

Mykola Kolotylo

Ph.D. student

Yukhymenko Family Doctoral School of the National University of Kyiv-Mohyla Academy, Ukraine

UKRAINE’S ACCESSION PROCESS TO THE EU: JUDICIAL REFORM IN THE FOCUS

Abstract

This article scrutinizes the bilateral relations between the EU and Ukraine in the light of granting the candidate status and commencing the accession process. Firstly, it analyses the main legal frameworks existing prior to Ukraine’s application for membership. Further, it explores the main reflections on Ukraine’s application and the possible scenarios for the accession process. The reform of the judiciary is considered closely as a main condition within the accession process. It is argued that the fulfillment of the conditions prescribed in the European Commission’s opinion in 2022 and assessment report in 2023 relating to the judiciary have to be considered as a first step of successful negotiations process. Hence, the complex reform of the judiciary serves as a cornerstone in the accession process.

Key Words

Accession Process, Candidate Status, EU-Ukraine Association Agreement, Rule of Law, Judiciary, Judicial Reform, EU Conditionality

Introduction

23 June 2022 marks an important turning point in the bilateral relations between the EU and Ukraine. The European Council recognized the European perspective of Ukraine and

granted the status of the candidate to Ukraine.¹ The conclusions of the European Council followed the Opinion of the European Commission on Ukraine's application for membership in the European Union.² Both the conclusion of the European Council and the Commission's opinion could not have been imagined at the beginning of 2022. However, in the background of the Russian full-scale invasion, Ukraine sent its application for EU membership on February 28, 2022.

The European perspective of Ukraine was subject to many speculations over the years. Ukraine has persistently mentioned its aspiration to join the EU. At the same time, the position of the EU was rather cautious. This article intends to analyse critically the bilateral relations between the EU and Ukraine since the 1990-s considering different legal instruments. Further, the second part deals with reflections concerning the Ukrainian application to join the European Union and the main views on how this process could take place. In the concluding part, the article focuses on the accession process and views the judicial reform in Ukraine as a key condition. It is argued that the process will be based on the conditionality approach, and the reform of the judiciary has the central role.

1. The EU-Ukraine relations: from a partner to a candidate

1.1 Partnership and Cooperation Agreement

Following the fall of the Berlin wall in 1989 and the dissolution of the Soviet Union, the European Union has developed various legal forms of relations with the other European States.³ The beginning of the EU-Ukraine relations dates back to the period following the proclamation of Ukraine's independence in 1991. In June 1994 the EU signed a Partnership and Cooperation Agreement with Ukraine, which entered into force in March 1998. The European Union concluded similar agreements in the 1990s with many post-Soviet countries. For example, similar agreements were concluded with the Russian Federation, Armenia, and Azerbaijan. At the same time, Europe Agreements were concluded with the Central-Eastern and Baltic countries, which provided closer political association and the possibility of acquiring the status of a member of the European Union. Such agreements were concluded, for example,

¹ European Council conclusions on Ukraine, the membership applications of Ukraine, the Republic of Moldova and Georgia, Western Balkans and external relations, June 23, 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/06/23/european-council-conclusions-on-ukraine-the-membership-applications-of-ukraine-the-republic-of-moldova-and-georgia-western-balkans-and-external-relations-23-june-2022/>.

² Communication from the Commission to the European Parliament, the European Council and the Council COM(2022) 407 final of 17 June 2022, Commission Opinion on Ukraine's application for membership of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0407>.

³ Hillion C. (2000), Institutional aspects of the partnership between the European Union and the Newly Independent States of the former Soviet Union: Case studies of Russia and Ukraine, *Common Market Law Review*, v. 37, issue 5 (2000), p. 1211.

with Poland, Hungary, and Lithuania.

Ukraine has aspired to join the EU already since the 1990-s. This statement was constantly declared by Ukrainian public officials. However, the EU did not have a separate strategy for Ukraine at that time. In December 1999, the European Council adopted a Common Strategy on Ukraine. The strategy emphasized the importance of partnership with Ukraine, especially in the context of enlargement when some future EU Member States share the border with Ukraine.⁴ However, the strategy was completely silent on Ukraine's perspective to join the EU. In fact, the European Council in June 1999 adopted very similar Common Strategy on the Russian Federation.⁵ It might sound absurd in 2024 but the Common Strategies of the European Council on Russia and Ukraine in 1999 were almost identical. The structure, formulation, and objectives in the Strategy on Ukraine to a great extent just repeated the Strategy on Russia. Until 2003 there were practically no significant differences in the EU's relations with Ukraine and Russia.

1.2. European Neighborhood Policy and Eastern Partnership

On the eve of significant enlargement, the European Commission presented the concept of 'Wider Europe' in March 2003.⁶ The idea was *'to avoid drawing new dividing lines in Europe and to promote stability and prosperity within and beyond the new borders of the Union.'*⁷ The concept included the following neighbors: Russia, Ukraine, Moldova, Belarus, and Southern Mediterranean countries.⁸ Eventually, Russia was not included in the European Neighborhood Policy (ENP) in 2004 mainly due to the Russian position.

