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On the Road to EU Membership

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By Roman Petrov and Oksana Holovko-Havrysheva

Executive Summary

The outbreak of the war against Ukraine on February 24, 2022, tremendously impacts the security and economic worldwide, where the political, economic and social implications both for the Ukrainian economy and the global economy are far-reaching.

The EU-Ukraine cooperation in economic matters is regulated by legal instruments, where the EU-Ukraine Association Agreement with the provisions on deep and comprehensive free trade area forms its ultimate core for granting to Ukraine the access to the EU Single Market. Besides this overarching and multifaceted cooperation, where Ukraine's progress in the access to the EU Single Market depends on the efficiency of domestic reforms and the rapprochement of Ukraine's legal system to the EU, the bilateral cooperation framework on special issues (f.e. energy, transit, Single European Avia Space) are in place, shaping the cooperation to the needs of the parties involved.

In times of war, the cooperation between Ukraine and the EU in economic matters still builds upon the legal and regulatory framework as established before the war where the main focus rests on the legislative and regulatory approximation according to the EU-Ukraine Association Agreement, which is a cornerstone for future negotiations on Ukraine's membership in the EU.

1. Introduction

The Russian invasion of Ukraine on February 24th 2022 posed an existential challenge for Ukraine and the EU. On one hand it tested the EU's resilience and political autonomy. On other hand it questioned the existence and territorial sovereignty of Ukraine – country deeply committed to integrate into the EU, as seen by the signing of the EU-Ukraine Association Agreement in 2014. Nevertheless, the EU and its Member States remained reluctant to even acknowledge the perspective of Ukraine's membership in the EU for indefinite future.

Suddenly, such ambiguous *status quo* was loudly broken when on February 28th 2022 President Zelensky triggered Article 49 TEU for Ukraine on February 2022. Very few people expected President Zelensky and his government to even think about the EU membership amidst the avalanching invasion of Russian army, the largest European inter-state conflict nowadays. President Zelensky signed the formal application to the

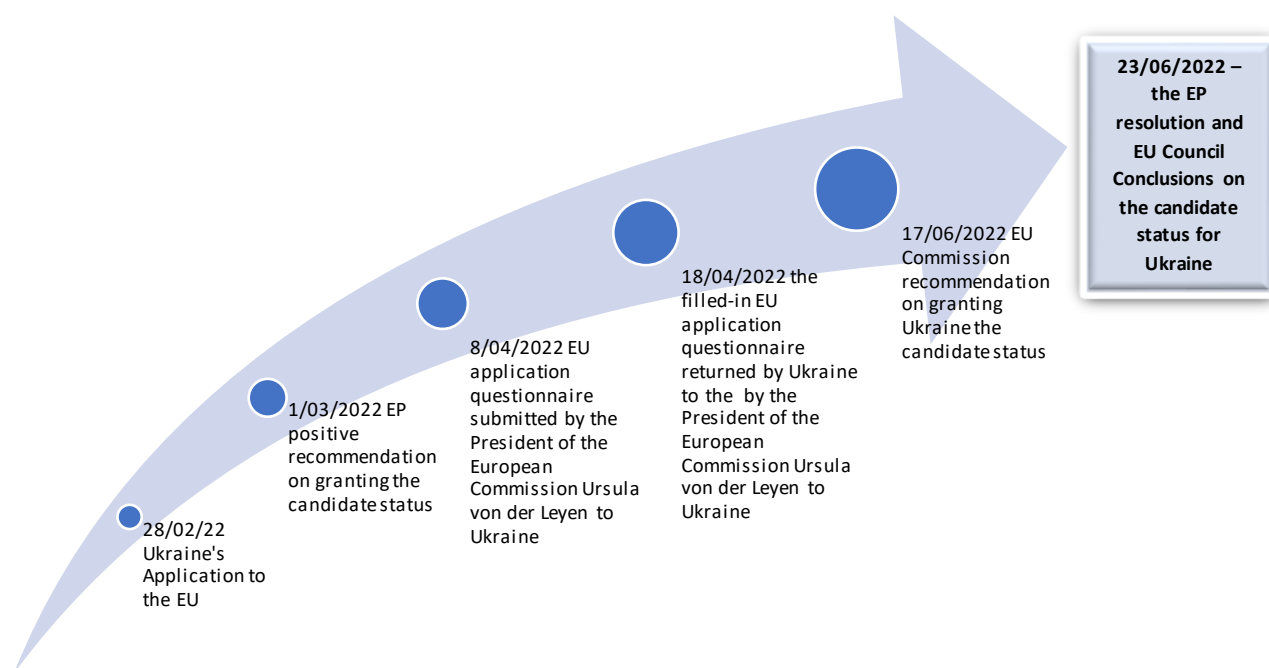
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EU whereas Russian army troops were staying just about 20 kilometres from his office in Kyiv. The Ukrainian nation’s attempt to apply for the EU membership suddenly took place in one the most critical and mortal moment of its history.

