“Admitting Ukraine to the EU: Article 49 TEU is the ‘Special Procedure’”

Op-Ed

Dimitry Kochenov and Ronald Janse

“Admitting Ukraine to the EU: Article 49 TEU *is* the ‘Special Procedure’”

www.eulawlive.com

Suggested citation: Dimitry Kochenov and Ronald Janse, “Admitting Ukraine to the EU: Article 49 TEU *is* the ‘Special Procedure’”, *EU Law Live*, 30 March 2022

"Admitting Ukraine to the EU: Article 49 TEU *is* the 'Special Procedure'"

Dimitry Kochenov and Ronald Janse

On 28 February 2022, Ukrainian President Zelensky submitted to the President of the Council of the European Union the application of Ukraine to become a member of the European Union. He requested that the application 'be considered under a special procedure': the EU is 'to immediately start the formal procedure which will lead to the formal granting to Ukraine of status as a candidate for membership of the European Union.' What is this 'special procedure'? Given that Article 49 TEU does not specify this, a clarification is in order. The easiest answer would have been to say that such a procedure does not exist and the President is not well informed. We would disagree, however, with such a mischaracterization.

We submit that there are two crucial points that need to be kept in mind in this context. First, President Zelensky clearly makes an emphasis on the speed of accession, as opposed to the usual process, which can take decades. Second – and this might seem counter-intuitive to some – the procedure described, precisely, in Article 49 TEU, the instrument of the primary law of the Union responsible for the regulation of EU enlargements, could be considered that 'special procedure', which President Zelensky is seeking to see deployed. Indeed, Article 49 TEU gave way to an extremely detailed system of customary regulation not necessarily rooted explicitly in the text of this Treaty article – at least not demanded by it: a matter that one of us has explored in detail in 'Treaty–Custom Concubinage', showing that it tends, ultimately, to lead to the 'Failure of Conditionality'.

While Article 49 TEU is political and purely open-ended as to the concrete modalities of the organization of the accession process as long as all the EU Member States agree to admit the country in question, the European Parliament and the Commission are called upon to support accessions with the majorities specified in Article 49 TEU and the general condition of admission specified by the Council of the European Union are taken on board.

There is nothing in the Primary law on the crucial issue of recent 'pre-'accession practice: candidates adopt the *acquis* and comply with 'democracy', 'the Rule of Law' etc first and accede later, what one could call the 'principle of mistrust'. Even beyond the point that mistrust does not always work, as we learn from the case of Poland for instance, which has ejected itself

from the realm of European Rule of Law fundamentals in breach of Court of Justice of the EU and ECtHR case-law, mistrust takes time. It is costly, while leading to the same result as trust, one should not forget: the first accessions were organized along the lines of agreeing on the transitional periods needed for the implementation of the *acquis* and the principle of full *acquis* incorporation, followed by accession. Either you trust your partner to comply with the *acquis*, including the values, and to build up sufficient capacity or not, does not affect the outcome, while affecting the timing of accession.

President Zelensky does not have much time. The EU does not have much time either. As one of us suggested in the *Verfassungsblog*, not making a decisive move to admit Ukraine could amount to failing to uphold the values the EU builds on: the special nature of the situation has to be recognized. Ukraine should join under the 'special procedure', i.e. following the flexible, accommodating and values-oriented approach of Article 49 TEU. Applying Article 49 TEU without the principle of mistrust and the further failures of conditionality, let alone, outright politicization and abuse of the process, which marked accessions in the past, will amount to nothing but a 'special procedure', which President Zelensky is seeking. It is thus clear that a 'special procedure' *is* Article 49 TEU. But is such a reading really feasible? The ball is in the Member States' court and the game has started well.

Indeed, already one day following Zelensky's letter to the Council, the European Parliament endorsed Zelensky's call by adopting, with overwhelming support (637 votes in favour, 13 against and 26 abstentions), a resolution which urged 'the EU institutions to work towards granting EU candidate status to Ukraine, in line with Article 49 of the Treaty on European Union and on the basis of merit, and, in the meantime, to continue to work towards its integration into the EU single market along the lines of the Association Agreement.' Commission President Ursula von der Leyen initially declared that Ukraine is 'one of us and we want them in the European Union', but later appeared to walk back from that remark by leaving open not only when but also whether Ukraine will ever become an EU member.

