

EDITORIAL COMMENTS

Another “Big Bang” enlargement? Three candid suggestions to start preparing

On 1 May 2004, ten European States joined the European Union. It was the biggest increase in EU membership since the establishment of the Communities. Beyond its magnitude, its extraordinary modalities and preparations also made that “Big Bang” enlargement special. In effect, it was the product – and, in hindsight, a test – of the original *EU pre-accession strategy* which institutions and Member States devised to transform candidates into operational members.¹

After years of (culpable) neglect,² the once celebrated EU enlargement policy is back. It took Russia’s full-scale invasion of Ukraine,³ and the subsequent Member States’ recollection that enlarging the Union’s membership is “a geo-strategic investment in peace, security, stability and prosperity”⁴ (as the Community founders indeed foresaw), to resuscitate it.⁵ If all goes according to plan, the envisaged admissions⁶ could engender a Union of 37 members – six times the original size of the early Communities.

Considering the state of (some of) the applicants, of the Union (members), and of the international environment in which it is to proceed, a potential big bang enlargement 2.0 will undoubtedly be demanding. A recent Commission “Communication on pre-enlargement reforms and policy reviews” acknowledged that being “in the Union’s own strategic interest . . . does not mean that enlargement comes without *challenges*” (emphasis added) – a word that appears 25 times in the 22-page document,⁷ adding that “candidate

1. See e.g. Maresceau, “Pre-accession” in Cremona (Ed.), *The Enlargement of the European Union* (OUP, 2003), p. 9.

2. Following European Commission President Juncker’s announcement, available at <ec.europa.eu/commission/presscorner/detail/en/SPEECH_14_567>.

3. See Guest Editorial, “Accession through war – Ukraine’s road to the EU”, 59 *CML Rev.* (2022), 1289.

4. See e.g. Granada Declaration, European Council, 6 Oct. 2023; and European Council Conclusions, 15 Dec. 2023.

5. Recall the Preamble of the Treaty of Rome (now included in TFEU), and particularly the founders “calling upon the other peoples of Europe who share their ideal to join in their efforts”.

6. Albania, Bosnia and Herzegovina, Georgia, Kosovo, Moldova, Montenegro, North Macedonia, Serbia, Türkiye and Ukraine.

7. COM(2024)146 final, “Communication on pre-enlargement reforms and policy reviews”, p. 1.

countries and potential candidates . . . will need to carry out substantive political, institutional and policy reforms to be ready for membership, [while] the Union . . . will have to deal with, inter alia, increased heterogeneity, the need for new resources, further complexity of decision-making processes”.⁸

That the candidates should be prepared for accession, and that the functioning of the Union should be adapted, is obvious. It is indeed what Article 49 TEU, the procedure for the EU (Member States) to admit more members, requires. But perhaps more than on previous occasions, further enlargement will also necessitate steady political resolve and methodological inventiveness. One finds evidence of such a resolve in recent (grandiloquent) European Council, Commission and Parliament official statements, and indeed in the exceptional speed with which the applications of Ukraine, Moldova and Georgia were initially processed.⁹ But it will have to be sustained, if not strengthened over time, and across all levels of EU governance and society – as much as in the candidates themselves.

Whether this involves far-reaching EU institutional reforms ahead of admission of new members is debatable.¹⁰ Legally, the procedure of Article 49 TEU makes clear that the adjustments to the Treaties that enlargement entails should be introduced through the accession treaty negotiated and concluded between the Member States and the candidate(s). Politically, there seems to be little appetite in various EU States to embark on an extensive treaty revision. Indeed, convincing europhobes and vetocrats in power in various capitals of the expediency of further integration, by asking them to give up unanimity in the Council’s decision-making, including in the context of Article 7 TEU, would be a tall order. Opening such a discussion with such protagonists is more likely to enable (yet again) their hostage-taking,¹¹ stalling both reforms and accessions, ultimately further damaging the Union and in turn the stability of the whole continent.

Still, proceeding with enlargement as a geo-strategic investment would be self-defeating if it were badly prepared and arranged hurriedly. If EU declarations to that effect are to be trusted, reforming the way in which the EU presently operates (and how Member States themselves operate therein) should therefore be envisaged, but *à traité constant*. As will become clear, it is

8. Ibid.

9. Accession negotiations were formally opened with Moldova and Ukraine on 25 June 2024; see e.g. the EU Negotiating Framework for Ukraine <www.consilium.europa.eu/media/ksodan30/ad00009en24.pdf>.

10. See e.g. Report of the Franco-German working group of EU institutional reform, “Sailing on high seas: Reforming and enlarging the EU for the 21st century”, Paris-Berlin (18 Sept. 2023).

11. See Editorial Comments, “Compromising (on) the general conditionality mechanism and the rule of law”, 58 CML Rev. (2021), 267.

primarily by modifying the ways existing EU rules are applied, both internally and in relation to the candidates, that a big bang enlargement 2.0 ought to be prepared. Three such alterations could be contemplated.

