



From the Russian invasion to the EU accession. What path lies before Ukraine?

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📖 EU AND COMPETITION LAW, CONSTITUTIONAL AND INTERNATIONAL LAW, PERSPECTIVES

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In the wake of the Russian invasion, on 28 February 2022 Ukraine submitted its official application to join the European Union, with President *Zelensky* requesting immediate accession under a "new special procedure" and demanding that the European Parliament should give the

war-ravaged country a clear path towards EU membership.

The accession of new Member States to the EU is governed by Article 49 of the Treaty on the European Union (TEU)¹, which requires the new entrant to be a European country that respects and undertakes to promote the common

¹ Article 49 TEU states: "... Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements...".



values listed by Article 2 TEU². Accession, however, is far from an automatic process, and depends on both the adequate preparation of the applicant country and the EU's ability to integrate it within its community.

More particularly, the process of joining the EU consists of different stages.

Before applying for membership, the entrant country typically signs an association agreement, a treaty between the EU, its Member States and the entrant country that creates a preliminary framework for cooperation in areas such as, amongst others, the development of closer political, trade, social, cultural and security ties³.

When the entrant country is ready, it submits an application to the Council, which subsequently asks the Commission to prepare an opinion on the readiness of the entrant country to begin accession negotiations. If the application is unanimously accepted, the country becomes an official candidate for membership.

The candidate State then moves on to formal membership negotiations, a process that involves the gradual adoption of established EU law in a number of sectors, preparations to be in a position to properly apply and enforce it, and the existence and implementation of such judicial, administrative, economic and other reforms and measures, as are necessary for the country to meet the conditions for joining, known as the Copenhagen criteria. Defined by the European Council in 1993, these criteria

represent the essential political⁴, economic⁵ and administrative⁶ conditions that all candidate countries must satisfy to become a Member State. Besides the Copenhagen criteria, all applicant countries must enact legislation to bring their laws in line with the so-called "acquis communautaire", that is, the body of common rights and obligations resulting from secondary legislation and the case-law of the Court of Justice that is binding on all EU Member States and is divided into 35 chapters, each dealing with different policy fields such as, amongst others, fundamental freedoms, transport, energy, taxation, environment and intellectual property law⁷.

Membership negotiations take place between ministers and ambassadors of the EU governments and the candidate country (adding up to the so-called "intergovernmental conference"); however, this stage will not start until all EU governments agree, by a unanimous decision by the Council, on a framework or mandate for negotiations. The first part of the process is the "screening" of each of the 35 negotiation chapters, which serves as a preliminary assessment of the degree of preparedness of the candidate country. After two formal meetings for each *acquis* chapter, the Commission prepares a screening report for the chapter, which may conclude either that the country concerned is sufficiently prepared to open negotiations on the chapter, or recommend that certain conditions (so-called "opening benchmarks") need to be achieved in order for the chapter to be opened. At a later time, Member States

² Article 2 TEU states: "... *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...*".

³ Article 217 TFEU states: "... *The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure...*".

⁴ That is stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.

⁵ That is a functioning market economy and the capacity to cope with competition and market forces.

⁶ That is the administrative and institutional capacity to effectively implement the *acquis communautaire* and ability to take on the obligations of membership.

⁷ For further information see the following [LINK](#).

will assess and examine the findings of the screening report and, by a unanimous decision, the Council may accept the recommendation of the Commission. If the Council decides to open the chapter for negotiation, it will invite the candidate country to present its Negotiating Position (NP), which will be followed by the Draft Common Position (DCP) prepared by the Commission. The Council will then assess the DCP, and again by a unanimous decision may adopt the definitive European Union Common Position (EUCP). Once the NP and the EUCP are completed, the Council and the candidate country can formally open the chapter for negotiation.

When negotiations on all chapters are finalised, the Commission gives its Opinion on the readiness of the country to become a Member State, based on which the Member States will decide unanimously to close the negotiation process (provided that the Parliament gives its consent). The closure is then followed by the adoption of the Accession Treaty, the instrument that cements the entrant country's EU membership and contains its detailed terms and conditions, all transitional arrangements and deadlines, as well as details of financial arrangements and any safeguard clauses.

Entrant countries that have signed an accession treaty obtain the status of "acceding countries", and are expected to become full Member States on the date set out therein, provided that the treaty is ratified by the Member States and the acceding country. Until that time, there is an interim period, in which acceding countries benefit from special arrangements, are kept regularly informed of EU legislation via an information and consultation procedure, and are given the opportunity to comment on proposals; furthermore, they hold an active observer status in all relevant institutions and bodies, in which

they have the right to speak but not to vote.

Simultaneously, candidate countries invariably need to go through specific internal constitutional processes to secure the accession by means of an international treaty. According to the 2004 Law of Ukraine on International treaties, the ratification of a treaty such as the accession one is up to the *Verkhovna Rada* of Ukraine ("Supreme Council"). If the treaty should contravene the Ukrainian Constitution, its conclusion is possible only after relevant amendments are introduced to the latter⁸. More particularly, any amendment to the Constitution needs to obtain at least 300 votes in its favour in the *Verkhovna Rada*. A draft law introducing amendments to Section I ("General Principles"), Section III ("Elections. Referendum") and Section XIII ("Introducing Amendments to the Constitution of Ukraine") of the Constitution, however, requires not only 300 votes in favour, but the approval by an all-Ukrainian referendum, that shall be called by the President of Ukraine⁹.

