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Legal Aspects of Enlargement of the European Union

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Abstract

The pulling power of the European Union has helped to transform Central and Eastern European countries into modern, well-functioning democracies. Regarding its integration activities, enlargement is one of the EU's most powerful policy tools. This paper analyses the legal basis of the enlargement of the EU embodied in Art. 49 of the Treaty of the European Union, which is a result of an evolution lasting for nearly 70 years, but this evolution has not been finished, because there are still unclarified and open issues regarding the legal regulations. This paper overviews the accession criteria, finds that the enlargement process found in this Art. and in practice reveals some hiatuses of the legal basis of the enlargement and proposes to extend the enlargement clause with the basic procedural rules, fundamental principles and the conditions for membership developed in practice.

Keywords: • legal basis of enlargement • accession criteria • enlargement process • accession negotiations • hiatuses of legal basis • "custom law" of the enlargement

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Pravni vidiki širitve Evropske unije

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Povzetek

Raztezna moč Evropske unije je pomagala preoblikovati države srednje in vzhodne Evrope v sodobne, dobro delujoče demokracije. Z integracijskega vidika je širitev eno najmočnejših orodij EU. Ta referat presoja pravno osnovo za širitev EU, ki je zajeta v členu 49 Pogodbe o Evropski uniji in je rezultat skoraj 70-letnega razvoja. Vendar pa ta razvoj ni dokončan, saj še zmeraj obstajajo nepojasnjena in odprta vprašanja pravne ureditve širitve. V članku avtorica obravnava pristopne kriterije, ugotovlja, da širitveni proces z omenjene določbe in iz prakse razkriva nekatera razhajanja med pravno osnovo za širitev ter predlaga razširitev širitvene klavzule z osnovnimi procesnimi pravili, temeljnimi načeli in pogoji za širitev, ki so se razvili v praksi.

Ključne besede: • pravna osnova širitve • pristopni kriteriji • širitveni proces • pristopna pogajanja • razhajanja med pravnimi osnovami • »običajno pravo« širitve

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1. Introduction

There have been several successful enlargements of the European Communities and then of the EU, as a result it has grown from six founding Member States to the current 27 members. The enlargements in 2004 and 2007 were unprecedented both in terms of the number of countries to join, and the accession challenges the EU had to face. This later one resulted from the political and economic situations in the majority of these countries, which required more preparation beforetheir admission. Moreover, the EU itself had to make preparations in terms of its absorption capacity, in order to be able to accommodate them.[1] That is why the EU put a stronger emphasis on the enlargement process in these cases to support the countries' transition and reform processes, so that they would be capable of meeting their obligations as Member States at the moment of their accession.

Enlargement is a carefully managed process which helps the transformation of the countries involved, extending peace, stability, prosperity, democracy, human rights and the rule of law across Europe. It is a very complex field, which has economic, social and political angles and its processes are governed by the founding treaties. According to the address given by Willy Brandt to the Bundestag on European policy in 1967, the enlargement of the Communities is an objective stated in the founding treaties.[2]

Keeping the wishes of the founding fathers and the spirit of the Treaties, the EU is seeking to achieve its goal of creating unity in diversity and promoting stability and prosperity by bringing together countries, which share common values namely freedom, democracy, the rule of law and respect for human rights.

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[1] Europe and the Challenge of Enlargement, 24 June 1992. Prepared for the European Council, Lisbon, 26-27 June 1992. In: Bulletin of the European Communities, Supplement 3/92, 14–15.

[2] Address given by Willy Brandt to the Bundestag on European policy (Bonn, 13 December 1967) In: Verhandlungen des deutschen Bundestages. 5. Wahlperiode. 126. Sitzung vom 13. Oktober 1967. Stenographische Berichte. Hrsg. Deutscher Bundestag und Bundesrat, 1967, Nr. 65, Bonn.

