotiations with each of the 12 countries.

2.5 Years 2000 – 2002

Accession negotiations started on 15 February 2000 at the Accession Conference in Brussels attended by Slovakia together with Latvia, Lithuania, Malta, Bulgaria and Romania. At the

introductory meeting of the Conference the Slovak Republic submitted its General Negotiation Position on the accession negotiations. At the same time it committed itself to harmonizing its legislation with the EU legislation and 1 January 2004 was set out as a reference date for the full adoption and implementation of *acquis communautaire*. This date also became a preliminary accession date for the SR.

Negotiation process

Acquis communautaire was divided into 31 chapters for the purpose of negotiations.

In the introduction to the book "Slovakia on the way to the EU" its authors Ján Figeľ (Slovak Negotiator, present EU Commissioner) and Miroslav Adamiš (Director General, Ministry of Foreign Affairs of the SR, later Slovak Ambassador to the EU, present Head of Cabinet of the Commissioner) write: "... Negotiations of the Slovak Republic with the EU were based on a constructive and realistic attitude. We bore in mind that participation in the integration process was our priority. EU integration was, to a certain degree, an answer to necessary economic and social reforms, to a necessity of security enhancement, but also regional development and environmental improvement. We realised that the EU accession meant adoption of the existing contractual and legal status of the Community with possible individual modifications and specific provisions for certain areas. The negotiation strategy of the Slovak Republic was aimed at securing favourable, acceptable conditions for EU membership including adequate participation in the administration and decision-making on common European affairs... Our concern was a joint accession together with the neighbouring countries in the region – the Czech Republic, Hungary and Poland – for different reasons. Beside political interests, from the point of view of Slovakia's position on decisive questions on the continent, it

was also an intention to maintain the advantage of the Czecho-Slovak Customs Union until the accession, to adjust the Slovak customs regime to Schengen conditions jointly with neighbouring countries, to enforce cross border regional cooperation. Our tactic was not to demand as much as possible and in as many chapters as possible, but to rationally concentrate on priority interests and sensitive issues and to enforce them with help of clear reasons, objective arguments and mutual confidence. In terms of results and implementation of the defined strategy, Slovakia had successfully accomplished its negotiation journey from Helsinki to Copenhagen after 34 months. The results reflect defined priorities and requirements for transitional periods are generally and in detail objectively comparable with results of the countries that started negotiations 2 years sooner. It is the results that are important, not gestures and rhetoric. The mutual confidence is very important in complicated negotiations, however it is not measurable. Slovakia gained confidence of the EU countries and it had gradually enhanced it. It had stopped to be omitted and neglected. In nearly 10 years Slovakia concluded a historic journey "from Copenhagen to Copenhagen". When in 1993 Heads of State and Government of EU countries determined membership criteria of future Member States, Slovakia started its independent journey to the fulfilment of these criteria. At the end of 2002 the European Council, in Copenhagen again, confirmed the accomplishment of accession negotiations with Slovakia and other 9 countries."

The festive moments in Brussels were replaced with everyday work. On 15 March 2000 15 Member State Ambassadors decided that the SR would start accession negotiations in 8 chapters of European legislation. On 28 March 2000 Ján Figeľ, Chief Negotiator, handed over the position documents for accession negotiations in 8 chapters representing the beginning of negotiations on the accession of the Slovak Republic into the EU.

The negotiations that followed took a form of intergovernmental conference. Contrary to usual international negotiations they had different contents, range and number of participants taking part in negotiations. Though there were separate negotiations with each of the countries it is not possible to speak about bilateral negotiations as the counterparts were representatives of 15 Member States led by a representative of the country in Presidency at the time. The European Commission played a role of active organizer and moderator of preparatory steps for individual negotiation rounds. Slovakia was a part of a 12-member group of negotiating candidates out of which 10 succeeded to close the negotiations at the end of 2000. Though each of the candidates negotiated separately, a lot of the agenda had a horizontal character. Informal negotiations, discussions, consultations taking place among candidate countries during the whole period of the accession process played an important part. A differentiated attitude helped Slovakia and other countries of the so called Helsinki group at the opening of negotiating chapters and also in negotiations. Slovakia did not plan to require derogations (exceptions) to the implementation of *acquis communautaire*, however, it requested a transitional period in those areas where it was necessary first to improve the efficiency of economy or to ensure extensive capital investments. It comprised also expenses of achieving compatibility and specification of sources to cover these costs. From the point of range and contents, the essential areas were those of internal market, transport, environment, energy, agriculture, regional policy and coordination of structural instruments. The strategy was to open as many chapters at the beginning as possible (half by the end of 2000 and other gradually by the end of 2001).

2000, 1st half – Portuguese Presidency

In March 2000 the Slovak Government approved the second revision of the *National Programme for the Adoption of Acquis Communautaire*. Besides the Accession Partnership, the National Programme followed

the EC Regular Report on Slovakia's progress made towards the accession (October 1999) and also other documents (documents of other state administration central bodies, government legislative work plan for 2000, comments of the European Commission of December 1999, conclusions of bilateral screenings). As regards the structure, a vertical division of negotiation chapters was applied and thus reflected the structure of the accession negotiation process. The document had two volumes – Volume I represented the National Programme itself divided into negotiation chapters. Each chapter contained: *Measures taken* (further split into Law Approximation and Administrative Structures); *Priorities* (further divided into short-term and mid-term priorities); *Administrative Needs*; *Financial Needs*. Volume II contained annexes (Accession Partnership; Legislative Process Scheme; Government legislative work plan for 2000; Common Opinion on Mid-term Economic Policy Priorities of Slovakia; Elaboration of EU Industrial Policy Principles applied on Slovak conditions, Employment Policy Plan for 2000 with a determination of the National Employment Plan, Social Insurance Reform Plan; National Environmental Action Programme II). The Vice Prime Minister of the Slovak Government for EU integration was appointed the National Coordinator of work related to the NPAA.

SR had opened the first eight negotiation chapters and 6 out of these were even provisionally closed. Chapters Small and Medium-sized Enterprises, Education and Training, Science and Research, Common Foreign and Security Policy, Statistics and External Relations did not require considerable changes of Slovak legislature, as integration of these areas in the EU had not reached such a level as it was in the chapters that followed. This was an encouraging start for Slovakia.

2000, 2nd half – French Presidency

Member States decided about opening next 8 chapters and the SR closed 4 chapters– Fisheries, Consumer and Health

Protection, Industrial Policy, Culture and Audiovisual Policy. By December 2000 SR submitted its negotiation positions in all the remaining chapters (it does not mean the same as "to open the chapter "). Despite the fact that at the beginning there were some time delays on the EU side, the programme determined for the French Presidency was fulfilled. In 2000 Slovakia opened 16 chapters thus meeting its internal goal – to open at least half of the negotiation chapters during the first year of negotiations. 10 chapters were closed, 6 remained opened with a requirement of further information or possibly seeking alternative solutions.

2001, 1st half – Swedish Presidency

The European Council in December 2000 endorsed the strategic document that had been prepared by the Commission – Roadmap – which defined a priority timetable in negotiations of the EU with candidate countries during the following 3 presidencies. At the end of the Swedish presidency Slovakia had 29 opened chapters directly related to the *acquis*, 19 chapters were provisionally closed. For example all chapters related to the internal market were closed, plus some containing requirement of transitional period (Freedom to Provide Services, Free Movement of Capital). The only chapter in which the deadline was not met was the chapter Environment. It was necessary to elaborate detailed financial and implementation plans for 21 directives with a focus on those where SR required transitional periods.

2001, 2nd half – Belgium Presidency

In this half-year the negotiation agenda reached a more demanding phase. More extensive chapters as far as the amount of legislation and the requirements of the SR were negotiated. Three other chapters were closed – Energy, Environment, and Financial Control. A time delay in the fulfilment of the negotiation agenda

appeared due to the events after 11 September when the attention concentrated more on the fight against terrorism and related activities. Despite this the EU summit in Laeken ranked Slovakia among 10 candidate countries with a supposed entry date in 2004 if they maintained the speed of progress in negotiations.

2002, 1st half – Spanish Presidency

In this period Slovakia provisionally closed 4 demanding chapters– Taxation, Transport policy, Justice and Home Affairs, Institutions. It also managed to close chapters Agriculture – Veterinary and Phytosanitary legislation. Under this presidency preparations of the Accession Agreement were launched.

2002, 2nd half – Danish Presidency

All "non-financial" chapters were closed by October – Regional policy and Competition Policy. Under the Danish Presidency the negotiations in sensitive chapters with financial impacts were terminated – in the horizontal part it was chapters Agriculture and Budget. The objective of Slovak negotiators in these chapters was to ensure the balance of rights and duties following from the EU membership, to ensure the positive budget balance in the first years after accession (more favourable in comparison with the period before the accession) and to achieve such a combination of individual factors as production limits, direct payments, financial means for rural development, budget contribution and other compensations, which would ensure competitiveness of Slovak farmers and food producers and acceptable impacts on consumers and the macroeconomy of the country. The negotiations in the last chapter Miscellaneous were also important – questions which are part of the EU legislation but were not included in previous chapters (EU funds contributions, preconditions for entering the European Central

Bank and European Investment Bank, protective measures for fulfilment of membership duties).

