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## WAR AS AN ACCESSION ACCELERATOR? UKRAINE'S PATH TOWARDS THE EU<sup>1</sup>

**Abstract.** The European Union's response to the war in Ukraine is perceived as swift and relatively coherent. The political willingness to support its attacked neighbour has also extended to Ukraine's membership bid. Despite protracting war and worsening Ukraine's position, there are no doubts over the state's commitment to reforms. For now, it can be safely assumed that Ukraine will pursue its path towards membership. Can fighting war and pushing an arduous accession process be balanced by the political will of the EU Member States rooted in a wartime gesture of solidarity?

**Keywords:** European Union, Ukraine, membership, accession process, negotiations

## WOJNA JAKO AKCELERATOR AKCESJI? UKRAINA NA ŚCIEŻCE DO CZŁONKOSTWA W UE

**Streszczenie.** Odpowiedź Unii Europejskiej na wojnę w Ukrainie jest postrzegana jako szybka i relatywnie zgodna. Polityczna wola wsparcia zaatakowanego państwa sąsiedzkiego znajduje także swoje odbicie we wsparciu Ukrainy w jej dążeniu do członkostwa w Unii Europejskiej. Pomimo przedłużającego się konfliktu nie ma wątpliwości co do zaangażowania Ukrainy w proces reformowania kraju. W tym momencie można założyć, iż Ukraina będzie dążyć do uzyskania członkostwa w Unii Europejskiej. Czy zakorzeniona w wojennej solidarności wola polityczna państw członkowskich UE może zbalansować ciężar jednoczesnego prowadzenia wojny oraz procesów reformujących Ukrainę?

**Słowa kluczowe:** Unia Europejska, Ukraina, członkostwo, akcesja, negocjacje

### 1. INTRODUCTION

On 28<sup>th</sup> February, 2022, five days after Russia's unprovoked attack, President Volodymyr Zelenskyy signed an application for Ukraine's membership into the European Union. For the first time in history, the state at war lodged the

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application. This bold move simultaneously “boosted the combatting morale of the Ukrainian nation” and “challenged the EU to provide extensive support and live up to its fundamental principles” (Petrov, Hillion 2022, 1289). Despite Ukrainian President’s plea for “immediate accession via a new special procedure”, no new, preferably speed-track formula, was drafted. However, less than four months later, the European Council, upon considering the European Commission’s positive opinion, granted the EU candidate status to Ukraine. It means that Ukraine has been implementing reforms while fighting a war, all during the phase in which the EU decides whether or not to open accession negotiations, which, according to Haughton (2007, 235), is a phase in which the EU has the strongest transformative power.

Taking under consideration that the war is ongoing, the final needs for the (sustainable) reconstruction are not known yet. The EU has already declared long-term support to “re-establish the foundations of a free and prosperous country, anchored in European values and well-integrated into the European and global economy and to support it on its European path” (European Commission 2022c), but, as already mentioned, protracting war is reducing Ukraine’s capacity to meet the criteria towards accession. Therefore, the crucial question regarding “accession through war” (Petrov, Hillion 2022) is about the durability of the political will rooted in a wartime gesture of solidarity and its reflection on a comprehensive accession process. To provoke substantive debate, the author will attempt to navigate between perspectives of an EU-aspiring state (not a legal term) and international organisation *per se* which has created intricate and formalistic accession process.

Relations between the European Union and Ukraine have not started with the lodged membership application. Therefore, to contextualise Ukraine’s path towards the EU membership, the first part will be dedicated to sketching EU–Ukraine relations from the moment of Ukraine’s independence from the Soviet Union in 1991 to steps taken after Russia’s attack in 2022 with the exclusion of the membership bid. Since the EU *acquis* does not envision an accession procedure other than the one enshrined in Article 49 of TUE, the next part of the presented paper will focus on the accession process, which broadly consists of three stages. Meagre provisions of Article 49 do not reflect that due to a constant evolution of the *acquis* potential, accession can be more difficult than cases of previous enlargements (especially those before the “big bang” enlargement). The next section discusses the EU’s approach towards Ukraine after Russia’s attack, with special attention given to Ukraine’s membership bid. Finally, possible challenges ahead for Ukraine will be analysed.

Throughout the text, some of the debates on the enlargement will also be outlined.