2. The legal basis and criteria for the accession to the EU

2.1. The legal nature of the founding treaties and the legal basis for enlargement

Concerning the legal nature of the founding treaties, these treaties and their amendments can be categorized into the group of particular treaties within multilateral treaties, more concretely to the regional category type (Malone, 2008: 5). Since there are some criteria to fulfil for a third country to apply for membership, and the Council of the European Union, the members of the integration and also the European Parliament (according to the law in force) have to give consent to the accession of a third country, we can state that the founding treaties are not open international treaties, which are condition free to apply, but they are semi-open (or semi-closed) international treaties (Malone, 2008: 9).

The term "enlargement" means the extension of the EU by an admission of (a) third country/countries into its organization, resulting in a growth in its legal entities, while the word "accession" represents the step of a third country to become a member of the integration. The legal basis for enlargement is (former Art. 237 of the Treaty establishing the EEC – and then the former Art. O of the EU Treaty – with the Amsterdam Treaty) now the Art. 49 of the Treaty on European Union (TEU), which sets out some accession conditions and introduces the application process in a nutshell.[3]

It is very important to emphasize that this Art. contains only the right of a third country to give in its application for admission to the EU, but there is no guarantee for a successful accession even if this country meets all criteria. Even beginning the accession negotiations or the integrating process alone does not create any obligation for the EU, and the preparation for the accession by the applicants does not cause any legitimate expectations (Bomberg et al., 2012: 166–167).

2.2. The accession criteria

Taking a deeper look at the accession criteria in the Art. 49 of TEU, the first condition is that only a state could be a member, which is an entity with

[3] Official Journal of the European Union (OJ) C 83 Volume 53, 30 March 2010.

international legal standing in the light of the international law.[4] This means, that international organisations or alliances/associations of countries are not applicable. The other criterion is to be a European state. This means that the EU is open to all European countries; therefore each state being part of the European continent has the right to apply. However, this is not only a question of geographical location, but cultural traditions and historical roots of a state should also be taken into account. The report of the European Commission titled "Europe and the challenge of enlargement" dated 24 June 1992 states: "The shared experience of proximity, ideas, values, and historical interaction cannot be condensed into a simple formula, and is subject to review each succeeding generation. The Commission believes that it is neither possible nor opportune to establish now the frontiers of the European Union whose contours will be shaped over many years to come."[5]

This view can be interpreted as a flexible approach, without providing a precise definition for Europe. Taking a closer look on the history of enlargements, the European state criterion was used in a broader sense and there has been no intent to clearly define Europe by the Communities and the Union. In my opinion it is also not felicitous to draw such borders, because it could lead to isolation, and the EU could also loose its pulling and inspiring power.

In former enlargements it was not a difficult decision whether a country is in Europe, but now the situation is far more complicated. One of these examples is Turkey, because only three percent of its territory lies in the geographical Europe. Furthermore, the Turkish capital is not in Europe, but in Asia. Turkey is the member of the Council of Europe, and the Preamble and the Art. 28 of the Association Agreement with the former EEC confirm that the country is European in the sense of the former Art. 237.[6] It is an open question whether the EU would accept states outside the European continent as a member (similarly to the Council of Europe) or not.

The amendments of the founding treaties have not changed these above-mentioned criteria, but they have been extended by others. The Maastricht Treaty has unified the legal bases of the enlargement of the three

[4] The criteria of statehood in international law are the following: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states (Shaw, 2003: 178).

[5] Commission of the European Communities: Europe and the challenge of enlargement 24 June 1992, Prepared for the European Council Lisbon, 26-27 June 1992. In: *Bulletin of the European Communitie*s, Supplement 3/92, 11.

[6] Agreement establishing an Association between the European Economic Community and Turkey (signed at Ankara, 12 September 1963) OJ C 113, Volume 16, 24 December 1973.

former Communities (European Economic Community - EEC, European Coal and Steel Community - ECSC, European Atomic Energy Community – EAEC or Euratom) into the Art. O of the TEU, and introduced some additional criteria in the Article F (1) and (2) of the TEU, namely the principles of democracy, respect for human rights and fundamental freedoms. The Amsterdam Treaty defined a third condition that a third European country that wishes to apply for EU membership should respect the principles in Art. 6 (1) of the TEU, which contains the above mentioned principles extended with liberty and the rule of law.[7] Prior to the Treaty of Lisbon there was no other condition for accession mentioned in the primary law.