Based on the assessment of Slovakia's progress made in the fulfilment of accession criteria, the Commission recommended closing the accession negotiations with Slovakia by the end of 2002. This standpoint had been consequently confirmed by the European Council at its extraordinary session in October. On 20 November 2002 the EP in Strasbourg by an outstanding majority approved a resolution on EU enlargement inviting Member States to set out the entry date at its summit in Copenhagen for 1 May 2004 at the latest. Following these steps the Council of EU set the entry date for new members on 1 May 2004.

During the 2nd half of 2002 Slovakia opened the remaining 2 chapters and closed 9 thus together with 9 other candidate countries accomplishing the accession negotiations at the European Council summit in Copenhagen.

2.6 Year 2003

The Accession Agreement was signed on 16 April 2003 in Athens. Its signature was preceded by an assent of the European Parliament which had with a large majority approved the entry of all 10 candidate countries into the EU. 521 MPs voted for the membership of Slovakia, 21 voted against and 25 abstained. The EU Council (Foreign Ministers of Member States) also approved the accession of new members. After the Accession Agreement had been signed the ratification process started in all Member and Candidate Countries which was to be concluded so as to meet the EU accession date of 1 May 2004.

On 17 February 2003 Slovak President R. Schuster announced the referendum on EU accession for 16 and 17 May. The referendum question was: „Do you agree that Slovakia becomes a Member

State of the EU?". 52.15% of qualified voters participated in the referendum, 92.46% of them supported the accession. Slovak Government allocated 50 million SKK for a pre-referendum campaign. It was a large-scale campaign – electronic media – TV, radio, internet, conferences, workshops, seminars and NGO's small projects – as the previous experience with referendum turn-out was negative – none of the referenda thus far was successful due to insufficient turn-out of voters.

2.7 Year 2004

In front of the European Parliament building in Strasbourg on 1 May 2004 the national flags of Cyprus, the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia were raised in observance of the new Member States.

2.8 Negotiated transitional periods for Slovakia

This part contains a brief overview of the transitional periods that Slovakia negotiated in the individual chapters.

Chapter 2 – Free Movement of Persons

7-year transitional period (structure 2-3-2 years) to protect the labour market of Member States. During this period all Member States may apply internal restrictive measures towards workers of other Member States. The model is flexible. This means that the decision on the protection of the labour market is up to each of the Member States. The need to apply restrictions in the access to the labour market is to be checked, first after 2 years, then after 3 years. After 7 years the transitional period expires.

The transitional period was adopted horizontally for all CEECs. Some Member States have not applied transitional period for new Member States since their accession (Great Britain, Ireland, Sweden, and Denmark), other countries cancelled the measure on the basis of 2-year experience (Belgium, Finland, Greece, Spain, Italy, Luxembourg, Portugal, and Holland). Germany and Austria have been applying a 7-year transitional period in full extent. The measures could be reciprocal.

Chapter 3 – Freedom to Provide Services

Germany and Austria worrying about cross-border provision of services have been applying internal measures in the area of free movement of Slovak workers providing certain types of services. This transitional period is being applied in accordance with a transitional period restricting free movement of employees generally. Types of services are enumerated – these are mostly services in the construction industry, cleaning, gardening, security services and home nursing.

Chapter 4 – Free Movement of Capital

Slovakia negotiated a 7-year transitional period for a possibility of purchasing agricultural and forest land into private hands or for enterprising for all EU citizens. This period may be extended by further 3 years. This ban does not concern individual farmers allowed to purchase land after 3 years that they had settled in the SR and started their business in the area of agriculture and on the leased land.

Chapter 6 – Competition Policy

The most discussed form of state aid was the tax relief. Slovakia negotiated 2 transitional periods for state aid provision

in sensitive sectors for Volkswagen, a.s. Bratislava (until 2008 up to 30% of lawful investment costs) and U.S. Steel, s.r.o., Košice (until 2009 provided the overall assistance will not exceed 500 million USD).

Chapter 10 – Taxation

Transitional period related to the VAT – 1-year transitional period for the preservation of the decreased VAT tariff rate for gas and electric energy; 5-year transitional period for the preservation of decreased VAT rate for thermal energy (especially taking into account social impacts on the citizens); 4-year transitional period for the preservation of a decreased VAT rate for constructions and construction works related to housing. These transitional periods were not used as Slovakia had undergone a tax reform uniting the VAT at 19%, so the decreased rate was not necessary. SR has negotiated a permanent exemption for the application of a limit of 35 000 € of annual turnover and up to this amount entrepreneurs are not obliged to register as VAT payers.

Transitional period for excise duties – 5-year transitional period to reach a minimum excise duty on cigarettes (a schedule for tax increase was set up to reach the height harmonised with the EU legislation); a permanent exemption for floricultural distillation of fruit (50 l of fruit spirit per farmer and household will be taxed up to maximum 50% of standard rate of spirit excise tax).

Chapter 22 – Environment

In terms of implementing the European standards, the greatest demands are on both the state budget and on entrepreneurs, especially in the environmental area. Slovakia had asked for 10 transitional periods, in three cases it decided not to use this possibility, but to attempt for harmonisation with EU directives in longer period as enabled by the relevant European legislation.

Air protection – transitional period for petrol storage at petrol stations and its distribution from terminal units to petrol stations (high costs of necessary modification), deadline by the end of 2004, eventually 2007.

Waste treatment – transitional period for dangerous waste incineration plants and industrial waste incineration plants (by the end of 2006); transitional periods for package recycling and package waste recycling (by the end of 2007).

Water protection – transitional period for municipal waste water treatment plant (by 2015, according to the rural agglomeration size), modernisation and construction of waste water treatment plants including sewage treatment; transitional period for pollution by dangerous substances discharged into the water environment (by the end of 2006), observance of emission limits pursuant to the list of the relevant directive.

Industrial pollution inspection – transitional period for integrated prevention and inspection of industrial pollution (by the end of 2011), a complex air monitoring and protection against dangerous substances; transitional period for emissions of certain pollutants by 3 big incineration facilities (by the end of 2007).

3

Case study

3 Case study: Antimonopoly Office of the SR and its way during the association and accession process (Negotiation chapter 6 Competition)

The Antimonopoly Office of the Slovak Republic as a central state administration body was established in 1991. Its role is to intervene against competition restriction by the undertakings – against agreements restricting competition, abuse of a dominant position and to take preventive control over the market structures through the assessment of concentrations. The AMO may sanction also the conduct of other state authorities or municipality bodies when distorting the competition conditions.

The work of the AMO is of the expert-analytical nature, followed by the issuing of the decision. The AMO's interventions should sensitively fine-tune the operation of market mechanism.

The independency of the AMO is ensured through the way of appointing the Chair (Chairwoman at the moment) and creation of a body competent to decide on appeals against the decision of the AMO, as well as the legal possibility to bring an action against any decision of the body before the court.

The chairwoman is not a member of the government but she has the right to sit at the meetings of government. AMO has around 66 employees now – 63% of them are economists and 20% lawyers.

1991

The Antimonopoly Office of the Slovak Republic (further AMO) as a central state administration body was established in 1991 (at that time Slovakia was still a part of Czechoslovakia and the name of the Office was the Slovak Antimonopoly Office). The first Act on Competition – Act No. 63/1991 on Protection of Competition which laid down the rules concerning the cartels (agreements restricting competition), dominant position of undertakings and mergers was adopted.

1992 – 1993

The political changes took place in Czechoslovakia, the Slovak Republic was established. The AMO was at that time more oriented towards the OECD integration than the EU integration.

1994

One of the priorities of the AMO became a close communication with the DG Competition at the European Commission (meetings of experts, stages of employees of the AMO in the DG Competition) on the basis of European Agreement (Association Agreement between Slovak Republic and European Community and their Member States) signed in 1993. The articles on competition were the part of the European Agreement (further EA only).

The AMO took part in PHARE programmes aimed to support the implementation of EA.

The new Act No. 188/1994 Coll. On Protection of Competition was adopted. One of the reasons for its adoption was to harmonise Slovak competition rules with the EU competition rules (in compliance with the EA). Also the status of AMO was strengthened and its position in the privatisation process was defined (AMO was competent to give statements to privatisation cases).

On the basis of EA the Implementation Rules on Application of Competition Rules between the EU and SR were signed. The Implementation Rules laid down the mechanism for application the criteria for protection of competition set out in the treaties, the competences for assessing and decision making on anticompetitive practices, exchange of information, consultations and decision making within the Association Council.

1995 – 1998

Years characterised by stagnation of the SR in the integration process into the EU due to political reasons (1996 – EU's demarche concerning the necessity to respect human rights and democracy in Slovakia).

