



INSIGHT

THE RUSSIAN WAR AGAINST UKRAINE AND THE LAW OF THE EUROPEAN UNION

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BUMPY ROAD OF UKRAINE TOWARDS THE EU MEMBERSHIP IN TIME OF WAR: “ACCESSION THROUGH WAR” v “GRADUAL INTEGRATION”

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ABSTRACT: The candidate country status for Ukraine was justified and widely supported by the EU institutions and EU Member States because of Russia’s brutal invasion of Ukraine in February 2022. However, Ukraine’s accession to the EU is not going to be an easy ride. It is the first case in history of EU integration when a candidate country that fights for its sovereignty and existence is endeavoring to meet strict conditions of the EU membership. This situation brings to both the EU and Ukraine difficult choices and challenges. For Ukraine it is essential to secure a just and lasting peace deal with Russia, to end the hostilities and to be able to complete the meticulous EU accession process. For the EU it is urgent to adjust its institutional, legal, political and economic systems to absorb a new wave of enlargement that may bring 10 new Member States on board. This *Insight* advocates that Ukraine’s accession to the EU will not be conventional but an experimental exercise that embraces new accession tracks like “accession through war” and “gradual integration”.

KEYWORDS: EU accession – candidate country – Ukraine – accession through war – gradual integration – Peace Deal for Ukraine.

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I. INTRODUCTION

Ukraine's formal application for EU membership, on 28 February 2022, took place in tragic circumstances. It also came as a surprise to many. The formal bid for EU membership was an act of despair by a country already at war since 2014, and now fighting for its survival. Indeed, this bold move ultimately served its purpose and considerably boosted the combatting morale of the Ukrainian nation. It also raised hopes for more military, financial and technical assistance on behalf of the EU to support Ukraine in its war effort. By any standards, the EU accession process triggered by the application unfolded with unprecedented speed. While Ukraine's bid for EU membership was immediately joined by similar bids from Moldova and Georgia, the European Commission committed itself to issuing its Opinions on the respective applications, as required by art. 49 TEU, as soon as possible.¹

Indeed, by 17 June 2022, the Commission had already assessed Ukraine's ability to join the EU, in consideration of the accession conditions based on the so-called "Copenhagen criteria". It concluded that "Ukraine is a European State which has given ample proof of its adherence to the values on which the European Union is founded [and] therefore recommend[ed] to the Council that Ukraine should be given the perspective to become a member of the European Union".² Consequently, the Commission also recommended the European Council to grant Ukraine the much sought after "candidate status" – a label that is not formally envisaged by the procedure of art. 49 TEU. This recommendation was supplemented by the request to conduct urgent reforms within 7 sectors (judiciary, rule of law, fight against corruption, national minorities, anti-money laundering legislation, anti-oligarch legislation, media legislation in line with the EU *acquis*). The European Commission committed itself to monitor Ukraine's progress within these fields and to issue a final assessment by the end of 2023. Further, the European Commission confirmed that Ukraine's accession process will be based on "established criteria and conditions".³ Thus, it confirms that the Copenhagen Criteria will remain crucial for the progress of the Ukraine's accession. Furthermore, the EU-Ukraine Association Agreement "has been and continues to be of essential importance in facilitating and promoting Ukraine's further integration with the EU".⁴

The contribution comprises of three parts. The first part deals with the impact of the war on the accession process of Ukraine. It traces the progress Ukraine has made after it submitted the formal application to join the EU on 28 February 2022 till it was granted

¹ "So we will accelerate this process as much as we can, while ensuring that all conditions are respected": see 'Statement by President von der Leyen with Ukrainian President Zelenskyy at the occasion of the President's visit to Kyiv' (08 April 2022) ec.europa.eu.

² Communication COM(2022) 407 final from the Commission of 17 June 2022 'Commission Opinion on Ukraine's application for membership of the European Union'.

³ *Ibid.* 21.