Amendments to the Constitution are prohibited under martial law or during a state of emergency¹⁰. Any required constitutional reforms, however, can be adopted either by changing the explicit wording of the Constitution, or by amending its meaning by interpretation while leaving the text unaltered. Possible conflicts may be solved by interpretation of the text of the Constitution by the Constitutional Court. Once Ukraine has become a Member State, its representation in the European institutions and bodies will be governed by ordinary legislation.

Ukraine and the European Union have been developing closer ties for some time, even prior to Russia's invasion in February 2022. In 1994, a Partnership and Co-operation Agreement between the then European Communities and

⁸ See Article 9 of the Constitution of Ukraine.

⁹ See Article 156 of the Constitution of Ukraine.

¹⁰ See Article 157 of the Constitution of Ukraine.

their Member States and Ukraine was signed and ratified. A decree of the Cabinet of Ministers of Ukraine on the introduction of an Adaptation Mechanism of Ukrainian Legislation to that of the European Union was issued in 1998¹¹. The State Programme for Adaptation of Ukrainian Legislation to the Legislation of the European Union was adopted on 18 March 2004. On 30 March 2012 the EU and Ukraine initialled a proper Association Agreement in order to further strengthen relations and cooperation. On 15 May 2013 the European Commission recommended to the EU Council to sign the Association Agreement and on 9 August 2013 the draft was published on the government website.¹² However, then President *Yanukovych* suspended the Association Agreement process in November 2013, and chose to radically change policy in a radically pro-Russian direction. The Ukrainians were largely disappointed and peaceful protests commenced to be organized. This changed climate resulted in the use of force and illegal arrests to deter activists, but protests in support of the Association Agreement continued. On 16 January 2014 the *Verkhovna Rada* adopted ten controversial pieces of legislation in contravention of constitutional procedures¹³, restricting peaceful assemblies, introducing strict media censorship, limiting the activities of NGOs and adopting new legislation on “extremism” allowing for the imprisonment of participants to protests. The Ukrainian civil society though continued to fight for its constitutional rights, notwithstanding a heavier and heavier political climate and a more open involvement of Russian personnel in public order operations. On 21 February 2014 President *Yanukovych* fled the country. On 23 February 2014 the

process of occupation and annexation of Crimea commenced, and on 6 April 2014 part of the Luhansk and Donetsk regions were temporarily occupied by Russia. The existing EU–Ukraine Association Agreement¹⁴ was signed on 21 March 2014 by newly elected prime minister *Yatsenyuk*.

As a part of the Association Agreement, a Deep and Comprehensive Free Trade Agreement (DCFTA) was provisionally applied since January 2016, reducing tariffs that EU companies face when exporting to Ukraine, facilitating trade by making customs procedures more efficient and gradually approximating Ukrainian legislation, rules and procedures, to those of the EU.

In an extraordinary session held on 1 March 2022 in the wake of the dramatic events that commenced on 24 February 2022, the European Parliament passed a vote of immediate support to Ukraine’s application to join the Union, condemning Russia’s invasion and calling on the EU institutions to work towards granting Ukraine candidate status in line with Article 49 TEU¹⁵. Despite the Parliament’s broad support, and the five packages of sanctions imposed on Russia so far¹⁶, EU leaders initially refused to bypass the EU consolidated accession rules by offering Ukraine a fast-track to EU membership. Against the background of the ongoing military operations and humanitarian crises, however, on 8 April 2022 Commission President *von der Leyen* visited Kyiv and presented President *Zelensky* with the legislative questionnaire to officially begin Ukraine’s application course, implicitly foreshadowing a fast-track process.

¹¹ This decree was replaced in 2004 by a decree of the Cabinet of Ministers of Ukraine on some questions of the Adaptation Mechanism of Ukrainian Legislation to the Legislation of the European Union.

¹² For a detailed chronology of the adoption of the Association Agreement between the European Union and Ukraine see the following [LINK](#).

¹³ For further information see the following [LINK](#).

¹⁴ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161 of 29.05.2014.

¹⁵ For further information see the following [LINK](#).

¹⁶ For further information see our previous article, available at the following [LINK](#).

The case for Ukraine's accession to the Union is quite clear, albeit driven by geopolitical and strategic considerations, rather than by robust economic and policy factors. The European administrative machinery and its legal infrastructure have over the decades shown an unscathed resilience and ability to withstand exogenous circumstances of any source and magnitude. The extremely slow process of accession of the Western Balkans is

living proof of that proposition. It remains to be seen if Ukraine's accession path will prove any simpler in the wake of the first war on the European soil after 75 years, and if the Union and, above all, the Member States, will be able to reach consensus on the changes in secondary, as well as probably primary, legislation that appear unavoidable in order to make a fast track happen. The ball is now in the Commission's court.



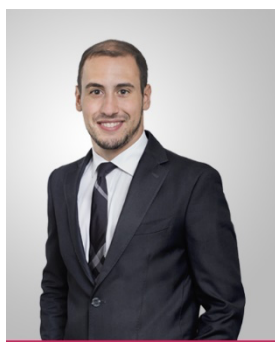
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