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Examining Ukraine's EU Candidate Status: (When) Does the Accession Process Turn from Political to Legal?

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This article explores the nature of the notion "candidate country status" in the context of EU accession. In particular it enquires whether the candidate status, which was granted to Ukraine by the European Council on 23 June 2022, has any actual legal implications or is the whole accession process up to the point where accession agreement is signed entirely devoid of legal consequences. Legal doctrine seems to generally answer this question in the affirmative, explaining that the candidate status was a rather political concept bearing primarily symbolic relevance. However, the example of Ukraine, which was granted candidate status much more rapidly than a number of other countries before it, challenges to explore the topic in more depth, in particular by delving into the CJEU's existing case law on candidate status and the possibility of challenging the granting of candidate status through litigation in the CJEU.

Keywords: EU candidate country, European Council, accession to the EU, enlargement of the EU, Ukraine, Court of Justice of the European Union.

Contents

Introduction

A frequent comparison of Brexit-analyses illustrating the process and consequences of the United Kingdom leaving the European Union (EU) was the analogy of a divorce.[1] Hence, one may be tempted to adopt this wider image though reversing its central aspect by asking, is EU-accession somehow comparable to getting married? Indeed, accession to the EU has the aim of creating a (life-long[2]?) union which is supposed to bring mutual benefits and also obligations. Without entering too deeply into this comparison and avoiding the slippery grounds of discussing a marriage with 27, one may nevertheless be tempted to raise a related question: Is an accession candidate, who had well founded hopes for EU-accession, in a similar legal situation as a fiancée who was promised marriage? In this case, it is inspiring to let thoughts travel in space and time across the various EU member states jurisdictions: frequently different legal orders governed that (under certain circumstances) an abandoned fiancée could bring a claim for certain (also immaterial) damages.[3] Somewhat similar to this question, this essay seeks to answer the question, whether anything may be found or constructed under EU law or international law that provides rights to a membership-aspirant whose hopes for accession have (unduly) been frustrated. More precisely, due to the current political focus and the impressive recent advances in the accession process,[4] this article will concentrate on the example of Ukraine.

On 23 June 2022, Ukraine was granted candidate status by unanimous agreement between the leaders of all 27 EU Member States. Given the Russian aggression and the ongoing war, this decision seems to have raised more attention than the granting of the candidate status to other states, such as Albania, Bosnia and Herzegovina or – simultaneously with Ukraine – to Moldova. However, this attention also brings

[1] E.g.: *Poole, S.* Don't Say Divorce, Say Special Relationship: The Thorny Language of Brexit. Available: www.theguardian.com/books/2017/apr/07/brexit-language-divorce-special-relationship-negotiation-britain-eu [last viewed 12.01.2024]; see already before Brexit: *Tatham, A. F.* 'Don't Mention Divorce at the Wedding, Darling!': EU Accession and Withdrawal after Lisbon. In: EU Law After Lisbon, *Biondi, A. et al.* (eds). Oxford University Press, 2012, p.152.

[2] Initially, the Treaties did not provide any provision regulating the leave of a Member State; *see Dörr, O.* Art. 50 EUV, para. 1–7. In: Das Recht der Europäischen Union: EUV/AEUV [The law of the European Union: EUV/TFEU], *Grabitz, E., Hilf, M., Nettesheim, M.* (eds). Beck, 2021.

[3] Under German law, withdrawal from an engagement may still entail legal consequences for the other person, see §§ 1297 BGB. Available: www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p5468 [last viewed 12.01.2024]; however, the former § 1300 BGB in Germany, formally abrogated only in 1998 went considerably beyond, hereon a rather informal overview of the background and legal history of this norm: *Felz, S.* Geplatztes Heiratsversprechen: Das doppelt verfassungswidrige Kranzgeld [Bursted wedding-promise: A wreath money which is doubly unconstitutional]. Available: www.lto.de/recht/feuilleton/f/kranzgeld-verloebnis-heirat-ehe-schadensersatz-frau-unbescholten-verfassungswidrig/ [last viewed 12.01.2024].

[4] *Lorenzmeier, S.* Der Beitritt der Ukraine zur EU: Rechtliche und politische Fragestellungen, Ukraine-Krieg und Recht (UKuR) [The EU-Accession of the Ukraine: Legal and Political Questions, Ukraine and the War]. Beck, 2022, p. 390.

forward questions about the implications of this decision as a first step on the road to EU accession for the *candidate*, the EU and its Member States.