⁴ European Council, Press release of 3 February 2023, Joint Statement following the 24th EU-Ukraine Summit, www.consilium.europa.eu.

the EU candidate country status in June 2022. The second part focuses on the future Ukraine-Russia Peace Deal, analyses its possible scenario and their impact on the EU accession process for Ukraine. The third part elaborates on possible impact of the EU membership of Ukraine on political, economic and security pillars of the EU edifice. It is argued that the EU membership of Ukraine will strengthen EU external and security initiatives like the European Political Community, Strategic Compass and PESCO.

II. THE IMPACT OF THE WAR ON THE ACCESSION PROCESS OF UKRAINE

There is a price to be paid by Ukraine for the meteoric decision of the EU institutions to grant candidate status. This price is the fact that Ukraine's accession to the EU will always bear the label of the war. It is argued that Ukraine's ability to conduct the accession negotiations with the EU will inevitably depend on the outcome of the war, and the terms upon which hostilities eventually end. A potential war settlement will indeed define and/or confirm the geographical borders of Ukraine and could influence its sovereignty on issues related to its security and ability to join international organisations like NATO and the EU.

The European Council's decision to grant candidate status to Ukraine would probably not have happened in pre-war circumstances. While the country's aspirations to join the EU have been clear for some time, formally applying for membership was not seriously contemplated in Kyiv before the Russian invasion. Russia's aggression thus paradoxically turned into reality Ukraine's ambition to engage on an EU membership course.

To be sure, the Commission's annual reports on the implementation of the association agreement had never been overly positive.⁵ Even Ukraine's internal evaluation of the domestic implementation efforts was rather humbling.⁶ In other words, had the Commission (and the European Council) been asked before 24 February 2022 to assess Ukraine's (as well as Moldova's and Georgia's) ability to join the Union by reference to established accession standards, its Opinion would likely have been far less supportive.

Arguably therefore, the EU Member States and institutions have granted the candidate status to Ukraine essentially as an act of moral support, to boost the country's resistance to the aggression and, perhaps more than ever in the history of EU enlargement, as a (geo)political decision rather than a scrupulous legal application of the conditions related to art. 49 TEU. Russia in effect boosted the eligibility of Ukraine, and incidentally that of Moldova and Georgia - whose respective territorial integrity has also been undermined by Russia-backed forces.

⁵ Ukraine: EU report notes continued implementation of the reform agenda though challenges remain, ec.europa.eu. Association Implementation Report on Ukraine 2021, Joint Staff Working Document, 22 July 2022, SWD(2022)202 final.

⁶ 6th UCEP Monitoring Report "Ukraine and the Association Agreement. Implementation Monitoring 2014-the first half of 2021", www.kas.de.

III. PEACE DEAL AS A DECISIVE FACTOR FOR UKRAINE'S ACCESSION TO THE EU

A future Ukraine-Russia Peace Deal will not only mark the end of hostilities but, eventually, make Ukraine's membership in the EU certain. The terms of any peace deal between Ukraine and Russia will inevitably influence the pace and priorities of Ukraine's accession to the EU. Several scenarios could be envisaged at this stage. They will determine the geographical borders of Ukraine as a future Member State and could affect its sovereignty on issues related to its security and ability to join international organizations like the EU, let alone NATO. Several scenarios could be envisaged at this stage, acknowledging however that the evolution of the situation remains highly unpredictable.

In a first scenario, Russia could face complete military defeat from Ukraine, followed by a regime change. In this situation, a peace settlement could lead to the liberation of all Russian-occupied areas of Ukraine, including Crimea and the territories of so-called "Lugansk and Donetsk Peoples' Republics" in the East (LDPR). From the perspective of the accession process, that would be the best outcome for Ukraine and the EU. Such a peace deal would restore Ukrainian sovereignty within its internationally recognized borders and lay the grounds for the fastest possible reconstruction of Ukraine, and the finalization of its accession to the EU. The EU (and some other world powers, as well as international organizations) could then provide the necessary financial and technical assistance to support Ukraine's reconstruction, with the Copenhagen criteria and the EU *acquis* operating as general compass.