The EU institutions quickly realised that the momentum of a mortal danger for the Ukrainian state requires immediate and resolute actions. It only took a week for the EU Council to activate the procedure of Article 49 TEU and invite the European Commission to issue its Opinion on Ukraine’s application bid. The European Commission acted swiftly too and assessed the Ukraine’s ability to join the EU by June 17th 2022.¹

Finding that “Ukraine is a European State which has given ample proof of its adherence to the values on which the European Union is founded”, it recommended to the Council that the country “should be given the perspective to become a member of the European Union”,² and to the European Council that it should be granted the (much sought after) “candidate status” – a label that is not formally envisaged by the procedure of Article 49 TEU, but which has de facto become a milestone in the accession process. While confirming that Ukraine’s accession would be based on “established criteria and conditions”, including the so-called “Copenhagen criteria”, the Commission also requested urgent reforms in most critical sectors for Ukraine.³

The timeline of enhancing the relations between the EU and Ukraine during the war:



¹ “So we will accelerate this process as much as we can, while ensuring that all conditions are respected.” 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/neighbourhood-enlargement/news/statement-president-von-der-leyen-ukrainian-president-zelenskyy-occasion-presidents-visit-kyiv-2022-04-08_en>, all sebsites last visited 23 Aug. 2022.

² Commission Opinion on Ukraine’s application for membership of the European Union, Brussels, 17 June 2022, COM(2022)407 final.

³ Namely: the judiciary, the rule of law, the fight against corruption, national minorities, anti-money laundering legislation, anti-oligarch legislation, media legislation. It also committed itself to monitoring Ukraine’s progress in those fields, and to issuing an assessment of the situation by the end of 2022.

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The accession procedure to the EU is regulated by Article 49 TEU, which provides a framework for the procedures on membership.⁴ It contains a set of provisions, which regulate the accession to the EU in basic terms:

- Conditions for the accession (commitment to the EU values, enshrined in the Art. 2 of the TEU, belonging to the European Area, formal application to the Council of the EU, adjustment to the founding treaties of the EU and the accession treaty)
- Basic requirements regarding the procedural issues, basically related to 2 major stages in the accession procedure: *firstly*, the application of the accessing state (the application of the accessing state to the Council of the EU, the notification of the EP and national parliaments of the EU Member States on the application, European Council eligibility conditions and the unanimity rule for the Council to act on the application after the respective consultation with the European Commission and after the consent of the European Parliament with a majority voting) and *secondly*, the accession treaty containing the requirements with the adjustments to the EU founding treaties to be signed between the accessing country and the EU Member States and ratified duly according to the national provisions.

The wording of Article 49 TEU is constructed in a manner setting at one hand clear lines for the EU accession procedures and allowing at another hand the degree of flexibility in shaping the relations with the accessing country. The accession to the EU itself contains two parts: the part, regulated by the international law, and the part, regulated by the EU practices⁵.

The EU Accession Treaty is an international agreement signed between the EU Member States and the acceding country, which contains principal provisions on the accession and the conclusion and entering into force of which is regulated by the Vienna Convention on the Law of International Treaties 1969, to which the EU Member States and Ukraine are parties to. At the EU-internal documents regulating the accession procedure include the EU Commission opinion on accession application, the EU Council decision on the application and starting from 1994 the EU Parliament legislative resolutions on accession applications. The accession treaty contains at one hand the statements on the accession to the EU, at another hand it has detailed provisions which regulate country's admission to the EU as negotiated by parties and include modalities of the country's participation at the EU Single Market provisions and waives the acceding country negotiates regarding the timeline it gets to implement full rights and obligations as the EU member state.