In this regard, one may distinguish between two dimensions, firstly, a political and secondly a legal dimension. While the first reflects rather unbinding perspectives for the actors, a legal dimension would imply rights and obligations which at some point might become the object of judicial disputes. The vast majority of publications on this aspect limits itself to stating that the accession process is political,[5] i.e. concerns the first dimension. Hence, not much[6] has been written on potential legal implications of the candidate status. However, with regard to the public attention, candidate status gets, it appears questionable whether the status is purely symbolic. This would mean that the respective decisions would merely be seen as something like a marketing event or a "beauty contest" bearing almost no binding relevance.

This paper aims at analysing the implications of the "candidate" status, striving to distinguish between the two dimensions and indicate whether it is possible to identify aspects in this concept that might be classified as legal. If the overall candidate status does not bring legal rights for the aspirant, it still brings forward the question whether the following accession process turns from political to legal, and if so, at what point? Furthermore, would it be helpful for the applicant to bring a disputed legal aspect to the Court of Justice of the European Union (CJEU)? Or, returning to the analogy of a wedding, whether a frustrated fiancée could claim for compensation – would there be any equivalent for a candidate country?

The authors will address these questions in two sections. Firstly, the article will provide an overview of the accession process (1.1.), and hereafter, explain the relevance of association agreements for a potential accession (1.2.) for indicating what legal elements an accession process might generally entail. On this basis, the exact procedure of becoming a candidate will be discussed (1.3.), and any potential legal implications of the candidate status analysed (1.4.). Under the assumption that there might be legal elements, the second section will discuss the prospects of a (hypothetical) claim brought to the CJEU.

While these questions may have been somewhat neglected in the past due to the political character of negotiations and the relative theoretical relevance of this aspect, this could be different in the case of Ukraine, for two reasons. Firstly, more than the applications of other states, for Ukraine, EU membership would bring significant advantages when defending against the Russian aggression and thus makes a fast accession more pressing. Secondly, Ukraine differs considerably from other applicants, insofar as (among a range of other aspects) its president Zelensky, due to the practical importance of effectively countering Russia, has developed a straightforward style, that, also with regard to the geo-political importance of the country may bring in additional weight in negotiations. Accordingly, these aspects may render the perspective less obvious that Ukraine would remain a stoic observer when potential obstacles to accession arise, that previously had not been on the agenda.

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[5] *Ohler, C.* Art. 49 EUV para. 3, 2021.

[6] *Šarčević, E.* EU-Erweiterung nach Art. 49 EUV: Ermessensentscheidungen und Beitrittsrecht, Europarecht [EU Enlargement and 49 TEU: Decisions implying Discretion and the Law regarding Accession]. Nomos, 2002, pp. 461–479; see *Zeh, J.* Recht auf Beitritt? Ansprüche von Kandidatenstaaten gegen die Europäische Union [Right to Accession? A Right of Candidate States vs. the EU]. Baden-Baden, Nomos, 2002.

1. How does a state become a candidate

1.1. Accession requirements

On a very broad and general basis, accession is dealt with in Article 49 of the Treaty on the European Union (TEU), which stipulates:

> *Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.*
>
> *The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.*

With Article 49 TEU, there is only one norm in EU primary law regulating accession,[7] however so short that it governs the process almost rudimentarily.[8] This provision implicitly structures the accession process in either two[9] or three phases[10]. The difference is, whether one counts a first phase, which concerns the application – being dealt with in the first paragraph of Article 49; the second, the pre-candidate-phase; and the third – the accession-phase, i.e. accession negotiations (Article 49(2) TEU). At first glance the first paragraph only once seems to explicitly refer to substantive law, namely to the values enshrined in Article 2 TEU. However, since its codification with the Lisbon Treaty, the last sentence, "The conditions of eligibility agreed upon by the European Council shall be taken into account" opens the pre-candidate-phase to further substantive requirements. Differing from Article 49(1) TEU, which involves the EU's institutions and refers to the procedure of accessions, paragraph 2 leaves the substantive conditions of the accession to "… an agreement between the Member States and the applicant State".

Apart from adjusting procedures within the EU, the fifth enlargement with 12 states applying for EU membership brought a general practical need to equip these aspiring members in order to cope with the political, legal and economic reality in the EU.[11] Accordingly, the Copenhagen European Council, which was dealing with

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[7] *Kochenov, D., Janse, R.* Admitting Ukraine to the EU: Article 49 TEU is the 'Special Procedure'. EU Law Live, 30 March 2022. Available at SSRN: https://ssrn.com/abstract=4083111 or http://dx.doi.org/10.2139/ssrn.4083111 [last viewed 12.01.2024].

[8] *Ohler, C.* Art. 49 EUV para. 3, 2021.

[9] *Terhechte, J.* Art. 49 EUV, Para 21. In: Kommentar zu EUV, GRC und AEUV [Commentary on TEU, CFR and TFEU], *Pechstein, M., et al.* (eds). Mohr Siebeck: 2017.

