Joining, Staying in, and Leaving the European Union

Joining, Staying in, and Leaving the European Union:

Legal, Political and Economic Perspectives

Edited by

Manolis Perakis

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INTRODUCTION

From its inception, the European integration project sought to achieve an "*ever closer union among the peoples of Europe*", by creating an institutional and legal framework with an intense degree of teleology; For that very reason, the Founding Treaties were signed as "open-ended" documents, with no fixed term, providing for a very strict procedure of accession and without any provisions for withdrawal or expulsion of a Member State.

The book presents and assesses several important issues regarding the most crucial periods of a Member State's "life" in the Union. First, its accession, which comes after its long struggle to adapt to the strict requirements set by the Treaties, sometimes facing more obstacles than other candidates. Second, its presence and exercise of its rights within the Union, as well as the rules and goals of its participation in the decision-making procedures. Finally, its legal right but also its real ability to withdraw and "detach" from the European Union in all levels of governance.

Starting from the beginning, Professor *R.-E. Papadopoulou* explores the three criteria, i.e. the political, the legal and the economic one, for joining the EU as well as the issue of a possible hierarchy thereof. She argues that it is not possible to draw a clear line of distinction or establish a hierarchical relationship, because each type of criterion includes the other two. *Papadopoulou* illustrates the equal importance of all types of criteria highlighting the fact that they reflect the -equally important- political, legal and economic obligations linked with EU membership, which is a holistic event.

Concerning the important issue of accession to the EU, the torch is picked up by two authors, both focusing on EU – Turkey relations as their specific example, but each one from a completely different point of view.

Indeed, *P. Vlachos* uses the above example in order to delve into the legal, (geo)political, and cultural factors that have proven to be decisive for the enlargement of the European Union, thus imposing high barriers for every candidate country. *Vlachos* is analyzing the recent developments in EU – Turkey relations from the angle of the rule of law, touching upon the so-called «enlargement fatigue», i.e. a political concept affecting every candidate

country's possibilities of joining the EU. In his conclusions, he summarises the main obstacles which, in his view, currently keep Turkey outside the EU.

Using a different point of departure, *Professor A. Fidan* highlights the Turkish public opinion towards the EU and underlines two important factors that can affect the individuals' opinion towards a democratic organization such as the EU: religiosity and liberal democratic attitude. *Fidan's* analysis is based on the most recent and important data, EVS-WVS jointly, as well as literature review. His study demonstrates the important effect of liberal democratic attitudes on positive stance towards the EU while religiosity had a negative impact on the sentiments of support for the Union in a predominantly Muslim society.

Moving on to the principles and rules that govern the membership of a State in the EU, three authors focus on three different, but equally important and challenging policy areas reigned by clash and balance between supranationalism and state sovereignty: Foreign Policy, Economy and balance of rights and obligations.

Professor *D. Skiadas* studies the most recent EU Structural Fund, the Just Transition Fund, in legal, institutional, political and financial terms, highlighting its importance within the EU's Multiannual Financial Framework for the 2021-2027 period, and its significance as an instrument for implementing the European Green Deal. He identifies the approach adopted by the EU institutions regarding the concept of just transition as a major issue, and concludes that the JTF, as well as the JTM as its operational umbrella, are mere attempts of a managerial reform which maintains the main features of the status quo in this policy field, by putting forward increased ambition at the beginning but losing significant momentum and strength as it continues.

In a completely different area, that of foreign and security policy, Dr. *K. Boskovits* revisits the qualified majority voting system in relation to the balance of power and institutional change. He suggests that this discussion is of direct relevance to the dynamic content of Union membership as a continued engagement to an open-ended process, arguing that the transition to QMV may be viewed as a test case in order to examine institutional growth and qualitative changes in the EU and their implications in terms of balance of power.

The question of balance between membership obligations and internal autonomy, which is dramatically posed in policy areas such as those mentioned by the previous authors, has been answered by the UK by an "à la carte" participation in the integration project. According to Dr. *V. Spyrakou* this peculiarity illustrates "Brexit" and the specificity of the British paradigm as a particular case, both in terms of its previous involvement within the creation of the EU institutional and legal framework, and a case in point of an existing tool-based method by which the EU's interrelationship with Member States is re-examined. The author argues that "Brexit" marks a change of political paradigm, as a result of complex factors that correspond to the political legitimacy representing the European argument.

It is by walking over the bridge built by the previous chapter, that the collection reaches the final issue under study, i.e. the exit of a Member State from the European Union. In this context, two authors discuss complicated legal questions, the answers to which lie between international and EU law.

Dr *K. Georgaki's* and *E. Giakoummakis'* study is an interesting contribution to the debate about the ways in which the EU may react to serious violations of its core values by certain Member States, placing the focus of attention on whether the Union's powers may go as far as expelling a Member State from its circles. The authors' initial approach to the issue originates in international treaty law, but after a very interesting legal analysis they conclude that the absence of a specific provision on the right to expel a Member State from the EU is not an unfortunate *lacuna* in the EU legal framework, but a deliberate choice made by the EU constitutional legislator which precludes reliance on general rules of international law.