Defending (and consolidating) the fundamentals of EU membership

At the risk of stating the obvious, the first important pre-enlargement modification will be for EU institutions and Member States, as co-custodians of the EU constitutional order, more resolutely to confront the deterioration of the rule of law and democracy within their midst.

Regression from the “fundamentals” of membership,¹² that is from the commitments which States make upon choosing to be (and remain) a member, impairs the EU functioning and sustainability. And it is precisely the (increasingly explicit) agenda of regressive member governments, viz. free riding on the privileges of membership (including through representation and associated financial benefits in e.g. the European Parliament) while dismantling the Union from the inside – and, in this perspective, actively pushing for admitting like-minded candidates. The phenomenon endures; it is even deepening in some Member States and may well metastasize following recent elections across the Union.

In underlining the need to “maintain undisputed respect for and continued application of the EU’s core values”,¹³ the above-mentioned Commission’s pre-enlargement communication does, correctly, recall the fundamental connection between value observance and future enlargement. But it does it half-heartedly. Enlargement requires not only to “maintain”, but also and primarily to *restore* and *bolster* such an “undisputed respect”, which in turn necessitates more resolute action within the EU.

The (mis)handling of the procedure of Article 7(1) TEU, activated against the Hungarian and Polish governments, respectively, exposes the Member States’ lingering powerlessness, if not unwillingness, to enforce the fundamentals of membership whose fulfilment they otherwise expect from the candidates. The speed with which the Commission decided to terminate that very procedure, which it had itself initiated against the recalcitrant Polish Government, after the latter’s replacement last autumn but *before* the

12. On the notion of “fundamentals” in the accession process, see e.g. COM(2020)57 final, “Enhancing the accession process – A credible EU perspective for the Western Balkans”; see also COM(2023)690, “2023 Communication on EU Enlargement Policy”, esp. pp. 8 et seq.

13. COM(2024)146 final, “Communication on pre-enlargement reforms and policy reviews”, p. 1.

established regression had effectively been reversed,¹⁴ also raises (again) questions as to whether the “Guardian of the Treaties” itself is determined to perform its constitutional mandate set out in Art. 17(1) TEU.¹⁵ Its earlier initiative to unblock substantial EU funds to Hungary on the eve of – and in the hope of easing – the European Council meeting of December 2023,¹⁶ allegedly on the basis of “sufficient guarantees to say that independence of the judiciary will be strengthened” in that Member State,¹⁷ does little to help dispel those doubts, and rather confirms the problematic politicization of the institution’s operation.¹⁸ The European Parliament has indeed contested the legality of that initiative before the Court of Justice, potentially offering an occasion to bolster the Commission’s accountability in the exercise of its functions and clarify its constitutional responsibilities.¹⁹ The Commission’s decision was all the more astounding since it was taken while the Hungarian Parliament was adopting a Kremlin-inspired legislation on the “Protection of National Sovereignty Act and the establishment of the Sovereignty Protection Office”,²⁰ and in relation to which the same Commission opened an infringement procedure just a few weeks later on the grounds that such legislation violates no less than:

“the democratic values of the Union; the principle of democracy and the electoral rights of EU citizens; several fundamental rights enshrined in the EU Charter of Fundamental Rights, such as the right to respect for private and family life, the right to protection of personal data, the freedom of expression and information, the freedom of association, the electoral rights of EU citizens, the right to an effective remedy and to a fair trial, the privilege against self-incrimination and the legal professional privilege;

14. See “Commission decides to close the Article 7(1) TEU procedure for Poland”, *Daily News* (29 May 2024), available at <ec.europa.eu/commission/presscorner/detail/en/mex_24_2986>.

15. Its quick decision to release EU funds to the new Polish Government is equally remarkable in view of the limited reforms being actually implemented; see <www.gov.pl/web/justice/european-commission-unblocks-funds-for-poland-from-the-national-recovery-plan>.

16. Available at <ec.europa.eu/commission/presscorner/detail/en/ip_23_6465>.

17. Declaration of Justice Commissioner Reynders, *ibid.*

18. See also in this respect: “Von der Leyen buries report slamming Italy as she seeks Meloni’s vote”, available at <www.politico.eu/article/ursula-von-der-leyen-italy-rome-commission-president-giorgia-meloni-elections/>.

19. Case C-225/24, *Parliament v. Commission*, action brought on 25 March 2024. Out of consistency, the Parliament could have also contested the Commission’s decision to release EU funds to the new Polish Government, before the required reforms were effectively implemented and the rule of law restored.

20. Motion for a resolution on ongoing hearings under Art. 7(1) TEU regarding Hungary to strengthen the rule of law and its budgetary implications, available at <www.europarl.europa.eu/doceo/document/B-9-2024-0223_EN.html>.

the requirements of EU law relating to data protection and several rules applicable to the internal market”²¹

The ambivalence of EU institutions and Member States in upholding the fundamentals of membership hampers the Union’s enlargement policy. Instead of leading by example and incentivizing candidates’ pre-accession transformation, the EU’s flip-flopping rather fuels disillusion, if not cynicism, about its value-discourse and foundations, which malevolent forces can then easily amplify and instrumentalize further to undermine the Union’s image across candidates’ societies, and increasingly within its Member States.