In 1996 the Association Council, a body established according to the EA, adopted a decision on the approval of Implementation Rules for the Application of Competition Provisions under article 64 (1)(i),(ii) EA. They contained the modification of criteria to be applied for the assessment of agreements restricting competition as well as cases of dominant position in the whole area of the EC or SR or a major part of this area that could unfavourably affect the trade between the EC and SR. The Rules determined the proceedings to be followed by responsible institutions – DG Competition and AMO for cases of anti-competitive practices, proceedings in case of positive and negative competition conflicts, ways of mutual collaboration, de minimis rule, mutual exchange of relevant information and proceedings for the search of mutually acceptable solution of the particular anti-competition practice and the way of decision making in controversial cases in the bodies set up by the EA. The rules came into effect on 1 January 1997. They had not been published in the Collection of Laws immediately so their applicability in the SR was questioned.

In that year further harmonisation of the Slovak competition law was under consideration, especially with regard to so called block exemptions, e.g. rules for exemption of some agreements restricting

the competition. Harmonising the provisions regarding procedural modifications of the third person rights protection and introduction of competition rules in sectors such as energy, telecommunications, water, capital market, banking, insurance, etc. was under way. The preparation of the above mentioned amendments was directly connected to recommendations arising from the White Paper.

AMO employees filled the parts on economic competition of the European Commission questionnaire which was supposed to be a background material for the elaboration of Slovakia's assessment as an associated country for accession.

1999

This year was a year of intensive harmonisation legislative activity of the Office.

Without AMO's involvement a provision on competition was included in the agricultural law. This provision excluded agreements on agricultural production of milk, fatstock, oil plants, grains, sugar beet, vegetable, fruit and potatoes which follow harmonisation of production and sales of these products for economically justified prices from the ban on agreements restricting competition, and this contradicted gravely the competition rules of the EU. It was necessary to cancel this provision as soon as possible. It was also necessary to introduce other institutes pursuant to the European competition legislation.

Preparation of a completely new law on competition to ensure more independence and update of the Slovak competition legislation with regard to the EU trends of development was included in the 2000 government legislative plan.

The EU Regular Report on the preparedness of the SR for the accession for 1999, where the Commission assessed Slovakia's progress, stated that the major part of antimonopoly provisions had been harmonised with the *acquis communautaire*, however

further harmonisation in the sphere of block exemptions and some other legal provisions was required. The Commission observed that there was a necessity to hire a number of qualified lawyers for the Office (during 1999 AMO hired another four lawyers, the total number of employees being 71 at the end of 1999).

In this period the key document for AMO was the already mentioned National Programme for the Adoption of *Acquis Communautaire*. The planned amendment to the law on the protection of competition was defined as a short-term priority, while the adoption of a completely new law was defined as a medium-term priority.

Relations of AMO with the DG Competition were a priority and already for the fifth time a conference on competition for representatives of the associated countries of Central and Eastern Europe and the DG Competition (already with the participation of Cyprus and Malta) was held.

2000

Slovakia was finally invited to negotiations. Chapter 6: Competition was open among the first chapters.

The priorities of AMO were OECD and EU integration. At the end of 2000 Slovakia became a member of OECD.

The EU Regular Report on the preparedness of the SR for the accession for 2000, where the Commission assessed Slovakia's progress, stated that the valid law on the protection of economic competition is to a large extent in harmony with the EC rules. Adoption of an amendment to this law was positively assessed. It eliminated the exemption from the ban on agreements restricting competition for farmers in agricultural production of milk, sugar beet, potatoes, fatstock, oil plants, grains, fruit and vegetable, it introduced the de minimis rule for the assessment of agreements restricting the competition, it introduced a new wording of a legal

institute of a negative certificate and modified the so called individual exemption from the application of general ban on agreements restricting competition in the compliance with the Community competition law. According to the Regular Report it was necessary to adopt secondary legislation concerning the calculation of the turnover and notification of concentration and to ensure further harmonisation, above all in relation to the policy in the field of group exemptions and with the development of *acquis communautaire* on vertical restrictions. According to the European Commission the AMO should have ensured that the anti-trust rules were effectively enforced and executed and give priority to cases that concerned the most serious law-breaking in the field of competition.

The key document in the accession process was the above mentioned National Programme for the Adoption of *Acquis Communautaire*. The short-term priorities of the National Programme for chapter Competition included the task to adopt an amendment to the law on the protection of competition and this was fulfilled. Its adoption meant further progress in the process of harmonisation of the Slovak competition legislation with the EU legislation. The adoption of a new law on the protection of competition became short-term task of the National Programme. The aim of the new law was to reflect the experience of AMO with application of the law in force as well as some modifications of the Community law in the interest of further approximation of the Slovak legal system to that of the EU. The adoption of the new law and its related regulations was supposed to accomplish the harmonisation of rules and proceedings in the area of competition with the EU competition legislation and to achieve full approximation with the *acquis communautaire* for the area of competition. The new law on the protection of competition was supposed to come into effect on 1 January 2001, however this was not possible due to the lengthy legislative process and it was postponed until 1 May 2001.

A medium-term priority of the National Programme for the Adoption of *Acquis Communautaire* for chapter Competition was to

adopt a decree on group exemptions for agreements restricting competition, supposed to come into effect on 1 December 2002. Preparation of this piece of secondary legislation followed from the EU requirements for inclusion of main principles of group exemptions from application of general ban on agreements restricting competition in the Slovak legal system.

In order to assess a draft law on protection of competition, the Office initiated three international activities. The first one was a discussion on the draft law with representatives of the DG Competition in Brussels where the representatives of the Office obliged themselves to incorporate their comments and elaborate the secondary legislation. The AMO requested assistance of a reputable foreign expert, former Director General of the Swedish Antimonopoly Office and the then Chairman of the EU working group on competition Mr. Jörgen Holgersson. The Chairman of the Office on the recommendation of DG Competition personally visited the counterpart offices in Portugal, the Competition Council and DG Trade and Competition. The second meeting of the Accession Conference took place in Brussels where 8 chapters were officially opened including chapter Competition. In its negotiation position the SR stated that the country was prepared to implement in full the *acquis* in chapter Competition by 1 January 2004. The new Law on Protection of Competition was supposed to ensure full approximation of competition legislation in the area of antitrust law for which AMO was responsible. The State Aid Office was responsible for the area of state aid.

2001

In 2001 there new competition legislation was adopted:

- Act of the National Council of the Slovak Republic No. 136/2001 Coll. on Protection of Competition and on Amendment of Act of the Slovak National Council No. 347/1990 Coll. on Organisation of Ministries and Other Central State Administrative Bodies of the Slovak Republic as amended.

- Decree of the Antimonopoly Office of the Slovak Republic No. 167/2001 Coll., which sets out details on calculation of turnover.
- Decree of the Antimonopoly Office of the Slovak Republic No. 168/2001 Coll., which sets out details on the conditions of notification of concentration.

Strengthening the AMO's independence

One of the objectives of the new Act on Protection of Competition was to strengthen AMO's independence and decision-making objectiveness by changing the way of appointing the Chair of the Office – on the basis of a proposal submitted by the Government, by the President of the SR for 5-years term of office. The act allowed the same person to be appointed only for two consecutive office terms with the taxative reasoning of his/her recalling.

Before, the Chair was appointed by the government and he/she was dismissible by the government – practically he/she depended on the government.

The Act was also to establish a new body – the Council of the Office.

The Council is a collective body of the AMO deciding on the appeal, prosecutor's protest, it reviews decisions apart from the appeal proceedings and it also decides on renewal of proceedings.

Before, it was the Chair of the Office who had the power to take decision on appeals against the decision of the AMO.

The Council is composed of seven members – Chair of the Office, Deputy Chair and experienced experts with legal or economic background who work with the AMO as externs.

Within the Negotiation position in Chapter 6 Competition the AMO undertook not to require any exemptions, or transitional periods in connection with transposition and implementation of competition *acquis communautaire*. In the course of 2001 the AMO had, regarding the additional questions of EC, continuously provided more detailed information on updating the exclusive and sole rights provided to individual subjects, on abolishing the state monopolies of commercial nature and on description of valid license system in the SR. In connection with this an indicative plan for adopting the EU secondary legislation, related to block exemptions of agreements restricting competition from legal prohibition and also related to the simplified proceedings on assessment of some concentrations, was approved. Upon request of EC a detailed structural review of decisions of the AMO issued in the course of 2000 was made and sent as a basis for assessing the implementation of the Act on Protection of Competition and preparedness of the SR in this area. It was not possible to preliminary conclude Chapter Competition in 2001 as it was still necessary to adopt certain measures regarding the state aid.

Assistance Projects at AMO

Three projects ran at the AMO in 2001.

NERA

The project organized by National Economics Research Associates (NERA) in partnership with the AMO was approved in November 2000. The British Know How Fund participated in financial aspect of realization of this project. The purpose of the project was to provide assistance and expert advice in technical competition questions and issues, dealing with the competition, institutional development and provided some study stays.