The second scenario would see Ukraine win convincing military successes while Russia gets increasingly crippled by the growing costs of the war and international sanctions. In this situation, the Russian authorities might agree to a compromise peace settlement that envisages the de-occupation of Ukrainian territories invaded since 24 February 2022, but not those of Crimea and of the LDPR. This option would not imply any formal recognition of the territorial status of those latter entities. Simply this issue could be postponed to a later stage in the settlement. This scenario would come close to the first one in terms of its positive effects on Ukraine's reconstruction and accession prospects. However, it would inevitably raise sensitive questions as to how Ukrainian nationals, companies, goods, and services from those territories should be treated in EU law, in the event of Ukraine's membership of the EU, and also beforehand in the context of the application of the Association Agreement. Regarding companies, their registration and seat of operation would be essential to determine the legal regime applicable to them. However, the status of Ukrainian nationals residing in Crimea and LDPR would remain problematic. Most of them have acquired Russian citizenship and could rely on their Ukrainian passport to use (or abuse) their rights as EU citizens. In this regard, the experience of Cyprus could provide some insights in possibly handling (some of) these intricate issues.⁷ For

⁷ N Skoutaris, 'The application of the *acquis communautaire* in the areas not under the effective control of the republic of Cyprus: The Green Line Regulation' (2008) CMLRev 727; F Hoffmeister, *Legal Aspects of the Cyprus Problem: Annan Plan and EU Accession* (Martinus Nijhoff Publishers 2006).

instance, it could help to formalize the territorial application of the EU-Ukraine Association Agreement and relevant EU law on the remaining occupied territories of Ukraine (Crimea and Donbas). In any event, the latter should not constitute obstacles to Ukraine's membership; EU Member States would otherwise be rewarding Russia's aggression.

In a third scenario, Ukraine and Russia would face a military draw and subsequently reach a "status quo" deal, leaving already occupied Ukrainian territories under Russian control. Most likely that would imply the indefinite "freezing" of the conflict. As a result, Ukraine would face a permanent security threat on its borders and lose access to the Azov Sea, while its Black Sea ports would remain blocked, or at least de facto controlled by the Russian Navy. Thereby, Ukraine's export of agricultural products and other goods would likely continue to face a plethora of obstacles in terms of reaching the EU and international markets. This option would significantly complicate Ukraine's accession process. The accession negotiators would then have to consider establishing specific derogations to the application of the EU acquis and membership rights within the internationally recognized territory of Ukraine.

The fourth scenario would be a complete military defeat of Ukraine, potentially leading either to the loss of all or most of its territory to Russia, or its partition into several zones/peoples' republics, as occurred in some occupied European countries in the early 1940s. In the worst-case scenario, the Ukrainian Government could be forced to go into exile or move from Kyiv to another regional centre like Lviv, while the Ukrainian resistance would continue the fight within occupied territories. This scenario would severely complicate Ukraine's accession prospects in both legal, economic and political terms, at least in the short and medium term.

All those scenarios remain highly speculative since the terms of any settlement remain to be decided on the battlefield. For now, top Ukrainian officials have ruled out any prospect of a peace deal with the Russian Federation, other than on the basis of the latter's complete military defeat. Of course, such a defeat is the most desirable option both for Ukrainians and for the international community.⁸ The Russian Federation has, however, embarked upon a war of attrition in the hope to overcome Ukraine's resistance and international assistance, while its nuclear blackmail has thus far succeeded in preventing further engagement to support Ukraine. This ultimately suggests that the more sombre scenarios, especially the last one, remain plausible. In any outcome, the options we discussed show that the objectives of the Ukraine-Russia settlement will have a considerable impact on Ukraine as a State, on the pace and nature of its accession to the EU and will require commensurate engagement from the EU and its Member States to make it possible.