Since the Lisbon Treaty has modified this condition, the third country has to respect the common values in Art. 2 of the TEU[8], and is committed to promoting them instead of the earlier mentioned principles. The innovation in the Treaty of Lisbon is that this article contains a more comprehensive specification.

All these criteria mentioned above are not only fundamental premises, but preconditions, which have to be realized in the third state at the very moment of the application for membership. Therefore only a declaration on the respect of these values in the future is not sufficient. In other words, the legal basis of the enlargement contains only such criteria, which are preconditions to submit an application for membership.

The legal basis contains no criterion that has to be fulfilled after the application for membership, but according to the original founding treaties and their amendments, the conditions of accession or admission have to be set out in an agreement between the Member States and the applicant state. In order to achieve this agreement in practice, these parties should conduct negotiations, which are called accession negotiations.

In case of the European Coal and Steel Community, the Council also had the opportunity to define additional conditions according to its enlargement

[7] "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."

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

clause.[9] The Maastricht Treaty unified these provisions and omitted the ability of the Council to raise conditions, which was in force till the Lisbon Treaty. This Treaty enabled the European Council to raise additional conditions for membership.

On the other hand, in practice of the enlargement it is the European Commission who raises conditions in its (provisional) opinions for the accession, which can be identified since the first enlargement, but it is not regulated *expressis verbis* by the legal basis up till now. The European Council started to raise additional conditions in the 90's, usually by referring to the conditions established by the Commission. Nevertheless, this role has been granted by the Lisbon Treaty.

As an example, the so-called Copenhagen criteria were laid down first not by the European Council, but by the European Commission in its opinions,[10] and the European Council has only restated them in Copenhagen in 1993.[11] These are the followings:

- political criteria: stability of the institutions, safeguarding democracy, the rule of law, human rights and respect for and protection of minorities;
- economic criteria: existence of a viable market economy, the ability to respond to the pressure of competition and market forces within the EU;
- legislative criteria: the ability to assume the obligations of a Member State stemming from the law and policies of the EU (or the *acquis*), which include subscribing to the Union's political, economic and monetary aims.

In 1995, the European Council meeting in Madrid further clarified that a candidate country must be able to put the EU rules and procedures into effect.[12] In Helsinki, the European Council added the "good-neighbour" criteria and the condition that the applicants should make every effort to resolve any outstanding border dispute among themselves or involving third countries. Failing this they should agree that the dispute be referred to the International Court of Justice.[13] This meeting of the European Council recalled the importance of high standards of nuclear safety in Central and Eastern Europe, and it called on the Council to consider how to address the

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[9] Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951) Art. 98.
[10] Towards a closer Association with the Countries of Central and Eastern Europe. Report by the Commission to the European Council, Edinburgh, 11-12 December 1992. SEC (92) 2301 final, 2 December 1992. c.).
[11] The European Council, Copenhagen, 21-22 June 1993. Conclusions of the Presidency. In: Bulletin of the European Communities No. 6/1993, 13.
[12] The European Council, Madrid, 15-16 December 1995. Conclusions of the Presidency. In: Bulletin of the European Communities No. 12/1995, I.16. and I.25.
[13] Helsinki European Council, 10 and 11 December 1999.
Presidency Conclusions.00300/1/99, 4.

issue of nuclear safety in the framework of the enlargement process in accordance with the relevant Council conclusions.[14] The European Council meeting in Nice in 2000 stated that candidate countries are requested to continue and speed up the necessary reforms to prepare themselves for accession, particularly strengthening their administrative capacity and economic competitiveness.[15] The European Council in Seville emphasized that the accession also requires the candidate country to create the conditions for its integration by adapting its administrative structures.[16]