MATRA

The pre-accession project MATRA, run by the Dutch institution Center International in the name of Dutch Ministry of Economy and Dutch Ministry of Foreign Affairs was approved in September 2001. The purpose of the project was to increase the practical knowledge in the area of competition legislation, to assure unified interpretation and implementation of competition law within the AMO and to develop a communication strategy to help the AMO clearly define its position as a competition authority in its relation to expert and laic public.

PHARE

In 2001 the AMO cooperated with APS consortium (EU based) in a PHARE project "Legal Advice on Approximation of Legislation Focused on the Short-term and Medium-term Priorities of the Accession Partnership". EC started this project with the purpose to fulfil its obligations to provide technical assistance for the SR in the approximation process. The tasks of the APS consortium were to provide technical help to Slovak state authorities in approximation, to control the compatibility of Slovak draft laws with EC law with interest to fulfil the National Programme for Adoption of *Acquis Communautaire* and Accession Partnership, to assure materials and data, to supervise the preparation of concordance tables and to provide legal documentation. The APS consortium provided legal counselling mainly when drafting the law adjusting the so-called block exemptions. In the course of the year the competition experts from Germany and Belgium visited the AMO and provided the staff with advice.

The following table gives an example of training activities for the AMO employees. It was taken from the Assessment of Training the Staff at Central State Administration Bodies in the second half of 2001 in the framework of the integration process.

Activity	Institutional/ organisational arrangements	Financial arrangements	Number of employees involved in the educational process
- Language preparation – English and French - 30 July – 3 August: MATRA Project covered by the Dutch Government Grant –– visit of two experts focused on the specification of Terms of Reference and preparation of procedural and reference material - October: in the frame of cooperation with APS Consortium, meeting with expert Jukka Luostarinen on questions concerning the adoption of *acquis communautaire* regarding group exemptions - 10-13 October – accomplishment of collaboration of the AMO with APS Consortium at the conference in the High Tatras, lecture on the proceedings at the European Court of Justice, case study - 23 – 25 October: NERA seminar, focused mainly on questions of concentration and AMO cases - 12-13 November: a seminar of Mr. Russel Pittman from the U.S.Department of Justice devoted to the issues of predatory behaviour, secret cartel agreements, intersection of powers of the regulatory and antimonopoly offices and AMO cases - 17 – 19 December: seminar of Mr. Terry Lawrenc devoted to the training on preparation of annual operation plans and medium-term strategy of the Office	- Language preparation: 1.in October and November AMO arranged English language teaching for the employees interested in the premises of the AMO and during working hours - Besides this in the second half of year AMO financially contributed to employees attending English and French courses out of the office - MATRA Project– Dutch Government - APS Consortium - NERA – British Know How Fund - U.S.Department of Justice - Department for International Development in Great Britain and British Know How Fund	- Language courses: 1. costs of mass education of English language in October and November were fully covered by AMO 30 250,- SKK – Costs of individual courses were covered up to 70%, e.g. 11 412,- SKK for English language and 4, 970,-SKK for French. - AMO: 55 232.90 SKK, inviting parties	- Language preparation: ad 1 – 12 employees ad 2 – 7 employees (5 – EN, 2 – FR) - MATRA Project: all professional employees of the AMO (ca 40) - Meeting with Mr. Jukka Luostarinen – 8 employees - APS Consortium, High Tatras – 2 employees - NERA – all professional employees of AMO (ca 40) - Lecture of Mr. Russel Pittman – all professional employees (ca 40) - Training of Mr. Terry Lawrence – AMO management (ca 6)

2002

The act on block exemptions was adopted.

At the end of 2002 Chapter 6 was provisionally closed following intensive negotiations. In this context the common position of the EU was adopted. The SR accepted the *acquis communautaire* in Chapter 6 and declared its ability to implement it already before the entry into the EU, with two exceptions regarding the state aid in the form of tax relieves) in sensitive sectors (for Volkswagen, a.s. Bratislava by 2008 30% of justified costs and U.S. Steel, s.r.o., Košice by 2009 providing the overall assistance would not exceed 500 mil. USD), which were subject to the negotiated transitional period where the agreed measures were limited in terms of extent and time. It was stated, that the SR achieved a satisfactory level of approximation of Slovak competition law, while greater emphasis needed to be placed on tightening the sanction policy, where priority must be given to serious breaks of the competition rules.

2003

Another amendment of Slovak competition legislation in connection with new EC regulation on the implementation of the competition rules was made and the powers of AMO in regard to inspections within the investigation and sanction policy were strengthened.

In connection with the Commission monitoring report of November 2003 and in accordance with recommendations of the Commission, the AMO adopted an internal directive on the procedure for imposing fines.

The MATRA pre-accession project financed by a Dutch institution Center International representing Dutch Economy Ministry and Foreign Ministry was completed in 2003. The project resulted inter alia in preparation of manual for areas of agreements restricting competition, abuse of dominant position

and procedure, new logo of the AMO and new website of the AMO.

AMO prepared a twinning light project with the aim to run trainings for judges deciding the competition cases (in cooperation with the Ministry of Justice of the SR).

2004 – the year of Slovakia's accession

In February 2004 OECD wrote about AMO: "...it is active... but according to the existing legislation the tasks of AMO and some regulatory Offices in the different sectors (Telecommunication Office, Office for Regulation of Network Industries) are overlapping and the cooperation is not sufficiently developed. More over the actions against the decisions of AMO were successful because the judges are not experienced and they do not have the expert assistance."

The Commission's comprehensive monitoring report on Slovakia's preparedness for EU membership (November 2003), chapter Competition, states: "...In the sphere of competition policy, Slovak legislation covers the principles contained in the EC competition rules...On the other hand Slovakia must make sure that its legislation does not contradict the latest block exemptions on the part of the EC....Slovakia has already established all necessary implementation structures and AMO is up and running. However, it is still necessary to make a greater effort to increase the awareness of all entities on the Slovak market in the area of the competition rules and introduce a trustworthy and transparent competition structure. It is necessary to continue the development of special training of judges. The level of enforceability of competition laws is generally satisfactory...."

A new operation system was established through the ECN network (European Competition Network) at the end of 2002. A system of coordination of competition policy within the

European Community and a system of parallel competences of the European Commission and national competition institutions of EU Member States in the application of Articles 81 (agreements restricting competition) and 82 (abuse of a dominant position) of the EC Treaty were established in accordance with the relevant Council Regulation. The AMO became an integral part of this forum, whose task and goal is to create a specific basis for developing and maintaining common competition culture in Europe. During the course of 2004, employees of the AMO took part in several sessions of the ECN plenary committee and the advisory committee for concentrations, as well as in model training concerning inspections in business entities and sessions of the subgroup for the energy sector, the subgroup for liberal professions, the subgroup for beer distribution, and so on.

3.1 State aid

It is necessary to mention also the issue of state aid as this area was a part of the negotiation chapter 6 Competition. However, the AMO was never responsible for state aid and it never made any decisions on state aid in the SR.

The State Aid Office as a separate central body of the state administration was established in 2000 pursuant the Act on State Aid adopted in 1999. The Office had 35 employees.

Before 2000 the Ministry of Finance of the SR was in charge of state aid issues.

After establishment of the State Aid Office state aid could have been provided only after its assent.

The task of the Office was to establish a transparent notification system which would be fully compatible with the system in the EU. An important task was also strengthening the position of the Office and its administrative capacity.

In 2001 the Office elaborated a report on state aid provided in SR in 2001 and submitted it to the European Commission. The report was elaborated in compliance with the request of Commission.

Due to serious irregularities in the conduct of the State Aid Office the government asked the Minister of Finance (in September 2001) to prepare a plan for merging the State Aid Office with the Antimonopoly Office. The cabinet endorsed the plan in early February 2002, however the merger never happened.

The shortcomings in the work of the State Aid Office were: systemic deficiencies, misconceived concept of state aid, unclear priorities and criteria for the provision of state aid, poor organisational structure, insufficient record-keeping, absence of control, staffing, poor management, absence of a strategy for Office's institutional development.

State aid issues constituted an important part of Chapter 6 Competition, which was one of the most important chapters for Slovakia to be concluded prior the accession. However, the omnipresent problems connected with the provision of state aid represented a major obstacle that impeded the progress of negotiations in this chapter.

Slovakia finally negotiated two transitional periods in chapter 6 Competition concerning the part of state aid as mentioned earlier in this part.

The State Aid Office was abolished to date of accession – 1st May 2004 and the state aid issues were transferred again to the Ministry of Finance.

4

NEGOTIATION PROCESS

4 Negotiation process

This section will deal with the process and techniques of the negotiations between Serbia on the one hand, and the European Union, represented by the European Commission (EC), on the other, and it will focus on the negotiation efforts of the people sitting around the negotiation table as well as the preparation for the actual negotiations.

From the side of the Serbian Delegation, there are a number of points, which the Delegation must have clear in its mind before initiating detailed negotiations, namely what is the overall objective of the negotiations?

To begin with, Serbia needs to negotiate the Stability and Association Agreement (SAA), and only later will screening/ negotiations on EU Membership take place. Hence, at first, the overall objective of the negotiations is to agree on the SAA, and once that has entered into force, the objective of the negotiations will be to achieve EU Membership.