Yours truly, Professor *M. Perakis* symbolically brings down the curtain on the collection, by focusing on a very specific and understudied aspect of the consequences of "Brexit". More precisely, he discusses the complicated legal issues regarding the UK's new position in the legal map of international relations and also comments on the various legal theories concerning whether and how the UK can remain a contracting party to the EU's exclusive and mixed international agreements. In this context, he interestingly describes the aftermath of "Brexit" as a "reboot" in UK's international relations, and he argues that the latter will likely have an extremely difficult time negotiating or renegotiating - outside the EU - international agreements in its favour without the prestige and power of the Union as the world's largest market.

It is the goal of all the authors of this book to contribute in the academic discourse regarding critically important and modern issues of EU law, its politics and economy, and its relations with its Member States. The differences in their background, experience, field of expertise and point of view is one of its greatest assets.

Finally, it goes without saying that all of the authors have contributed in their personal capacities and that their views do not necessarily represent those of any of the institutions with which they are associated.

Athens, May 2022
Manolis Perakis

CHAPTER ONE

POLITICAL, LEGAL AND ECONOMIC CRITERIA FOR JOINING THE EU: IS THERE A HIERARCHY?

REBECCA-EMMANUELA PAPADOPOULOU[*,2]

Abstract

The paper explores the three types of criteria for joining the EU as well as the issue of a possible hierarchy thereof. It argues that it is not possible to draw a clear line of distinction or establish a hierarchical relationship, because each type of criteria includes the other two. Political criteria, alias democracy and respect of the rule of law, have significant legal and economic dimensions; legal criteria, namely the incorporation of the Union acquis, imply the candidate State's political commitment to adopt a democratic regime and to adhere to the European economic model of open market economy; lastly, fulfilment of the economic criteria for accession is not possible without the establishment of the appropriate political and legal institutions. The paper concludes that the three types of criteria are equally important insofar as they reflect the -equally important- political, legal and economic obligations linked with EU membership, which is a holistic event.

Introduction

Article 49 TEU provides 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"*. These values are the foundations of the Union; they are deemed common to all Member States and they

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[2] I would like to thank Mrs Panagiota Radovits, PhD Candidate at the Law School of the NKUA, for her research assistance.

amount to *"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 framework set by these value-based requirements is quite general and it tackles several sensitive aspects of a State's institutional and legal structure. Thus, the application for accession has an "existential" dimension: the applying State strongly commits to undertake all appropriate steps in order to reform, if necessary, its foundations and institutional structure in order to meet the criteria for joining the European family.

Article 49 also provides that *"the conditions of eligibility agreed upon by the European Council shall be taken into account".* This phrase formally acknowledges the membership criteria already proclaimed at the 1993 Copenhagen European Council, known as "the Copenhagen criteria". The latter are threefold and include (a) stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, (b) a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union, (c) the ability to take on the obligation of membership including adherence to the aims of political, economic and monetary union[3],[4]. Also, under the perspective of the Central and Eastern Europe countries joining the EU, the 1995 Madrid European Council provided that candidate countries should set up administrative and judicial structures so as to ensure effective application of the "accession acquis"[5]. Given the "centrality of the accession to the functioning of the EU" (Craig 2020, 2-3)[6], a thorough scrutiny of the situation in the applicant State with regard to the satisfaction of these criteria is necessary, and the assent of all EU institutions is required in view of the completion of the accession process.

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[3] https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/conditions-membership_en, accessed December 30, 2021.

[4] Another consideration, which can be qualified as a fourth institutional criterion, refers to *"the Union's capacity to absorb new Members, while maintaining the momentum of European integration, which is important in the general interest of both the Union and the candidate countries".* This requirement does not concern the applicant countries themselves, and thus it will not be analyzed in this study.

[5] https://www.europarl.europa.eu/summits/mad1_en.htm#enlarge, accessed December 30, 2021.

[6] It results from the wording of article 49 that it acknowledges not only the Copenhagen and Madrid criteria, but also any other requirement for accession, which may be added by the European Council in the future.

The range of requirements deriving from the above is very wide and it includes political, legal and economic factors. This leads us inevitably to reflect upon the weight of each type of requirement. Are political, legal and economic criteria equally important or is there a hierarchy among them?

This paper explores the relationship and the dynamics between the three types of accession criteria. In Parts I and II it is argued that it is not possible to draw a clear line of distinction between political and legal criteria, because these two types are not exclusive of each other; on the contrary, they are closely linked and inter-dependent. Part III focuses on economic criteria, which are not explicitly mentioned in article 49 TEU but constitute a *conditio sine qua non* for membership, and explores their political and legal dimensions. These developments will allow us to draw plausible conclusions as to the central issue of this paper, i.e. a possible hierarchical relationship among accession criteria.