In addition to the ENP, the relations between the EU and Ukraine were significantly impacted by the Orange revolution in 2004. Ukraine's orientation towards the West and integration with the EU became more explicit. These changes in internal Ukrainian politics form an important prerequisite for concluding a new enhanced agreement.

⁴ European Council Common Strategy 1999/877/CFSP of 11 December 1999 on Ukraine, O.J. L 331, 1999, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31999E0877&rid=1>.

⁵ European Council Common Strategy 1999/414/CFSP of 4 June 1999 on Russia, O.J. L 157, 1999, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31999E0414&from=FR>.

⁶ Communication from the Commission to the Council and the European Parliament COM(2003) 104 final of 11 March 2003, Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A52003DC0104>.

⁷ *Ibid*, p. 2.

⁸ *Ibid*, p. 1.

In June 2008, Poland and Sweden presented their proposal on launching the Eastern Partnership initiative within the ENP.⁹ The initiative included the following neighbours: Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine. The aim was to enhance bilateral and multilateral relations with the neighbours. In addition, one of the declared goals was the conclusion of Association Agreements with partners. The AAs were concluded only with three countries (Georgia, Moldova, and Ukraine) in 2014.

The development of the EU relations with the Eastern Partnership (EaP) has been very different. After the beginning of the Russian full-scale invasion of Ukraine in February 2022 the difference became even more obvious. Ukraine and Moldova were recognised as candidate countries in 2022. Georgia was granted the European perspective in 2022 and received a candidate status in 2023. All three countries have Association Agreements with the EU being in force. At the same time, Armenia is a member of the Eurasian Economic Union since 2015. The legal framework of the EU-Armenia relations is the Comprehensive and Enhance Partnership Agreement (CEPA) which is less ambitious than Association Agreement both politically and economically. The legal framework of the relations between the EU and Azerbaijan is an outdated Partnership and Cooperation Agreement and a new comprehensive agreement is still being negotiated.¹⁰ The PCA with Belarus did not enter into force despite being signed in 1995.¹¹ On June 28, 2021, Belarus has suspended its participation in the EaP.¹² The EU has also imposed sanctions against Belarus in context of its involvement in Russia's full-scale military invasion of Ukraine in February 2022. These developments put countries in an even more different position than they were before. These changes raise questions as to the format of EaP and the needed changes. The European Commission is not ready yet to reflect on the need to continue such an initiative in general or the new format of EaP.

⁹ Perchoc P. (2006), *The European Neighbourhood Policy*, European Parliamentary Research Service, p. 17, DOI:10.2861/97957.

¹⁰ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, O.J. L 246 (1999), https://eur-lex.europa.eu/eli/agree_internation/1999/614/2009-11-01.

¹¹ Proposal for a Council and Commission Decision on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States of the one part, and the Republic of Belarus, of the other part, COM/95/44FINAL – AVC 95/0057 (1995), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A51995PC0044&qid=1723123345399>.

¹² Joint Declaration of the Eastern Partnership Summit of 15 December 2021, Council of the European Union, COEST 327, 14964/32, p. 5, <https://www.consilium.europa.eu/media/53527/20211215-eap-joint-declaration-en.pdf>.

1.3. Association Agreement

The procedure for concluding the AA was not ordinary for Ukraine. Following the parliamentary elections in March 2006 in Ukraine, the EU decided to start consultations with a view to negotiate a new enhanced agreement with Ukraine. Negotiations started in March 2007. The draft Association Agreement was initialled in March 2012. The refusal by the then President of Ukraine to sign the Association Agreement in November 2013 triggered the Revolution of Dignity. In the aftermath of the Revolution of Dignity, Russia illegally annexed Crimea and backed illegal armed groups in eastern Ukraine. The EU and the international community condemned these grave breaches of international law, and subsequently, the EU imposed sanctions against the Russian Federation. Ukraine's new government, in place after the Revolution of Dignity, signed the political part of the AA in March 2014. The economic part of the AA was signed after the presidential election in May 2014. Major parts of the agreement have been provisionally applied since 2014. In September 2017, the AA fully entered into force.¹³

The role of the Association Agreement is very particular from the enlargement perspective. On the one hand, the Agreement does not mention explicitly the European membership perspective. On the other hand, the Preamble to the Agreement states '*recognising that Ukraine as a European country shares a common history and common values with the Member States of the European Union and is committed to promote these values*'.¹⁴ This formulation recalls the first sentence of Article 49 of the Treaty on the European Union stating that '*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*'.¹⁵ The Association Agreements with Moldova and Georgia contain similar formulations, however, Georgia is called '*an Eastern European country*'. Another important aspect of the Association Agreement is the developed legislative and regulatory approximation clauses. The agreement contains a clear obligation of Ukraine regarding the implementation of the EU acquis, and the EU legislation is explicitly prescribed in the annexes. Such provisions of the agreement allowed Ukraine to bring its legislation closer to the EU acquis even before applying for membership. The European Commission has assessed the Ukraine's progress through the Association Implementation Reports, which has later been used as a basis for the opinion on Ukraine's application for membership.