The author will review relevant materials: normative sources (the Treaty of Lisbon, secondary sources of the EU law) and authoritative sources (scholarly

legal writings). Additionally, a body of documents produced by the EU institutions regarding accession procedures, reports, speeches, statistics, and Ukrainian government statements will be analysed.

In response to Russia's invasion of Ukraine, the EU adopted sanctions against Russia (eleven packages with most recent including anti-circumvention tool). Despite being unprecedented in its scale, the issue falls outside the scope of the presented paper.

## 2. NOT-SO-PRIORITY PARTNER

Ukraine relations with the European Union have not started with the membership application but can be dated back to Ukraine's independence in 1991. Founded on the periphery of the Eurasian empire, Ukraine became a part of un-sustainable "overlapping" (Casier 2016) and "contested" (Delcour 2017) neighbourhood in which elites were "balancing domestic interests, Russia and the West" (Ekman 2023). Democratic shortcomings in Ukraine hindered any discussion about Ukraine's membership, whereas later on the European Union's side "enlargement fatigue" was looming large.

With the Copenhagen Conclusions (1993), the European Council expressed "keen interest in expanding cooperation with Ukraine". In June 1994, the EU signed a Partnership and Cooperation Agreement with Ukraine. A decade later, Ukraine became the EU's priority partner under the frame of the European Neighbourhood Policy (ENP). In May 2009, Ukraine became a part of the Eastern Partnership (EaP) – Eastern dimension of the ENP aimed at deepening political association and economic integration between the bloc and six partnering states. However, the Joint Declaration (2009) pointed out that the aim of the Eastern Partnership is to support of "political and socio-economic reforms of the partner countries and facilitate approximation towards the European Union", creating a sense of ambiguity. Partnering states were about to transform, but without the membership perspective.

Despite Ukraine's progress towards full-fledged membership, in December 2022, foreign ministers from Member States and EaP partners reaffirmed their commitment to the framework in parallel to the enlargement process and bilateral relations. From the current perspective, a reshaped Eastern Partnership could play a crucial role in bringing the partner states which do not aspire to membership closer to the EU standards.

In March 2007, Ukraine negotiated an Association Agreement (AA). In February 2008 – Deep Comprehensive Free Trade Area (DCFTA). One week before the Vilnius Summit in November 2013, then Ukraine's president, Viktor Yanukovich, refused to sign both acts. Ukrainians started the "Revolution of Dignity" in the aftermath, which resulted in the annexation of Crimea by Russia.

In spite of this, Ukraine's new government signed both the AA – considered “the most advanced agreement of its kind ever negotiated by the European Union” (Van Rompuy 2013) and DCFTA, the biggest international legal document in Ukrainian history. Both entered into force in September 2017.

The same year, Ukrainian citizens (with biometric passports) gained the possibility of travelling throughout the Schengen Area for up to 90 days during any 180-day period. Currently, Ukraine also is a part of the Erasmus Plus Programme and the Creative Europe Programme. Moreover, it became fully associated to the EU's Horizon 2020.

On an internal front, aiming at consolidation of its pro-Western course, in 2019, Ukraine introduced changes to its Constitution. Article 85(5) explicitly states that the goal is acquisition of the “full-fledged membership” into the EU and in the North Atlantic Treaty Organization (NATO). It is the President's role to guarantee the implementation of this strategic course (Article 102) and the Cabinet of Minister's role to provide the implementation of the strategic course.

Despite the reforms, the EU had not acknowledged Ukraine's (and Georgia's and Moldova's) membership aspirations. In July 2021, at trilateral summit in Batumi, three states called for a clearer membership perspective.

### 3. LONG AND ARDUOUS – THE ACCESSION PROCESS

Enlargement is a “success story for the European Union as a whole” (European Council 2001). According to the European Commission (2022), “a credible enlargement policy is a geostrategic investment in peace stability, security and economic growth in the whole of Europe”. Throughout years, the number of Member States increased from six to twenty-eight (post Brexit – twenty-seven), with Croatia being the recent to join on 1<sup>st</sup> July, 2013. Subsequently, “enlargement fatigue” dominated the EU public opinion (Devrim, Schulz 2009), making the accession policy “practically dead” (Tocci 2023). Russia's unprovoked and unjustified war on Ukraine, however, has put the EU enlargement “to the fore of the European agenda” (European Commission 2022), with a high number of EU citizens in favour of a new enlargement (European Commission 2022e).