In addition, one of the most important criteria as highlighted at the 1993 Copenhagen European Council, the EU's integration or absorption capacity must be considered for each enlargement in order to ensure smooth integration. The functional concept of absorption capacity means the EU's capacity to continue deepening as it widens.[17] The EU must be able to integrate new members: it needs to ensure that its institutions and decision-making processes remain effective and accountable; it needs to be in a position, as it enlarges, to continue developing and implementing common policies in all areas; and it needs to be in a position to continue financing its policies in a sustainable manner, which is to be ensured by the Lisbon Treaty. The EU's integration capacity also requires enlargement to be supported by public opinion both in the Member States and the applicant states.[18]

By means of this routine, the European Council has created a "custom law" in the field of enlargement policy, but it does not appear in the legal basis (Kochenov, 2008: 62). To clarify this situation, now it has become the part of the EU's primary law by Treaty of Lisbon: "The conditions of eligibility agreed upon by the European Council shall be taken into account." On the other hand, this is still a very flexible condition, because in a future

[14] Helsinki European Council, 10 and 11 December 1999,
Presidency Conclusions, 00300/1/99, 7.
[15] Nice European Council, 7-10 December 2000, Presidency Conclusions. Nr: 400/1/00. 7.
[16] Seville European Council, 21 and 22 June 2002, Presidency Conclusions, Council of the European Union, Brussels, 24 October 2002 (29.10) (OR. fr) 13463/02, Polgen 52.
[17] Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2006 – 2007. Commission of the European Communities, Brussels, 8.11.2006, COM(2006) 649 final.
[18] Public support for enlargement is essential. It depends on better communication of the advantages of enlargement, which entails increasing transparency, making key working documents public (regular reports, common negotiating positions, etc.) and posting specific user-friendly information on websites. All players must be involved in this communication process: the Member States, regional and local authorities, civil society with the support of the Commission, its representations and delegations, and the European Parliament. Mutual understanding is also important and will be fostered by the dialogue between civil societies launched in 2005, which encourages in particular people-to-people contacts in the fields of culture, education and research.

enlargement process both the former conditions could be used and also new ones could be stated by the European Council.

Beyond that, the legal basis does not define the extent to which the new Member States need to be integrated into the EU. In this respect, since the first enlargement the former Community and then the EU has always wanted to preserve the complete *acquis communautaire* for the whole integration even after the accession of new Member States.[19] This implies that the capability to implement the whole *acquis communautaire* before the accession is another important condition (Jørgensen, 1999: 2). It is necessary to mention that the Art. 49 of the TEU does not contain a requirement of the adoption of the *acquis communautaire*. It also does not contain rules defining the extent of admissible exemptions from EU law or defining the conditions under which such exemptions are admissible at all (Tatham, 2009: 228 and Meier, 1978: 12 and 16). More exact guidelines in this respect can only be deduced from general legal principles and from the enlargement routine.

The use of strict accession conditions together with its involved obligations enables the EU and its Member States to shape the candidate country before its accession, so each enlargement has been an opportunity for the Member States and the EU institutions to reflect on the conditions of entry, resulting in a constant evolution of the integration.

2.3. The enlargement process according to Art. 49 of the TEU

Art. 49 of the TEU contains an additional sentence regarding the enlargement process: "The European Parliament and national Parliaments shall be notified of this application." This notification is important because of the principle of subsidiarity. Before 1 December 2009 the national Parliaments could be notified of the third country's application only after the decision of the European Parliament.

The Applicant State has to address its application to the Council, which acts unanimously after consulting the Commission[20] and receiving the consent of the European Parliament accepted by a majority of its members. In 1987, the Single European Act gave the European Parliament the right to veto any accession by an absolute majority. This process is one of the special legislative

[19] General Considerations on the Problems of Enlargement. Communication sent by the Commission to the Council on 20 April 1978. COM (78) 120 final. 19. pont. In: Bulletin of the European Communities, Supplement 1/78.

[20] The European Commission provides a formal opinion on the applicant country, this called *avis*; in light of this opinion the Council decides whether to accept the application.

procedures of the EU, the so called consent (formerly assent) procedure (O'Brennan 2006: 97 and Tatham, 2009: 78).

