

EDITORIAL COMMENTS

The Sixth Enlargement

In 2002, the European Council reassured Bulgaria and Romania that these countries would be welcome to join the European Union in 2007, provided they made sufficient progress in fulfilling the membership criteria. The negotiations were completed in December 2004 and the Treaty of Accession was signed on 25 April 2005.¹ This Treaty states that, following ratification by all parties, the two new members will accede on 1 January 2007, unless the Council were to decide, upon a recommendation from the Commission, to postpone the accession of either country until 1 January 2008.² The Commission, after issuing three progress reports monitoring the recent state of preparations of the two candidate countries, one in October 2005, one in May 2006 and the final one on 26 September 2006, has not seen fit to recommend such a postponement to the Council. In its final report it concluded that Bulgaria and Romania, based on the progress made, will be in a position to take on the rights and obligations of membership on 1 January 2007.³ In the meantime, the Council has endorsed the Commission's view.⁴ Since by early November 2006 most countries had completed the process of ratification of the Accession Treaty, it may virtually be taken for granted that as of 1 January 2007 the European Union will have 27 Member States.

The Commission delivered its opinion under Article 49 TEU on 22 February 2005.⁵ It – somewhat euphemistically – called this opinion a favourable one and it repeated an earlier statement made in 2004 that Bulgaria and Ro-

1. O.J. 2005, L 157/11.

2. Art. 4(2) Treaty of Accession and Art. 39 of the Act of Accession. The latter Article reads: "If, on the basis of the Commission's continuous monitoring of commitments undertaken by Bulgaria and Romania in the context of the accession negotiations and in particular the Commission's monitoring reports, there is clear evidence that the state of preparations for adoption and implementation of the *acquis* in Bulgaria or Romania is such that there is a serious risk of either of those States being manifestly unprepared to meet the requirements of membership by the date of accession of 1 January 2007 in a number of important areas, the Council may, acting unanimously on the basis of a Commission recommendation, decide that the date of accession of that State is postponed by one year to 1 January 2008."

3. COM(2006)549 final.

4. Council Conclusions on enlargement, adopted at the 2755th General Affairs Council Meeting, Luxembourg, 17 Oct. 2006.

5. O.J. 2005, L 157/3.

mania fulfilled the political criteria. The confusing thing about this document was that it also acknowledged – and rather overtly – that at that time these countries were nowhere near fulfilling the political, economic and *acquis* criteria for membership. Indeed, the Commission stated in its opinion that it would continue to monitor closely the progress made by Bulgaria and Romania in pursuing the improvements still to be made in the context of the political and economic criteria and in relation to the implementation and the enforcement of the *acquis*. It would not hesitate to recommend the Council to postpone accession by one year to 1 January 2008, should it consider that there was clear evidence that the state of preparations for adoption and implementation of the *acquis* in either country was such that there was a serious risk of either of these States being manifestly unprepared to meet the requirements for membership by the intended date of accession on 1 January 2007. In addition, the Commission reserved its rights to invoke the various safeguard clauses foreseen in the Accession Treaty for both countries.

In spite of these warnings, from the outset it seemed a foregone conclusion that Bulgaria and Romania would join the European Union, either in 2007 or in 2008. Accession was a matter of *certus an* and basically also of *certus quando*. Clearly, the Commission was not in a position to call into question the political decision of 2002 to let these countries in. It was unthinkable that it would be able or willing to obstruct entry by reaching the conclusion that progress toward fulfilling the membership criteria was insufficient. All it could hope to do was to put as much pressure as possible on Bulgaria and Romania to effect the necessary reforms before the intended date of accession of 1 January 2007, to threaten them with postponement of entry until 1 January 2008, and to warn that special safeguards might apply after the date of accession. But there is no evidence that the notion that the two countries might not pass the test and that entry could be refused was ever considered to be a serious possibility. In the early stages of the protracted negotiations with Bulgaria and Romania, the notion of the “absorption capacity” of the Union had not assumed the importance which it has today. So, in that respect the position of the Bulgaria and Romania has always been very different from that of other candidates for membership such as Croatia, Turkey or Macedonia. Indeed, no target dates have been set for the accession of these countries and no one appears prepared to make a prediction in that area. As a result, in clear contrast to the promises held out to Bulgaria and Romania, for other European States the prospects of future membership can only be described in terms of *incertus an* and *incertus quando*.

Considering that from a political point of view it has never been in doubt that it would be unwise to keep Bulgaria and Romania out of the Union

much longer, the guardedly favourable opinion which the Commission delivered on 22 February 2005 and its subsequent lukewarm endorsement of accession on 1 January 2007 do not really come as a surprise. On balance it may be preferable to work with them when they are inside than to try to push for reforms from the outside. Nevertheless, what may come as a surprise for many observers is the long list of “things to do” which the Commission has deposited at the doorstep of the two countries just a few months before the intended date of accession.