In the meantime, there are two major peace plans on the table. Ukraine offered its 10-point Peace Plan/Ukraine's Peace Formula outlined by President Zelenskiy on November 15th 2022.⁹ This plan was strongly backed by the EU and other G7 members. Ukraine's

⁸ S Tisdall, 'As Putin's war spreads panic across Europe, Ukrainians must fear a stab in the back' (14 August 2022) The Guardian www.theguardian.com.

⁹ *What is Zelensky's 10-Point Peace Plan?* war.ukraine.ua.

Peace Formula defines prerequisites for the cessation of hostilities withdrawal of Russian troops from the territory of Ukraine as it was internationally recognized in 1991. Also, it presumes international criminal responsibilities for those Russian politicians who initiated annexation and invasion of Ukrainian territories. In other words, Ukraine's Peace Formula is feasible in case of scenario number one and two above.

The second major peace plan was offered by China on February 24th 2023 and called "China's Position on the Political Settlement of the Ukrainian Crisis".¹⁰ This plan calls for the cessation of hostilities but without the withdrawal of Russian troops from the Ukrainian territory and does not mention the perspective of international justice. In other case, China's Position is feasible in case of scenario number three.

Recently more international players expressed their will to join a peace process between Ukraine and Russia. Among them are Vatican and countries of the African Union.¹¹ Very little is known on their visions regarding the aims and substance of the perspective Peace Deal between Ukraine and Russia. Nevertheless, success of international mediation and choice of a modality of a Peace Deal depends on the factors like the status quo on the battlefield and ongoing commitment of the Western allies of Ukraine to support its economic recovery and ability of Ukraine to continue its military resistance to Russian aggression.

IV. IMPACT OF UKRAINE'S FUTURE MEMBERSHIP ON THE EU AND ITS POLICIES

Future membership of Ukraine in the EU will be a considerable challenge not only for the EU accession process but also is likely to impose far-reaching consequences for the EU institutions, legal system, economy and policies. Further we highlight only some of these challenges to be met by the EU.

Ukraine's membership in the EU will trigger reform of the EU institutional system. It looks like the EU is bracing itself for the second "big bang" enlargement that potentially covers up to 10 new Member States (Western Balkan countries, Ukraine, Moldova and Georgia (possibly Turkey)).¹² Such an ambitious enlargement of the EU will definitely call for the fundamental constitutional reform of the EU and, as a consequence, a new founding treaty. It will imply the necessity to adjust the relocation of national seats and votes in the key EU institutions (European Parliament, EU Council and the European Commission).

¹⁰ Ministry of Foreign Affairs of the People's Republic of China, 'China's Position on the Political Settlement of the Ukraine Crisis', 24 February 2023, www.fmprc.gov.cn.

¹¹ P Pullella, 'Pope says Vatican involved in secret Ukraine peace mission' (1 May 2023) Reuters www.reuters.com and N Camut, 'African Union calls on Russia to reinstate Ukrainian grain deal' (27 July 2023) Politico www.politico.eu.

¹² For instance, HR J Borrell was outspoken "The issue of enlargement has been floating over our discussions. Ukraine has to become a member of the European Union. The Western Balkans also. Quickly". Informal Foreign Affairs Council (Gymnich): Press remarks by HR Josep Borrell at the press conference on 31 August 2023. newsroom.consilium.europa.eu