[10] Pechstein explains both in Enzyklopädie Europarecht [Encyclopedia of EU Law], Vol. 1, § 21, Baden-Baden, Nomos, 2022, p. 1157, para. 11; seemingly, also: *Ohler, C.* Art. 49 EUV para. 3, 2021.

[11] From the perspective of Estonia as one of the accession states: Estonia's way into the EU. Available: https://eu.mfa.ee/wp-content/uploads/sites/19/2018/09/Estonias_way_into_the_EU.pdf [last viewed 12.01.2024].

the upcoming accession, agreed in 1993 (and later in the Madrid European Council in 1995),[12] that applicant countries need to fulfil certain requirements. Only later, these Copenhagen Criteria – which in the fifth enlargement had been applied without being codified – were formally introduced with the Lisbon Treaty Article 49(1) sentence 4 TEU. They require states to have stable institutions in order to guarantee democracy, the rule of law, human rights and respect for and protection of minorities. With regard to economic aspects, aspirants should have a viable market economy, the ability to cope with competitive pressure and market forces within the Union and also, to be able to meet obligations relating to the objectives of political, economic and monetary Union.

Furthermore, they have to adopt the *acquis communautaire*, i.e. effectively implement the rules, standards and policies that make up the body of EU law. The extent of this latter requirement has continuously grown and already in prior accessions, the *acquis* comprised around 90 000 pages that needed to be translated and to be incorporated into the national legal systems.[13] This mere detail illustrates that practical requirements by far exceed what one might expect when reading the minimalistic wording of Art. 49 TEU.[14] Furthermore, it illustrates that, with the growing bulk of EU law – including case law of the CJEU – fulfilling requirements is becoming increasingly demanding for aspirants.[15]

1.2. Preparing accession: Association Agreements and the Ukraine

Usually, the application for membership in the EU is anticipated, planned and prepared. An important method to structure the pre-accession has been the use of association and partnership agreements.

a. Association Agreements

Article 217 (also 198–204, 37) of the Treaty on the Functioning of the European Union (TFEU) deals with so-called association agreements, i.e. those, which go beyond mere trade agreements and in addition include a range of other policy areas. Commonly, they aim to achieve closer relations – contingent on the type of agreement – by fostering development and facilitating political, societal and economic transformation in the partner states. However, association agreements may take different forms depending on the respective state. These can include free trade agreements, like the European Economic Area (EEA), development association, e.g. with African states, or constitutional association with former Member States' colonies.[16] A particular form known as accession-association, focusses on the prospect

[12] Europäischer Rat Kopenhagen, 21./22.6.1993. Schlussfolgerungen des Vorsitzes [European Council Copenhagen 21/22.6.1993, conclusions of the presidency], S. 13 des Umdrucks, SN 180/1/93. Available: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/de/ec/72924.pdf [last viewed 12.01.2024].

[13] European Commission. Translation: where do we stand after completion of the fifth enlargement? MEMO/07/76. Brussels, 23 February 2007. Available: https://ec.europa.eu/commission/presscorner/detail/de/MEMO_07_76 [last viewed 12.01.2024].

[14] The reach of the Simmental decision illustrates the reach of the impact of EU law for Member States. See: *Beutel, J., Broks, E., Buka, A., Schewe, C.* Setting Aside National Rules that Conflict EU law: How Simmenthal works in Germany and in Latvia. In: New Legal Reality: Challenges and Perspectives. University of Latvia Press, 2022, pp. 123–142.

[15] European Commission. Guide to the Main Administrative Structures Required for Implementing the Acquis May 2005. Available: http://ec.europa.eu/enlargement/pdf/enlargement_process/accession_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/adminstructures_version_may05_35_ch_public_en. pdf [last viewed 12.01.2024].

[16] *Vöneky, S., Beylage-Haarmann, B.* Art. 217 AEUV, para. 1–3. In: Das Recht der Europäischen Union: EUV/AEUV [The Law of the EU: TEU/TFEU], *Grabitz, E., Hilf, M., Nettesheim, M.* (eds). Beck: 2021.

of EC/EU accession and was first applied in 1981, when preparing the accession of Greece. Since then, this method has been consistently utilized, and further elaborated association agreements played a significant role in facilitating the accessions of enlargements in 2004, 2007 and 2013.[17]

Accompanied by economic and financial support, these initiatives aim at bringing about a conducive environment for fostering democratization, promoting cooperation in legal matters, enhancing justice and home affairs, and intensifying political dialogue. A related form of association agreements is encompassed by the EU Neighbourhood Policy, which, among other initiatives also includes the Eastern Partnership.[18] Association agreements are concluded as binding international treaties, bringing forth rights and obligations for all parties involved. The procedure is governed by Art. 218 TFEU and involves the three institutions, the Commission, the Council and the European Parliament.