Having said that, when preparing for and conducting negotiations on the SAA, Serbia should also keep the objective of the future negotiations on EU accession in mind. In other words, already during the preparations and actual conduct of negotiations on the SAA, it is worth considering and determining own interests and negotiation objectives for the accession negotiations. – If this is not done, obligations (as well as rights) accepted during the SAA negotiations will be very difficult to undo or change in the later accession negotiations.

In the following we will review:

- The concept of "negotiations", the specificities of negotiations in and with the EU and the negotiation cycle

- What to consider when preparing for negotiations, in particular identifying "interests", determining "objectives" and formulating "positions"
- Starting negotiations and pre-empting rejections of initial positions
- Important aspects of preparing negotiation mandates/ instructions, including drafting instructions, ensuring coherence and formulation of instructions
- Some "rules of thumb" concerning the composition and behaviour of national delegations
- Some fundamental negotiation techniques, with particular focus on good negotiation practices and tools, which may increase Serbian delegations' influence on the proceedings
- Some observations from the 2004 round of enlargement negotiations

However, before going into the above listed points in more detail, a disclaimer must be made: "Negotiations" and "negotiation techniques" are *not* exact sciences. The success and outcome of negotiations will, irrespectively of what may be written in the following, always depend to a large extent on non-objective factors, such as the atmosphere in the place, where the negotiation takes place, or the skills and behaviour of the individuals representing their organisation or country. Having said that, there are a number of "good practices" and "rules of thumb" which, when followed, may help to lead to a successful conclusion on any given negotiation. This section of the handbook reviews the most important of these practices and rules of thumb.

4.1 The concept of "negotiations", EU negotiations and the negotiation cycle

The word "negotiation" can be defined as a process where two or more parties seek to reach a *joint* decision on matters of *common* concern or interest in situations where they are in actual or potential *disagreement or conflict*.

When translating this general definition to Serbia's current situation, the "joint decision" could be said to be the achievement of the SAA (and, later, Serbia's accession to the EU), and the matter of "common concern or interest" to be the enlargement of an area without war or war-like conflicts and of the common market as well as the increased influence on the international scene by being/becoming part of an enlarged united player (i.e., an enlarged EU).

But if the parties to a negotiation have common interests and all wish to arrive at a joint decision, one could ask, how the last part of the definition becomes relevant? How can there then be an "actual or potential disagreement"? The answer lies not in the overall objective of the negotiation, *e.g.* that the EU Member States on the one hand and Serbia on the other all aim at entering an SAA, but rather in the *conditions* (*i.e.* the rights and obligations of the parties) contained in the SAA or, later, for Serbia's accession to the EU.

While the above describes the general concept of negotiations, it does not, in our opinion, define fully the concept of "EU negotiations". One more element is missing, namely the *aim* of the negotiations: The aim of negotiations in the EU is, unlike some more traditional international negotiations, but rather like many negotiations in the private sector, normally two-fold: Namely to reach a *sensible and effective* result, which allows the parties to *maintain good relations* between them.

The first part of the aim of EU negotiations is absolutely crucial for the success of the EU: the agreements entered between the Member States, whether manifesting themselves in changes to the founding Treaties or in various legal measures (e.g. directives or regulations) must be

"sensible", in the sense that all parties must be able to, at least, live with the result; and

"effective", in the sense that the agreements must be implementable and enforceable in practice.

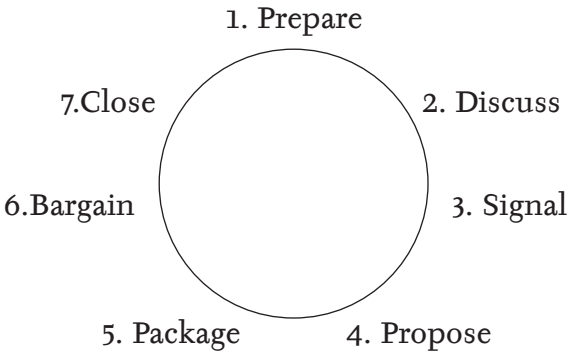
The second part of the aim, "maintaining good relations", is also highly important, because within the framework of EU decision-making, national representatives and experts meet regularly in Brussels or other EU locations either on a given dossier, but in most cases on several different dossiers. In order to ensure smooth co-operation and progress, even on difficult dossiers, it is important that all parties feel that they are treated – and that consideration is shown to their vital concerns – as equally and fairly as possible.

3rd countries, which deal with the EU, whether as trading partners or as prospective EU Member States, sometimes fail to understand this specificity of EU negotiations, and instead simply find the EU slow and inflexible to deal with. What a 3rd country should understand is, first of all, that when the EU expresses an interest, concern or position, this is, in itself, a compromise of 27 sovereign countries' interests, etc.; and secondly, that the interest/position expressed is sensible and effective, if not in the short term, then in the long term, and not only for the existing Member States, but also for the counter part.

It must be granted, however, that there are examples where the EU may have perceived the real situation/concern/interest of the third party wrongly. But this is not always, on the other hand, the EU's fault. There are also examples of the 3rd parties either

not being clear when communicating their needs or positions, or where they have expressed contradicting views in different, yet overlapping areas.

There may be linguistic or cultural reasons for such misunderstandings,[27] but often misunderstandings occur due to one or both parties having failed or made mistakes somewhere in one of the phases of the *negotiation cycle*:



The negotiation cycle shows the seven phases of any, so-called "principled negotiation", *i.e.*, a negotiation relationship characterised by, *inter alia*, being or aiming at becoming a long term relationship between the parties, with high long term risks and gains for the parties, and where the emphasis of the relationship/negotiations lies on problem-solving and finding win-win or at least mutually acceptable solutions rather than on winning and losing.

The first phase of the negotiation cycle is the *preparation* for the negotiation, and this is the phase most often neglected and, therefore, also the most frequent reason for parties finding the outcome of the negotiations unsuccessful. The below sub-

[27] For reasons of space, the cultural aspects of EU negotiations are not treated here.

sections 2, 4 and 5 focus on preparatory considerations, which need to be made, before going to the negotiation table.

The second phase, the *discussion* phase, may be spread over several separate meetings, where the parties exchange provisionally views, positions and, if the parties do not immediately agree, then explain the reasons why they cannot agree to the position of the other, etc.

More frequently than not, negotiations in – or with – the EU concern complex issues which are likely to impact significantly on the parties. For example, when EU Member States discuss the adoption of, say, an environmental directive, which sets out certain maximum levels of exhaust from cars, one could think that this is simply a question of agreeing on new exhaust levels and then approximating national laws to introduce the new exhaust levels. In fact, the consequences of such a piece of legislation raise many other issues, which need to be considered.

For example, there may be car manufacturers in some Member States, which due to previously adopted national environmental legislation have been obliged to develop, *inter alia*, new technology in order to lower the level of the exhaust of their cars. This will have caused cars produced by the said manufacturers to be more expensive than those produced by car manufacturers located in other Member States, which do not have similar legislation. In order to ensure equal terms of competition, the first mentioned Member States would support such a directive, if for no other reason, then to help the national car manufacturers.

On the other hand, for car manufacturers in other Member States without such legislation, the new directive on lowering the level of car exhausts will cause these manufacturer(s) to invest heavily to develop new, less polluting engines. This will lead to a rise in the price of the cars, potentially making them less attractive than cars made by manufacturers in the first mentioned

Member States, who already possess less polluting technology, with the result that the less developed manufacturers will sell fewer vehicles and need to lay-off workers; and this, in turn, will lead to a rise in unemployment stemming not only from the laid-off workers, but also among the suppliers of parts or raw materials as well as in other economic sectors, which depend on income from the workers, which have been made redundant, etc.

The governments in these latter Member States will tend not to support the new directive as a way to support the national car manufacturers and, thus, also in order to avoid the potentially negative effects of the new directive.

And then, just to complicate things, there will a number of other Member States, which do not have car manufacturers, but who believe that new, lower car exhaust levels will improve the environment in their countries. These countries will therefore most likely tend to support the proposed EC Directive; and among this third group of Member States, some will be more "fanatic" in the sense of wanting very low levels of car exhausts, while others will be more pragmatic and therefore express a higher degree of flexibility in the final determination of permissible exhaust levels. For these latter countries, the most important interest will be that some common standard be established.

The new law will also raise public administration capacity issues, such as how and by who will the control of car exhaust be done: new measuring technology will be needed as will development of measuring facilities and employment and/or training of staff to undertake the measurements, to ensure that vehicles exceeding the allowed levels are improved or taken out of commission, to issue and enforce possible fines, etc.

In other words, the discussion phase is normally where the parties (should) explain to the others their primary interests, concerns and needs, such as those mentioned in the above

example, and thereby establish a basis for the next two phases of the negotiation cycle, namely "signalling" and "proposing": Having heard the interests and concerns of the other parties, and compared them with own interests, the time has come to indicate on what points, they might be able to move (= *signalling*), and to propose compromises or alternative solutions to problems where Member States do not agree on the draft legal text (= *proposing*).