¹³ *Supra* note 2, pp. 2-3.

¹⁴ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, O. J. L 161 (2014), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22014A0529%2801%29>.

¹⁵ Treaty on the European Union (Consolidated version 2016), O. J. C 202, Article 49, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M/TXT>.

2. Application for membership in the time of war

The formal application of Ukraine for membership on 28 February 2022 provoked academic discussion concerning the membership perspective. The main issues related to the role of the EU-Ukraine Association Agreement, the accession procedure under Article 49 of the Treaty on the European Union, and the implications of the war on the accession process.

Van Elsuwege and Van der Loo advocate that EU-Ukraine Association is the most suitable framework for EU-Ukraine relations.¹⁶ The authors' main arguments relate to the dynamic nature of the agreement and far-reaching legal approximation.¹⁷ These arguments are extremely convincing but political processes within Ukraine cannot be underestimated. Ukraine has been vocal for years about its aspiration to join the European Union. The amendments to the Ukrainian Constitution in 2019 explicitly proclaim that the objective of the foreign policy in Ukraine is full membership in the European Union. The Association Agreement has been serving as an important legal instrument for further integration of Ukraine into the EU internal market through the legal approximation clauses. However, it has never explicitly declared the European perspective of Ukraine, which was missing for Ukraine. The European Commission's opinion and the decision of the European Council to grant Ukraine candidate status do not undermine the role of the Association Agreement. Moreover, the implementation of the Association Agreement by Ukraine served as one of the main sources for the assessment of the Ukrainian application for membership by the European Commission. The granting of a candidate's status is a very important supplement that focuses more on the political dimension. The accession process does not substitute the Association Agreement. In the context of accession, the Association Agreement will remain to play a crucial role specifically in relation of its deep and comprehensive free trade area part. Ukraine has to use the instruments provided by the Association Agreement to foster accession negotiations.

The Ukrainian application has triggered discussion concerning the speed of the accession and a 'special procedure' for Ukraine. Kochenov and Janse soundly argue that the 'special procedure' of accession exists under the EU law and paradoxically this 'special procedure' is Article 49 TEU, the only article prescribing the process of accession.¹⁸ The authors claim that Article 49 TEU does not require the candidates to adopt *acquis* and comply with con-

¹⁶ Van Elsuwege P., Van der Loo G., Op-Ed "The EU-Ukraine Association Agreement as a Stepping-stone towards EU membership?", *EU Law Live*, March 28, 2022, <https://eulawlive.com/op-ed-the-eu-ukraine-association-agreement-as-a-stepping-stone-towards-eu-membership-by-peter-van-elsuwege-and-guillaume-van-der-loo/>.

¹⁷ *Ibid.*

¹⁸ Kochenov D., Janse R., Op-Ed "Admitting Ukraine to the EU: Article 49 TEU is 'Special Procedure,'" March 30, 2022, *EU Law Live*, <https://eulawlive.com/op-ed-admitting-ukraine-to-the-eu-article-49-teu-is-the-special-procedure-by-dimitry-kochenov-and-ronald-janse/>.

ditions prior to accede.¹⁹ However, customary regulation has developed in the history of enlargement not explicitly enshrined in Article 49 TEU but thoroughly applied. The opinion of the European Commission confirms that the European Union still intends to apply customary regulations concerning enlargement. In the opinion on Ukraine's application, the European Commission cites Article 49 TEU as the legal framework and at the same time invokes the conclusions of the European Council of June 1993 in Copenhagen and of December 1995 in Madrid.²⁰ These conclusions set the economic and political conditions required from a candidate state to assume the obligations of membership. Hence, the European Commission is eager to apply the same standards to Ukraine setting the mandatory conditions to be met in the process. The idea of building a process based on conditionalities remains the primary one. The European Union is not ready for new radical responses within the framework of enlargement.

Tatham put forward the ideas to give tangible support to further participation of Ukraine in different sectors and familiarization of Ukrainian civil servants and politicians with practices of the European institutions.²¹ In addition, the EU has to prepare a funding plan aimed at the reconstruction of Ukraine.²² Tatham argues that Ukrainian application for membership may be seen as a test for the EU as a global actor. Those ideas are not yet elaborated by the European Commission. The EU seems to be keen on the well-established procedures in relations of the accession and applying additional ad hoc solutions to support Ukraine's economy, as such, temporary trade liberalization.²³ In October 2021, prior to the Ukrainian application for membership, Emerson, Lazarevic, Blockmans, and Subotic presented a template for staged accession to the EU.²⁴ This template was prepared in the context of the accession of Western Balkan States. The authors divided the process into four stages: initial accession, intermediate accession, new member state, and conventional membership.²⁵ This approach might be used in the context of Ukrainian accession. However, neither the EU nor Ukraine advocated for staged accession. Ukrainian authorities reiterate that Ukraine is interes-

¹⁹ *Ibid.*

²⁰ *Supra* note 2, pp. 1-2.