b. The EU-Ukraine Association Agreement

Closer institutionalized relations between the EU (then European Community (EC)) and Ukraine have been in place since 14 June 1994, when the Partnership and Cooperation Agreement (PCA) replaced an earlier agreement the EC had concluded with the USSR. On 9 September 2008, an agreement was signed and on 7 May 2009 Ukraine became a member of the Eastern Partnership. Even though negotiations on the conclusion of an Association Agreement had been relatively advanced, the former Ukrainian President Janukovich on 21 November 2013 decided to "freeze" the process.[19] Furthermore, as he also denied the signing of the Association Agreement, this led to protests and the beginning of the Euro-Maidan. Instead, he seemed to consider signing an agreement aimed at joining Eurasian Economic Community – the Customs Union between Russia, Belarus, and Kazakhstan.[20]

Notwithstanding this intense and precarious political conflict, on 21 March 2014 the "political part" of the Association Agreement was signed and has been applied since December, 2015. On 1 January 2016, Ukraine became a member of the Deep and Comprehensive Free Trade Area (DCFTA)[21] and since 11 June 2017 an agreement on visa-free travels has been applied.

The Association Agreement[22] between Ukraine and the European Union encompasses 1200 pages and is organized into 7 titles or chapters. The primary objective is to facilitate a gradual rapprochement between the Parties, which involves

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[17] *Vöneky, S., Beylage-Haarmann, B.* Art. 217 AEUV. See also *Majkowska-Szulc, S., Wierczyńska, K.* European Neighbourhood Policy and EU Enlargement. In: The Oxford Handbook of International Law in Europe. Oxford University Press, 2023.

[18] See information on the Eastern Partnership on the website of the Council of the EU. Available: https://www.consilium.europa.eu/en/policies/eastern-partnership/#candidate [last viewed 12.01.2024].

[19] Generally, on the agreement, see: *Lorenzmeier, S.* Das Assoziierungsübereinkommen EU – Ukraine und der Krieg. Ukraine-Krieg und Recht (UKuR) [The Association Agreement EU-Ukraine and the War. Ukraine and the War]. Beck, 2022, p. 104.

[20] *See Schewe, C., Aliyev, A.* The Customs Union and the Common Economic Space of the Eurasian Economic Community: Eurasian Counterpart to the EU or Russian Domination? German Yearbook of International Law, Vol. 54, 2011, p. 565.

[21] EU-Ukraine Deep and Comprehensive Free Trade Area (DCFTA). Available: https://www.eeas.europa.eu/sites/default/files/tradoc_150981.pdf [last viewed 12.01.2024].

[22] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part. Available: www.consilium.europa.eu/en/documents-publications/treaties-agreements/ratification/?id=2014045&partyid=NL&doclanguage=en [last viewed 12.01.2024].

establishing common values and fostering close and privileged links.[23] Additionally, the Agreement aims to enhance Ukraine's association with EU policies and increase its participation in various EU programs and agencies. One of the key features of the Agreement is the provision of an appropriate framework for an elevated political dialogue in all areas of mutual interest, ensuring a comprehensive and dynamic relationship between the Parties.

In contrast to the preceding association agreements with the Central European states that foresaw an accession perspective, this was not the case for the EU-Ukrainian Association Agreement. One important reason is that in the Netherlands there were concerns regarding the impact of the Association Agreement; a consultative referendum was undertaken prior to the ratification of the Ukraine's Association Agreement, in which 61% of votes were against the Approval Act. Against this backdrop, the Netherlands requested modifications and a peculiar compromise was worked out in the European Council. This compromise, did not commit the EU to grant Ukraine EU candidate status, or provide security guarantees, military support or financial aid, or free movement to Ukrainians within the EU.[24]

1.3. The procedure to become a candidate

As already noted, the founding treaties say very little on the accession process and even less on the seemingly important step of that process, i.e., on how a State becomes a candidate. Article 49 TEU spells out only that "[t]he applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament". Thus, the process starts with an application to the Council[25], which in the case of Ukraine was submitted on 28 February 2022, just four days after the start of Russia's invasion.[26]

After receiving the application, the Council forwarded it to the European Commission and invited it to prepare an Opinion on Ukraine's capacity to meet the accession criteria.[27] The Commission then provided Ukraine with two questionnaires: one on political and economic criteria and another on EU *acquis* chapters. On 17 June 2022 on the basis of Ukraine's replies to the questionnaires the Commission issued a favourable opinion that Ukraine be granted the candidate

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[23] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, Article 1(2). Available: www.consilium.europa.eu/en/documents-publications/treaties-agreements/ratification/?id=2014045&partyid=NL&doclanguage=en [last viewed 12.01.2024].