Membership into the European Union is based on voluntariness; nonetheless, accession is not granted automatically, and negotiations process is highly asymmetrical. The initiative is on the aspiring third country that must “accept the pre-existing set of rules before getting chance to take part in shaping them” (Raik 2006, 85). Throughout the process, a candidate state has to prepare to meet its obligations. With the core principle “nothing is agreed until everything is agreed”, negotiation chapters are closed, and agreements are reached at the end of the process (European Commission 2007, 11). The EU's position throughout the process is rather cautionary and reactive.

The readiness of the aspiring state is assessed according to accession criteria known as the “Copenhagen criteria” defined in 1993. Criteria were divided into three groups. The first one requires the candidate state to achieve stability of institutions guaranteeing democracy, the rule of law, human rights, and the respect and protection of minorities. This so-called political criterium is perceived as the crucial one (Truszczyński 2020). Second, there must be the existence of a functioning market economy and capacity to compete with market forces within the EU. The third criterion is about the ability to carry Member State's obligations.

Despite absorption capacity not being added as a criterion, provision of the Copenhagen Conclusions explicitly points to the fact that enlargement shall not influence the position of the Union as the viable political force and it would not come at the expense of efficient and accountable policymaking.

The legal basis for enlargement consists of Article 49 of the Treaty on the European Union (TEU) establishing what state can apply for membership and Article 2 of the TEU – encapsulating the EU's founding values which must be respected by the state. Pursuant to Article 49, a state that wishes to join the EU addresses its application to the Council. The European Parliament and national parliaments are notified of this application. The Council by unanimity agrees to grant the country the candidate status. Negotiations are launched once the EU Council issues unanimous decision. The process can be considered a form of gradual trust-building, where the Accession Treaty is the crowning achievement (Truszczyński 2020, 29).

However, before the negotiations start, the European Commission delivers a “screening” report for each negotiation chapter. The conclusion of screening report is Commission's recommendation to open negotiations. Following the recommendation, it is the Council that decides unanimously to open new negotiation chapter(s). At the same time, financial and transitional arrangements are discussed. The process can be suspended when “serious and persistent breach of the principle of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law” occur (European Commission 2006).

Accession negotiations are accomplished when all negotiation chapters are closed (with approval of every Member State's government). The drafting committee creates an accession treaty which must be approved by the Council of the EU unanimously. It also must receive consent from the European Parliament. The treaty is signed by each Member State and by the accession country which must ratify it in accordance with their constitutional requirements. Countries that have signed the treaty of accession obtain a status of “acceding states.” From the date of accession, the provisions of the original Treaties and the secondary law are binding on the new Member State and shall apply under conditions laid down in Treaties on which the Union is founded as amended or supplemented.

Finally, it is worth adding that after Croatia's accession, the European Commission decided to put the rule of law at the centre of the negotiation process

with negotiating chapters on Judiciary and Fundamental Rights (chapter 23), and Justice, Freedom and Security (chapter 24) to be opened at an early stage and closed as the last. Under the revised methodology, no negotiation chapter can be closed if the interim benchmarks on the rule of law chapters have not been met.

#### 4. WAR AND ACCESSION

On 24<sup>th</sup> February, 2022, unprovoked Russia attacked Ukraine. The European Union became “unavoidably entangled in this war” (Zielonka 2023). Member States and European institutions immediately showed their unwavering support in the form of emergency and humanitarian assistance, as well military aid. Some of them were unprecedented. For example, for the first time in history, the Temporary Protection Directive (TPD) was activated, which not only allowed asylum-seekers to avoid a prolonged asylum process and falling into irregular status, but also alleviated migratory pressure on Member States’ asylum systems (Mazur 2023, 35).