Of course, neither the European Parliament nor the Commission President decide whether a country accedes to the Union or gets a candidate status. The Council holds the key. According to Article 49 TEU, a state that wishes to become a member must send an application to the Council, which, after having received an opinion by the Commission and obtained the consent by the majority of the component members of the European Parliament, decides on the admissibility of the request, but every EU member in the Council has to agree. Article 49 TEU contains a procedure, which is clear and open ended.

This procedure does not know 'candidacies', but practice shows that once the Council requests an Opinion from the Commission, the procedure can be regarded as launched: what has notably never happened in the cases of Morocco or Franco's Spain. With Ukraine, in fact, this Opinion has already been requested and Miss von der Leyen promised to be swift. Ukraine, thus, could be regarded as a candidate country already today.

What the Commission writes in the Opinion does not matter much in practice: while a lot of fuss accompanied these in the past, research shows that the Council was not in fact guided by the opinions in taking the most crucial pre-accession decisions and had other considerations at hand. These were purely political in nature and undermined the Rule of Law component of the pre-accession process to a great degree, what Balkan candidates know better than any other county. Fair enough, given the generally poor quality of Commission's work, demonstrating the lack of basic consistency across countries as well as across years, coupled with its inconsequential nature (the Council will decide (or not) and not the Commission) painting the Commission's involvement in the positive light would be a mistake. The customary enlargement law perched on mistrust failed to deliver solid compliance, as we have seen in Poland, Hungary and other countries.

The great news for Ukraine is that the elaborate pre-accession conditionality dance which does not work and takes time is not required by Article 49 TEU. To stick to the letter and the spirit of primary law, Ukraine will need to negotiate the Treaty of Accession with the Member States to establish 'the conditions of admission and the adjustments to the Treaties on which the Union is founded'. The treaty is then concluded between Member States and the applicant country, and must be ratified by all states concerned according to their constitutional requirements. Article 49 TEU is thus quite clear and it is chiefly about politics, not law.

This is good and bad for Ukraine. The good thing is that mistrust-based window-dressing approach that marked the previous three accession rounds premised on the need of the failure of conditionality that made insufficient emphasis on enforcement after accession and gave us the gift of the Rule of Law crisis that plagues the Union, is not necessary. Ukrainian accession cannot follow this path, since the *acquis* compliance and respect of EU values has to be water-tight: no one needs another Poland in the Union.

All this is also bad for Ukraine, since the initial enthusiasm about doing the right thing is being replaced by hesitation, if not cowardice. It is not the first – and not the most dramatic example of a potential enlargement suffering from political exposure: Ukraine, whatever happens, cannot be exposed to any more absurdity coming from the EU and the Member States than Macedonia, to give just one example. Enlargement politics is poison in a complex Union. And the poisoning of our values, which started long ago, can only get intensified with the increased stakes, which the prospect of Ukrainian accession brings.

To be fair, it is of course unclear when and how the war will end: the membership conversation evolves in the atmosphere of overwhelming uncertainty. It is thus unsurprising that during its informal meeting in Versailles on 10 March 2022, the heads of state or government of the 27 EU member states did not endorse any other steps to fast track the procedure. Indeed, the Council only noted that 'Ukraine belongs to our European family.' The Member States disagree over Ukraine. On 28 Februrary, the presidents of Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Poland, the Slovak Republic, and Slovenia published an open letter with a call 'to immediately grant Ukraine a EU candidate

country status and open the process of negotiations'. But old Member States had a different view. 'All countries in the Western part of Europe that I speak to say that you shouldn't try to have a fast-track procedure or accelerated accession process', said the Dutch Prime Minister Mark Rutte: 'There is no fast-track procedure to become a member of the EU.' As we have seen above, this is both right and wrong: the law is open-ended and alluding to any 'procedure' in this context as a possible limitation on what the Member States can do is a political move devolved from any legal analysis. The Council President Charles Michel already flagged the disagreement on 1 March, however: '…we know this is a difficult subject, as it touches upon enlargement. And we know that, within the European Union, there are diverging and sometimes qualified views on that subject'.