Part I. (non-purely) Political criteria for joining the EU: ensuring democracy, respect for the rule of law, and protection of fundamental human rights

The values proclaimed in article 2 TEU, but also the first Copenhagen criterion, concerns democracy, the rule of law and protection of human rights, including protection of minorities. These are usually referred to collectively as "political criteria" for accession (Kochenov 2004, 10; Janse 2019, 43). It seems, though, that such qualification is not totally accurate, as there are no purely political accession criteria.

(a) Democracy and the Rule of Law

Democracy was not expressly mentioned in the founding treaties as a requirement for membership. However, the lack of an express reference to democracy does not mean that the -then- Community could be open to non-democratic States; it should be reminded that the Paris and Rome Treaties were adopted in the wake of the creation of the Council of Europe in 1949, which has been a source of inspiration for the "fathers" of the Treaties (De Burca 2011, 664-667).

Democracy was gradually brought out as an explicit criterion for joining the Union, through the evaluation of the situation in certain applicant countries, namely Greece, Spain and Portugal, which had undergone the experience of authoritarian, non-democratic regimes (Janse 2017, 57). It is true that such

a regime cannot provide the institutional guarantees which are necessary in order to ensure the State's contribution to the Union's integration process.

The components of the *Democracy* criterion are not exclusively political, though. Certainly, the setting up of a democratic system of governance resulting from fair and free elections and allowing for peaceful alternation of political power lies in the field of politics. This is the standard conception of democracy as expressed in the Commission's Reports concerning countries applying for accession (Janse 2019, 55). However, such system cannot be assessed independently from the legal rules which guarantee that democracy is operating in practice. This is why this criterion is often considered in an "organic combination" (Kochenov, 2004, 11) with the requirement of respect for the Rule of Law.

The *Rule of Law* criterion is not purely political, either. This results clearly from the definition given by the European Commission in the 2019 Communication concerning this issue:

> *"The rule of law is enshrined in Article 2 of the Treaty on European Union as one of the founding values of the Union. Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law. These principles have been recognized by the European Court of Justice and the European Court of Human Rights*"[7].

Certainly, all the elements enumerated above have a highly political value; but at the same time, they reflect specific legal rules and principles (Roos 2008, 2) whose infringement may lead to the imposition of sanctions. Recent developments prove beyond any doubt that respect for the rule of law is not plainly a political commitment but sets a strict and binding legal frame of action. In its ground-breaking judgment in the *Portuguese judges* case[8], issued in 2018, the Court of Justice of the European Union (hereafter:

[7] "Further strengthening the Rule of Law within the Union. State of play and possible next steps", COM(2019)163. See also "Strengthening the Rule of Law within the Union. A blueprint for action", COM(2019)343.

[8] CJEU, 27.02.2018, *Associao Sindical dos Juizes Portugueses,* C-64/16, ECLI: EU:C:2018:117.

CJEU)[9] brought out the legal dimension of the *rule of law* requirement under its specific expression of effective legal protection. Based on article 19(1) TEU, which provides that *"Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law"*, it pointed out that this provision *"gives concrete expression to the value of the rule of law affirmed in Article 2 TEU"*[10]. Thus, the Court used article 19(1) as a tool that allowed it to transform the political *rule of law* criterion into a legal one.

The case of the recent judicial reforms in Poland, which has been qualified as "rule of law backsliding" (Craig and De Burca 2020, 46, 48), illustrates the limits of the political approach enshrined in article 7 TEU, which aims at sanctioning shortcomings in the field of the rule of law. The constraints of the article 7 mechanism are related to its highly political nature[11], which renders it inconclusive (Kochenov 2017, 6). In this case, the European Commission introduced an action for infringement against Poland on the basis of article 258 TFEU, thus crossing the "bridge" already built by the Court in the *Portuguese judges* case in order to link the article 2 TEU values with the legal obligations of Member States. In its judgment, the CJEU reaffirmed the role of article 19(1) as a specific expression of the EU values and ruled that this provision *"entrusts the responsibility for ensuring the full application of EU law in all Member States"*[12]. It concluded that Poland had infringed article 19(1) by introducing reforms as to the age of retirement of judges, which put at stake the independence of the judiciary. In its subsequent judgments the Court deployed the same reasoning with regard to other aspects of the Polish judicial reform, such as the independence of ordinary courts and the disciplinary regime for judges[13]. The legal nature of the *rule of law* criterion and its impact thereof was confirmed by the Order of the Vice-President of the Court, issued in October 2021, which imposed on Poland a periodic penalty of one million Euros per day, for not having

[9] For the case law issued before the Lisbon Treaty, the term "European Court of Justice" (ECJ) will be used.

[10] CJEU, *Associao Sindical dos Juizes Portugueses,* par. 32.