[24] *Wessel, R.* The EU solution to deal with the Dutch referendum result on the EU-Ukraine Association Agreement. European Papers, Vol. 1, No. 3, 2016, pp. 1305–1309. Available: www.europeanpapers.eu/en/europeanforum/eu-solution-deal-dutch-referendum-result-on-the-eu-ukraine-association-agreement [last viewed 12.01.2024]; *Baczynska, G., Bartunek, R. J.* EU agrees Dutch demands on Ukraine deal to avoid present for Russia. Available: https://www.reuters.com/article/us-ukraine-crisis-eu-rutte-idUSKBN14416I/ [last viewed 12.01.2024].

[25] That is the Council of Ministers, which in the TFEU and the TEU is referred to simply as "the Council" – not to be confused with the European Council, i.e., the meeting of the Heads of State and Government of the Member States.

[26] Article 49 TEU also stipulates that: "The conditions of eligibility agreed upon by the European Council shall be taken into account". Thus, the Article clarifies that the accession requirements are not always uniformly fixed but may be adjusted according to the peculiarities of the situation.

[27] The Opinion assesses not only the Copenhagen criteria, but also Ukraine's administrative capacity as well as the country's efforts to implement its Association Agreement, including obligations under the Deep and Comprehensive Free Trade Area. See *Veebel, V.* Relevance of Copenhagen criteria in actual accession: Principles, methods and shortcomings of EU pre-accession evaluation. Studies of Transition States and Societies, 3(3), 2011, pp. 3–23.

status.[28] The European Parliament similarly endorsed Ukraine just days after the Commission.[29] With both the Commission and the Parliament supporting Ukraine, the European Council on 23 June 2022 granted the candidate status to Ukraine.[30]

1.4. Implications of being granted the candidate status

The European Council granted the candidate status to Ukraine in a document designated as "Meeting Conclusion", which is not a legal act in the context of Article 288 TFEU. Although the European Council is an EU institution[31] Article 15(1) TEU explicitly states that the European Council does not exercise legislative functions. Also Article 263 TFEU states that acts of the European Council are subject to judicial review by the CJEU only if they are "intended to produce legal effects *vis-à-vis* third parties" which, as shown in section 2 of the current article, is unlikely in the case of Conclusions.[32] Thus, the European Council deciding "to grant the status of candidate country to Ukraine" seems to lack the hallmarks of a legal act that would create rights or obligations or could be challenged before the CJEU.[33]

Likewise, the Commission's Opinion technically is cast as a "Communication to the European Parliament, the European Council and the Council". Communications again are not intended to produce legal effects *vis-à-vis* third parties and therefore are not subject to judicial review under Article 263 TFEU. The same applies to the Resolution of the European Parliament which endorsed Ukraine's candidacy. Thus all three – the European Council's Conclusions, the Commission's Communication and Parliament's Resolution – fall into the category of EU's "soft law" and as such have no legally binding force.[34]

They do, however, generate considerable practical implications. First and foremost, granting the candidate status is a powerful signal of solidarity and support to Ukraine. Being a step closer to EU membership gives a notable boost to morale of both the army, and of the civilian population – a significant asset for a country at war. Secondly, becoming a candidate encourages Ukraine to undertake much needed domestic reforms on issues such as corruption, independence of the courts, effective

[28] European Commission, Commission Opinion on Ukraine's application for membership of the European Union, Brussels, 17.6.2022, COM(2022) 407 final. Available: https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-06/Ukraine%20Opinion%20and%20Annex.pdf [last viewed 12.01.2024]. In terms of methodology, the Opinion is a mix of formalism and substantive evaluation of the accession requirements.

[29] European Parliament resolution of 23 June 2022 on the candidate status of Ukraine, the Republic of Moldova and Georgia (2022/2716(RSP)), (2023/C 32/01). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022IP0249 [last viewed 12.01.2024].

[30] European Council Conclusions, 23 and 24 June 2022. Available: https://www.consilium.europa.eu/media/57442/2022-06-2324-euco-conclusions-en.pdf [last viewed 12.01.2024].

[31] See Article 13 of the TEU.

[32] The legal conundrum created by the Dutch referendum rejecting the Association Agreement between the European Union, its Member States and Ukraine demonstrates that the European Council, when it wants to create legally binding effects, may frame its action as Member States acting outside the scope of the EU. See *Wessel, R.* The EU solution to deal with the Dutch referendum result on the EU-Ukraine Association Agreement. European Papers, Vol. 1, No. 3, 2016, pp. 1305–1309. Available: https://www.europeanpapers.eu/en/europeanforum/eu-solution-deal-dutch-referendum-result-on-the-eu-ukraine-association-agreement [last viewed 12.01.2024].