²¹ Tatham Allan F., Op-Ed "Conflict between Rhetoric and Reality of Enlargement: The implications of Opening EU Accession Negotiations with Ukraine", EU Law Live, April 5, 2022, <https://eulawlive.com/op-ed-conflict-between-rhetoric-and-reality-of-enlargement-the-implications-of-opening-eu-accession-negotiations-with-ukraine-by-allan-f-tatham/>.

²² *Ibid.*

²³ Regulation (EU) 2024/1392 of the European Parliament and of the Council of 14 May 2024 on temporary trade liberalisation measures supplementing trade concessions applicable to Ukrainian products under the 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, O. J. L 2024/1392, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024R1392&qid=1723126404159>.

²⁴ Emerson M., Lazarevic M., Blockmans S., Subotic S., A template for Staged Accession to the EU, Centre for European Policy Study, <https://www.ceps.eu/ceps-publications/a-template-for-staged-accession-to-the-eu/>.

²⁵ *Ibid.*, p. 2.

ted in full membership fearing being stuck with some partial solutions.

The factor of war in Ukraine is not to be ignored in the process of accession. Petrov states the pace and priorities of Ukraine's accession will depend strongly on the future peace deal between Ukraine and Russia.²⁶ Petrov describes four options from Russian complete military defeat to complete military defeat of Ukrainian forces.²⁷ These options have a direct effect on the process of accession. The EU has already experience admitting the new Member States with temporary occupied territories in case of Cyprus and adjusting the application of EU rules to those territories. This solution is not desired either by Ukraine or by the EU, but it shows that the accession of a new Member State with temporary occupied territories is possible. The European Commission's opinion does not address the issue of war as a factor impacting the enlargement procedure. Lazowski argues that the pace and time framework remain significantly important for both the EU and candidate states not to lose the momentum.²⁸ The Commission has shown quite swift approach concerning the assessment of Georgian, Moldovan, and Ukrainian applications. However, a pace and time framework of the next steps remains unclear.

3. Judicial reform in the focus of the accession process

While the European Commission recommended granting candidate status to Ukraine, it suggested seven measures to be taken by Ukraine.²⁹ The very first mentioned conditions related to the judicial reform. In particular, Ukraine had to implement reforms concerning the main institutions in the judicial system – the Constitution Court, the High Council of Justice (HCJ), and the High Qualification Commission of Judges (HQCJ). The HCJ is responsible for the appointment and dismissal of judges, disciplinary proceedings, and ensuring the independence of judges.³⁰ The HQCJ conducts the competitive selection of judges and recommends the HCJ regarding the appointment of candidates for vacant positions.³¹ Hence, these two bodies are the most responsible for the composition of the Ukrainian judiciary.

²⁶ Petrov R., Op-Ed "Ukraine's Accession to the EU: Does the Peace Deal Matter?", EU Law Live, May 4, 2022, <https://eulawlive.com/op-ed-ukraines-accession-to-the-eu-does-the-peace-deal-matter-by-roman-petrov/>.

²⁷ *Ibid.*

²⁸ Lazowski A., "EU enlargement at the crossroads," EU Law Live, June 30, 2022, <https://eulawlive.com/op-ed-eu-enlargement-at-the-crossroads-by-adam-lazowski/>.

²⁹ *Supra* note 2, pp. 21-22.

³⁰ Verkhovna Rada Ukrainy. *Konstytutsiya Ukrainy* [Constitution of Ukraine], 254k/96-BP, adopted June 28, 1996, Article 131, <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

³¹ Verkhovna Rada Ukrainy. *Pro Sudoustriy i status suddiv* [On Judiciary and Status of Judges], Zakon Ukrainy 1402-VIII, adopted June 2, 2016, Article 70, <https://zakon.rada.gov.ua/laws/show/1402-19#Text>.

These conditions of the European Commission were not surprising, since it consistently pointed out the necessity of judicial reform in Ukraine. In the Association Implementation Report 2020 on Ukraine, the European Commission stated that further reforms in the area of the judiciary were required mentioning the need to establish a new HCJ and ensure the integrity within the HCJ.³²

In July 2022, the European Commission issued the Association Implementation Report on Ukraine covering the period from December 2020 to the beginning of Russia's full-scale military aggression on 24 February 2022. It further emphasized the several positive developments concerning the adoption of key laws on the reform of the HCJ and the HCJ and the need to implement them.³³