[11] The article 7 TEU mechanism is highly political, given that the decision concerning the existence of a "clear risk of a serious breach" (par. 1) or of a "serious and persistent breach" (par. 2) of the values enshrined in article 2 lies with the Council and the European Council, respectively, and that the substance of the case cannot be assessed by the CJEU.

[12] CJEU, 24.06.2019, *Commission v. Poland,* C-619/18, ELI:EU:C:2019:531, par. 47.

[13] CJEU, 05.11.2019, *Commission v. Poland,* C-192/18, ECLI:EU:C:2019:924, 15.07.2021, *Commission v. Poland,* C-791/19, ECLI:EU:C:2019:596.

complied with a previous Order issued in July 2021 that had imposed interim measures in the framework of a pending case against that Member State[14]. Finally, the EU Regulation 2020/2092 *"on a general regime of conditionality for the protection of the Union budget"*, known as Conditionality Regulation[15], further corroborates the legally binding nature of the *rule of law* requirement, insofar as it links shortcomings in this field in a Member State with the imposition of specific economic sanctions, mainly suspension of payments due by the EU to that State[16].

The above considerations concern States which are already members of the Union. In the past it has been argued that the content of the *rule of law* concept, as addressed to Member States, is not identical to the one addressed to candidate countries according to the Copenhagen criteria. In this respect, it was noted that the *rule of law* threshold for applicant countries in view of the 2004 enlargement was low, the Commission satisfying itself with the mere fact that democratic institutions were in place and not assessing their actual operation (Kochenov 2004, 17). These considerations are not totally unfounded: in the case of the 2004 wave of enlargement, *"whilst pursuing compliance with all the criteria on the part of the candidate countries, another goal consisted in ensuring that they would be accessing the EU together"* (Cerruti 2014, 795-796); furthermore, the blueprint issued in 1997 by the Commission in view of that enlargement, called Agenda 2000, refined the pre-accession strategy by providing for a close monitoring of candidate countries through annual reports on their progress (Janse 2019, 48).

However, two points must be made concerning the current state of affairs:

First, it should not be disregarded that respect for the rule of law is a universal requirement. It does not apply only in the fields of EU competence, but it concerns the institutional structure of the candidate State in its entirety[17]. Inappropriate operation of national institutions may affect uniform

[14] Order of the Vice-President of the Court, 27.10.2021, *Commission v. Poland,* C-204/21R, ECLI:EU:C:2021:878.
[15] Regulation 2020/2092 of the European Parliament and the Council of 16.12.2020, OJ L 433 of 22.12.2020, p.1.
[16] Quite unsurprisingly, Hungary and Poland brought actions for annulment against the Conditionality Regulation (C-156/21 and C-157/21, respectively). Both actions were dismissed by the Court with its judgments of 16.02.2022, ECLI:EU:C:2022:97 and ECLI:EU:C:2022:98, respectively.
[17] See the Commission Communication concerning the mechanism of art. 7 TEU, COM(2003)606, par. 1.1.

application of EU law and thus jeopardize the integration process. Thus, if a national parliament does not operate in a satisfactory way or its powers are not duly respected in practice, it will not be able to fulfil efficiently the role entrusted to it with regard to the subsidiarity test of EU legislative drafts[18]; besides, satisfactory operation of the national parliament, respect for its powers and full participation of the opposition in its activities, are identified by the Commission as the main parameters that must be assessed as part of the *Democracy* and *Rule of Law* criteria for candidate countries (Kochenov 2004, 16). Also, if the national judiciary is not independent it will not be able to ensure impartial and effective application of EU rules and to fulfil its role in the preliminary reference mechanism, which is the keystone of the Union's judicial system as clearly stressed by a settled case law of the CJEU[19]. Furthermore, in its Reasoned Proposal in accordance with article 7(1) TEU concerning Poland, the Commission stressed the link between the rule of law and the functioning of the internal market: *"the proper functioning of the rule of law is also essential in particular for the seamless operation of the Internal Market and an investment friendly environment, because economic operators must know that they will be treated equally under the law"*[20].

Therefore, the mere existence of appropriate institutions in the candidate countries does not suffice; these institutions must also operate properly to ensure respect for the rule of law. The rigorous evaluation process in view of Croatia's accession in the EU is illustrative in this respect (Cerruti 2008, 794).

Secondly, the recent case law developments show that democracy and the rule of law are not momentary criteria and that they are not exhausted upon completion of the accession process; on the contrary, their impact is extended to the post-accession stage; even more, they generate a constant obligation of "non-regression" for all Member States, which has been

[18] The involvement of national parliaments in the Union's legislative procedure through the "early warning mechanism" is an important innovation of the Lisbon Treaty, See Protocol No 1 on the role of national parliaments, and Protocol No 2 on the application of the principles of subsidiarity and proportionality.

[19] CJEU, *Commission v. Poland,* C-619/18, par. 45. In its judgment of 26.03.2020 in the *Lowicz* case, C-558/18 and C-563/18, ECLI:EU:C:2020:234, the Court stressed that *"provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court"* undermines judicial independence (par. 58-59).