[33] *Ohler, C.* Art. 49 EUV para. 3, 2021.

[34] On EU's soft law, see: *Peters, A.* Soft Law as a New Mode of Governance. In: The Dynamics of Change in EU Governance, *Diedrichs, U., Reiners, W., Wessels, W*. (eds). Edward Elgar Publishing, 2011, pp. 423–424*; Snyder, F.* The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques. The Modern Law Review, 56(1), 1993, p. 32.

administration and many other areas. The accession process will create considerable pressure on the Ukrainian government from the civil society, media and from the EU to rapidly proceed with reforms required by the EU. Thirdly, being a candidate opens a much wider access to EU funding and support.

The above described process leading up to the granting of the candidate status also serves as a point of reference for the upcoming accession negotiations. The accession criteria, the Commission's questionnaire and also its Opinion all form the basis of the initial to-do list for the candidate - it is the first time when the candidate is presented with a somewhat detailed sketch of what requirements it must satisfy before becoming a Member State. Subsequently this sketch is filled in with much more detail in the so-called screening of the *acquis* process, in which the candidate together with the Commission undertakes an in-depth examination of *acquis* thereby for the first time learning the details of what it is expected to do before joining the EU.

Thus, the process of becoming a candidate seems to be lacking tangible legal structures or legal implications. The outline of the process is indeed regulated by a legal norm, i.e., Article 49 TEU. However, the stages of that process – the application, Commission's opinion, consent of the European Parliament and the European Council's Conclusions are in essence political acts or steps of internal decision making rather than legal acts that would create rights or obligations. Certainly one may suggest that any action of the EU's institutions must comply with general principles of law.[35] Thus legal certainty, legitimate expectations or *estoppel* or *venire contra factum proprium* in principle would impose restraints on what EU's institutions may do. For example, the Commission arguably should not impose new criteria that were not initially required of Ukraine or increase the required standard, which it previously has accepted as being good enough.

However, such arguments by and large seem to be moot, because the process for transitioning from a candidate to a member is negotiation. Within negotiations Ukraine certainly may also use legal arguments, such as *estoppel*, to advance its interests. But in practical terms *estoppel* or other general principles would serve only as a bargaining chip, rather than a basis for an actual legal claim in the CJEU. EU law does not provide for rights or obligations stemming from the candidate status. There is no right to become a candidate; and being a candidate does not grant a right to become a Member State. Although the EU is thoroughly a legal creature with a tendency to increasingly legalize all its doings, all that takes place before the Accession Agreement is inherently a political process with a few formalized stages which in themselves hardly create rights and obligations.

2. Bringing the candidate status before the CJEU

Although section 1.4 has already outlined the legally non-binding nature of the candidate status, it is worth looking further at the CJEU's position both on soft law generally and on the case law relating to the candidate status.

The general approach of the CJEU regarding the range of norms that can be legally challenged in Luxembourg, is a relatively broad one. As the usage of "soft law" instruments by the EU institutions increased through time, the developments in

[35] *See Tridimas, T.* The General Principles of EU Law. Oxford University Press, 2006; *Lenaerts, K., Gutiérrez-Fons, J. A.* The Constitutional Allocation of Powers and General Principles of EU law. Common Market Law Review, Vol. 47, No. 6, 2010, pp. 1629–1669.

the case law of the CJEU have followed.[36] The CJEU has emphasized that the binding effects of a measure must not be limited to the formal designation of the act. Instead, it should be assessed in accordance with objective criteria. Those criteria, according to the CJEU, include the contents of the measure, the context in which the measure was adopted and the powers of the institution which adopted the measure.[37] Thus, all these criteria must be taken into account: regarding the content, whether the act in question imposes mandatory obligations; as regards context, whether the act is intended to produce binding legal effects and whether the issuing authority intended it to have such effects; and, as regards the powers, whether the issuing authority has been given such powers.[38]

Generally, this broad approach has been used also in the context of the EU's action in the field of international law – as far back as the famous ERTA case, in which the Commission challenged the decision of the Council of the EU on the negotiation and conclusion by the Member States of the international treaty under the auspices of the United Nations Economic Commission for Europe. Despite the fact the Council of the EU claimed that the application was not admissible as the decision in question did not constitute a legislative act in form, substance or object, the CJEU was willing to review it.[39]