The reform of the HCJ and the HCJ mentioned in the Commission's opinion was introduced in August 2021. Concerning the reform of the HCJ, a new body (Ethics Council) was established.³⁴ The Ethics Council assists the appointing bodies of the HCJ in assessing the integrity of the candidates with criteria of professional ethics and integrity. The Ethics Council consists of six members. A special procedure is provided for the first composition of the Ethics Council. The first composition is compound of three Ukrainian judges and three legal professionals nominated by international organizations. The inclusion of the international component has to ensure the impartiality of the selection process. In addition, within six months of its establishment, the first composition of the Ethics Council conducts an assessment of the current member of the HCJ. On February 22, 2022, by the decision of the HCJ, the powers of ten of its members were voluntarily terminated. In May 2022, the Ethics Council conducted interviews with four remaining members and decided that one of them did not meet the criteria of integrity and professional ethics.³⁵ Since then, the Ethics Council has continued to

³² European Commission, Joint Staff Working Document, Association Implementation Report on Ukraine, SWD(2020) 329 final, November 27, 2020, pp. 10-11, https://www.eeas.europa.eu/sites/default/files/2020_ukraine_association_implementation_report_final.pdf.

³³ European Commission, Joint Staff Working Document, Association Implementation Report on Ukraine, SWD(2022) 202 final, July 22, 2020, <https://www.eeas.europa.eu/sites/default/files/documents/Association%20Implementation%20Report%20on%20Ukraine%20-%20Joint%20staff%20working%20document.pdf>.

³⁴ Verkhovna Rada Ukrainy. *Pro vnesennya zmin do deyakykh zakonodavchykh aktiv Ukrayiny shchodo poryadku obrannya (pryznachennya) na posady chleniv Vyshchoyi rady pravosuddya ta diyal'nosti dystsyplinarnykh inspektoriv Vyshchoyi rady pravosuddya* [On amendments to some legislative acts of Ukraine regarding the procedure for election (appointment) of members of the High Council of Justice and activities of disciplinary inspectors of the High Council of Justice], Zakon Ukrainy 1635-IX, adopted July 14, 2021, <https://zakon.rada.gov.ua/laws/show/1635-20#Text>.

³⁵ Etychna Rada, *Pro nevidpovidnist' diyuchoho chlena Vyshchoyi rady pravosuddya Hryshchuka V.K. kryteriyam profesiyanoi etyky ta dobrochesnosti dlya zaynyattya posady chlena Vyshchoyi rady pravosuddya* [On the non-compliance of the current member of the High Council of Justice, Hryshchuk, with the criteria of professional ethics and integrity for the position of a member of the High Council of Justice] Rishennya No. 6, May 7, 2022, https://ec.court.gov.ua/ec/pres-centr/rishenna_er/rishennj_6_07_05_2022.

conduct interviews with the candidates for the HCJ. The activities of the Ethics Council are quite complex since the body is responsible for the selection process of candidates to be appointed by different institutions (the Parliament, the Congress of Judges, the President, etc).

The HQCJ was not operational from November 2019 till June 2023.³⁶ The Parliament introduced the reform to re-establish the HQCJ. The reform was not implemented, partly because of the strong opposition from the judiciary. In August 2021, the new amendments to the Law were introduced establishing the Selection Commission responsible for the selection of the members to the HQCJ.³⁷ The Selection Commission is responsible for conducting a competition for the position of a member of the HQCJ and recommending them for appointment by the HCJ. The first composition of the Selection Commission consists of three Ukrainian judges and three legal professionals nominated by international organisations. The Selection Commission announced the competition for a position of a member of the HQCJ in January, suspended in February, and resumed in July 2022. The Selection Commission finished their assessment of the candidates at the beginning of 2023. The new composition of the HQCJ was appointed by the HCJ in June 2023. It was one of the cornerstones for the beginning of accession negotiations. However, these conditions regarding the judiciary should not be perceived as final ones. The reform of the judiciary is quite complex. According to the HQCJ, as of August 5, 2024, Ukraine lacked 2 070 judges (28% of total number of judge positions).³⁸ Therefore, the re-established HQCJ face a major challenge in filling vacancies with new professional judges. The activities of HCJ and HQCJ can reshape significantly Ukrainian judiciary which should also be seen from the membership perspective.

In the report on Ukraine of 2023, assessing the functioning of the judiciary, the European Commission stated that Ukraine had some level of preparation in the functioning of the judiciary. The European Commission further observed that Ukraine made good progress with the implementation of the 2021 reform re-establishing the HCJ and HQCJ following a transparent and meritocratic process. The Commission argued that it enabled to start filling more than 2 000 judicial vacancies and to resume the vetting of sitting judges.

³⁶ Verkhovna Rada Ukrainy. *Pro vnesennya zmin do Zakonu Ukrainy "Pro sudoustriy i status suddiv" ta deyakykh zakoniv Ukrainy shchodo diyal'nosti orhaniv suddivs'koho vryaduvannya* [On amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and some laws of Ukraine regarding the activities of judicial governance bodies], Zakon Ukrainy 193-IX, adopted October 16, 2019, <https://zakon.rada.gov.ua/laws/show/193-20#Text>.