[20] Reasoned Proposal in accordance with article 7(1) concerning the rule of law in Poland, COM(2017)835 final, par. 180(3).

qualified as the "Copenhagen dilemma" (Pech and Kochenov 2021, 18). Therefore, the *rule of law* threshold for acceding States cannot be lower than the one already in force within the Union and applying to all Member States.

(b) Fundamental human rights protection

Respect for fundamental human rights, including protection of minorities, constitutes the third piece in the "puzzle" of political criteria for accession. Indeed, democracy and the rule of law cannot operate in a world where fundamental rights are infringed, and the latter are considered as an important component of the rule of law, thus forming a triangular relationship (Carrera, Guild and Hernanz 2013).

Protection of fundamental rights was not expressly included in the founding treaties. It is the Court that gradually elaborated a system for their protection, basing itself on three elements: general principles of law[21], constitutional traditions which are common to the Member States[22], and international agreements on fundamental rights protection where Member States are parties, namely the European Convention on Human Rights[23] (hereafter: ECHR).

Today, the Union is equipped with a full-fledged system ensuring fundamental rights protection, which is based on two pillars: on the one hand, article 6(1) TEU proclaims the Charter of Fundamental Rights, which was adopted in Nice in 2000 but became part of EU primary law only in 2009 with the Lisbon Treaty. On the other hand, article 6(3) TEU reiterates the Court's case law acknowledging that fundamental rights, as guaranteed by the ECHR and as resulting from common constitutional traditions, constitute general principles of law[24]. Furthermore, article 6(2) TEU announces the Union's intention to accede to the ECHR, insofar as its competences are not affected by the accession[25].

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[21] ECJ, 12.11.1969, *Stauder*, 29/69, ECLI:EU:C:1969:57.
[22] ECJ, 17.12.1970, *International Handelsgesellschaft,* 11/70, ECLI:EU:C:1970:114.
[23] ECJ, 14.05.1074, *Nold,* 4/73, ECLI:EU:C:1974:51.
[24] This provision constitutes an excellent example of the dynamic and constructive interaction between the EU judge and the EU legislator.
[25] Protocol No 8 annexed to the Lisbon Treaty provides that the accession agreement must preserve the specific characteristics of the Union and not affect its competences or the exclusive jurisdiction of the Court, in accordance with article 344 TFEU.

It results from the above that fundamental rights protection has undoubtedly a significant political and symbolic dimension for the Union, as it enhances its role and legitimacy as an organization whose objectives go beyond economic integration. Such dimension is further strengthened by its commitment to accede in the ECHR, which enjoys a high reputation as the instrument *par excellence* for human rights protection at the European level[26]. This is why the accession project has not been abandoned despite the negative Opinion delivered by the Court in 2014 concerning the Draft Accession Agreement[27]; negotiations have resumed with the view to elaborating a new version of the agreement that will address the concerns expressed by the Court (Tacik 2017, 919, Jacqué 2020, 21).

Do the above considerations mean that fundamental rights protection is to be viewed as a purely political criterion for accession? Definitely not. It is most importantly a legal requirement of the EU legal order. Therefore, States wishing to join the Union not only must declare their commitment to protect rights, they must also dispose appropriate substantive and procedural legal rules ensuring genuine protection thereof. Furthermore, it must not be disregarded that several fundamental rights concern freedom to work, to establish oneself and to provide services as well as freedom to conduct a business (articles 15 and 16 of the Charter); effective protection of these rights requires the operation of an open market economy, which constitutes an economic criterion for accession (see below, Part. III).

It must be stressed that accession renders States liable towards the Union at two levels. On the one hand, they are bound to respect fundamental rights, as enshrined in the Charter, when they act in the fields covered by EU law. Their failure to do so may be declared by the Court, mainly following an action for infringement based on article 258 TFEU[28]. They may even be

[26] Accession of the Union in the ECHR has been a constant aspiration of EU institutions. The first attempt was made in 1994 and was rejected by the Court in Opinion1/94, due to the lack of a specific legal basis in the Treaty, Opinion 1/94, 15.11.1994, ECLI:EU:C:1994:384.

[27] In its Opinion 2/13 the Court considered that the Draft Agreement for the Accession of the EU in the ECHR was not compatible with article 6(2) TEU because it was liable to affect the specific characteristics of the EU legal order, Opinion 2/13 of 18.12.2014, ECLI:EU:C:2014:2454.

[28] The breach of a fundamental right on behalf of a Member State may also be addressed indirectly in the framework of a preliminary reference sent by the national court by virtue of article 267 TFEU. The Court has ruled that the provisions of the Charter may enjoy vertical direct effect (CJEU, 26.02.2013, *Fransson*, C-617/10, ECLI:EU:C:2013:105), and is has found that certain provisions may also have

subject to economic sanctions in case they fail to take the necessary measures to abide by the Court's judgement (article 260(2) TFEU). On the other hand, they must respect fundamental rights as a component of the rule of law, even in the fields which remain within national competence. Systematic failure to comply with these requirements may also trigger judicial proceedings and legal sanctions against the failing State, as was recently the case of Poland.

