***Statewatch* analysis of**

The EU accession treaty

by Steve Peers

Introduction

The accession treaty governing the next planned accession to the EU is the most complex and ambitious to date. In four previous enlargements, the EU accepted a total of nine new Member States, and now it is planning to take ten Member States at one go.

In the areas of Justice and Home Affairs (JHA) and free movement of persons, the applicant Member States have sacrificed a great deal. There is to be a seven-year wait for full free movement of workers and services between the new and old Member States, and the wait for full application of the Schengen rules could be indefinite. But while it could take many years for border controls between the new and old Member States to be abolished, the new Member States are expected to apply the EU's external border control rules and much of its visa regime immediately, cutting communities at the eastern border of the future EU off from the traditional trade and relationships with people across the border.

In addition, the obligations of new Member States as regards JHA are somewhat ambiguous and the possibility of imposing sanctions against them for breach of their obligations are ambiguous both as regards what they could face sanctions for doing and also as regards what the sanctions will consist of. It is clear that they will have to apply the EU's rules on determining which Member State is responsible for considering a refugee claim immediately, while their own citizens will face a hugely reduced opportunity to claim asylum.

The new Member States will therefore be in the "second class" of EU integration for a number of years to come.

Overview

There are several different elements to the accession treaty. The first element is the core accession treaty itself, which consists of only 3 Articles and governs only the basic issue of which new Member States join and the date on which they take place.

This is in turn implemented by the Act of Accession, which is an integral part of the Accession Treaty (see Article 1(2) of the Accession Treaty). This Act sets out detailed rules concerning accession, in particular concerning exceptions and derogations from the normal rules in the Treaties.

There are seventeen Annexes to the Act of Accession, which are concerned with specific adaptations to be made by each new Member State. Of these, Annex I sets out specific rules relating to the Schengen acquis and the Annexes concerning all the new eastern Member States set out detailed rules on a transition period for full free movement of workers and services.

There also nine Protocols, which deal with specific sectoral issues. Of these, Protocols 3, 5 and 6 deal

with certain issues of relevance to JHA and free movement of persons.

Finally, the final act to the Treaty contains a number of declarations, several of which are relevant to JHA and free movement issues. In principle such declarations are non-binding, but the Court of Justice has taken them into account (see judgment in Case C-192/99 *Kaur*).

In principle the text of the Accession Treaty is now fixed and will not be amended prior to its signature, scheduled for 16 April 2003 in Athens. If a Member State or applicant State wanted to request amendments it would likely be turned down. But it is possible that new declarations, particularly unilateral declarations, will be added before signature. There is no prospect of changes, even to add declarations, after the date of signature.

General issues

1) Enlargement

First of all, the date of accession is set for 1 May 2004 (Article 2(2), Accession Treaty). Accession will go ahead on that date for all those new Member States that have ratified the Accession Treaty, provided that all of the current Member States have approved the enlargement treaty according to their constitutional procedures. This happens to be the same date that the Council is obliged to take a decision altering the decision-making and judicial rules concerning EC immigration and asylum law (see Articles 67 and 68 EC), although this is purely a coincidence--the May 2004 date was actually chosen to place the new Member States in a better financial position (they will not have to send funds to the EC budget before they receive them).

Nine of the applicant Member States have planned referenda on accession (the exception is Cyprus). These will take place between March and September 2003.

It was agreed at the Copenhagen European Council in Dec. 2002 that the planned new EU Treaty, which will be negotiated following the conclusion of the current EU constitutional convention in June 2003, will not be signed until after enlargement. It has not yet been decided when the negotiations for a new Treaty will take place.

There will be specific rules on consultation with the new Member States between the signature of the accession treaty and its entry into force (see the Exchange of Letters to be annexed to the Final Act).

2) Judicial Control

The European Court of Justice has stated that it can interpret the text of accession treaties and measures based upon them. However, it lacks jurisdiction to declare any part of the accession treaties themselves invalid. Therefore these treaties are the primary law of the EU; it would be fruitless, for example, to ask a court to rule that the restrictions on free movement of workers set out in the accession treaty are invalid.