However, in the context of the accession process so far the case law of the CJEU indicates restraint and reluctance to elaborate on the legally binding dimension of the accession process. Thus the CJEU in Mattheus/Doego clearly stated that the Court cannot "determine the content" of the accession, i.e., the CJEU cannot establish in its case law a binding set of criteria defining the requirements for a country to be admitted to the EU. It clarified that the legal conditions for accession should be defined in the context of the accession procedure as specified by the Treaties "without it being possible to determine the content judicially in advance".[40]

Similarly the concept of the candidate country features in the case law of the CJEU very seldomly. In fact, only a few indirect references can be identified, mostly by parties of the case. For example, in the Korkmaz several applicants sought before the General Court a partial annulment of the Commission's Report concerning Turkey's progress towards accession and, *inter alia*, argued that Turkey was failing the obligations of a candidate country.[41] The Court did not elaborate on the concept of the "candidate country" and found the application inadmissible on other grounds.[42] In another case, the Hungarian government used the status of a candidate country to argue that on the basis of being a candidate Serbia must be considered a safe country of origin, but CJEU did not take this argument into account.[43]

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[36] See, e.g., *Korkea-aho, E.* National Courts and European Soft Law: Is Grimaldi Still Good Law? Yearbook of European Law, Vol. 37, 2018, pp. 470–495. Available: https://academic.oup.com/yel/article/doi/10.1093/yel/yey008/5259665?searchresult=1 [last viewed 12.01.2024]

[37] Judgement of 13 February 2014 of the Court of Justice of the European Union in case C-31/13 P Hungary v. Commission, especially para. 55.

[38] Ibid.

[39] Judgement of 31 March 1971 of the Court of Justice of the European Union in case 22/70 Commission v. Council.

[40] Judgment of 22 November 1978 of the Court of Justice of the European Union in case 93/78 Mattheus/Doego Fruchtimport, para. 8.

[41] Judgment of 30 March 2006 of the General Court in case T-2/04 Korkmaz and others.

[42] Ibid.

[43] Judgment of 22 June 2023 of the Court of Justice of the European Union in case C-823/21 Commission v. Hungary, para. 36.

Perhaps the best chance for the CJEU to meaningfully interpret the concept of the candidate country was in Spain v. Commission[44]. In this case the CJEU had to interpret the following phrase in the preamble of Regulation (EU) 2018/1971: "… regulatory authorities of third countries competent in the field of electronic communications where those third countries have entered into agreements with the Union to that effect, such as European Economic Area or European Free Trade Association States and *candidate countries* (emphasis added) [...]"[45]. The dispute in this case was whether the regulation should also apply to Kosovo, which is not an official EU candidate country. The CJEU held that the reference to "candidate countries" in regulation was merely illustrative and that, accordingly, Kosovo should be among the countries covered by this regulation, too.[46] However, even in this case, the CJEU did not take the opportunity to clarify the nature of the candidate status.

Considering the uncertainty of the concept of "candidate" one may wonder whether it would be possible to challenge the European Council's decision to grant candidate status before the CJEU? The short answer seems to be – unlikely. It is true that the Lisbon Treaty established the European Council as an institution of the European Union and the measures adopted by the European Council "no longer escape the review of legality provided for in Article 263 TFEU"[47]. However, this may happen only if the measure in question would meet the above discussed criteria of a legally binding act. In the context of the decision on the candidate status it seems that, firstly, the content of the decision itself does not impose mandatory obligations and, secondly, the context of this decision (more precisely, the intent of the European Council) is not aimed at giving the decision a legally binding effect.

Regarding the non-mandatory nature of the European Council's decision – obviously, it cannot impose obligations on Ukraine without its consent. Similarly, the European Council's decision is unlikely to create obligations for other EU institutions without these obligations being spelled out in the TEU or the TFEU. The whole communication between the EU institutions in the context of the accession is not entirely regulated by Article 49 TEU or any other article of the treaties and lacks transparency. Therefore it is hard to estimate the exact impact of the decision to grant the status of a candidate country on other EU institutions. Yet it seems that the European Council's decision does not impose mandatory obligations on anyone, and it does not even mark the beginning of the accession negotiations.

As for the intent of the European Council, it is hard to imagine that by granting the candidate status the European Council would see itself making a definite commitment to the membership of the candidate and thus giving up conditionality – EU's most effective tool in the accession process. Also it could be argued that state representatives within the European Council, if necessary, can distinguish between their actions that are intended to create legally binding effects and non-binding ones. For example, to make something legally binding, state representatives could choose

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[44] Judgment of 17 January 2023 of the Court of Justice of the European Union in case C-632/20 P Spain v. Commission.

[45] Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No. 1211/2009; OJ 2018 L 321, p. 1.