The whole algorithm of the EU accession process is likely to be changed too. In the meantime, the European Commission has embarked upon drafting “substantial proposals” to change the format and substance of the EU accession process.¹³ In this regard two dimensions are relevant. First, is the so-called “Growth Plan” which would require the EU to increase investments into the Western Balkan region.¹⁴ Similar investment packages could be offered to Ukraine to cope with the cost of the war with Russia. Indeed, one of the prerequisites of the EU membership of Ukraine is economic recovery of its regions devastated by the brutal warfare. Second, the so-called “gradual integration” will imply significant increase of EU pre-accession funds and early access of the EU candidate countries to the EU policies depending on the pace of the EU membership negotiations.¹⁵ It is likely that this approach will not be general but to be implemented on a case-by-case basis depending on the success and readiness of a candidate country. The objective of this reform is to make candidate countries’ nationals and companies enjoy the main benefits of EU membership before the accession process is finalized. On the other hand, it will encourage the EU candidate countries not only to implement relevant EU *acquis* but also to develop the capacity to apply the EU *acquis* on the same scale as the EU Member States. The “gradual integration” in the context of Ukraine would mean steady access of Ukrainian nationals and companies to the freedoms of the EU Internal Market and participation in selected EU policies (transport and space, digital market, health, education and others). It is already a fact that the application of the EU temporary protection mechanism allowed Ukrainians to access selected freedoms of the EU and, therefore, serves as a good example of the ‘gradual integration’ policy.

Since Russia’s invasion of 24 February 2022 Ukraine has experienced about 140 billion euro of economic and infrastructural damage¹⁶ and likely cost of economic recovery after the war amounts 400 billion euro.¹⁷ After acquiring EU membership Ukraine will rely on EU structural funds to recover its economy and infrastructure. To meet this challenge the EU institutions decided to apply the so-called ‘ceiling strategy’ by establishing a maximum ceiling of the annual EU funding support for Ukraine. For instance, the EU Council’s meeting in August 2023 established a maximum ceiling of 20 billion per year for the next 4 years for the financial support for military supplies through the European Peace Facility and training

¹³ For more information see A Brzozowski, ‘EU readies “substantial proposals” on enlargement in October, Varhelyi says’ (1 September 2023) Euractiv www.euractiv.com.

¹⁴ The EU’s “Growth Plan” envisages key investment projects into the Western Balkan region of about 2.1 billion euro: see European Commission Directorate-General for European Neighbourhood Policy and Enlargement Negotiations, *European Commission launched an additional €2.1 billion investment package for the Western Balkans under the Economic and Investment Plan*, neighbourhood-enlargement.ec.europa.eu.

¹⁵ A Brzozowski, ‘EU readies “substantial proposals” on enlargement in October, Varhelyi says’ cit.

¹⁶ Kyiv School of Economics, *\$147.5 billion — the total amount of damages caused to Ukraine’s infrastructure due to the war, as of April 2023* kse.ua.

¹⁷ E Knickmeyer, ‘World Bank puts cost of rebuilding Ukraine at \$411 billion’ (22 March 2023) The Associated Press apnews.com.

of Ukrainian military through EU Military Assistance Mission EUMAM. However, it can be blocked by any EU Member State unless the unanimity in CFSP is revised.

Geopolitically, after Ukraine joins the EU there is going to be no buffer state on the border with Russia. Basically, future membership of Ukraine will extend EU external borders immediately to the borders of Russia and Belarus. These countries could potentially become a part of a new security area headed by a newly emerged global power - China. Such a shift of the geopolitical location would inevitably exacerbate many geopolitical vulnerabilities of the EU. In other words, the EU will face the necessity to revise and enhance its CFSP and CSDP to meet the challenges in the East. It is argued that a further merge of the EU and NATO's competences is unavoidable. The case of Ukraine opens a door for this process. Both the EU and NATO will be expected to grant Ukraine essential security guarantees after Ukraine acquires the full EU membership and the NATO membership/special status. The question is how the security guarantees will reconcile the EU and the NATO's competences? Will the EU security guarantee in art. 42(7) TEU either complement or contradict security guarantee in art. 5 of North Atlantic Treaty? This issue remains to be clarified, in particular, with respect to post-war Ukraine.

Further, the EU accession of Ukraine may enhance the role of new EU political initiatives like the European Political Community. A recent initiative of this kind is the European Political Community (EPC) proposed by French President Macron in May 2022, as France was holding the presidency of the EU Council.¹⁸ The need behind the emergence of the EPC was to bring the issue of the EU enlargement and regional conflict resolution to the forum of all the countries of the European continent including the EU Member States (as well as the UK), EU candidate countries and pro-European countries of the continent.