One obvious complication with the Court's jurisdiction relating to the Accession treaty is the different regimes for the Court's jurisdiction in the area of JHA. For immigration and asylum law, only final courts can refer questions to the Court of Justice. Although the Council is obliged to 'adapt' these rules from 1 May 2004, which is also the planned date of enlargement as noted above, it is not yet known whether the Council will discharge this obligation or, if it does no, what form such an adaptation will take.

As for policing and criminal law, there is another regime in Article 35 of the EU Treaty, under which Member States have to declare their willingness to permit their national courts to send questions on the validity or interpretation of criminal law and policing measures to the Court of Justice. Twelve of the current Member States (all except the UK, Ireland and Denmark) have permitted their courts to send such questions, although Spain has limited this power to its final courts only.

The question now is whether the new Member States will opt in or not. In the final act to the accession treaty (declaration 26), the Czech Republic has opted into this jurisdiction, permitting all its courts to

send cases to the Court of Justice. None of the other new Member States has made a declaration yet. However, such a declaration can be made at any time and it is possible that further declarations will be made by the time the accession treaty is signed or following the entry into force of the accession treaty. It should be recalled that only a few such declarations were made by the current Member States when the original Treaty of Amsterdam was signed, but eleven Member States had made declarations by the time that Treaty entered into force.

Because of the existence of these different jurisdictional regimes, it is necessary to establish how they will apply to the accession treaty. Article 1(3) of the Accession Treaty states that "The provisions concerning…the powers and jurisdiction of the institutions of the Union" as set out in the EC and EU Treaties "shall apply in respect of this Treaty". But which provisions apply in which case? Logically the "normal" rules of the Court's jurisdiction must apply when considering the derogations from the free movement of persons, because movement of persons from the new Member States will be a free movement issue, not an immigration issue, after enlargement. However, the specific derogations relating to JHA (discussed below) will be subject to the Court's jurisdiction either over immigration and asylum law (if the derogation concerning civil law is applied) or policing and criminal law (if the derogation concerning criminal law is applied).

Free Movement of Persons

The derogations from the free movement of persons are set out in Protocols which concern the eight eastern new Member States. These are standard rules and their effect can be demonstrated by examining the agreement with Slovakia, which details the application of the derogation in fourteen paragraphs. First of all, it is clear from paragraph 1 that the derogation only applies to free movement of workers and services. Therefore it does *not* apply to freedom of establishment (of the self-employed) or movement for any other purpose (as students, pensioners or self-sufficient persons). Those freedoms apply immediately upon entry into force of the new accession treaty. Paragraphs 2 to 12 concern workers, paragraph 13 concerns services, and paragraph 13 concerns both.

Paragraph 2 sets out the principle that national immigration law will apply to workers moving from Slovakia for two years, with a possible extension to five years. However, the scope of this rule is limited to Articles 1-6 of Regulation 1612/68, the EC legislation governing access to employment of workers, along with the EC Treaty right to free movement of workers (the application of which is restricted by paragraph 1) and the parallel Directive on the immigration status of workers, where the provisions of this Directive relate directly to the restrictions on access to employment (see paragraph 9). Implicitly, then, the *other* provisions of Regulation 1612/68 concerning equal treatment while in employment (Articles 7-9) and family reunion and the status of family members (Articles 10-12) will apply, *if* a Member State authorises a Slovakian to enter its territory as a worker. The EC rules on social security, expulsions and mutual recognition of qualifications will also apply.

However, paragraph 8 sets out a further exception concerning family members' access to employment. Those family members legally residing with a worker on the date of accession shall have immediate access to employment if a worker has been authorised to stay there for more than 12 months. Otherwise they will have access to employment if they have lived there for over eighteen months or after three years from the date of accession (likely 1 May 2007), whichever comes earlier. It is not expressly stated that the family members have equal access to the labour market. Unfortunately, there is a clear problem with this provision, for the Europe Agreements with the applicant states provide expressly that the spouse of a legally authorised worker must have access to employment. No waiting period for access to employment is provided for (although conversely there is no right of family reunion under the Agreements). It follows that for family members joining workers during the first three years following enlargement, their right of access to employment will be more limited than it was before accession!

