

Transitional Measures concerning the Schengen *acquis* for the states of the last accession: the cases of Bulgaria and Romania.

The enlargement of 2007 brought two new eastern countries into the European Union: Bulgaria and Romania. That was the ending of the Eastern enlargement, started in 2004 with the accession of eight countries previously belonging to the Communist bloc. The necessity to provide a gradual acceptance of these two countries into the structure of the EU, involved the adoption of some transitional measures to delay, where necessary, the application of certain provisions for whom they were not ready. The aim of this choice was to guarantee the stability of the EU, as well as the safeguard of sensitive areas of politics for Bulgaria and Romania. Some of these measures were already adopted for the 2004 enlargement, however, there were also new and more incisive procedures in order to control the progress of reforms in the countries (and even allow a possible delay in their accession) that will continue even after the moment of the entrance in the EU as in the case of the Cooperation and Verification mechanism.

The most important category of transitional measures is the one concerning the application of the Schengen *acquis*. On the one hand the question of the internal borders, and the freedom of movement inside the common territory; on the other hand the question of the external borders, with the necessary controls in order to assure the security of the area and the prevention of criminal traffics. The two aspects are strictly linked if we consider that - thanks to the Schengen system - checks at the internal borders are abolished and it is created just one external border and, once an EU citizen or a third-country national enters the space, he has the right to move without further controls. This question involved several implications: Romania and Bulgaria had a new border that comprehends the coast of Black Sea and Turkey and it has to cope with the lack of a strong administrative structure and economical resources to grant the security, both inherited by the previous communist system. Progresses and reforms are going to be implemented by Bulgaria and Romania, demonstrating the strength of their will to accomplish the standards in order to be fully part of the Schengen area. Moreover, their position will also give new strategic importance to the EU thanks to the influence of these two countries on the eastern area and the Balkans which will be interested by the future accession to the EU.

The 2007 enlargement and the Treaty of accession

The path that brought Bulgaria and Romania into the EU started in 1995, when they officially presented their demand of accession. It was a logical consequence of the Council of Copenhagen of 1993, when the EU opened itself to welcome new democracies from the East and established three criteria to be respected in order to become new members. The compliance to these levels are object of negotiations, which were very long for the two countries: from 1998 to 2006. That was also the reason for which this entrance was separated from the ones of 2004. Finally, the Treaty of Accession was signed in Luxembourg in 2005, and it stated as the future date of accession the 1st January 2007. Nonetheless, article 39 had a provision to delay this date by an unanimous decision of the Council if there would have been incompetence in some strategic areas: a demonstration of flexibility in the process of accession that will be probably applied to future enlargements and which underlined an important role for the Commission in the pre-accession phase.

The Treaty was approved with a large majority in almost all the old Member states, with some significant exception as the ones of Belgium, Netherlands or Germany where the Parliaments tried to keep attention on critical situations still present in the countries. It started that feeling of distrust that will have continued from that moment on, especially in the field of the Schengen *acquis*.

The Treaty of accession was structured in two parts: a Protocol and an Act on the conditions concerning the admission. The first one would have entered in force in case of approval of the Treaty establishing a Constitution for Europe; the second one if the Union would have had just a reform of the Treaties. So, we are now considering provisions inserted in the Act. Inside it, we found primarily the institutional changes necessities in order to accommodate representatives of Bulgaria and Romania into EU institutions. If we move, instead, to the analysis of more substantial norms, we found some protective measures and some transitional dispositions, both providing derogations from the rules of the Treaties. Protective measure are expressly considered for economic activities with cross-border effects, in the internal market or in criminal law and civil matters. They could be activated by the twenty-five old member states or by Bulgaria and Romania to defend themselves from deterioration in their internal situation. Moreover, Annexes VI and VII of the Act provided transitional dispositions for whom the Commission has only an *ex post* role. The important role is the one of the Member states that will decide whether to derogate

some disposition for a limited period of time and in the fields expressed in the Treaty. Here there are the fundamental ones concerning the free movement of persons, capitals or in agricultural matter.

The Schengen area and cooperation

The most important disposition that was let outside the measures applied to Romania and Bulgaria was their complete entrance into the Schengen area. The Schengen area was the result of a long process started outside the legal framework of the European Union in order to allow the shift of checks at the internal border and to move them only to the external ones, now common to the entire territory. This goal, that could be considered even the essential and initial purpose of the EC itself, it wasn't reach inside it because of the sensitivity of such dispositions that implied the loss of powers on the borders and the shift toward a post-national conception of them. Therefore, it was accepted only by Germany, Netherlands, Belgium, Luxembourg and France which signed the Schengen Treaty in 1985. This was actually implemented only in 1990 with the Convention implementing the Schengen Agreement, that got in force five years later. During this time several states within or outside the EU joined the group for that same mission; the only request for them was to simply applied in their legal system the created *acquis*.

The EU and the Schengen system merged together only in 1997 with the Treaty of Amsterdam which brought into EU law these principles and changed the institutional structure of the Schengen Convention to be put into EU institutions. This rules were now binding even for the Member states. In that same Treaty it was also created the "European space of Freedom, Security and Justice", with dispositions related to security, border control, criminal cooperation, put in common after they started with an intergovernmental procedure in the Third pillar of Maastricht: "Justice and Home Affairs". This new area should grant freedom of circulation and internal security to citizens, due to the fact that, once a EU citizen or a third country national has crossed the border it is then free to move in all the common territory without further checks because internal borders are abolished in the Schengen area. The dispositions put in the Amsterdam Treaty are in Title IV TCE (Visas, asylum, immigration and other policies related to free movement of persons) and in Title VI TEU (Provisions on police and judicial cooperation in criminal matters). These had to be implemented – following disposition adopted in the European Council of Tampere - within

2004. On that same year, part of this matters switched to the co-decision procedure, that enable EU institutions to broadly increase the number of act adopted in that field. It is now completely under the communitarian rules in the Title V of the Lisbon Treaty.