Calibrated in such a way, the EPC could indeed complement, and boost the EU enlargement preparations both on the side of the candidates and that of the EU. By involving representatives of the candidate countries "in coordination, decision-making and cooperative projects to respond in a concrete way to the challenges facing all countries on the European Continent",¹⁹ the EPC could help restore the attractiveness of the EU, badly damaged by years of neglect and unfulfilled promises towards candidates from south-east Europe. The EPC could in particular offer a forum for candidate countries and EU Member States also to work together and solve lingering disputes that have hampered the accession process, and strengthen the broader process of European integration (e.g. between Greece and Bulgaria on the one hand, and North Macedonia on the other, or between Poland, Hungary and Ukraine).

Furthermore, participation in the EPC could open further opportunities for candidate countries' involvement in a variety of forms of pan-European cooperation including both EU and non-EU States, which have become ever more critical in the wake of Russia's aggression.

¹⁸ Speech by E. Macron at the closing ceremony of the Conference on the Future of Europe, 9 May 2022 www.elysee.fr

¹⁹ *Ibid.*

For countries like Ukraine, Moldova and Georgia, the EPC could boost the European cooperation in foreign policy, security and defence, building on the relevant provisions of their association agreements while exploring additional collaborations with EU initiatives and mechanisms, like PESCO and Strategic Compass,²⁰ or even through art. 42(7) TEU.

V. CONCLUDING REMARKS

The EU membership of Ukraine is inextricably linked to the Peace Deal that will be a stepping stone to end the war in Ukraine. In other words, the EU accession of Ukraine is conditional on reaching the just and fair Peace Deal for Ukraine.

Today's geopolitical turbulences require fundamental change and revision of conventional EU domestic and external policies, including the EU enlargement process which Ukraine brought back to the top of the EU agenda. Back in 2004-05, enlargement was a potent framework to trigger wide-scale Europeanization of ex-communist countries from central and eastern Europe, including some former Soviet republics. In 2022, EU accession was applied to boost the war effort of Ukraine and to enhance the potency of European common values when they are defended on the battlefield. If so, the question can then be raised whether Ukraine's further accession process will continue to be framed by the so-called "accession through war" approach,²¹ or whether it will ultimately comply with the "gradual integration" track. There is no obvious answer to this question at least till the war in Ukraine is over. Most likely, Ukraine will deal with all these tracks since it is the first and only one candidate country in history of European integration that embarked upon meticulous accession process while an exhausting war effort threatens its existence as independent state. It implies the reformatting of the EU accession process as not only the exercise to align candidate countries with demanding "Copenhagen criteria" but also refining it as a tool to ensure security and peace and post-war recovery of Ukraine.

²⁰ PESCO stands for "Permanent Structural Cooperation". It was established on 11 Dec. 2017 under the framework of the CSDP and offers legal framework for joint planning and investment in shared capability projects in area of security and defence (Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States). Strategic Compass is another EU initiative under the CSDP to offer specific actions to strengthen the EU's security and defence: EU Council, "A Strategic Compass for Security and Defence – For a European Union that protects its citizens, values and interests and contributes to international peace and security", 21 March 2022, 7371/22.

²¹ "Accession through war" entails that the war justifies the EU taking a different approach in its assessment of the applicant's ability to join the Union. It implies a more favourable EU treatment of the membership application if and because the applicant is fighting, literally, to defend common European values as defined in arts 2 and 21 TEU. If such a country is committed to respecting those values, notably by taking an active part in the EU external policies (e.g. Eastern Partnership), and/or as a party to a framework association agreement with the EU, and becomes a victim of a military or hybrid invasion, it may expect extensive political, economic, security, and humanitarian support from the EU and its Member States. R Petrov and C Hillion, 'Guest Editorial: "Accession through war" – Ukraine's road to the EU' (2022) CMLRev 1289.