The EU differentiates the legal status of the accessing country within 3 modes: the pre-candidate status, the candidate status with the negotiations on the membership and the status of the acceding country,⁶ which is linked to the development of the legal framework of the future membership. The very first status is granted to the country based on its formal application and

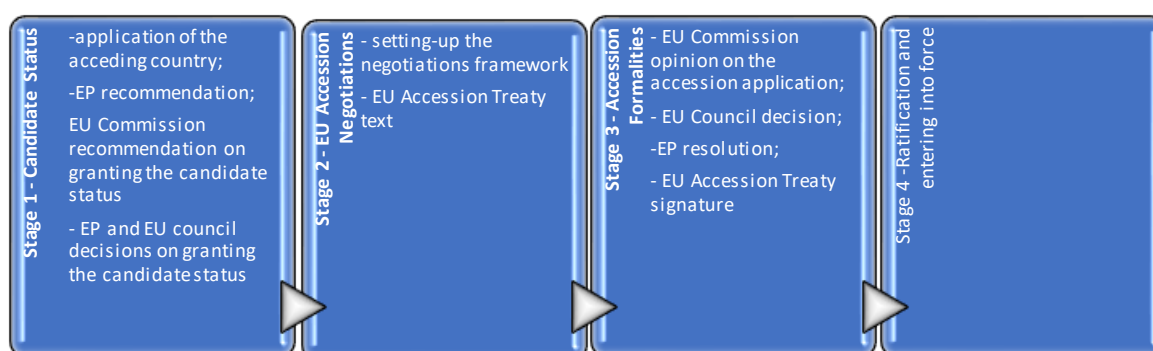
⁴ The founding treaties amendment procedures include are regulated by the Article 48 TEU (both ordinary and simplified treaty amendment procedures), but the treaties can be amended while using Article 352 TFEU (Lückenschließungsklausel) and Article 49 TEU (on admission and accession of new members).

⁵ Kochenov, Dimitry and Kochenov, Dimitry and Janse, Ronald, Admitting Ukraine to the EU: Article 49 TEU is the 'Special Procedure' (April 13, 2022). EU Law Live (March 30, 2022), Available at SSRN: <https://ssrn.com/abstract=4083111> or <http://dx.doi.org/10.2139/ssrn.4083111>.

⁶ https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/steps-towards-joining_en

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marks the start of the negotiation procedures of with an accessing state⁷. It usually covers the period between the accessing state application and granting the candidate status. The second candidate status is connected to further formalization of negotiations between the EU and the accessing state, where the negotiations on the accession treaty take place and usually ends up with the signature of the accession treaty. The status of the acceding state becomes active after the signature and covers the period of the accession treaty ratification by the accessing state and the EU member states as well as interim provisions regulating the relations between the acceding country and the EU in the period prior to the date when the full EU membership becomes effective (it usually depends on the ratification procedures and is set-up in the accession treaty itself). The accession process as described by the EU contains 9 steps, being mainly regulated by accession practices⁸. Depending on the role of the members states and EU institutions in the process of accession, as well as the goals to be achieved by the parties, 4 stages in accession process might be identified, focusing 1) on granting the candidate status to the applicant country; 2) accession negotiations aiming to elaborate the accession treaty; 3) signature of the accession treaty and 4) ratification and entering into force of the accession treaty.



In the meantime, the accession process of Ukraine is on the standby mode which implies that it triggers the accession negotiations in 2023 once Ukraine would be able to show the progress in providing reforms in the sectors specified by the European Commission.⁹ As for the time being the single market legislation is not one of the areas where urgent progress in reforms is expected by the EU. However, once Ukraine will be invited to wider negotiation process regarding the EU accession treaty the importance of the EU single market *acquis* will reach the top of the legislative and political agenda of Ukraine.