According to the legal basis of the enlargement, the Council has the competence to approve the accession. Comparing the English, French, German, Italian, Spanish and Hungarian official versions of the Treaty of Lisbon, which was announced in the Official Journal of the European Union, I have found that there is a mistranslation in the Hungarian official version: the Council acts not unanimously according to the text, but by majority of its members, and the Parliament should not accept the application by a majority, but by a qualified majority. From the aspect of the Hungarian version of the Art. 49 of the TEU, to get the green light from the Council is not so complicated. Since this may cause a serious misunderstanding, we notified the Publications Office of the Official Journal about this issue. There are no further details about the accession process in the enlargement clause (Art. 49 of the TEU).

The countries of the Western Balkans – Albania, Bosnia and Herzegovina, and Kosovo under United Nations Security Council Resolution 1244 – have all been promised by the prospect of EU membership, when they would be ready to fulfil the accession conditions. They are known as potential candidate countries. With this status the European Council granted them the opportunity to address their application to the Council of the European Union.[21] The reason for this promise is that the EU hopes that the possibility of membership will help to accelerate reforms and to promote greater stability in these countries and other states interested in eventual EU accession. Nevertheless, most analysts believe that it will likely take several years before any of these countries are ready to join the EU.

Once the application of astate has not been denied by the Council and the enlargement process is started with the Commission opinion, the European Council could grant the candidate status of the applicant state, but the accession negotiations are not necessarily opened immediately.[22]

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[21] Santa Maria da Feira European Council, 19 and 20 June 2000, Presidency Conclusions, Nr. 200/1/00. 67.

[22] At present, there are five candidate countries: Iceland, the Former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey. Accession negotiations with Turkey started on 3 October 2005, with Iceland on 27 July 2010. The Former Yugoslav Republic of Macedonia became a candidate on 16 December 2005, the Commission recommended the opening of accession negotiations in October 2009, but the negotiations have not started yet. On 17 December 2010, the European Council granted candidate status to Montenegro. On 26 June 2012 the Council endorsed the Commission's assessment that Montenegro has achieved the necessary degree of compliance with the membership criteria to start accession negotiations. Serbia became a candidate on 1 March 2012, negotiations have not started yet.

Finally when the negotiation has begun, the speed of the process depends on one hand on the candidate country's own progress towards the EU's common goals. The other crucial factor is the above mentioned absorption capacity of the EU. The closed chapters may, however, be reopened, if the applicant countries no longer satisfy the conditions until the accession agreement is not ratified.

It is very important that the accession negotiations may be suspended in the event of a serious and persistent violation of the principles and values on which the EU is founded. In such cases, the Commission may recommend either on its own or at the request of the Member States, that negotiations should be suspended, and additional conditions may be recommended for them to be reopened. The Council adopts the recommendation by a qualified majority after consulting the particular candidate country (e.g. in December 2006, there was a partial suspension of Turkish accession talks because of the Cyprus conflict).

Therefore the duration of negotiations can vary: a simultaneous start with several candidates does not imply that negotiations with each of them will be completed at the same time – for example in the case of Croatia and Turkey. The accession talks are part of a non-guaranteed procedure, which is open-ended. When the negotiation has begun, the candidates cannot be sure that they will become a member in the future. The membership is ensured only with a successful ratification of the accession treaty.

In December 2006 the European Council in Brussels strengthened the EU's determination to continue its enlargement. This renewed consensus on enlargement[23] is based on consolidation, fair and rigorous conditionality and better communication, combined with the EU's capacity to integrate new members. In this document it was emphasized again that the acceding countries must be ready and able to fully assume the obligations of EU membership, and the Union must be able to function effectively and to develop. Another criterion in this document is that the difficult issues such as administrative and judicial reforms and the fight against corruption should be examined already at an early stage of the process. It was also reaffirmed that the EU will refrain from setting any target dates for accession until the negotiations are close to completion. According to the conclusions, it is the Commission's task to provide impact assessments on the key policy areas and the results should be involved in its opinion on a country's application for membership and in the course of accession negotiations.