What about the details of the derogation from free movement of workers? Paragraph 2 states that Slovaks legally employed on the date of accession and admitted for over 12 months of employment will enjoy continued access to the labour market of that Member State. The same will apply to those admitted to the labour market for a 12-month period after enlargement. So it will be impossible for a Member State to remove people on economic grounds if they have already been admitted or are later admitted for longer-term employment during the transitional period. Again it is not expressly clear

whether 'access to the labour market' means full access.

Paragraph 3 requires a review of the transitional period after two years and paragraph 4 permits Slovakia to require a further review to be held. But these results of these reviews are not binding on those Member States that still wish to maintain their national controls on workers.

After the five years are up, a Member State can still claim that there are 'serious disturbances of its labour market or threat thereof'. In that case, the Member State can apply restrictions for a further two years, upon notification to the Commission (para 5). Again the Member State has discretion whether to continue these restrictions, but arguably the determination of whether or not there is a threat to labour markets or not could be challenged in the courts.

Even those Member States which apply full free movement of workers have a special safeguard for seven years, according to para 7. However, to apply it, they need the Commission's permission, although that decision can be overturned by the Council. It is also possible for Member States to apply the safeguard unilaterally 'in urgent and exceptional cases'.

There is leeway for Member States to apply more liberal rules if they wish, 'including full labour market access', according to para. 12. After two years, this could mean application of the full EC rules. It is important to keep in mind that if a Member State only applies national rules which are more liberal, rather than the EC rules, the interpretation of those rules is presumably outside the jurisdiction of the EU courts, unless they allegedly infringe the accession treaty.

Para. 13 allows Germany and Austria (but no other Member States) to apply restrictions on the provision of specified services for the entirety of the seven-year transition period (if they retain controls on workers for the same period). But there is a 'standstill' clause preventing the rules on the take up of service provision from becoming more restrictive than on the date of signature. Declaration 20 in the Final Act makes clear the view of Germany and Austria that these restrictions can apply to their entire territory.

Next, para. 14 sets out an identical 'standstill' clause relating to the movement of workers, and also obliges Member States to give preference to workers and service providers from the accession states over persons from all non-EU countries. Member States may not treat non-EU nationals more favourably than workers and their families from the accession states.

There are declarations in the final Act relating to each of the accession states as regards free movement of workers, assuring them that "Member States shall endeavour to grant increased labour market access" to their nationals. As a result, the "employment opportunities" for nationals of new Member States "should improve substantially" after accession and "EU Member States will make the best use of" the rules "to move as quickly as possible to the full application" of the EC rules on free movement of workers (for instance, see Declaration 6). However, as noted above, declarations are not legally binding and Member States retain discretion over whether to extend restrictions for the full seven years.

Finally, there is provision in Article 37 of the Act of Accession for a safeguard to be applied within the first three years after accession if there are serious economic difficulties. It is hard to see how such safeguards would be needed for free movement of workers given the possibilities for restriction already present, but they could be relevant for freedom of establishment or freedom to provide services. It is up to the Commission, not the Member State concerned, to authorise such action. Article 38 provides for a similar safeguard regarding the "internal market"; it is not clear if this could be used as regards free movement of persons.

Justice and Home Affairs

There appear to be no transitional periods granted in the area of JHA except for the important transition period relating to the Schengen acquis. Article 3 of the Act of Accession states that all of the Schengen acquis is binding on the new Member States from the date of accession, but that only the acquis listed in Annex I will apply immediately upon accession. Article 3(2) leaves it to the Council, with the unanimous vote of the full Schengen states after consulting the EP, to approve full application of the

Schengen rules in each new Member State. The UK and Ireland also vote to the extent that they have opted in to the relevant measure.