³⁷ Verkhovna Rada Ukrainy. *Pro vnesennya zmin do Zakonu Ukrainy "Pro sudoustriy i status suddiv" ta deyakykh zakoniv Ukrainy shchodo vidnovlennya roboty Vyshchoyi kvalifikatsiynoyi komisiyi suddiv Ukrainy* [On amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and some laws of Ukraine regarding the resumption of the work of the High Qualification Commission of Judges of Ukraine], Zakon Ukrainy 1629-IX, adopted July 13, 2021, <https://zakon.rada.gov.ua/laws/show/1629-20#Text>.

³⁸ Vyshcha kvalifikatsiyna komisiya suddiv Ukrainy. *Oblik posad suddiv* [Number of judges' positions], August 5, 2024, <https://vkksu.gov.ua/oblik>.

The EU has amended the methodology of accession procedure in February 2020.³⁹ The document's name "Enhancing the accession process – A credible EU perspective for the Western Balkans" emphasizes that it is targeted at the Western Balkans. However, the EU still tends to ensure the same procedures to all candidates. Hence, this approach is being applied to Moldova and Ukraine. The procedure still includes 33 *acquis Communautaire* chapters, but in the new model they are divided into six clusters. The first cluster is 'Fundamentals', which includes chapters 23 (Judiciary and fundamental rights) and 24 (Justice, Freedom and Security).⁴⁰ One of the features of the new approach is that '*negotiations on the fundamentals will be opened first and closed last*'.⁴¹ In this case the negotiations concerning the 'Fundamentals' will last throughout the whole process.

One can argue that suggestions of the Commission is a clear response to the rule of law problems of Member States which joined the EU from 2004 and 2013. The judicial reform is perceived as a key direction from the membership perspective. Article 19 of the Treaty on European Union states that '*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union Law*'.⁴² The Court of Justice of the European Union (hereinafter – CJEU) has developed significantly its case-law on the rule of law and judiciary recently. In *Portuguese judges'* case, the CJEU the concept of independence of national courts in tribunals. The independence of judiciary is particularly essential to ensure the judicial cooperation system under the preliminary ruling mechanism.⁴³ In *EC v. Poland*, the CJUE further clarified that the concept of 'independent court' which contains external and internal aspect.⁴⁴ The external aspect concern the absence of any external interventions or pressure on the court, while internal dimension is linked to impartiality and '*seeks to ensure that the equal distance is maintained from the parties to the proceedings*'.⁴⁵ The developments of the CJEU has to be closely monitored by the candidate countries, since it creates the framework for the negotiations concerning the rule of law and judiciary criteria.

³⁹ Commission Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, Enhancing the accession process - A credible EU perspective for the Western Balkans, COM (2020) 57 final, February 5, 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0057&from=EN>.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Supra* note 15, Article 19.

⁴³ Court of Justice of the European Union, Judgement of February 27, 2018, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, C-64/16, ECLI:EU:C:2018:117, paragraphs 43-44, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=199682&doclang=EN>.

⁴⁴ Court of Justice of the European Union, Judgement of June 24, 2019, *European Commission v. Tribunal de Contas*, C-619/18, ECLI:EU:C:2019:531, paragraphs 71-73, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62018CJ0619&from=EN>.

⁴⁵ *Ibid.*, paragraphs 72-73.

Ukraine creates the prerequisites for the successful accession process by fulfilling the conditions defined in the opinion and the report of the European Commission. The conditions concerning the reform of judiciary are the most complex one. However, the fulfilment of these explicitly mentioned conditions serves only the basis for a demanding process of negotiations. Considering the challenges for Ukrainian judiciary, the complexity of reforms to be implemented, on the one hand, and the accession process and CJEU's developments, on the other hand, the rule of law criterium is to become the cornerstone in the process of accession. The fulfilments of the conditions concerning the HCJ and HQCJ reform constitutes an important first step in the demanding accession process.

Conclusion

This article explores the main legal instruments framing the relations between the EU and Ukraine prior to the application for membership. Despite not being a pre-accession instrument, the EU-Ukraine AA played a crucial role in bringing Ukraine's legislation closer to the EU *acquis* and obtaining candidate status.

Ukraine's application for membership in the time of war put the EU in the difficult task to find the most appropriate solution. The EU has decided to proceed based on its practice of previous waves of enlargement, where the principle of conditionality plays a crucial role.

The main condition to be fulfilled is the reform of the judiciary in Ukraine. While the first conditions concerning the reform of the HCJ and the HQCJ are explicitly mentioned in the Commission's opinion, they should not be perceived as final ones. The EU will require more complex conditions to be met in the process of accession negotiations to ensure that Ukraine is able '*to provide remedies sufficient to ensure the effective legal protection in the fields covered by Union law*'.⁴⁶ Given that the rule of law and judiciary chapters have to be opened first and closed and closed last, the conditions regarding the judicial reform might significantly impact the whole process.