For one thing, and moving beyond the analysis of the relevant Treaty provision and the customary practice of its previous application, there is a clear precedent for speeding up the accession process. When Greece, Spain and Portugal applied for membership in 1975 and 1977 under article 237 of the EEC Treaty, the applications were favourably received 'mainly for political rather than economic reasons'. The Council decided to open negotiations with Greece, Portugal and Spain within months of the Commission's opinions, even though the Commission, in its opinion on Greece, had advised a pre-accession period before negotiations could start (an idea which made a come-back in 1994 at the Essen European Council with a view to the big bang enlargement). It is worth noting, in this context, that the wording of Article 237 EEC is virtually identical to Article 49 TEU currently in force, leaving no doubt whatsoever as to the possibility of taking the same approach in the context of Ukrainian accession.

Moreover, before this pre-accession process was launched in 1994, the comprehensive adjustments which candidate states had to make usually took place during extensive transitional periods *after* the entry into force of the treaty of accession. Spain, Portugal and Greece are a case in point. Indeed, the Cooperation and Verification Mechanism for Bulgaria and Romania can be regarded as the continuation of this practice since both countries acceded in 2007 but are still subject to this 'transitional measure to assist the two countries to remedy shortcomings'. Taking the context of the first enlargement into account, which resulted in the accession of the UK, Ireland and Denmark to the EU, and which did not know any 'pre-accession', allow for a conclusion that the EU has not always been guided by the principle of mistrust in its enlargement practice and that not applying any 'pre-accession' to Ukraine, thus speeding up the accession time-frame significantly, will not be as unusual as some could appear eager to argue.

We are not suggesting that the substantive conditions for membership of Article 49 TEU, including a commitment to Article 2 TEU values and the rest of *acquis*, to be incorporated in full, should be watered down for Ukraine. The above is about the timing of the formal accession and obvious possibility of skipping pre-accession and installing lengthy transitional periods with muscled enforcement clauses, if necessary applicable post-accession, included in the Treaty of Accession. The symbolic value of admitting Ukraine fast – especially given that the EU will

likely have assembled enough Russian money to rebuild it fast – should not be underestimated. This said, speedy accession should not have any negative impact whatsoever on the practical operation of the *acquis* in Ukraine upon the expiry of the transitional periods. It goes without saying that no special treatment as to the full compliance with EU law should be on the table.

The preamble to the Association Agreement recognises 'that Ukraine as a European country shares a common history and common values with the Member States of the European Union (EU) and is committed to promoting those values', an almost ad verbatim quote from article 49 TEU. Ukraine is aware that the road to membership is not a walk in the park. In its application for membership, it has stated, and justifiably so, that it is 'fully aware of all the difficulties related to the fulfilment of the membership criteria'. Our point is that a fast-paced process to accession is possible, indeed a time-tested approach, under article 49 TEU. Now is the time to muster the political will and creativity to offer Ukraine a credible prospect of membership following the 'special procedure', i.e. Article 49 TEU without the stains of mistrust and the failure of conditionality.

Dimitry Kochenov *is Professor at the CEU Democracy Institute, Budapest and CEU Department of Legal Studies, Vienna.*

Ronald Janse *is Dean of the Law Department, Open Universiteit.*

EU Law Live is an online publication, focused on European Union law and legal developments related to the process of European integration. It publishes News on a daily basis, along with Analyses, Op-Eds, and Weekend Long Reads.

ISSN

EU Law Live	2695-9585
EU Law Live Weekend Edition	2695-9593

Subscription prices are available upon request. Please contact our sales department for further information at

subscriptions@eulawlive.com

stay alert | keep smart