On the economic front, the first package of assistance measures from the European Peace Facility (worth 500 million EUR) were allocated February 2022. Out of the entire 12 billion EUR total budget for 2021–2027, 5.6 billion EUR was allocated to Ukraine. In June 2023, the European Commission also proposed a new Ukraine Facility based on three pillars: support to Ukraine in the form of grants and loans; the mobilisation of private investments in Ukraine by providing guarantees and blended finance; and finance assistance and capacity-building programmes for Ukraine’s government and civil society to help to achieve the EU *acquis* and standards. If adopted, it would mobilise up to 50 billion EUR to support Ukraine’s path towards accession. Regarding trade, until June 2024, customs duties under Title IV of the Association Agreement, quotas and trade defence measures were suspended. Moreover, the EU (European Commission 2022d) has also introduced Security Lanes, making sure Ukraine can export grain and import the goods it needs.

Finally, with regard to external relations, the idea of the European Political Community emerged. Due to fears of EU-aspiring states, it was quickly assured that the platform is not an alternative for the EU membership.

Five days after Russia’s attack, in circumstances described as “tragic” (Petrov 2023, 3), Volodymyr Zelenskyy submitted an application for Ukraine’s membership into the European Union. Some of the Member States supported the notion of a “special track” for Ukraine’s membership, but the European Commission (2022b) explicitly stated that the “accession process remains based on established criteria and conditions”.

After submittance, the Council acted swiftly and on 7<sup>th</sup> March, 2022, invited the European Commission to submit its opinion. Although the Versailles

Declaration (2022) did not mention the candidate status, on 8<sup>th</sup> April, 2022, Ukraine received the questionnaire on the political and economic criteria, five days later on the *acquis*. Ukraine provided its replies swiftly respectively on 17<sup>th</sup> April and 9<sup>th</sup> May, 2022, with the European Commission (2022b) acknowledging the “remarkable level of institutional strength, determination and ability to function”.

The European Commission in its Opinion (2022b), which also took into account the state's progress in the implementation of the obligations under the Association Agreements and Deep and Comprehensive Free Trade Area, recommended that Ukraine should be given the perspective to become a member of the European Union. Opinions included seven prerequisites for Ukraine, regarding selection procedure for judges of the Constitutional Court of Ukraine; the election of candidates for the High Council of Justice and High Qualification Commission of Judges of Ukraine; strengthening the fight against corruption, in particular at a high level; anti-money laundering legislation; Anti-Oligarch law; the adoption of a new media law aligning the EU audiovisual services directive; and legal framework for national minorities.

During the European Council meeting on 23<sup>rd</sup> June, 2022, the European Council granted EU candidate status to Ukraine and invited the European Commission to report back on the fulfilment of the conditions presented in the Commission's Opinion. EU leaders decided that this should be done as a part of a regular enlargement package issued in Fall 2023, which for the first time includes reports on Ukraine, Moldova, and Georgia. In this case, the Council decided to not go with the Commission's plan to report on recommended steps. However, in order to send an encouraging signal to Kyiv, in December 2022, the Council of the European Union (2022) asked the Commission to provide preliminary assessment on seven recommendations in Spring 2023, without prejudice to the regular reporting for the enlargement package.

In June 2023, the European Commission (European Commission 2023a) extraordinarily in an oral update on progress stated Ukraine met two out of seven above-mentioned conditions, namely Step 2 (on the High Council of Justice and High Qualification Commission of Judges of Ukraine) and Step 7 (on key media legislation). Among above-mentioned, the most challenging reform is the law on de-oligarchisation. According to the Venice Commission (2023), the legislation took a “personal approach”, which seeks to identify persons as “oligarchs” and has a punitive character, although it can only be considered a “supplement” approach and does not alternate a “systemic” approach.

In the Enlargement Package 2023, which for the first time covers the Associated Trio, the European Commission stressed a “steady intensification of work on the respective reform agendas” in Ukraine (European Commission 2023). The Commission also underlined “resilience and strong political will” demonstrated by the Ukrainian Parliament. Considering the fulfilment of the Copenhagen criteria and the continuation of its reforms, the Commission

recommended the Council to open accession negotiations with Ukraine. Assuming that the Council would give the green light during the summit in December 2023, the screening process for Ukraine might even start the same month.