Bibliography

1. Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, O. J. L 161 (2014), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22014A0529%2801%29>.

⁴⁶ *Supra* note 15, Article 19.

2. Commission Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, Enhancing the accession process - A credible EU perspective for the Western Balkans, COM (2020) 57 final, February 5, 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0057&from=EN>.
3. Communication from the Commission to the Council and the European Parliament COM(2003) 104 final of 11 March 2003, Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A52003DC0104>.
4. Communication from the Commission to the European Parliament, the European Council and the Council COM(2022) 407 final of 17 June 2022, Commission Opinion on Ukraine's application for membership of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0407>.
5. Court of Justice of the European Union, Judgement of February 27, 2018, Associação Sindical dos Juizes Portugueses v. Tribunal de Contas, C-64/16, ECLI:EU:C:2018:117, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=199682&doclang=EN>.
6. Court of Justice of the European Union, Judgement of June 24, 2019, European Commission v. Tribunal de Contas, C-619/18, ECLI:EU:C:2019:531, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62018CJ0619&from=EN>.
7. Emerson M., Lazarevic M., Blockmans S., Subotic S. (2021), A template for Staged Accession to the EU, Centre for European Policy Study, <https://www.ceps.eu/ceps-publications/a-template-for-staged-accession-to-the-eu/>.
8. Etychna Rada, *Pro nevidpovidnist' diyuchoho chlena Vyshchoyi rady pravosuddya Hryshchuka V.K. kryteriyam profesynoyi etyky ta dobrochesnosti dlya zaynyattya posady chlena Vyshchoyi rady pravosuddya* [On the non-compliance of the current member of the High Council of Justice, Hryshchuk, with the criteria of professional ethics and integrity for the position of a member of the High Council of Justice] Rishennya No. 6, May 7, 2022, https://ec.court.gov.ua/ec/pres-centr/rishenna_er/rishennj_6_07_05_2022.
9. European Commission, Joint Staff Working Document, Association Implementation Report on Ukraine, SWD(2020) 329 final, November 27, 2020, https://www.eeas.europa.eu/sites/default/files/2020_ukraine_association_implementation_report_final.pdf.
10. European Commission, Joint Staff Working Document, Association Implementation Report on Ukraine, SWD(2022) 202 final, July 22, 2020, <https://www.eeas.europa.eu/sites/default/files/documents/Association%20Implementation%20Report%20on%20Ukraine%20-%20Joint%20staff%20working%20document.pdf>.
11. European Council Common Strategy 1999/414/CFSP of 4 June 1999 on Russia, O.J. L 157, 1999, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31999E0414&from=FR>.
12. European Council Common Strategy 1999/877/CFSP of 11 December 1999 on Ukraine, O.J. L 331, 1999, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31999E0877&rid=1>.

13. European Council conclusions on Ukraine, the membership applications of Ukraine, the Republic of Moldova and Georgia, Western Balkans and external relations, June 23, 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/06/23/european-council-conclusions-on-ukraine-the-membership-applications-of-ukraine-the-republic-of-moldova-and-georgia-western-balkans-and-external-relations-23-june-2022/>.
14. Hillion C. (2000), Institutional aspects of the partnership between the European Union and the Newly Independent States of the former Soviet Union: Case studies of Russia and Ukraine, *Common Market Law Review*, v. 37, issue 5 (2000), pp. 1211-1235.
15. Joint Declaration of the Eastern Partnership Summit of 15 December 2021, Council of the European Union, COEST 327, 14964/32, <https://www.consilium.europa.eu/media/53527/20211215-eap-joint-declaration-en.pdf>.
16. Kochenov D., Janse R., Op-Ed “Admitting Ukraine to the EU: Article 49 TEU is ‘Special Procedure’”, March 30, 2022, *EU Law Live*, <https://eulawlive.com/op-ed-admitting-ukraine-to-the-eu-article-49-teu-is-the-special-procedure-by-dimitry-kochenov-and-ronald-janse/>.
17. Lazowski A., “EU enlargement at the crossroads”, *EU Law Live*, June 30, 2022, <https://eulawlive.com/op-ed-eu-enlargement-at-the-crossroads-by-adam-lazowski/>.
18. Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, O.J. L 246 (1999), https://eur-lex.europa.eu/eli/agree_internation/1999/614/2009-11-01.
19. Perchoc P. (2006), The European Neighbourhood Policy, European Parliamentary Research Service, DOI:10.2861/97957.
20. Petrov R., Op-Ed “Ukraine’s Accession to the EU: Does the Peace Deal Matter?”, *EU Law Live*, May 4, 2022, <https://eulawlive.com/op-ed-ukraines-accession-to-the-eu-does-the-peace-deal-matter-by-roman-petrov/>.
21. Proposal for a Council and Commission Decision on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States of the one part, and the Republic of Belarus, of the other part, COM/95/44FINAL – AVC 95/0057 (1995), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A51995PC0044&qid=1723123345399>.
22. Regulation (EU) 2024/1392 of the European Parliament and of the Council of 14 May 2024 on temporary trade-liberalisation measures supplementing trade concessions applicable to Ukrainian products under the 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, O. J. L 2024/1392, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024R1392&qid=1723126404159>.
23. Tatham Allan F., Op-Ed “Conflict between Rhetoric and Reality of Enlargement: The implications of Opening EU Accession Negotiations with Ukraine”, *EU Law Live*, April 5, 2022, <https://eulawlive.com/op-ed-conflict-between-rhetoric-and-reality-of-enlargement-the-implications-of-opening-eu-accession-negotiations-with-ukraine-by-allan-f-tatham/>.
24. Treaty on the European Union (Consolidated version 2016), O. J. C 202, Article 49, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M/TXT>.