[46] Judgment of 17 January 2023 of the Court of Justice of the European Union in case C-632/20 P Spain v. Commission; see, in particular, para. 56.

[47] See, e.g., the decision of 28 February 2017 of the General Court in case T-193/16 NG v. European Council, para. 44 and the case law mentioned there.

to act as "the Heads of State or Government of the Member States of the European Union, meeting within the European Council" (which *de facto* would mean creation of a separate international agreement).[48]

Even if one assumes the possibility to challenge the decision on the candidate country status in the CJEU substantively, the question remains who has the *locus standi* in such cases. According to Art. 263(2) of the TFEU, theoretically, any of the Member States could challenge that decision. According to Art. 263(4) of the TFEU, natural and legal persons have a right to start proceedings only against acts that are "of direct and individual concern to them", which the decision on the candidate status clearly is not. The only exception here is Ukraine itself - although Ukraine is not the explicit addressee of this decision, yet possibly it would satisfy the "direct and individual concern" test, especially taking into account recent move towards broader *locus standi* in the CJEU position in Venezuela v. Council.[49] But, even if the Member States or Ukraine itself could challenge the decision on candidate country status, it is very unlikely that they will have motivation to do it (perhaps only in the rare case of a radical change in government policies).

Overall, the current assessment of the CJEU case law does not provide a clear answer not only on the legal consequences of candidate status, but also on the distinction between the legal and political elements of the accession process as a whole. The CJEU has recognized in several cases that the promises made by a country during accession negotiations must be fulfilled by that country.[50] However, in all these cases, the legally binding nature of the accession negotiations stemmed from the subsequent Accession Treaty and the provisions contained therein, which contained a reference to the accession negotiations that had taken place.[51] Thus, the only clear threshold after which the accession process indeed turns from political to legal seems to be the Accession Treaty.

Summary

The notion of the "EU candidate country" is primarily a non-legal concept, which accordingly does not entail specific rights for the candidates to further advance towards full membership. Still, it formally acknowledges that the application for membership in the EU has been accepted and considered as admissible. Accordingly, it brings along political prestige, which may entail considerable benefits.

Or, returning to the analogy with a fiancée: the (marital) candidate may not derive precise rights to marriage, however, by officially creating a deeper bond between the partners which is openly accompanied by plans, promises and perspectives for the future, this bond may nevertheless impress third persons and actors. However, both partners remain aware that this future still remains conditional to the fulfilment of the reciprocal expectations.

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[48] See *Wessel, R.* The EU solution to deal with the Dutch referendum result on the EU-Ukraine Association Agreement. European Papers, 2016, Vol. 1, No. 3, pp. 1305–1309. Available: https://www.europeanpapers.eu/en/europeanforum/eu-solution-deal-dutch-referendum-result-on-the-eu-ukraine-association-agreement [last viewed 12.01.2024].

[49] Judgment of 22 June 2021 of the Court of Justice of the European Union in case No. C-872/19 P Venezuela v. Council.

[50] E.g., judgment of 26 February 2016 of the Court of Justice of the European Union in joined cases T-546/13, T-108/14 and T-109/14 Šumelj and others (on Croatia); judgment of 21 December 2021 of the Court of Justice of the European Union in joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 Euro Box Promotion and Others (on Romania).

[51] Ibid.

The process of becoming a candidate is only partially spelled out in Article 49 TEU and in practice is more complex and ambiguous. The documents adopted by the EU institutions within this process hardly create rights or obligations that could be adjudicable – at best, they are steps of internal decision making, which supposedly result in the self-commitment of these institutions.

CJEU case law on the concept of the candidate country is almost non-existent. It is highly doubtful that the decision to grant the candidate country status could be challenged in the CJEU as the decision lacks legally binding content – it does not come with mandatory obligations and the intent of the European Council does not aim to make the decision legally binding. Moreover, it is questionable who has a right to start such action in the CJEU and who has an interest to challenge the granting of candidate status. Nevertheless, there is no *expressis verbis* evidence in the case law of the CJEU that would confirm that the CJEU sees the candidate country status only as a political will and forfeits any possible legal dimensions of that status.

The ambivalent nature of the candidate country status prompts a more extensive critique of the accession process as a whole. To enhance transparency of the accession process and to ensure predictability, it is essential to clearly define the roles of EU institutions involved, particularly emphasizing the European Council's role. Although conditionality of accession, which allows the EU to ensure that the candidate implements all the reforms required by the EU, is an essential part of the accession process, absence of legally spelled out details leaves the process potentially susceptible to obstruction tactics where the candidate fulfils accession requirements, yet still is denied membership. Increased transparency would benefit not only the political actors but also the wider public.

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