⁷ As for Ukraine, p. 11 of the Conclusions of the European Council of 23 and 24 June 2022, Brussels, 24 June 2022, EUCO 24/22, <https://www.consilium.europa.eu/media/57442/2022-06-2324-euco-conclusions-en.pdf>

⁸ https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-10/eu_accession_process_clusters.pdf

⁹ *Ibid.*

2. Challenges for the Ukrainian Road to EU Membership in Times of War

Ukraine's road towards EU membership will be a different one from the accession experience of the EU's old and new Member States. It is because, 'Ukraine became the first country to apply for EU membership in the middle of a war that had been started by invasion of it by another state with which the EU still has a functioning bilateral partnership and cooperation agreement'.¹⁰ There are other challenges to be considered on Ukraine's road towards EU membership. First, is whether the comprehensive EU-Ukraine Association Agreement could remain a solid and relevant foundation of Ukraine's accession procedure. In this regard, experts advocate that the EU-Ukraine Association Agreement still has considerable potential and therefore, can be regarded as a perfect 'stepping-stone towards EU membership'.¹¹ Second, the Ukrainian case requires the reconsideration of the accession procedure due to the imminent and escalating cost of war. Ukrainian officials call for either a 'fast-track' procedure for Ukraine or for the 'special procedure' for Ukraine's application 'without the strains of mistrust and the failure of conditionality'.¹² Third, the substantive and procedural rules of the future accession of Ukraine to the EU must reflect the scope and objectives of a future peace deal between Ukraine and Russia. In other words, it would be an unbearable challenge for Ukraine to participate in the complicated and meticulous accession race while being engaged into resource-consuming and bloody war with Russia.

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 the Ukraine's ambition to engage on an EU membership course.

The EU-Ukraine Association Agreement of 2014 has been a backbone of the Ukraine's EU membership ambitions. Since 2014 the Ukrainian authorities had been concentrating their efforts on the demanding implementation of the Association Agreement, considered as "the

¹⁰ A. Tatham, Op-Ed: "Conflict between Rhetoric and Reality of Enlargement: The Implications of Opening EU Accession Negotiations with Ukraine", EU Law Live, 5 April 2022, <https://eulawlive.com/op-ed-conflict-between-rhetoric-and-reality-of-enlargement-the-implications-of-opening-eu-accession-negotiations-with-ukraine-by-allan-f-tatham>.

¹¹ P. Van Elsuwege, G. Van der Loo, Op-Ed: "The EU-Ukraine Association Agreement as a Stepping-stone towards EU Membership?", EU Law Live, 28 March 2022, <https://eulawlive.com/op-ed-the-eu-ukraine-association-agreement-as-a-stepping-stone-towards-eu-membership-by-peter-van-elsuwege-and-guillaume-van-der-loo>.

¹² D. Kochenov, R. Janse, Op-Ed: "Admitting Ukraine to the EU: Article 49 TEU is the 'Special Procedure'", EU Law Live, 30 March 2022, <https://eulawlive.com/op-ed-admitting-ukraine-to-the-eu-article-49-teu-is-the-special-procedure-by-dimitry-kochenov-and-ronald-janse>.

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most advanced agreement of its kind ever negotiated by the European Union”,¹³ and characterized by its unprecedented *comprehensiveness*, *complexity* and *conditionality*. The Agreement indeed governs the entire spectrum of Ukraine’s relationship with the EU, with the ambitious aim of integrating the country into the EU Internal Market, based on its ability to implement the relevant EU *acquis* and to observe its values.¹⁴

To be sure, the Commission’s annual reports on the implementation of the Association Agreement had never been overly positive.¹⁵ Even Ukraine’s internal evaluation of the domestic implementation efforts was rather humbling.¹⁶ 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.

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 Article 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. If so, the question can then be raised whether the three new applicants’ accession process will continue to be framed by this extraordinary “*accession through war*” approach, or whether it will ultimately fall back onto the “classic accession” track, as applicable to candidate States before the war.