Part II. (non-purely) Legal criteria for joining the EU: taking on the Union acquis

The third Copenhagen criterion concerns the ability of the applicant State *"to take on the obligation of membership including adherence to the aims of political, economic and monetary union*".

Becoming a member of the EU entails a large number of legal obligations. First, the applicant State must "prepare" its legal order to receive EU law and to ensure its effective application. Certainly, the principle of institutional and procedural autonomy acknowledges that Member States enjoy a wide margin of discretion as to the setting up of the institutions which will be called to interpret and apply EU law, the division of competences between them, the setting up of the relevant procedures, etc (Roccati 2015, 152). That said, domestic rules must be such as to ensure that EU rules are duly applied and deploy their effects based on the principles of equivalence and effectiveness (Craig and De Burca 2020, 273).

Furthermore, the applicant State must acknowledge and "absorb" what is usually qualified as the *Union acquis*. The term "acquis" is mentioned in article 20 TEU, which concerns the establishment of enhanced cooperation by a number of Member States; according to paragraph 4, acts adopted in the framework of this procedure *"shall not be regarded as part of the acquis which has to be accepted by candidate States for accession to the Union"*. This provision confirms *a contrario* the role of the acquis as an accession criterion[29].

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horizontal effect (CJEU, 17.04.2018, *Egenberger*, C-414/16, ECLI:EU:C:2018: 257). National courts have thus the opportunity to address preliminary questions to the Court, which involve a possible conflict between the Charter and domestic law.

[29] The European Commission has repeatedly used the term "acquis". See, for example, "Towards an enlarged Union", Strategy Paper and Report on the Progress towards accession by each of the candidate countries, COM(2002)700 final,

The term "acquis" represents *"a 'snapshot' of the situation existing at the moment of accession"* (Petrov 2011, 74) and it comprises *"the content, principles and political objectives of the treaties; the legislation adopted in application of the treaties and the case law of the Court of Justice of the European Union; declarations and resolutions adopted by the Union; measures relating to Common Foreign and Security Policy; measures relating to Justice and Home Affairs; international agreements concluded by the EU and those concluded by the EU countries between themselves in the field of the Union's activities"*[30]. Acceptance, implementation and enforcement of the acquis is a *conditio sine qua non* for the accession of a new Member State and it must be incorporated and applied by the date of accession[31]. Given the broad, variable and dynamic nature of the acquis, which has been compared to a "moving target" (Petrov 2011, 76), its assimilation is a very challenging task whose success depends on each applicant country's legal and economic situation.

Incorporation of the Union acquis is above all a legal requirement for joining the EU. The applicant country must abolish or amend domestic rules which are not compatible with EU law, even at the highest level of the legal hierarchy, and it must also undertake serious legal reforms in a large number of fields in order to absorb the secondary EU legislation already in force. Moreover, it must accede to international agreements of the EU in accordance with its national constitutional procedures and it is obliged to take the necessary measures in order to eliminate any incompatibility of international agreements it has concluded before accession, as required by article 351 TFEU.

The Union acquis, which must be incorporated and applied by the applicant country as from the date of its accession, is divided in 35 Chapters; these comprise a wide range of areas of EU competence, such as the four freedoms of the internal market, public procurement, company law, competition policy, agriculture, economic and monetary policy, taxation, environment, foreign policy etc[32].

Enlargement Strategy and Main Challenges 2009-2009, COM(2008)674 final, 2019 Communication on EU Enlargement Policy, COM(2019)260 final, 2021 Communication on EU Enlargement Policy, COM(2021)644 final.

[30] https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/conditions-membership/chapters-acquis_en, accessed January 3, 2022.

[31] Ibid.

[32] Ibid.

It results from the above that the obligation to undertake membership, in the form of assimilation of the Union acquis, constitutes above all a legal commitment and it must be ensured by means of significant and extensive interventions in a State's legal order (Boyle Jacobsen 2004, 41). However, this obligation is not purely legal. It also has an important political dimension; the latter results from the wording of the third Copenhagen criterion, which stresses that membership entails adherence to the aims of political, economic and monetary union. Therefore, in order to join the EU the applicant country must accept not only its legal rules and principles, but the entirety of its objectives, either legal, political or economic. The latter indicate that legal requirements for accession also include a significant economic dimension.

