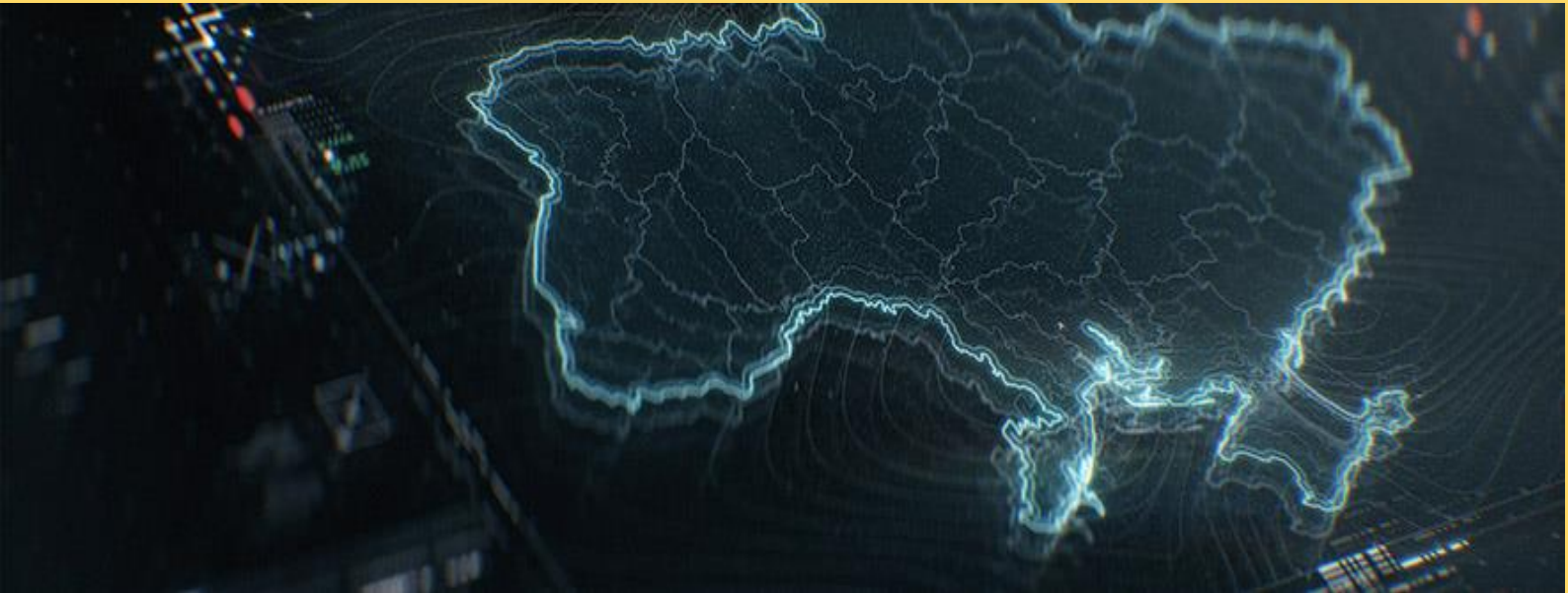




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UKRAINE SETTLEMENT PROJECT



UKRAINE SETTLEMENT OPTIONS:
Ukrainian Pathways to the European Union
By Jed Odermatt

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OpinioJuris

UKRAINE SETTLEMENT OPTIONS PAPER: UKRAINIAN PATHWAYS TO THE EUROPEAN UNION

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*A [shorter version](#) of this paper has been published on *Opinio Juris*. The views expressed in this paper are the author's alone.*

PREFACE

The Russian Federation has demanded that Ukraine should renounce potential NATO membership. Early on in the conflict, it also demanded that Ukraine would need to declare that it will not join the EU.

Indeed, the issue of EU membership is a sensitive one for the Russian Federation. It led to the Euro-Maidan protests of 2013, when the Ukrainian government, allegedly under Russian pressure, abandoned ratification of an association arrangement with Brussels in favour of closer ties with a Russian-led economic integration arrangement. This development resulted in further public unrest and, in February 2014, the removal of Russia-friendly President Viktor Yanukovich. That development, characterized to this day by the Russian Federation as a 'coup,' in turn triggered the initial intervention of 2014 in Crimea and the Donbas region.

At the Istanbul round of negotiations between the sides, facilitated by Turkey at the end of March 2022, there appeared to be a softening of the Russian Federation position relative to EU membership. By then Ukraine had accepted that it might declare itself permanently neutral, subject to effective security guarantees. In return, it appeared as if the Russian side might be willing to give up on its demand that EU membership for Ukraine would have to be ruled out.

In the meantime, there were strong voices within the EU in favour of facilitating rapid EU membership for Ukraine. It is not, in fact, clear, that this issue has actually been resolved between the sides. Nevertheless, we are particularly pleased that we have been able to persuade Jed Odermatt to address the issue of a possible pathway for Ukraine towards EU membership.