The *packaging* phase is where the negotiation starts in earnest. This is where the chair person and/or the parties try to combine all, or as many as possible of, the compromise or alternative proposals tabled so far. The parties will here start to prioritise their interests and needs, giving in on some points against obtaining other, for them, more important points.

Bargaining is the last negotiation phase before the negotiation is *closed*: Towards the end of the negotiation, namely when only a few remaining points are unresolved, the parties may defer to good old fashioned bargaining. Referring back to our above example, this may be where the parties seek to obtain as high or low exhaust levels for cars as possible, like 0,05 or 0,07 mg/litre of pollutant...and end up on 0,06 mg/litre. Another possibility could be, *e.g.*, that parties wanting a lower exhaust levels accept a higher level in return for an alternative solution, like the increasingly used "review clause" (*cf.* below in sub-section iii.).

4.2 Preparing for negotiations

Negotiations are often won and lost not due to the relative size or economic strength of the parties, but rather based on who has prepared the best. In other words, *before* sitting down at the negotiation table, be sure to have prepared for the negotiation.

How does one prepare for negotiations? Well, there are many things to do and ways to do them, and it is not possible to

describe them all here. However, in view of the special nature of negotiating with or in the EU described above, we can determine the three most fundamental "to do's", namely

to identify your needs/concerns and/or the reasons why you need/are concerned about something, in other words, by knowing your *interests*;

to define your objectives, i.e., to define what you want or do not want or, in other words, by knowing your *objectives*; and

to formulate clearly your *position(s)* and your arguments supporting your positions.

Identifying *interests* may appear more abstract and unnecessary than simply going straight to formulating what you want, *i.e.* your positions. But often, when we have not considered carefully our needs or concerns, we may formulate, either very definite or too vague, positions, which are difficult to negotiate or to compromise on.

When identifying our interests, what we in reality do is to carry out a *needs analysis*. For example, does our country wish to promote the liberalisation of a given market, thus obtaining free(r) access to other markets in return for allowing producers from other countries equally free access to our markets? Or do we consider our national industry ill-prepared to enter the free market and thus wish to protect, and perhaps even provide active support to it, keeping other countries' competing produces out of the country?

Once we know our fundamental interests, it becomes easier to define our objectives and, later during the negotiations, to analyse whether compromise proposals or alternative solutions, although seemingly different than our formulated positions, might after all meet our real needs/ resolve our real concerns.

Similarly, and *equally important*, we should use efforts to identify and consider the interests of our counter parts. The counter

parts' interests are, after all, an equal part of the problem as our own, as they are as important to the other parties as our interests are to us. Moreover, when analysing interests rather than positions, it becomes more feasible to identify allies as well as "opponents" which, in turn, will allow us to focus our normally limited resources on solving differences with the latter rather than wasting time negotiating and trying to persuade parties, who eventually want the same as us.

Once we have defined what and why we want (or do not want) something, effort should be taken to determine and prioritise our negotiation *objectives*. Objectives in EU negotiations can be defined as specific actions to be taken or exceptions to be granted in order to meet our needs or alleviate our concerns.

For example, an important part of the *acquis communautaire*, which EU applicant countries must harmonise national legislation to, is the state aid rules: the applicant country must adopt, apply and enforce the EC state aid rules. While it might seem to be in the country's interest not to introduce or apply such rules (which prohibit a government from supporting any given company or specific economic sector by giving money, granting interest free loans or giving special tax exemptions, etc.), experience from all previous enlargements show that obtaining an exemption from the state aid rules is simply not an option.

Instead, the applicant country's objective could be to obtain a so-called "transitional period", *i.e.* a shorter or longer delay before introducing or fully applying the state aid rules; or it could be to obtain a certain amount of technical assistance to finance and expertise to help with the establishment of new state aid authorities.

Once we know our interests and objectives, we can start preparing our *positions*, i.e. the formulation/communication of what we want, including the *reasons and arguments* supporting our position.

4.3 Starting negotiations and pre-empting rejections of initial positions

A frequently asked question is, "how should we open the negotiation?" Or "how do we introduce our positions and views"?

As indicated above, the process of negotiation is not an exact science, and there is no fixed rule or procedure that answers such questions. However, the following schedule may provide useful suggestions on how to cope with this potentially awkward phase:

Politeness Phrases	Thanking for the invitation / organisation of the meeting as well as for any documents forwarded by the other side/ the chair in preparation of the meeting Expressing hope and interest that the meeting will help to clarify certain specified points; enable the negotiations to progress; and/or lead to a mutually satisfactory outcome How your Delegation has studied the forwarded information/documentation with interest; or how useful the documentation has been for your preparations for the meetings
Identify problems/ concerns	Based on the outcome of the last meeting / the above mentioned documents, a natural next step is to introduce any concerns which the counter part's positions, proposals or views may have given rise to.
Talk about interests	Explain the reasons for the above mentioned concerns Explain what your Delegation would see as a preferred solution and the reasons for this if possible, provide documentation for your concerns/interests
Indicate openness to solutions meeting your interests/resolving your concerns	One way of doing this is to formulate your initial positions as proposals to resolve the identified problems (see immediately below)

When preparing positions for international negotiations, it is important to exercise *realism* as regards the demands to be put

forth and *preparedness* as regards what to do in case the other side is not prepared to accept our initial position. This latter scenario is particularly likely to occur in multinational negotiations, where each of the counter parts are likely to have – at best – only partially converging interests and negotiation objectives.

As indicated above, negotiating the SAA and, later, accession to the EU is, in fact, a multinational negotiation: it may be that the initial negotiation partner is the EC, but it should be recalled that the EC is representing the interests and views of 27 different countries.

Thus, when determining its negotiation objectives, the Serbian delegation must prioritise its objectives, including what is the "bottom line", the latter representing an end-result of the negotiation, which Serbia, on the one hand, can live with but also, on the other hand, without which it is prepared to take the consequences of not reaching an agreement. [28]

When formulating positions in preparation for the negotiations, the officials representing Serbia should ensure that they have been provided with instructions, which clearly set out

what Serbia would prefer to have as the result of the negotiations (*i.e.* the "best case scenario", typically expressed in the *opening* position);

alternative results, which the country would be happy with (*i.e.* the "second best scenario", typically expressed through *fall back* positions), as well as

the bottom line (*i.e.* the *ultimate* position).

The latter should correspond with the end-result set out above when prioritising the objectives, *i.e.* the minimum the negotiation delegation can live with.

[28] This is also called the "B.A.T.N.A." = the Best Alternative To No Agreement.

The following example from previous accession negotiations illustrate the above:

In the 1980's, Candidate Country A ("CCA") had experienced severe environmental problems, in particular that trees were dying or being felled due to, among other things, exhaust from cars and trucks. In response to this, CCA had introduced strict rules as regards permissible limits for exhaust from trucks, the permitted exhaust levels being considerably lower than those adopted at the level of the EU.

When becoming a member of the EU, CCA would become a central crossing point for truck transport of goods between both North and South and West and East of Europe. Under the rules of the internal market, including the free movement of goods and services, CCA would, upon becoming an EU Member State, have to allow all trucks registered in any of the EU Member States to enter and drive through CCA, irrespectively of the level of exhaust emitted from the trucks.

Since the environmental legislation was considered a vital interest for the country, CCA's *initial position* was that upon accession, it should be able to maintain and enforce its environmental rules, including the prohibition for trucks, which polluted more than allowed under CCA's law, to enter or drive through the country. The then 12 Member States could not accept this position, as it was directly contrary to the four fundamental freedoms of the Common Market and, as such, would limit the development of the Internal Market while giving trucks registered in CCA a competitive advantage compared to trucking companies based in other Member States.

CCA then reverted to a *fall-back position*, namely that it be granted a *temporary derogation* from the then more permissible EU rules, until the Member States in the Council adopted new environmental provisions on, *inter alia*, exhaust levels from trucks, which met or were, at least, closer to CCA's.

Following the mandate given by the at the time 12 Member States, the EC proposed a third solution: For a limited number of years, CCA could maintain its rules as regards trucks registered in CCA, but CCA would have to allow free entrance and transit of trucks registered in and meeting the legal requirements of the other Member States. During this time, studies would be made of the damage caused by the exhausts from trucks in CCA, and if these studies showed that pollution levels increased during the measured period compared to similar measurements made prior to CCA adopting its more stringent legislation, then the Council of Ministers would be obliged to negotiate and adopt new and tougher rules on permissible exhaust levels from trucks. (This approach is called a "*revision clause*".)

CCA then had to prioritise its objectives: Should it accept the EC's proposal and thus be able to close this accession negotiation chapter? Or should it maintain its initial position with the risk that this would prevent CCA's accession to the EU? CCA's Government concluded that, although not happy with this solution, then firstly, EU Membership was the more important objective, and secondly that the EC's proposal did acknowledge the country's interests and, as such, did fall within the country's bottom-line, in that it was confident the study to be undertaken would show increased levels of pollution which, eventually, would lead to new and stricter EU rules on exhaust from trucks, which would be equivalent to or at least closer their existing legislation.