The above reference to the Union's aims can be related to article 49 TEU, which provides that applicant countries not only must respect the article 2 values, but that that they must also be *"committed to promoting them".* In other words, absorption of the legal framework forming the Union acquis is also a "state of mind": the applicant country commits to be part of the integration project as a whole (Curti Gialdino 1995, 1090). The key element in this respect is the notion of "aims/objectives", whose acceptance is mandatory; the historic evolution of the Union shows that these objectives are dynamic and ever-evolving and the new State must ensure its participation in the future evolution thereof. This obligation is further enshrined in article 4(3) TEU, which concerns the principle of sincere cooperation and provides, among other obligations, that Member States must *"facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives".*

Part III. (non-purely) Economic criteria for joining the Union: adopting the European Economic Model

The second Copenhagen criterion refers to *"a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union".* At first sight, the wording gives the impression that is sets a rather general and loose frame of action, whereby the applicant country's economy must be healthy and able to participate in the process of economic integration. This impression is corroborated by the reference, in the third criterion, to *"adherence to the aims of […] economic and monetary union",* which is a rather political commitment.

The situation is quite complex, though. While article 49 TFEU does not make any reference to economic criteria for accession, such criteria derive indirectly from other Treaty provisions, namely articles 119 and 120 TFEU. More specifically:

Article 120(1) proclaims that *"the Member States and the Union shall act in accordance with the principle of open market economy with free competition, favouring an efficient allocation of resources and in compliance with the principles of article 119"*. These principles, as enumerated in article 119(3), are *"stable prices, sound public finances and monetary conditions and a sustainable balance of payments"*.

These provisions reflect the economic model adopted by the Union, which is also known as "the Union's economic Constitution" insofar as it has a constitutive, alias seminal value in the process of integration (Sauter 1998, 27; Semmelmann 2010, 515; Joerges 2015, 1). This model goes far beyond a simple advice or "encouragement" towards applicant countries. It is specified through concrete conditions and requirements as to the main parameters and indicators of a country's economic situation, such as public debt, public deficit, or inflation rates. These requirements are further elaborated in the Stability and Growth Pact[33]. It must be pointed out that both articles 119 and 120 refer to "the Member States and the Union", thus implicitly stressing that the economic model is an existential choice made by the Union regarding its own operation and it is only normal that such choice is further imposed on the Member States.

Any country wishing to join the EU family must reform its economic system and its market structure so as to render it compatible with the Union's economic model. The latter represents a mixed system based on the ordoliberal tradition (Leucht 2018, 191; Hien and Joerges 2018, 142) which promoted free competition as an element of the open market, coupled with corrective interventions in the market mechanism in order to address imbalances (Papadopoulou 2017, 5). Free competition is an inherent component of the internal market and serves the Union's objective of a "highly competitive social market economy" as proclaimed in article 3(3)

[33] The Stability and Growth Pact was adopted in 1997 in order to elaborate the mechanism of economic policies coordination. It consisted of Regulations 1466/97 and 1467/97, OJ L 209 of 02.08.1997, p. 1 and 6, respectively. Following the financial crisis this framework was amended and today consists of five Regulations and a Directive (known as "Six-Pack"): Regulations 1173, 1174, 1175, 1176 and 1177/2011 and Directive 2011/85, OJ L 306 of 23.11.2011, pp. 1, 8, 12, 15, 25, 33 and 41, respectively.

TEU[34]. It must be stressed that competition rules which are necessary for the functioning of the internal market constitute an exclusive competence of the Union. Any applicant country must, therefore, prepare its market to fully apply these rules; it must adopt measures such as lifting of barriers to market entry, liberalization of trade, abolition of monopolies, etc (Inglis 2010, 84). These obligations constitute economic criteria whose accomplishment is required in view of accession in the Union, but they also include a political will and determination to undertake deep structural changes in the operation of the market, as well as the adoption of the necessary legal measures that will allow for these changes to take place.

A second aspect of utmost importance is the applicant country's commitment to participate in the Economic and Monetary Union (EMU)[35]. This commitment is twofold and corresponds to the two fields of the EMU, which differ considerably from each other as to their nature and operation, thus forming an asymmetric set of rules. On the one hand, accession to the Union means that the applicant country must be willing to participate in the monetary union and become a member of the Eurozone as soon as it is able to do so on the basis of the convergence criteria[36]. Participation in the supranational construction of the monetary union, which constitutes an exclusive competence of the Union, means that the State will no longer have control of its monetary policy and will be subject to an enhanced supervision as to all aspects of its economic policy[37]. On the other hand, the applicant

[34] With the entry into force of the Lisbon Treaty, free competition is no longer a Union objective *per se*, but serves as a parameter of the broader "social economy" concept.

[35] This commitment is also reflected in the obligation of *"adherence to the aims of […] economic and monetary union"* mentioned in the framework of the third Copenhagen criterion.

[36] Participation of a Member State in the monetary union, following a formal decision of the Council concerning the fulfilment of the convergence criteria set in article 140(1) TFEU, is mandatory; this results from the fact that non-participating Member States are referred to as "Member States with derogation", article 139(1) TFEU. This view is also confirmed by Protocol No 13 "on the convergence criteria", which further analyses the principles which must guide the Union "in taking decisions to end a derogation".