25. Van Elsuwege P., Van der Loo G., Op-Ed "The EU-Ukraine Association Agreement as a Stepping-stone towards EU membership?", *EU Law Live*, March 28, 2022, <https://eulawlive.com/op-ed-the-eu-ukraine-association-agreement-as-a-stepping-stone-towards-eu-membership-by-peter-van-elsuwege-and-guillaume-van-der-loo/>.
26. Verkhovna Rada Ukrainy. *Konstytutsiya Ukrainy* [Constitution of Ukraine], 254k/96-BP, adopted June 28, 1996, Article 131, <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.
27. Verkhovna Rada Ukrainy. *Pro Sudoustriy i status suddiv* [On Judiciary and Status of Judges], Zakon Ukrainy 1402-VIII, adopted June 2, 2016, <https://zakon.rada.gov.ua/laws/show/1402-19#Text>.
28. Verkhovna Rada Ukrainy. *Pro vnesennya zmin do deyakykh zakonodavchykh aktiv Ukrayiny shchodo porядku obrannya (pryznachennya) na posady chleniv Vyshchoyi rady pravosuddya ta diyal'nosti dystsyplinarykh inspektoriv Vyshchoyi rady pravosuddya* [On amendments to some legislative acts of Ukraine regarding the procedure for election (appointment) of members of the High Council of Justice and activities of disciplinary inspectors of the High Council of Justice], Zakon Ukrainy 1635-IX, adopted July 14, 2021, <https://zakon.rada.gov.ua/laws/show/1635-20#Text>.
29. Verkhovna Rada Ukrainy. *Pro vnesennya zmin do Zakonu Ukrayiny "Pro sudoustriy i status suddiv" ta deyakykh zakoniv Ukrayiny shchodo diyal'nosti orhaniv suddiv'koho vryaduvannya* [On amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and some laws of Ukraine regarding the activities of judicial governance bodies], Zakon Ukrainy 193-IX, adopted October 16, 2019, <https://zakon.rada.gov.ua/laws/show/193-20#Text>.
30. Verkhovna Rada Ukrainy. *Pro vnesennya zmin do Zakonu Ukrayiny "Pro sudoustriy i status suddiv" ta deyakykh zakoniv Ukrayiny shchodo vidnovlennya roboty Vyshchoyi kvalifikatsiynoyi komisiyi suddiv Ukrayiny* [On amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and some laws of Ukraine regarding the resumption of the work of the High Qualification Commission of Judges of Ukraine], Zakon Ukrainy 1629-IX, adopted July 13, 2021, <https://zakon.rada.gov.ua/laws/show/1629-20#Text>.
31. Vyshcha kvalifikatsiyna komisiya suddiv Ukrayiny. *Oblik posad suddiv* [Number of judges' positions], August 5, 2024, <https://vkksu.gov.ua/oblik>.

Микола Колотило

Докторант

Докторська школа ім. родини Юхименків Національного університету «Києво-Могилянська академія», Україна

ПРОЦЕС ВСТУПУ УКРАЇНИ ДО ЄС: У ЦЕНТРІ УВАГИ СУДОВА РЕФОРМА

Анотація

У цій статті розглядаються двосторонні відносини між ЄС та Україною у світлі надання статусу кандидата та початку процесу вступу. По-перше, стаття аналізує основні правові рамки, що існували до подання Україною заявки на членство. Крім того, досліджені основні міркування щодо заявки України та можливі сценарії процесу вступу. Реформа судової системи розглядається як головна умова процесу вступу. Стверджується, що виконання умов, передбачених у висновку Європейської комісії у 2022 році та звіті про оцінку у 2023 році щодо судової системи, слід розглядати як перший крок успішного процесу переговорів. Таким чином, комплексна реформа судової системи є наріжним каменем у процесі вступу України до ЄС.

Ключові слова

Процес вступу до ЄС, статус кандидата, Угода про асоціацію між Україною та ЄС, верховенство права, судова система, судова реформа, принцип умовності ЄС