Annex I provides that the rules on external border controls, illegal immigration, criminal law cooperation, aspects of police cooperation, drugs, firearms and data protection (where relevant to the other measures) shall apply immediately. It follows that the 1990 Schengen Convention provisions on abolition of internal borders, visa policy, freedom to travel, the core of police cooperation (hot pursuit and surveillance) and the SIS will not apply until the Council's later decision. However, much of the implementing measures concerning visa policy (the visa list, common visa format and parts of the common consular instructions) will apply immediately.

Article 3(4) of the Act of Accession sets out an obligation for new Member States to accede to conventions or 'instruments in the field of justice and home affairs which are inseparable from the attainment of the objectives of the EU Treaty', if they have been opened for signature by the present Member States or drawn up by the Council within the framework of Title VI EU. They must also make administrative and other arrangements to facilitate practical JHA cooperation. The definition of 'inseparable' instruments is completely unclear but the paragraph appears to limit the obligation to acts of the Member States collectively (such as pre-Maastricht criminal law conventions) as distinct from Council of Europe or UN acts. There is also an obligation in Article 5(2) to accede to Conventions 'inseparable' from the attainment of the objectives of the EC Treaty. Treaties concluded with third states by the Community or in accordance with Article 38 TEU (such as the treaties with the US on extradition and mutual assistance now under negotiation) must also be acceded to by the new Member States (Article 6(1), act of accession). The Council has special powers to conclude Protocols to 'mixed agreements' with non-EU countries (involving participation of both the EC and its Member States) without national ratification of such Protocols by the national parliaments of the current Member States (Article 6(2) and 6(6), act of accession).

On top of the overall funding arrangement for new Member States, there are two funds of specific relevance to JHA matters. Article 34 of the Act of Accession provides for a fund for transitional issues, including JHA matters, to the end of 2006. Article 35 establishes a "Schengen facility" totalling 300 million euro/year to the end of 2006, for funding external border controls and related matters for seven of the applicants who will be responsible for controlling the EU's future external border.

Finally, there is provision in Article 39 of the Act of Accession for a safeguard to be applied within the first three years after accession if there are 'shortcomings' in a new Member State in the transposition, implementation or application of measures relating to mutual recognition in criminal or civil matters. Again, it is up to the Commission, not Member States, to authorise such action. Article 39 does not state explicitly what 'appropriate measures' can be applied but it does state that they 'may take the form of temporary suspension of the application of relevant provisions and decisions'. They can be continued (but not applied for the first time) after this three-year period. Presumably they can be challenged by Member States directly or by individuals through the national courts by way of analogy from the rules concerning civil law (in Title IV EC) or criminal law (in Title VI TEU) as the case may be. There is great ambiguity concerning the definition of criminal law measures which are covered, as the Article applies to 'framework decisions or any other commitments, instruments or cooperation and decisions relating to mutual recognition in the area of criminal law under Title VI of the EU Treaty'. It is not clear whether the safeguards must relate to acts adopted by the Council within the Title VI TEU framework or whether they can also apply to Council or Europe or UN measures.

Refugees

From the date of accession, a special Protocol to the EC Treaty (dating back to the Treaty of Amsterdam, which entered into force in 1999) will create a presumption that all applications for asylum for citizens of the new Member States are unfounded. So even without the full free movement rights that come with EU citizenship, the new citizens in the acceding Member States will face one of the burdens of EU citizenship. Moreover, in Resolutions agreed in autumn 2002, the JHA Ministers declared that they would apply a presumption against asylum applicants from the new Member States from the date of signature of the new accession treaties in April this year.

The new Member States will also have to apply the EU's rules on responsibility for asylum applications in the Dublin Convention (or the Dublin II Regulation about to be adopted) immediately, even though planned EU rules on the definition of 'refugee' and subsidiary protection, reception conditions for asylum applicants and asylum procedures will not yet be applicable. So the problems with applying the Dublin rules in the current Member States will apply equally to the new Member States.