4.4 Important aspects of preparing negotiation mandates/instructions

Good negotiation instructions should be *realistic* and formulated in a way that the negotiation delegation is *clearly* informed of the desired objectives as well as provided with appropriate (and preferably documented) *facts and arguments* supporting the position

taken. Moreover, the instructions should contain *references* to important points made by one's own as well as the counter part's delegations made in previous meetings, and they should provide *guidance*, under which circumstances the delegation can signal flexibility as well as at least some arguments to support what would make a possible fall-back position acceptable. Without this, any very firm stance taken during the presentation of the opening position may give the counter parts the impression that the delegation always starts "tough", but that its initial positions in reality should never be taken seriously.

In this context, it is important that the delegation is instructed not only to speak, but also to *listen*: This includes not only listening to the position of the other party/parties, but in particular to ask for the *reasons behind* the position, thus learning the *interests* of the others.

In the course of both the SAA negotiations and the accession negotiations, there will be specialised meetings referring to specific articles of the SAA / chapters of the *acquis communautaire*, which need to implemented, as well as more global meetings, in which progress reached overall is reviewed and solutions are sought to problems identified, but not resolved during the specialised meetings. In this context, the *importance of national coordination* cannot be emphasised enough:

A system must be established, ensuring that *horizontal vital national interests* are communicated to all specialised working groups and negotiation delegations in order to avoid that negotiation instructions and positions taken, as well as possible agreements entered, in the course of the negotiations contradict or annul any such national interests. Similarly, before going to negotiate, the specialised working groups and/or delegations must communicate draft instructions to the chief negotiator or other central coordination body for review, and in particular to ensure that they comply with overall horizontal national interests.

Lastly, there must be a two-way communication between the chief negotiator and the specialised working groups/negotiation delegations on the outcome of all meetings, where any decisions have been taken or signals or compromise proposals have been made or received to avoid that a delegation in one area is told by the EC that a given negotiation point or argument is no longer relevant following a previous negotiation in another area or at another level and to ensure that arguments and positions, which have proven successful in one setting, can be re-used in others.

Remember that within the EU, considerable resources are being spent on such communication and coordination not only within the EC, but also among the different relevant EU Institutions, *i.e.* with the EP and the Council, *and* within the Council, within the national governments of each of the members of the Council. This effort, which for sure is cumbersome, does have its advantages and disadvantages. The *disadvantages* include, naturally, the long time it may take for the EC or the Presidency of the Council to review progress reports and to revise negotiation positions or views and, subsequently, the relatively low degree of flexibility which the EC can exercise during negotiations. Among the *advantages* are, on the other hand, that all interested parties have been consulted, and that all proposals and positions presented by the EC or the applicant country have been scrutinized closely and possibly modified to meet the interests or concerns of not only the applicant country, but also of the EU Member States, thus later (a) facilitating the final phases of the negotiations prior to signature of the SAA or, eventually, the Accession Treaty, as well as (b) accelerating the ratification process in all the countries involved.

4.4.1 National coordination of EU affairs in Slovakia

When speaking about the chronological development of a national coordination system of EU affairs with a view of membership, several

periods or stages can be distinguished – the period of negotiations, whether it is association or accession negotiations, the period after the talks finished but the agreement is not yet in force and finally the period of association or full membership.

As mentioned earlier, the coordination of work vis a vis the EU is of utmost importance. EU membership requires not only the absorption of community standards and legislation but also the capacity to assert influence in Brussels. It is therefore important to create efficient mechanisms within public administration, setting up a network of contact points/persons ready to react in due time to initiatives and requests from the European Commission, other EU institutions or other EU Member States.

Candidate countries are adapting institutions to match the association/accession requirements... Many shortcomings in the accession process are rooted in the tradition of centralised states. Since central governments have a dominant position in coordination prerogatives, vertical as well as horizontal links and lines of command are often weak, blocking effective sharing of information and consultation. At the end of the day, EU membership obliges governments to involve all the relevant players, be it line ministries, interest groups, self-governments, in the decision-making process, as well as in the implementation phase, by means of collaboration and interoperability. (NISPAcee 2005, p. 52-53)

When speaking about the levels of coordination within the EU in general, several levels can be distinguished: in a Member State – within a sector and between sectors, in a Member State with other actors, such as national parliaments, regions, lobby groups and NGOs, and finally among the Member States and between the Member States and the Commission.

The national coordination systems are examined by different authors. Why is it so interesting? There is an externally imposed timetable for work, to which the administrations have to conform. There is also a big amount of work requiring the processing of a

large volume of information, documents, and opinions. There is a large range of activities since the EU activities are often cross-cutting several areas or policies. It involves complex decision-making processes. And finally, it is about the duty to implement any EU decisions in the adoption of which a Member State participated.

The aim of the coordination is to speak with one voice, defend and assert the national interests, formulate consistent positions at the meetings of Council working groups, in COREPER and at the ministerial level. The main actors are the ministries/government, the parliament (European Integration/Affairs committee) and the Delegation/Permanent Representation in Brussels.

The Slovak government started building the coordination system to function in the period of membership already well before the actual accession. The explanatory memorandum to the Governmental Resolution 681/2002 says: "With the growth of the Community agenda, there were gradually built separate units at individual ministries that dealt exclusively with the EU agenda. The task of these units is to coordinate the European affairs linked to their sectors, and co-operate closely with the Ministry of Foreign Affairs in preparing the specialised meetings of Councils of Ministers. The individual ministries are more and more involved in international negotiations, they directly participate in meetings of various working groups and Councils of Ministers. Ministries of Foreign Affairs in EU Member States established closer links with line ministries than it is usual for non-EU countries. Ministries of Foreign Affairs became partners of other organs of state administration in their coordination of decision making process. Europeanisation of domestic policies brought along more tasks for individual ministries as well as for Ministries of Foreign Affairs especially where the Ministry of Foreign Affairs took the role of main co-ordinator of European policy."

The system was not built out of blue, but it was based on the coordination system of 23 working groups established to implement the measures set out in the 1995 White Paper and

ensuing Slovak official documents and plans as described earlier. The working groups were in turn basis for negotiation teams operating in 31 chapters of accession talks.

Placement of the main coordination unit is an important aspect of any coordination. It may be in a newly created body, or at a line ministry, Ministry of Foreign Affairs, Prime Minister's Office or Office of Government.

It is interesting to see the case of Slovakia, where today the main coordination organ through which the instructions are sent to Brussels, is the Ministry of Foreign Affairs. However, the report of SIGMA nr 35 states, that the main coordination unit is the Government Office which houses the Ministerial Council for European Affairs that functions as a final arbiter in cases of disagreement among ministries as to what instruction should be sent to Brussels.

Another interesting element is the cooperation between the government and the parliament. On the one hand, there are parliaments with great political influence that approve negotiation mandates for the government, on the other hand there are parliaments with very low influence on the decision making process, and where the government only informs the parliament about its positions. In case of Slovakia, the Slovak Parliament got inspired especially by the Danish system with a strong position of the parliament. The cooperation between the executive and the legislature is now based on a constitutional law and has not faced any serious problems so far.

The essential work is, however, done at the level of line ministries and their experts. The work of so-called sector coordination groups (hereinafter SCG) represents the first stage of preparing the opinions and standpoints of Slovakia for meetings in Brussels. Such groups operate at all ministries and also at some other central administrative organs. The relevant governmental decrees require that all ministries and the Office for Normalisation, Metrology and Testing (due to their role in the area of free movement of

goods) have coordination groups, and other organs shall create conditions to ensure good coordination of decision-making in EU affairs, which for example means providing an expert to a SCG.

The national EU decision-making reflects the decision-making at the level of EU. Therefore it is very important that all experts involved have a good overview of the EU policy making system. Besides, the capacities of SCG depend on professional expertise, language skills, negotiation skills of their members and sufficient staffing.

The experience of Slovakia shows that it is important to keep the good and experienced people in their positions and avoid their leaving the civil service or leaving for Brussels (and if they do, then maintain the contacts with them there). The language abilities are not always sufficient and it is a problem as many important talks are done outside of meeting rooms, without the interpreters. Many ministerial experts complained about the lack of (quality of) translated EU official documents. Another problem that appeared was the questions of responsibility for a certain piece of EU legislation – which ministry should be the main body responsible for following a proposal and eventually for the transposition. The SCGs need political support and guidance. It is good if there is a direct link established to the minister to make sure that the position on a certain issue is coherent throughout the whole process. The officers, members of SCGs need to produce quality inputs for their superiors and political representatives of the country. It is also beneficial to include external people in SCGs, i.e. representatives of interest groups, self-governments, NGOs as they can bring in the views from practice.

Let us conclude this part with the findings of the World Bank study on administrative capacities of New Member States, which leads to recommendations that it is important to maintain the good administrative efforts from the pre-accession time and also to link the EU affairs with the "normal" domestic affairs to ensure an efficient functioning of a country in conditions of EU membership.