“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 Articles 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),¹⁷ and/or as a party to a framework association agreement

¹³ European Council, Press Remarks by H. Van Rompuy, President of the European Council, following the EU-Ukraine Summit, Brussels, 25 Feb. 2013, EUCO 48/13. Available at <europa.eu/rapid/press-release_PRES-13-74_en.htm>.

¹⁴ Van der Loo, Van Elsuwege, Petrov, “The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument”, European University Institute Working Papers (Department of Law), 2014/09.

¹⁵ Ukraine: EU report notes continued implementation of the reform agenda though challenges remain, <ec.europa.eu/commission/presscorner/detail/es/ip_20_2259>. See Association Implementation Report on Ukraine 2021, Joint Staff Working Document, Brussels, 22 July 2022, SWD(2022)202 final. The Report listed quite extensive issues where Ukraine is expected to improve its performance in implementing the EU-Ukraine Association Agreement, mainly in the fields of justice, rule of law and the fight against corruption. See <ec.europa.eu/commission/presscorner/detail/en/ip_22_4706>.

¹⁶ 6th UCEP Monitoring Report “Ukraine and the Association Agreement. Implementation Monitoring 2014-the first half of 2021”, <www.kas.de/en/web/ukraine/single-title/-/content/ukraine-and-the-association-agreement-implementation-monitoring-2014-the-first-half-of-2021>.

¹⁷ Further on Eastern Partnership, see e.g. <www.eeas.europa.eu/eeas/joint-communication-eastern-partnership-policy-beyond-2020-reinforcing-resilience-%E2%80%93-eastern_en>; <www.consilium.europa.eu/en/press/press-releases/2020/05/11/eastern-partnership-policy-beyond-2020-council-approves-conclusions/>.

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with the EU, and becomes a victim of a military or hybrid invasion,¹⁸ it may expect extensive political, economic, security, and humanitarian support from the EU and its Member States. Such support may indeed include the recognition of a membership perspective if the country wishes to accede, and ensuing EU engagement to make it happen. Of course, the aggression would have to be of such a nature that it undermines the territorial sovereignty of the State concerned, and its European integration objectives.

The notion of a more favourable approach towards Ukraine's accession was indeed evoked by several Member States early in the process.¹⁹ But it has also triggered negative reactions, both in the EU, and among other candidates for membership. Some Member States have promptly rejected any "fast-track accession" on grounds that formally there is no such special procedure in EU law, and that the watering down of entry conditions it could entail – which some EU governments might agree to for other reasons - would be dangerous for the Union,²⁰ as well as problematic for its relations with other applicants. Indeed, candidate States from the Western Balkan have warned against the proposition that Ukraine should get accession priority, as that would (further) undermine their own accession perspective. As is well known, some of the applicant countries from the region experienced bloody civil wars and military intrusion by third countries, and have since, at least in some cases, made considerable efforts to be able to join, though without always getting much support from the EU in return.

The other option for Ukraine (and Moldova and Georgia) is the "classic accession" process. Like any other candidate country, it will be expected to fulfil the Copenhagen criteria and, consequently, to apply the whole EU acquis covered by the 35 or more chapters of accession negotiation. Judging from official statements, this is indeed the approach that the EU institutions and Member States appear to favour. Having recalled the provisions of Article 49 TEU, and the accession conditions based on the Copenhagen criteria, the Commission's Opinion underlined that the latter "ha[d] been prepared following a methodology similar to that used in previous Commission Opinions". In the same vein, the European Council Conclusions underlined that "[t]he progress of each country towards the European Union will depend on its own merit in meeting the Copenhagen criteria".²¹ It is also noticeable that, while recalling that progress in the accession depends on the candidate's fulfilment of the Copenhagen criteria, the European Council underscored that "the EU's capacity to absorb new members", a

¹⁸ A hybrid invasion can be conducted by military as well as by non-military means, but still threatens the sovereignty and territorial independence of a State (cyber-attacks leading to a termination of government control and/or establishing of non-recognized entities, and others).

