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## REVIEW

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Roadmap to Europe. Ukraine's EU membership application  
and the environmental acquis communautaire

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### Abstract

Against the background of a dynamic political situation this article shows the process of Ukraine's EU approximation, which is already well underway. The text analysis the procedural and substantial criteria of the accession process to the European Union and gives an overview on the acquis communautaire which the candidate country has to comply with. The existing Association Agreement between Ukraine and the European Union is an important basis that already covers a number of environmental legislative acts.

## Roadmap to Europe. Ukraine's EU membership application and the environmental *acquis communautaire*

Gerhard Roller

### 1 Introduction

Not since the entry into force of the Treaties of Rome has a membership application been presented under such dramatic circumstances. In an extraordinary session of the European Parliament, Volodymyr Zelenskiy, the president of Ukraine, spoke to the Members of Parliament while Russian missiles bombarded Ukraine. In its resolution<sup>1</sup> on March 1, 2022, adopted with an overwhelming majority,<sup>2</sup> the European Parliament supported Ukraine's membership application and called for the EU Institutions to work towards granting EU candidate status to Ukraine, according to Article 49 TEU<sup>3</sup>. The European Council in its statement on March 10, 2022, condemning the Russian military aggression against Ukraine, declared that he had acted swiftly on Parliament's demand by inviting the Commission to submit its opinion on the application in accordance with the relevant provisions of the Treaties. President of the Commission, Ursula von der Leyen, announced during a visit to Kyiv on April 8, 2022, that the Commission would evaluate the application "until summer".<sup>4</sup> This evaluation, presented on June 17, 2022, recommends to the Council to give Ukraine the perspective to become a member of the European Union and to grant candidate status on the basis that steps are taken in a number of areas. On June 23, 2022, the Council decided to follow this recommendation and granted candidate status to Ukraine and Moldova. In only 4 months from the date of application, the European Union made a historical decision that opened the door widely for Ukraine to become a member of the EU and strengthens the country's endeavours to build up a modern European democracy. Becoming a member of the European Union is usually a lengthy procedure that takes several years. The quickest Accession occurred with Finland, taking only three years after the application was submitted. Given the current situation in Ukraine, it is understandable why President Zelenskiy requested a 'fast track' to Europe.

The length of the procedure also depends on the legal requirements that frame this process. In this article we will deal first with the procedural and substantial criteria of the accession process enshrined in the Treaty before taking a closer look at the *acquis communautaire* with which the Candidate Country has to comply. It should also be noted that the existing Association Agreement between Ukraine and the European Union<sup>5</sup> is an important basis that already covers a number of environmental legislative acts.

### 2 The legal requirements according to the Treaty to become a new member

#### 2.1 Procedural criteria

The Treaty's provision regarding the issue, as stated in Art. 49 of the TEU, is silent on the details of the procedure. Only the basic rule is set up, such that the Council shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament. However, there exists a practice in how Art. 49 TEU is applied.

(1) The first step is to become a candidate country. There is no formal procedure and Art. 49 does not even mention this preliminary procedure.<sup>6</sup> The status of 'candidate' is acknowledged by a unanimous decision of the Council after the opinion of the Commission. The candidate status does not immediately lead to the opening of negotiations, and in some cases this might take a rather long time, such as with Turkey. But the candidate status is the first step and marks the beginning of the accession procedure.

(2) The second step is the decision to open negotiations, which is made through a unanimous vote of the Council. A positive opinion from the Commission on the candidate's compliance with the Copenhagen criteria<sup>7</sup> is essential in practice. This opinion is preliminary<sup>8</sup> and not explicitly mentioned

<sup>1</sup> European Parliament 2022, para. 37.

<sup>2</sup> 657 votes in favour, 13 against and 26 abstentions, see van der Loo/van Elsuwege, 2022.

<sup>3</sup> Treaty on European Union, OJ C 326, 26.10.2012, p. 13–390.

<sup>4</sup> *Frankfurter Allgemeine Zeitung*, 8.4.2022.

<sup>5</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJEU L 161, 3 of 29.5.2014.

<sup>6</sup> Herrfeld, 2012, para. 10.

<sup>7</sup> See *infra* 2.2.

<sup>8</sup> Herrfeld, 2012, para. 7.

in Art. 49 of the TEU, thus not formally required.<sup>9</sup> The opinion gives a first evaluation of the application, and on the basis of this evaluation the Council decides on the beginning of formal accession negotiations.