Marc Weller

INTRODUCTION

This Options Paper discusses the implications of Ukraine’s membership in the European Union for any possible Peace Settlement for Ukraine.

In February 2022, Ukrainian President Volodymyr Zelenskyy [submitted a document](#) to the President of the Council of the European Union indicating Ukraine’s intention to join the European Union. President Zelenskyy proposed that Ukraine could join along “a new special procedure” that would allow immediate accession. European Commission President Ursula von der Leyen stated in respect to Ukraine: “they are one of us, and we want them in”. In the Versailles [Informal meeting of heads of state or government](#), the EU Member States declared that “Ukraine belongs to our European family”. There is political support from [some EU Member States](#) for Ukraine’s ‘immediate EU accession perspective’. This was echoed by the [European Parliament](#), which calls upon the EU institutions “to work towards granting EU candidate status to Ukraine...”

Ukraine’s ambitions to join the European Union are not new. Existing agreements regulating EU-Ukraine relations, namely the Ukraine–European Union Association Agreement (AA) and the Deep and Comprehensive Free Trade Area (DCFTA), envisage a possible path for Ukraine’s accession to the EU. A [2014 resolution](#) of the European Parliament states that the Association Agreement with Ukraine is not a final goal, but rather “Georgia, Moldova and Ukraine – like any other European state – have a European perspective and may apply to become members of the Union provided that they adhere to the principles of democracy, respect fundamental freedoms and human and minority rights and ensure the rule of law.” Ukraine’s relations with the European Union have been overshadowed by the former’s relations with Russian Federation, which has viewed closer ties with the EU and possible Ukrainian membership as a threat. The Euromaidan protests that led to the ousting of former president Viktor Yanukovich were sparked by the decision to reject the Ukrainian-European Association Agreement, favouring closer economic and political ties with Russian Federation.

EUROPEAN UNION ACCESSION - ARTICLE 49 TEU

While President Zelenskyy mentioned “a new special procedure” for Ukraine’s EU membership, the EU Treaties do not mention any special or ‘fast track’ procedure for accession of new member States. The rules and procedures for a candidate country to join the European Union are set out in Article 49 Treaty on European Union (TEU):

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.

The process of accession takes place through an accession agreement concluded between the applicant State and the EU Member States. The agreement is usually negotiated between the European Commission and the applicant State. Formal accession then requires the approval and ratification of the accession agreement in each EU Member State. Consent of the European Parliament is required. Article 49 TEU requires the European Commission be ‘consulted’.

Article 49 TEU also requires that the applicant State is committed to the values enshrined in Article 2 TEU. These include values such as “human dignity, freedom, democracy, equality, the rule of law and respect for human rights.” In addition, the “conditions of eligibility agreed upon by the European Council” are also to be taken into account. To satisfy these conditions, Ukraine may have to commit to improving its record in these fields. The number of cases against Ukraine before the European Court of Human Rights might suggest that the country does not yet satisfy many of these conditions. Ukraine’s EU membership would require the state to show commitment to the ‘European values’ set out in Article 2 TEU.

While Article 49 TEU sets out legal requirements and suggests a formal process of accession, the path towards membership is shaped by political considerations. If the EU Member States were to decide to pursue a ‘fast-track’ membership for Ukraine, Article 49 TEU would still allow the framework for such a process. Article 49 TEU is complemented by a general practice carried out by the Council and Commission which includes certain conditionality requirements, including those relating to the rule of law and democracy. Over time, the practice of the EU institutions has developed into what is understood as the EU’s enlargement policy, setting out certain procedures and conditions for entry. This has led to expanding [conditions of membership](#) that include a functioning market economy, the ability to take on and implement effectively the obligations of membership, and in the case of candidates from the Western Balkans, requirements [related to good neighbourly relations](#). Given the unique circumstances of the conflict in Ukraine and the outcome of any peace settlement, the Council could adopt an accession process that takes account of the special circumstances surrounding Ukraine’s accession.

Accession is usually a long process for both legal and political reasons. In addition to commitment to European values, a candidate country will also have to demonstrate that it can apply EU law (*acquis*), which will require time to transpose EU legislation. There has been some debate about whether a ‘special procedure’ that allows a fast track to membership would be possible. One argument is that the Union’s usual practice of conditionality – requiring a candidate to meet certain conditions *before* membership – has failed and should be replaced by a procedure that places trust in the applicant to meet conditions after membership. This would allow for Ukraine’s [immediate accession](#). Moreover, [some authors have suggested](#) that the existing EU-Ukraine Association Agreement should be the basis for Ukraine’s accession procedure. To date there have been no ‘fast track’ accessions. EU Member States may be reluctant to establish a precedent of adopting wholly different procedures for different candidates, especially when other candidate countries (Albania, the Republic of North Macedonia, Montenegro, Serbia and Turkey) have already spent years preparing for EU membership.