¹⁹ See the letter of the Polish and (then) Slovenian Prime Ministers sent the day before the start of Russia's invasion of Ukraine to European Council President Charles Michel, available at <www.gov.si/en/news/2022-02-23-joint-letter-of-slovene-and-polish-prime-minister-on-the-ukrainian-european-perspective/>; and the subsequent declaration of 28 Feb. 2022 of the respective Presidents of Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Slovakia, and Slovenia, available at <www.president.pl/news/open-letter-by-presidents-in-support-of-ukraines-swift-candidacy-to-the-european-union,49584>. See also: <www.euractiv.com/section/politics/short_news/poland-slovenia-lithuania-say-ukraine-deserves-eu-candidate-status/>.

²⁰ See e.g. <www.reuters.com/world/europe/there-is-no-fast-track-procedure-eu-membership-dutch-pm-says-2022-03-10/>; <www.theguardian.com/world/2022/mar/10/western-europe-leaders-rebuff-ukraine-fast-track-eu-membership-appeal>; <www.politico.eu/article/netherlands-ukraine-eu-membership-zelenskyy-putin/>.

²¹ European Council Conclusions, Brussels, 24 June 2022, EUCO 24/22, pt 14.

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consideration whose significance has steadily increased in the EU enlargement rhetoric since 2004, would have to be “tak[en] into consideration”.²²

Although EU institutions and Member States have risen to the occasion by reacting remarkably swiftly and positively to the applications, they also remain adamant generally to apply the established accession methodology to the new applicants too, and the legal adaptation this entails to entrench membership in all its dimensions in their systems. That said, it is arguable that the application of the classic methodology will also have to be adapted, and supplemented, as it has indeed been done in each enlargement episode to take account of the specificities of each case. The ongoing war has morphed into an attrition campaign, with protracted impact both on Ukraine and the entire EU. Ukraine’s ability to meet the accession conditions is being further depleted every day of the devastating aggression and will thus hinge on the country’s overall reconstruction. It will in turn depend on, *inter alia*, the long-haul support that Ukraine gets from the EU in this major undertaking. The more assistance the EU provides, the more it will be normatively and effectively in a position to demand the scrupulous observance of the accession conditions. While the magnitude and the specific nature of the efforts needed to reconstruct Ukraine require ad hoc adjustment of the accession methodology (also to meet the specific needs of Moldova and Georgia, as collateral victims of the war), the process should also trigger a wider, and salutary recalibration of the EU “pre-accession strategy”, which has shown its limits and weaknesses over the years. Ukraine’s application (as well as that of Moldova and Georgia) is indeed a major incentive for the EU to design a “pre-accession strategy 2.0”, *inter alia* so as better to prepare candidate States both to meet the accession criteria and to operate as well-functioning Member States in the future. The new strategy should also allow a country like Ukraine to get back on its feet as a post-conflict society, something the EU and Member States have proved not to be particularly strong at in various candidate countries of the Western Balkan; the EU needs to improve this strategy, to be able to fulfil its promises, and secure peace in Europe.

Conclusion

Back in 2004-07, EU enlargement was a potent framework to promote wide-scale Europeanization of ex-communist countries from central and eastern Europe, including some former Soviet republics. In 2022, EU accession is being applied to boost the war effort of pro-European post-Soviet countries, and to enhance the potency of European common values when they are defended on the battlefield. It remains to be seen how the apparent tectonic shift in the EU approach, i.e. from a mostly “technocratic” accession exercise in recent years, to a value-based “accession through war”, will play out in the longer term.

The end of the war in Ukraine will inevitably be finalised by the Russo-Ukrainian Peace Deal. There are several possible scenarios of the Peace Deal depending on the success on the battlefield in Ukraine. Any Peace Deal scenario for Ukraine would imply a constitutional reform in Ukraine. The scope of such constitutional reform may vary from revision of the status of unitary state and single official language policy to the acceptance of neutrality in foreign

²² European Council Conclusions, Brussels, 24 June 2022, EUCO 24/22, pt 14.

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policy and complete demilitarisation of Ukraine. New provisions should be added relating the Ukraine's membership in NATO and in the EU (recognition of primacy of EU law and other issues). No doubt that the degree of the constitutional reform and potential limitation of the national sovereignty directly depends on convincing success of the Ukrainian Army on the battlefield and resolute support of the Western allies.

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