Perusal of the assessment set out in the Commission report of 26 September 2006 is not a cheerful experience. Indeed, in spite of the recognition that the applicant countries have reached a high degree of alignment with the *acquis*, the Commission also identifies “a number of areas of continuing concern” and “areas where the Commission will initiate appropriate measures to ensure the proper functioning of the EU, unless the countries take immediate corrective action. Both countries are strongly encouraged to make proper use of the months before accession, in order to address the remaining issues”.⁶

It is, of course, not realistic to expect these countries to take great steps forward in so short a time and to remedy decisively the grave defects that have burdened their societies for a considerable length of time. For Bulgaria, the main areas of concern are the justice system, high level corruption, money laundering, organized crime, shortcomings in public administration, financial control systems and the treatment of minorities. The picture painted in relation to Romania is slightly less depressing. However, that country too must address a number of serious shortcomings related in particular to the justice system, the fight against corruption, and food safety.

So, as a counterweight to the serious shortcomings as regards the state of preparedness of Bulgaria and Romania, an impressive assortment of safeguard clauses, transitional arrangements and other defence measures have been put in place. In addition to the regular safeguard measures contained in the *acquis* and which can be applied in many policy areas in respect of any member State, under the Accession Treaty there are three types of special safeguard measures which can be invoked up to three years after accession.⁷ These are a general economic difficulties safeguard clause, a specific internal market safeguard clause, and a justice and home affairs safeguard clause. Furthermore, the Accession Treaty foresees two important categories of transitional arrangements. The first of these allows the Commission, for three years after accession, to prevent exports of Bulgarian or Romanian products

6. COM(2006)549 final, (Introductory paragraph).

7. Arts. 36, 37 and 38.

which fail to comply with EU veterinary, phytosanitary and food safety rules. During that period, however, non-compliant food establishments in the new Member States will be allowed to continue supplying domestic consumers with products that are unsafe in terms of the EU legislation. Upon the expiry of the three year period, they will have to comply with all the applicable rules or close down. The second group of transitional measures concerns specific areas where either the current Member States or Bulgaria and Romania are entitled to postpone the full application of the *acquis*. For example, the free movement of workers from the new Member States may be restricted for up to seven years after accession. Provision has also been made for temporarily limiting access to national road transport markets (cabotage).

The Commission has identified the reform of the justice system and the fight against organized crime and corruption as areas where extensive Union support is to be made available to Bulgaria and Romania. A mechanism for cooperation will be established to provide guidance in the reform process and to verify progress. The Commission will regularly report to the Council and the European Parliament on the progress made in addressing a set of benchmarks. These benchmarks are concerned with *inter alia* constitutional amendments and other measures to ensure a more efficient and transparent judicial process and enhanced professionalism, independence and accountability of the judiciary. Should either country fail to address the benchmarks adequately, the Commission will apply safeguard measures under the justice and home affairs safeguard clause (Art. 38 of the Act of Accession). This could lead to the suspension of the current Member States' obligation to recognize and enforce certain civil and criminal judgments and execute arrest warrants issued by Bulgarian or Romanian courts or prosecutors.

Obviously, one can only applaud the Commission's determination to make the best of a very embarrassing situation, through certain forms of remedial action. The fact remains that it is quite disturbing that the findings made with respect to the situation in the acceding countries in no way support the conclusion that these countries fulfil the political conditions for membership. One must especially deplore the lack of courage on the part of the Member States. They have failed to draw the necessary conclusions from the inconsistent reasoning in the reports of the Commission and the mixed signals sent by it. Prevention is better than cure, but in this situation it is necessary to do both. What is needed are measures that will prevent harm to essential Union interests coupled with arrangements and mechanisms for setting things right on a sustainable basis in Bulgaria and Romania. In this connection, it goes without saying that the reform of the judicial system counts among the subjects of prime importance. Progress in the European Union has been attributable in a large measure to the activities of the courts.

The national courts have always acted as reliable partners of the Community judiciary and their role in securing proper application and enforcement of EU rules can hardly be overestimated. At the hand of the judges, the concepts of direct effect and supremacy, have been – and continue to be – extremely important devices for disciplining the governments and legislatures of the Member States. These twin pillars of an effective Community legal order would crumble if there are insufficient guarantees for the integrity and the independence of the judiciary in the new Member States.

It is common knowledge that opposition to the Constitutional Treaty as expressed in the referenda held in 2005 in France and in the Netherlands was inspired in part by the prevailing uneasiness over further enlargement of the Union in an easterly direction. The way the Member States have dealt with the questions around the sixth enlargement of the Union is not likely to endear the European Union to the population any further. Things being what they are, it may be hoped that Bulgaria and Romania will be able to prove the pessimists and the sceptics wrong. Only a successful and relatively smooth process of incorporating the two Member States in the European Union may prevent a further deterioration of the mood among large segments of the European public. Needless to say, a concentrated effort must now be made for creating a climate which helps convince the electorate that the European Constitution, in spite of its imperfections, deserves to be approved. Now that the Union will have 27 Member States, the need for implementing the reforms foreseen in the Constitutional Treaty has become more pressing. More pressing even than the duty of the Council under Article 213 EC to start doing some serious work toward reaching unanimous agreement on a plan for reducing the number of members of the Commission and on a rotation scheme for choosing them.⁸

8. Art. 4(2) of the Protocol on the enlargement of the European Union appended to the Treaty of Nice 26 Feb. 2001, stipulates that amendments of the text of Art. 213 EC and Art. 126 Euratom, which amendments provide for a reduced number of members of the Commission chosen according to a rotation system, will be effective as of the date when the Union consists of 27 Member States. By virtue of Art. 4(3) the Council is to adopt the necessary arrangements after signing the treaty of accession of the 27th Member State of the Union.