Even if a fast-track procedure were adopted for Ukraine, it would still take considerable time for any accession agreement to be negotiated and for approval and ratification in EU Member States. The example of the negotiations between the EU and UK over the withdrawal agreement shows how negotiations can stall. Member States are divided in their levels of support for Ukraine’s speedy entry and could also delay accession progress. It is difficult to see substantial

negotiations taking place while Ukraine continues to be engaged in an armed conflict. The more likely option would be to follow a path and time scale closer to recent accessions, which have taken over ten years. Unless there is a sustained and strong political will to allow a fast accession process, Ukraine may not join for at least five years.

MUTUAL ASSISTANCE AND GENERAL SOLIDARITY CLAUSES

Any accession procedure would have to take into account Ukraine's EU membership in the larger context of Russia's use of force and the details of any peace settlement. As an EU member, Ukraine would benefit for the mutual assistance and general solidarity clauses in the EU Treaties, which would give rise to similar complications as with Ukraine's potential NATO membership.

Article 47(2) (Mutual Assistance Clause) sets out that an EU Member State that is a victim of armed aggression can request aid and assistance by other EU Member States.

7. If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

According to Article 222(1) of the Treaty on the Functioning of the EU (TFEU) (Solidarity Clause) sets out that

1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

(a) prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;

(b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

As outlined in [Options Paper on the Status of Ukraine \(Neutrality\)](#), these clauses do not prevent Ukraine from adopting a policy of neutrality, nor do they pose obstacles for Ukraine to agree to refrain from joining NATO. The Mutual Assistance and Solidarity clauses could be incompatible with a commitment not to join any 'military alliance'. However, Article 42(7) TEU also includes an important safeguard: 'This shall not prejudice the specific character of the security and defence policy of certain members states.' Ukraine's EU membership would not be incompatible with a commitment to neutrality. However, Ukraine's EU membership will have to take into account the terms of any Ukraine Settlement. A settlement that means, for example, that Ukraine does not have the ability to define independently its foreign policy could pose a problem for Ukraine's EU candidacy.

APPLICATION OF EU LAW IN OCCUPIED TERRITORIES

The Settlement may result in certain territories remaining under Russian control (such as Crimea) at least for an interim period. It would be difficult to envisage Ukraine joining the European Union while it is actively involved in an armed conflict on its territory or when it does not have effective control over large parts of its territory. A Settlement that addresses issues of territorial status may also address the conditions under which EU law may be applied in those territories. Cyprus joined as an EU Member State despite the fact that it not have control over its entire territory. Cyprus joined the European Union while a large part of its territory is under *de facto* control of the Turkish Republic of Northern Cyprus. EU law is suspended in areas where the government of Cyprus does not exercise effective control. The situation in Cyprus is not comparable to that of Ukraine, where an ongoing armed conflict is taking place, but it does show that EU membership is compatible with parts of the State's territory under being under occupation.

Article 52 TEU sets out that the EU Treaties shall apply to the EU Member States. Article 355 TFEU defines in more detail the specific territorial scope of the EU Treaties. For example, Article 355(5)(b) TFEU sets out that the EU Treaties 'shall not apply to the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus...'. This provision is supplemented by Protocol No 3 on the Sovereign Base Areas, which is part of the Act of Accession of Cyprus. Depending on the outcome of any final settlement, Ukraine's accession may require amendments to Article 355 TFEU and a separate additional protocol to set out the modalities of territorial application of EU with respect to certain territories. An important question in this respect will be whether individuals in those territories will be regarded as EU citizens with all the rights that accompany this.

Ukraine's EU membership may require significant amendments to the EU Treaties and a separate protocol that relates to Russian-controlled or disputed territories. This would further complicate any 'fast track' procedure for Ukraine's accession.

CONCLUSION

EU Members States have shown political openness to Ukraine's eventual accession to the European Union. There has been some debate about whether any immediate or fast track procedure would be legally possible. One option would be for EU membership soon after the end of hostilities, with a transition period to help align Ukraine with the EU *acquis* and to meet the criteria related to European values. Any plan for reconstruction of Ukraine's economy and infrastructure could also take place as part of its EU Membership. The second option would be for Ukraine to be given candidate status and for it to move towards EU membership over time. The existing DCFTA would lay the pathway towards eventual EU membership. Although Article 49 TEU does allow for the almost immediate membership in Option 1, the requirement for unanimous agreement of all 27 EU Member States mean that Option 2 is much more likely.

The Peace Settlement could include a reference to EU membership. EU membership would not be incompatible with any commitment to neutrality or to refrain from joining NATO. The Settlement could include a clause stating "Nothing in this agreement should be interpreted as preventing Ukraine from joining the European Union".