[37] See Regulations 472/13 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, and 473/13 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, known as "Two-Pack", OJ L 140 of 27.05.2013, p. 1 and 11, respectively. These Regulations

country accepts to submit its economic policy to constant supervision and evaluation. Indeed, while Member States maintain their competence in the field of economic policy, they are obliged to participate in the coordination mechanism in order to comply with the principles set in article 119(3) TFEU. Coordination of national economic policies implies a twofold process, which consists of constant multilateral surveillance and fiscal discipline; this process ensures that national policies are consistent with the broad guidelines and country-specific recommendations issued by EU institutions with regard to several economic and social indicators, as well as to the reduction of excessive deficits. Currently, under the Six-Pack regime, strict surveillance follows an annual circle known as the European Semester (Armstrong 2013, 23).

The outbreak of the financial crisis in 2010 led to the reinforcement of the Union's supervision on national economic and budgetary policies. Therefore, a country wishing to join the Union must accept to submit its economic and fiscal policy to strict substantive and procedural requirements as imposed by the new Stability and Growth Pact. In other words, it must proceed to the necessary legal and economic reforms in order to satisfy the principles by EU primary and secondary law. To undertake these reforms amounts to the fulfilment of economic criteria for accession, but necessitates also the adoption of legal measures and has thus an additional legal dimension. Last but not least, accepting to subject its monetary, fiscal and budgetary policy to the controlling power of the Union, implies a fundamental political commitment on behalf of the applicant country.

Conclusion: Is there a hierarchy among the accession criteria after all?

The above considerations lead us to an interesting conclusion as to the issue of hierarchical relationship among the criteria for joining the European Union. Political, legal and economic criteria are not exclusive of each other; on the contrary, they represent various facets of the same phenomenon. In other words, there are no purely political, purely legal, or even purely economic accession criteria. Each type of criteria involves and comprises the other two types, in the sense that it cannot be satisfied without their contribution. More specifically:

provide for strict sanctions for Eurozone members in case of non-compliance with Council's decisions.

- *Political criteria* concerning democracy, the rule of law and protection of fundamental rights imply the adoption of significant legal reforms, the setting up of stable legal institutions and judicial procedures, but also the opening of the market.
- *Legal criteria* as proclaimed in the Copenhagen European Council, which amount to the incorporation of the Union acquis, imply a political commitment on behalf of the applicant country as well as the adoption of an economic system allowing for the proper enforcement of the acquis, whose major part concerns rules with a significant economic impact (such as the lifting of restrictions to market access, the abolition of State monopolies, etc).
- *Economic criteria* for accession, i.e. acceptance of the Union's economic model and participation in the EMU, cannot be fulfilled without the applicant country's political commitment to transfer its sovereignty to the Union in the monetary field in the long term and to submit its economic policy to strict supervision; furthermore, fulfilment of economic criteria requires the adoption of the necessary legal framework for the opening of the market.

That said, can these criteria be classified in a hierarchical order?

It has been argued that, although the Copenhagen criteria form a set of three elements of equal importance, *"they were very soon modified by the European Council and Commission in order to accommodate a well-established pre-Copenhagen tradition of giving priority to the state of democracy in the candidate countries"* (Kochenov 2004, 4).

I do not share this opinion. The above analysis showed that there exists no hierarchical relationship between the accession criteria. Although economic criteria were not expressly mentioned before the 1993 Copenhagen European Council, they have always been present and highly relevant, because they implicitly derive from the Union's primary objective of economic integration: a country that would not accept to adopt the European economic model of open market with free competition, which amounts to the "hard core" of the EU construction, could not possibly accede. Furthermore, as analyzed above, the political criterion of democracy and the rule of law cannot be satisfied without the setting up and the operation of appropriate legal rules and institutions.

Accession of a country to the European Union is a holistic event. The status of the applicant State changes radically and irreversibly; it is transformed into a "Member State". This major, seminal event, also transforms the

accession criteria into specific parameters of that country's participation in the Union as from "day one"; in other words, the accession criteria are mirrored in the -equally important- political, legal and economic obligations which are inherent to membership. Because, as Paul Craig pointed out, *"membership is an admixture of rights, duties, powers, and privileges"* (Craig 2020, 30).

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CHAPTER TWO

ACCESSION TO THE EU, THE RULE OF LAW, AND ENLARGEMENT FATIGUE: THE LEGAL AND (GEO)POLITICAL IMPLICATIONS BLOCKING TURKEY'S ROAD TO ACCESSION

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Abstract

The present paper focuses on the EU accession procedure and the legal and (geo)political factors that define it. By using the example of Turkey, a country that received the candidate status back in 1999 but has not been able to convince the EU of its eligibility to become a member state, this contribution essentially connects the country's accession perspectives with the rule of law crisis that the EU is currently facing, but also with the enlargement fatigue that represents a fairly recent but important obstacle that candidate countries need to overcome in order to become full EU member states.

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