(3) The third step is the negotiation on the 35 negotiation chapters (see *infra* 2.3). After having successfully completed every chapter, based on the decision of the Commission, the Council, with consent of the European Parliament, has to reach a unanimous decision.

(4) The fourth and final step is ratification. All EU Member states must ratify the agreement according to their own legal systems. Finally, after all EU Member states and the candidate country have signed and ratified the Accession Treaty, the Applicant State becomes a member of the European Union.

#### Article 49 TEU

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 to all the contracting States in accordance with their respective constitutional requirements.

#### Article 2 TEU

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Figure 1: Selected provisions of the Treaty of European Union

## 2.2 Substantial criteria

The substantial conditions mentioned in the Article are rather vague. According to Art. 49 TEU, “*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 values enshrined in Art. 2 are: “*respect for human*

*dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*”.

The European Council in Copenhagen on June 21-22, 1993,<sup>10</sup> amended and concretized these rather general criteria. The so-called ‘Copenhagen criteria’, which are based on Art. 49 s. 3 (“*The conditions of eligibility agreed upon by the European Council shall be taken into account.*”) contain<sup>11</sup>:

- Political criteria: stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities;
- Economic criteria: a functioning market economy and the capacity to cope with competition and market forces;
- Administrative and institutional capacity to effectively implement the *acquis* and the ability to take on the obligations of membership.
- Moreover, the Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries.<sup>12</sup>

Granting candidate status to Ukraine was not only an important (geo)political decision, but it was also well justified on the merits. As far as the political criteria mentioned above are concerned, it has to be emphasized that after the ‘Euro Maidan’ revolution in 2014, an active civil society emerged in Ukraine and the government and Parliament took major steps in building up a stable democracy, with new instruments against corruption<sup>13</sup>. Certainly, this process is far from complete with much work still to be done, as Commissioner Ursula van der Leyen expressed on her second visit to Kyiv.<sup>14</sup>

The economic readiness of Ukraine has to be evaluated, as the Commission did, on the basis of the pre-war economic data.<sup>15</sup> In its decision, the Commission found that Ukraine “*has continued its strong macro-economic record, demonstrating a*

<sup>10</sup> See [https://ec.europa.eu/commission/presscorner/detail/en/DOC\\_93\\_3](https://ec.europa.eu/commission/presscorner/detail/en/DOC_93_3).

<sup>11</sup> See the Accession criteria published by DG NEAR at [https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/glossary/accession-criteria\\_en](https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/glossary/accession-criteria_en).

<sup>12</sup> European Council 1993, section 7. A. iii).

<sup>13</sup> In 2019 the High Anti-Corruption Court was set up. The progress and the shortcoming of the actions taken are analysed by a report of the European Court of Auditors, 2021: ‘Reducing grand corruption in Ukraine: several EU initiatives, but still insufficient results’.

<sup>14</sup> “*You have done a lot in strengthening the rule of law, but there still need to be reforms implemented, to fight corruption for example or to modernize this well-functioning administration, to help attract investors*”, *Le monde*, 12.6.2022. See also the report mentioned in note 13.

<sup>15</sup> Economic damages from the war, which have of course a disastrous impact on the economy, cannot be an argument against the preparedness of the candidate country, unclear insofar van der Loo/van Elsuwege, 2022, p.6.

<sup>9</sup> Copeland, 2013, p. 2.

*noteworthy resilience with macroeconomic and financial stability, while needing to continue ambitious structural economic reforms*".<sup>16</sup>

There seems to be little doubt that Ukraine has the administrative and institutional capacity to implement the *acquis communautaire* (third criteria). It is impressive to see that even under the current situation of Russian attack in 2022 Ukraine's administration and the legislator continue their work in order to align legislation with the Association Agreement.<sup>17</sup>

Finally, it must be stated, that there existed "a general enlargement fatigue in several member states".<sup>18</sup> It seems, however, that the Russian aggression played an important role in overcoming this fatigue. Obviously, structures in the EU Institutions and decision-making processes will have to be adapted.