The experience of the new Member States in the EU over the last two years has been mixed. Whereas most states have proven to be able to cope with the workload generated by core EU issues, such as transposition of legislation, their ability to effectively plan and use structural funds and to address broader issues of competitiveness remains in some doubt. Furthermore, a number of states have shown serious weaknesses in their performance on broader aspects of public management, for example, the growing fiscal deficit levels, while others have found it hard to cope with the intricacies of EU decision making. (World Bank 2006, p.1)

EI management systems formed the administrative backbone of the accession management process in the EU-8 and have been widely praised for their effectiveness. However, moving from management of the accession process to managing membership requires a significant change of approach, and the need to roll out specialized EI capacity throughout the state administration. (World Bank 2006, p.8)

4.5 Rules of thumb concerning composition and behaviour of national delegations

In the beginning of the negotiations for the Association Agreements, and again later during the Accession negotiations, many of the now new EU Member States, which joined the EU in May 2004 and January 2007, made the same *mistake*: At each meeting, whether being actual negotiations or simple screening meetings, countries often sent very top-heavy delegations lead by top civil servants and/or senior political officials, who tended to do all the talking, even in areas where they were not appropriately briefed, and sometimes even in meetings, where the then candidate countries were not meant to talk, but rather to listen (e.g. screening meetings). Other mistakes included sending

large delegations to each meeting, but with only one or two senior officials from the delegation taking the floor.

When *composing its delegations* for meetings or negotiations related to the SAA or accession, an applicant country should take into consideration the nature and purpose of the meeting. For example:

Will actual negotiations take place? In this case it should be considered to have a senior civil servant or political official lead the delegation; or

Will the meeting be more of an informative nature (e.g. a screening meeting)?

If the objective is of a more horizontal or sector-horizontal nature, such as an initial meeting or a progress report meeting, a top level official may be useful as delegation leader.

If the meeting will have a more technical in nature, e.g. for provisionally exchanges as regards concerns or needs of the applicant country or to obtain clarification on certain issues (e.g. how a national legal measure meets the relevant piece of *acquis communautaire*), the appropriate person to lead the delegation will be a civil servant, with the appropriate technical knowledge, experience and language skills.

In either of the above cases, it should be considered to let the person, who possess the appropriate knowledge, take the floor to present the dossier or reply to EC questions. The *role of Head of Delegation* is to present or reply to horizontal and/or political issues and to manage the Delegation, including by giving the floor to the officials with the appropriate technical expertise on more technical issues.

Before attending screening meetings or negotiations with the EU, the Head of Delegation should make sure that (s)he has been briefed on.

Where in the process are we?

What happened in the last meeting? Have we promised to do anything? Has the other side promised to do anything? Has it been done? If not, do it now or have an (honest!) explanation why it has not happened.

What is the agenda for the meeting? Has your side done all it should have done in preparation of the meeting? If not, why not? What will it take for your country to have it done and by when will you have it done?

Who is the lead technical expert on the various dossiers? Be sure that (s)he is invited to the meeting or, at least, invited to the national delegation's pre-meeting briefing of those, who will be attending the meeting.

Delegations should seek to *meet in advance* to agree on who says or replies to what, including what to do in case of uncertainty of what to reply to questions or proposals. – In this latter context, consider allowing yourself to follow an important rule of thumb: If the Delegation does not have a correct and honest answer/position ready to questions or proposals or requests from the EC or representatives from the Council (*i.e.* the Member States), do *not* try to bluff: be honest, take a "reservation", *i.e.* say that you cannot reply today, and give a (realistic) date by when the delegation can reply.

4.6 Some fundamental negotiation techniques

In the previous sub-sections, a number of *good negotiation practices* have been mentioned, and they can be summarised as follows:

Prepare well and have a clear idea of your interests and objectives (*cf.* above, sub-section 4.2)

Present concerns and problems early (*cf.* above, sub-section 4.3)

Be an active listener (*cf.* above, sub-section 4.4)

Prepare and offer documentation supporting your positions and arguments (*cf.* above, sub-sections ii and 4.4)

Keep promises (*cf.* above, sub-section 4.5)

Ensure coherence and respect national priorities through national coordination (*cf.* above, sub-section 4.4, and below in this sub-section)

Think alternatives to concessions, e.g. transitional periods, phasing-in periods, revision clauses, etc. (*cf.* above, sub-section 4.3)

When in doubt: take reservations – When doubt resolved, lift the reservation (*cf.* above, sub-section 4.5)

In addition to the above, consider the following *negotiation tools and techniques*, which experience shows increase the respect shown towards negotiators applying them:

When attending a meeting or negotiation, *be on time*. Even better: be early and inform yourself of the seating arrangements and any unwritten procedures, which might be applied.

When taking the floor, speak *clearly*, at normal pace with regular small breaks (to allow interpreters to catch up and negotiation partners to take notes), and keep your sentences as *short and structured* as possible.

Always *keep your interventions on the subject* of the negotiation, not the people. EU negotiations have a reputation for being direct, but polite; so negotiators, who allow irritation to show, are rude or "attack" representatives from other delegations, quickly lose respect.

When wishing to clarify previously made positions or unresolved issues, or when wishing to make proposals or changes to other delegations' proposals, consider to send them *in writing and in good time before* the meeting/negotiation. Remember

that your counter parts from the EC or the EU Member States have the same problem as you as regards proposals, which are submitted on the day of the meeting: They will generally not have the mandate to express an opinion on or to agree to your suggestion, but will need first to consult their hierarchy at home, which in practice often means that a decision or other follow up will have to wait until a later meeting, thus causing a delay in the negotiations.

And last, but not least: After each meeting, the head of delegation should take the initiative for a *debriefing* with participation of the members of the delegation and members of relevant working groups to review commitments made by the delegation during the negotiation as well as any requests received for information or clarification or any promises or agreements obtained. This exercise helps to avoid confusion or doubts as well as to prepare the next meeting, making sure that promises are kept and, thus, improving (or helping to maintain) the reputation and image of not only the delegation, but also of the country.

4.7 Slovak observations from the 2004 round of enlargement negotiations

The following lines are excerpted from an article written by Mr Peter Javorčík, who worked for Mr Jan Figeľ, the main negotiator for Slovakia and a Commissioner at moment, and he is now in his Cabinet.

It is in the interest of all to reach a value added for the Union with the entry of a new Member State. Despite the asymmetric nature of negotiations, it is not the goal of the Union to defeat the candidate and obtain as much as possible for the present members of the Union. In this aspect it is the European Commission that plays a unique role as it is the "best friend" for a candidate country.

Sometimes it may not be felt so by a candidate country since the Commission's role is to negotiate on behalf of the Member States which might also mean the obligation to present some things in a tougher way or bring "bad messages" to the candidates. On the other hand it is the task of the Commission to take care of the interests of the Union as a whole, i.e. including the candidate countries that are all the time perceived as future Member States.

One of the negotiators on the side of the European Commission put it in the following way: "The negotiation game can be compared to planning of a wedding. Neither in real life do we want to marry somebody who would then shock or surprise us with something unpleasant. At the minimum, it would be expensive for us as we would be obliged to pay also for the partner's problems".

The accession negotiations are characterised by a great asymmetry. In this aspect the accession talks are different from classic international negotiations. The asymmetry lies especially in different starting points of actors towards the subject of talks, i.e. the Community *acquis*. Candidate countries are in principle adapting to the rules and conditions given by the EU in form of already adopted and thus unchangeable legislation.

The author analyses different negotiation tactics of the recent and possible future accession processes and describes their asymmetric character. He divides the negotiation strategies constructed according to previous studies into six major categories and gives examples from the actual negotiations:

- *Tied hand strategy* – enables the candidate state as well as the Member States to improve their negotiating position by claiming that their decisions are limited due to public opinion in their home country. This tactic was used in the recent accession process mostly by the candidate states, since the negotiation process was more politically sensitive there than in the "old" Member States.

- *Threat strategy* – the candidate state could try to change the result of the talks by threatening to leave the negotiation table. However, this sort of threat from the candidate countries had never been used as it would have lacked the needed credibility because the successful end of the talks and finally the membership was their primary goal.
- *"Package deals" strategy* – anyone of the negotiation partners can improve their negotiating position by linking together several problems or topics and condition the acceptance of one by acceptance of the other. However, this approach could be considered more as a negotiating method than tactics due to the very complex nature of the accession negotiations.
- *Dead-weight catching* – the candidate's ability to force the Union to offer his country a better negotiation deal can be reached by reminding the Union of its previous acts or decisions in case of other candidate countries. The most recent negotiation process with 10 candidate countries has most likely created precedents for the future accession proceedings.
- *"Battering ram" strategy* – can be a useful tool to force candidate countries to compromise by using one of them as a "battering ram" – a model negotiation behaviour which should be followed by the rest of the group.
- *Group coordination* – candidate countries can improve their negotiating position by coordinating their strategies towards the EU. (Javorčík, 2005).

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