## 5. CHALLENGES AHEAD

Taking under consideration heavy social and economic impact caused by Russia's invasion, Ukraine's overall preparedness for accession might become a serious challenge. Membership into the European Union creates rights and obligations, not only for a state, but also its citizens, business entities, and other organisations. As mentioned above, from the date of accession, the provisions of the original Treaties and the secondary law are binding on the new Member State and shall apply under conditions laid down in Treaties on which Union is founded as amended or supplemented. Despite some flexibility instruments (safeguard clauses, post-accession monitoring mechanism, and country-tailored conditions), the process remains technocratic and rigorous. Considering Poland's and Hungary's democratic backsliding after accession, the EU might be particularly uncompromising on the rule of law.

As pointed above, the rule of law is a crucial requirement for EU membership. This is reflected in an enhanced way in the revised methodology. Notwithstanding progress made so far by Ukraine, a fight with deeply rooted corruption might be one of the most difficult steps towards EU membership. Despite progress on appointing new heads on SAPO and NABU, Ukraine does not have a "credible track record of prosecutions and convictions" (Press Remarks 2023). According to former European Commission President Jean-Claude Juncker, due to levels of corruption, Ukraine should be disqualified from membership into the EU (Augsburger Allgemeine 2023).

Once accessing the EU, Ukraine will be responsible for controlling external borders with Russia and Belarus. The lack of border stability might influence Ukraine's ability to protect the EU external borders on behalf of other Schengen countries. The decision on joining the Schengen Area is taken by the Council after consulting with the European Parliament. According to the European Council (2014), "outstanding disputes", including border disagreements, are having detrimental effect on the accession process and they must be solved in accordance with international law and established principles. The case of Bulgaria and Romania proves that the decision on allowing state to join the Schengen zone is a clearly political call that requires unanimity among Member States. Due to the Dutch and Austrian opposition, both states still do not belong to the Schengen Area, although they gained read-only access to Visa Information System.

On the EU's side, its institutions have to preserve credibility along the process in order to sustain reform and public support in Ukraine and other aspiring



states. With so many states in the process, the EU must assure that conditions for membership are “objective, precise, detailed, strict and verifiable” (European Commission 2021, 25). Despite the original Western Balkan’s frustration about Ukraine’s progress and their deadlock in bids to join the EU (Brzozowski, Taylor 2022), by the end of 2022, Balkan states and the EU came out with reinvigorating agreements (on roaming charges and integration into the EU higher education system) and the Tirana Declaration (2022), in which the bloc confirmed “full and unequivocal commitment to the European Union membership perspective of the Western Balkans”, underlining that this can happen based upon “credible reforms by partners; fair and rigorous conditionality”.

## 6. CONCLUSIONS

Ukraine’s membership into the European Union should not only be perceived as a continuation of the process, which started in 1993, but as a symbol of historical justice. For now, the primary concern is the war, but with the volume of military, financial, and legal support provided by the EU, it can be assumed that further in the process, Brussels will be willing to continue its extraordinary support, driven by a sense of moral obligation towards a neighbourhood state tarnished by war.

Support extended by the European Union to Ukraine is a rare example of a relatively coherent response to an external crisis which highlights the EU’s potential to “enact meaningful collective diplomacy” (Mauer et al. 2023). The EU is more than willing to recognise the effort made by Ukraine, which is an extension of wartime gestures and solidarity. However, as shown above, there is no appetite for any shorter procedure. At the same time, at least for now, Ukraine is not interested in any kind of subsidiary association due to the prestigious reasons.

To conclude, Russia’s attack on a neighbouring state revived the European Union’s interest in enlargement and in a rapid pace, allowing Ukraine to not only be granted a candidate status but with a higher possibility to also open negotiations by the end of 2023. However, considering the complexity of the process, Ukraine’s path can be long and arduous. The aspiring state needs to acknowledge that the EU is not a *deus ex machine* that can resolve national problems (Dimitrova 2021). As noted by Sadurski, Czarnota, and Krygier (2006), conditionality is the most efficient when it resonates with domestic preferences. Reforms, however, should not only be credible, but also irreversible (European Commission 2023).

Contrary to the past developments, there are no question marks over Ukraine’s current commitment to the reforms. The European Commission (2022b) stated that Ukraine has given “ample proof of its adherence to the values on which the EU is founded”, permanently escaping shades of declarative Europeanisation,

but whether Ukraine can handle an “extensive penetration of state sovereignty” (Schimmelfenning, Sedemeier 2005, 288) caused by the accession process, remains to be seen.

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