### 2.3 The *acquis communautaire* in accession treaties: a comprehensive affair

According to the Directorate-General for Neighbourhood and Enlargement Negotiations (DG NEAR) of the EU Commission,<sup>19</sup> the chapters of the *acquis* that are subject to the negotiations of an accession treaty are structured in thirty-five chapters from 'Free Movement of Goods' (Chapter 1) to 'Other Issues' (Chapter 35). The sheer number of chapters shows the complexity of the task. Chapter 27 is dedicated to Environment and Chapter 15 to Energy. Climate change is not foreseen as a separate chapter, but rather integrated into environmental protection. Nevertheless, it is worth mentioning that the word 'climate' originally did not appear at all in the Commission's note on the chapters of the *acquis*.

Since February 2020, a so-called 'New Approach' is applied and the chapters of the accession negotiations are structured in six clusters<sup>20</sup>: 1) Fundamentals, 2) Internal market, 3) Competitiveness and inclusive growth, 4) Green agenda and sustainable connectivity<sup>21</sup>, 5) Resources, agriculture, and cohesion, and 6) External relations. The fourth cluster also comprises environment and climate change and energy. In the new approach Chapter 27 is now titled, 'Environment and Climate Change'.

<sup>16</sup> See [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_3790](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3790).

<sup>17</sup> The new Waste Management Act has been finalised and adopted by Parliament in June 2022, see Roller and Tevkun, 2022 (in this issue).

<sup>18</sup> van der Loo/van Elsuwege, 2022, p.6.

<sup>19</sup> See in detail: [https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/conditions-membership/chapters-acquis\\_en](https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/conditions-membership/chapters-acquis_en).

<sup>20</sup> See European Commission, 2021.

<sup>21</sup> See on this item: [https://knowledge4policy.ec.europa.eu/projects-activities/sustainable-connectivity\\_en](https://knowledge4policy.ec.europa.eu/projects-activities/sustainable-connectivity_en).

Obviously, a country might have difficulties to reach every single requirement of the *acquis communautaire* in due time before entering the Union, given the wide range of existing legislation. Therefore, in practice the accession treaties provide for derogations and transitional measures. This is also the case in the environmental sector, as evidenced by the transitional measures for Bulgaria<sup>22</sup> concerning the fields of air quality, waste management, water quality, industrial pollution, and risk management. In the waste sector,<sup>23</sup> for instance, derogations were made concerning the time frame in which Bulgarian legislation had to adopt several directives (the packaging directive), or had to meet certain substantial requirements (derogation from the landfill directive regarding prevention of surface water entering the landfilled waste shall not apply to certain existing facilities), and had to separate collection rates for the WEEE directive.

## 3 The Association Agreement as basis for future Membership

### 3.1 Background

We should not ignore, however, that Ukraine has already taken important steps on its pathway to Europe. The Association Agreement between the EU and Ukraine,<sup>24</sup> which was negotiated and adopted under the Eastern Partnership Program of the EU, formally entered into force on September 1, 2017, after having been postponed for one year to address Russia's concerns about the agreement. We must also keep in mind that precisely this agreement was the point of departure for the Euro-Maidan revolution, as former Ukrainian President Yanukovich withdrew from the agreement that he had negotiated and supported and which was ready to be signed.<sup>25</sup> Due to Russian pressure,<sup>26</sup> he announced in November 2013 that he would not sign the agreement with the EU. It was neither foreseeable for the European governments nor for Yanukovich and Russian President Putin that this decision was the last straw that broke the camel's back and resulted in a popular uprising that brushed aside the old government.

The Agreement covers a wide range of sectorial issues. With all Annexes, the Agreements count is 2,135 pages. More or less, all policies covered by the EU Treaties are also covered by the Agreement, but in less depth. The quality of the Agreement is thus that it

<sup>22</sup> Annex VI to the Accession Treaty, OJEU L 157/104 of 21/6/2005.

<sup>23</sup> See Annex VI to the Accession Treaty, *supra* note 22, page 119 ss.

<sup>24</sup> Association Agreement, *supra* note 5.

<sup>25</sup> van der Loo/van Elsuwege, 2022, p. 8.

<sup>26</sup> See on the background: Grant, 2016.

aims to gradually and partially integrate Ukraine into the internal market by legislative approximation, which makes a fundamental difference to other bilateral trade agreements, such as CETA.<sup>27</sup> The economic core of the Agreement is the ‘Deep and Comprehensive Free Trade Area’ (DCFTA) that aims to integrate Ukraine gradually in the EU Internal Market.<sup>28</sup>

### 3.2 Environmental obligations according to the AA

The chapter on Environment of the Association Agreement covers the following issues:<sup>29</sup>

- Environmental governance and integration of environment into other policy areas
- EIA Directive and the Strategic Impact Assessment
- Access to information
- Air Quality, framework directive with certain daughter directives
- Waste
- Water
- Nature protection (wild birds and habitats)
- IED, Seveso
- Climate change Greenhouse gas emission allowances
- GMOs.