Nevertheless, it happened that some Member states did not want to remove checks at their borders or to completely cooperate on policies about freedom of movement and transnational cooperation, so they decided to have some opt-out on the Schengen matter. Denmark (that signed nonetheless the Convention) asked for the provision inserted in Title V not to be part of its communitarian *acquis*. United Kingdom and Ireland, are not at all part of the Schengen area and they continue to exercise checks at their borders but they can opt-in for every single disposition in the future. There is even the possibility for some European countries to be part of the Schengen area without being part of the EU: that is the case of Norway, Iceland, Switzerland and Liechtenstein. So, geographically, we understand how the territories of EU and Schengen do not actually coincide. Unfortunately, there's still a different position: the one of Bulgaria, Romania (and even Cyprus which wasn't accepted with the other states of 2004 enlargement), countries that do not respect some basic rules of the *acquis*, or that do not have fully implemented it yet. Therefore the Treaty of accession provides compulsory dispositions only on cooperation on controls and judicial matters on the external borders and not on the removal of controls at the internal ones. Progresses of Bulgaria and Romania are monitored by the Commission, but the ultimate decision to see them as completely part of the Schengen area should come with an unanimous decision of the Council.

Bulgaria and Romania into the Schengen area

Initial provisions indicated March 2011 as a possible date to be taken for the complete accession of Bulgaria and Romania into the Schengen area. Nevertheless, some Member states continue to ask further delays on that moment because they think it would be too early. This is the case of Netherlands or Finland that came up with this affirmation even after the recognition in 2011 by the Council of the respect of all the necessary provisions of the Schengen *acquis*, analyzed by Commission's reports.

Actually, reasons provided to procrastinate this decision are based on populist political opinion or on consideration on the weak levels on the JHA field that is still, in fact, under the Cooperation and

Verification mechanism, in order to control progress and point out objectives for the future to implement them correctly. Bulgaria and Romania are in difficulty with politics related to external borders and their control because in the previous Communist regime there was a lack of strong administration, borders were almost inexistent in that part of the world and there was a special visa politics with nearby states. Fear of illegal traffic, immigration and whatsoever raised, consequently, in the old Member states. The path of reforms, however, was strongly followed by EU institutions (through Schengen Action Plans), even before the beginning of negotiations on Chapter 24, concerning JHA and Schengen *acquis*. EU conditionality was, therefore, a good boost to make them reach that progress and modernization necessary to become part of the EU, which was, in the end, obtained. It financed projects, and continue after the accession to give resources, the so called "Schengen Facilities", to help them reach some levels (on border protection, staff's preparation, data archives) necessary for the other Member states to accept them definitely in the Schengen area.

Nevertheless, Schengen *acquis* and Cooperation and Verification mechanism are separated and should not influence each other. In the first case, in fact, all the compulsory level are reached by the two countries, while some effort on judicial system, level of corruption and legislation on cross-border criminal activities under the JHA field, are still waiting for an efficient implementation by Bulgaria and Romania.

We are waiting for a possible resolution and a vote in this October that will demonstrate if the refusal of Schengen participation is only a political issue for some Member states, a matter not only of "objectivity" but also of "trust" for Bulgaria and Romania as stated by President of Commission, Barroso. In the short future we will see if Bulgarian and Romanian efforts will be considered sufficient - or if there is still insecurity mixed with political reasons against them - to make them really, completely, efficiently part of the European Union.

Internal borders and the free movement of persons and workers

The principle of freedom of movement for workers was one of the core provisions inserted in the European Community since its beginning with the Treaty of Rome in 1957. It was a simply mercantilist necessity in order to complete the common internal market, the goal for the creation

of the EC itself. This mercantile substrate linked to the circulation was maintained in the Treaties until Maastricht when the “European citizenship” was born. Nonetheless, a great job of expansion of this right was put in order by the European Court of Justice, that extended the freedom of movement to the family members of workers, or even applied it to persons who had sufficient resources to live in another Member state without being a burden on its social assistance. With the European citizenship, the right belongs to every citizen of a Member state and it was for the first time applied to a non-national entity, with a transnational effectiveness and it enables citizens to move freely into the EU, to choose to establish or to work in whichever of the other states.

At last, the normative references for the freedom of movement is the Directive 2004/38/EC, a document which unified precedent norms and simplified all the regarding measures. The only limits that are still in force (and that somehow restrict the significance of the right), are the ones concerning the possession of resources and a medical insurance; and the refusal of entrance for reasons of risks in public policy, public security or public health.

The freedom of movement is still limited by some transitional measures for Bulgarian and Romanian citizens, but it does not cover the whole possibility of circulation, it just applies to workers for a maximum period of seven years from the moment of the entrance. The logic of this norm is to avoid some serious breach in the functioning of the internal market if it would have been opened immediately to the labour force coming from the two new countries. Every old Member state has the possibility for two years after the accession to maintain in force its national laws regulating the acceptance of workers of third country nationals (or bilateral agreement signed with the countries in object), or it can just decide to use communitarian rules. The Commission has a general control on the application of this measures and it’s the institution to which communicate them and that has to approve the request to maintain them for additional three years and other two. If a Member state decides to use transitional measures, Bulgaria and Romania have the right to do the same with it to maintain balance in the system.

One of the last country who decided to restrict access to labour to Romanian workers is Spain, due to the economic crises that is still affecting it and the high level of unemployment. This fact underlines the uncertainty on the application or the durance of this measures which leave a feeling of frustration to Bulgarian and Romanian for being rejected in part of the right directly linked to the participation in the EU and that changes even the perception of the European citizenship.