[23] European Council, Presidency Conclusions, Brussels 14-15 December 2006. 16879/1/06 REV 1.

In addition, on 5 December 2011, the Council adopted Conclusions on the EU's enlargement policy and on the stabilisation and association process for the Western Balkans, in which the Council reaffirmed the strong support of the EU for taking the enlargement process forward on the basis of the agreed principles and conclusions.[24]

According to the above mentioned documents the EU would not stop enlargement. After the ratification of the Croatian accession treaty would be successful, two important questions will arise in my opinion. Would the development of the other candidates reach the EU level soon? And on the other hand, would any more absorption capacity of the EU remain?

2.4. Hiatuses of the legal basis of the enlargement

I revealed that the Art. 49 of TEU regulates the preconditions and the process of the submission of an application for membership, but the conditions to be fulfilled after the submission are not included in the TEU and the accession procedure is only marginally regulated. As a result of this work, I identified the following hiatuses regarding the regulation of the enlargement in the Art. 49 of the TEU:

- it is not regulated when the institutions of the EU should perform their tasks defined in the enlargement clause;
- it is unclear who and when should notify the European Parliament and the national Parliaments of an application;
- the accession negotiations, its principles, processes and methods are not defined and regulated at all;
- tasks of the enlargement process involving the institutions of the EU can be categorized to a union level phase, while tasks related to the accession negotiations (involving intergovernmental acts) can be categorized to an intergovernmental phase. The connection and the timing (e.g. parallel or dependent) between these phases are unclear.

The institutions and Member States tried to address these unclarified procedural issues by creating practical guidelines, which have not been defined in the legal basis of the enlargement.Therefore the process and the practice of the accession are parts of the so called "custom law" of the enlargement (Kochenov, 2008: 62).

[24] Council conclusions on enlargement and stabilisation and association process, Brussels, 5 December 2011.

Following this discussion I arrived to the conclusion that the corresponding legal provisions of the founding treaties are not sufficient and not adequate to fully fulfil an enlargement process. Therefore the Art. 49 of the TEU represents a framework that can only be applied together with the above mentioned practical guidelines. I propose to extend the enlargement clause with the basic procedural rules, fundamental principles and the conditions for membership developed in practice.

3. Conclusions

The EU has definitely benefited from the enlargement and so did the accessed countries. The integration has helped to put an end to the conflicts of the past, and strengthened the peace, security and stability. It has supported a successful system transformation in large part of Central and Eastern Europe, and has helped to create intense political and economic connections. Nowadays the EU seems to be cautious with this policy. As a result of the significant impact of the biggest enlargement in 2004, the EU members require a more restricted selection approach to be adopted in the future. It is likely that a similar big bang to the 2004 enlargement is not expectable in the near future.

As noted previously, the EU asserts that the enlargement door remains open to any European country that is able to meet and implement the political and economic criteria for membership. It can be stated that there is a strong connection between the enlargement policy and the absorption capacity, which depends on the strength of the integration and institutional situation. It is evident that the EU cannot expand *ad infinitum*, therefore the main question is on the absorption capacity of the EU.

Art. 49 of the TEU is a result of an evolution lasting for nearly 70 years. But this evolution has not been finished yet, there are still unclarified and open issues regarding the legal regulations. As a result of my investigation, I propose to extend the enlargement clause with the basic procedural rules, fundamental principles and the conditions for membership developed in practice.

The several criteria and the enlargement process stated in the Art. 49 of the TEU and created in practice togeher represent an almost standardized enlargement mechanism, which was developed by the fourth enlargement in 2004. Now it is a complex system, which can be used by the forthcoming enlargements. This does not mean that there cannot be additional conditions. Each enlargement has been a chance for the Member States and the

institutions to reflect on the conditions of entry, because of the constant evolution of the Community.

The experiences learned from the enlargements performed so far have shown that careful preparations and fully fulfilled conditions would result in successful reforms that can lead the European integration forward by strengthening the motto: "united in diversity".

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