Clearly, environmental law is only one part of legislation in the overall picture of EU Law, but it may serve as an indicator. The importance of environmental law has grown and an important number of infringement procedures are opened against member states every year. It is impressive to see how in some areas like access to information<sup>30</sup> Ukraine already complies with the international and European standards and can even serve as a ‘good example’ in some respect.<sup>31</sup> The new legislation also shows the endeavours of the Ukrainian legislator to implement the rule of law, a principle that modern legislation has to respect and which is also an essential point in the AA.<sup>32</sup>

In addition, the recently adopted waste law,<sup>33</sup> the drafts on water law,<sup>34</sup> and the drafts on IED<sup>35</sup> show

that far-reaching legislative measures have already been taken by Ukraine's Parliament or are in the legislative process. These sectors show how far the process of adapting environmental law to the EU *acquis* is already underway.

## 4 Outlook

Some lucid contemporaries identified national sovereignty after World War II as “*the root cause of the most crying evils of our time and of the steady march of humanity back to tragic disaster and barbarism*”<sup>36</sup>. The unique construct of the European Economic Communities, which was shaped by its architects Robert Schuman and Jean Monnet, had and has still today an important precondition: Members of this Union have to renounce a part of her sovereignty for the benefit of the Community's institutions that act in favour of the Union's interest and not in the interest of one state. By an ever more integrated Union the basis for prosperity, freedom, and justice in peace should be reached. In fact, a main driving force for establishing the European Communities in 1958 was to guarantee peace, as for centuries war was the rule and peace the exception in Europe. Since February 24, 2022, Ukraine and the European Union are faced with a reality that we thought we had overcome.

The first steps of the Accession procedure have been taken regarding the candidate status to Ukraine. The process of EU approximation is already well underway. Certainly, Ukraine's membership in the European Union would enrich both partners. But it should also be noted that becoming a member of the Union is not only a burdensome affair, as mentioned above, but that it also requires a far-reaching readiness of the new member to give up part of his sovereignty. National institutions have to share her competences with EU institutions and the last word on the interpretation of EU law – and on environmental law, in particular – lies with the European Court of Justice. EU law prevails over national law.<sup>37</sup> Sometimes, these consequences might be difficult to accept. But in the end, these disadvantages are more than compensated for by what the state and the people win: Being a member of a stable Union of freedom and prosperity, and most importantly and hopefully, a Union where everybody can live in peace.

<sup>27</sup> van der Loo/van Elsuwege, 2022, p. 8.

<sup>28</sup> See on this: van der Loo/van Elsuwege, 2022, p. 8. The authors point out, however, that Ukraine does not yet meet the legislative and institutional conditions for this far reaching integration.

<sup>29</sup> Annex XXX to Chapter 6 of the Agreement, OJEU, 29.5.2014, L 161/1947.

<sup>30</sup> Aleksyeyeva 2022 (in this issue).

<sup>31</sup> See e.g. the free access data base that has been set up in EIA cases, see: Aleksyeyeva 2022 (in this issue).

<sup>32</sup> “*RECOGNISING that the common values on which the European Union is built – namely democracy, respect for human rights and fundamental freedoms, and the rule of law – are also essential elements of this Agreement*” see also Art. 3 of the Agreement.

<sup>33</sup> See, on waste management, Roller and Tevkun, 2022 (in this issue).

<sup>34</sup> Vykhryst 2022, (in this issue).

<sup>35</sup> Aleksyeyeva et al., 2022, (in this issue).

<sup>36</sup> Lord Lothian, 1939.

<sup>37</sup> The Ukraine law on waste management is already anticipating this rule in Art. 60 para. 2.

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## elni

*In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.*

*Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.*

*elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.*

### Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, Technische Hochschule Bingen (TH Bingen) and sofia, the Society for Institutional Analysis, located at the Darmstadt University of Applied Sciences. The person of contact is Prof. Dr. Roller at TH Bingen.

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The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut, TH Bingen and sofia.

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