The lack of resolute protection of the Union’s integrity indeed affects European citizens’ trust in the authority of its institutions, and in the validity of the social contract EU membership encapsulates,²² let alone their backing for further enlargement. Recall that this support is essential since the ratification of future accession treaties will have to be carried out in principle by referendum in at least one Member State. While popular enthusiasm may have increased in favour of Ukraine and Moldova in the wake of Russia’s aggression, it remains highly volatile, and risks becoming even more fragile as policy and financial consequences of further accessions are debated, and politicized. As already palpable, some of those implications are indeed bound to be unpopular. Recall how Polish farmers have blocked imports from Ukraine, and how subsequently the farming interest was pitted against that candidate – with the active support of Orbán’s government.²³

In sum, internal regression from the commitments of membership, and the lingering failure to reverse it, are major impediments to the Union’s sustainability and *a fortiori* to its ability to welcome new members. To be credible, reinvigorated enlargement talks must therefore go hand in hand with, and should indeed be a major incentive for a strengthened commitment to preserve the integrity of the EU’s foundations and membership. The required change of approach is essential to demonstrate, internally, that the Union can operate and effectively cope with the consequences of another big bang enlargement, while showing to the candidate countries that it is preparing their admission, notably by buttressing the polity they aspire to join. As respect for, and promotion of the fundamentals of membership is both a prerequisite for applicants to accede, a condition for Member States to enjoy the benefits of

21. European Commission, “February infringement package: Key decisions”, 7 Feb. 2024, available at <ec.europa.eu/commission/presscorner/detail/en/inf_24_301>.

22. See <euobserver.com/opinion/158136?utm_source=euobs&utm_medium=email>.

23. See <www.desmog.com/2024/05/02/orban-backed-think-tank-courts-farmers-linked-to-far-right-ahead-of-eu-poll/>.

membership,²⁴ and a pre-condition for the Union's ability to operate, restoring the "undisputed respect for and continued application of the EU's core values" internally must also be a prerequisite for it to admit new members.

Confronting regression from, and securing Member States' genuine (re)observance of the fundamentals of EU membership is therefore the mother of all internal "reforms" to prepare the Union for further enlargement. It is indeed the *condition préalable* for deeper revision to improve the functioning of the EU – not the other way around.²⁵ More qualified majority voting in EU decision-making procedures, and/or fewer commissioners will do little to improve the Union's operation, and capacity to integrate new members – a more apposite concern than that of the EUs "capacity to absorb" them²⁶ – if existing Member States keep on flouting EU Treaties and decisions, including those of the Court of Justice.²⁷

The good news is that the founding Treaties do not need to be amended for the Union to address its members' recalcitrance. As the Court of Justice confirmed,²⁸ an elaborate toolbox is available which, as alluded to above, remains to be resolutely used. This, incidentally, means mobilizing it also to secure the full restoration of constitutional democracy in Member States undertaking to reverse established regression, as presently in Poland. Rather than giving up all leverage on the new government, as it has unexpectedly done, the Commission (and other institutions) must maintain the pressure on the new authorities to ascertain that they effectively reinstate "undisputed respect for and continued application of the EU's core values". This is the logic of the infringement procedure of Articles 258–260 TFEU. Indeed as the Court recently – and aptly – recalled: "... mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under EU law".²⁹ This entails that the EU in general, and the Commission in particular, must also help the new authorities to confront and

24. See e.g. Case C-896/19, *Repubblika*, EU:C:2021:311.

25. Cf. <www.elysee.fr/en/emmanuel-macron/2024/04/24/europe-speech>; Report cited *supra* note 10.

26. European Council, Conclusions of the Presidency, 21–22 June 1993; pt. 7.A.iii); European Commission, EU's capacity to integrate new members; COM(2006)649 final, Annex I; EU Negotiating Framework for Ukraine, cited *supra* note 9, pt. 3.

27. See in this sense Case C-123/22, *Commission v. Hungary*, EU:C:2024:493.

28. Case C-156/21, *Hungary v. EP and Council (Conditionality)*, EU:C:2022:97; Case C-157/21, *Poland v. Council and EP (Conditionality)*, EU:C:2022:98.

29. Case C-123/22, *Commission v. Hungary*, confirming the well-established case law as per e.g. Case 168/85, *Commission v. Italy*, EU:C:1986:381 and Case 173/83, *Commission v. France*, EU:C:1985:56.

effectively overcome the remnants of the past regressive regime – viz. Poland’s current President of the Republic and “Constitutional Tribunal” which keep obstructing the new government’s restorative reforms, thereby perpetuating if not increasing the risk of a serious breach of the EU core values, contrary to what has been misguidedly alleged.³⁰ Indeed, and to quote the Court again: “[a] Member State cannot plead practical, administrative or financial difficulties or difficulties of a domestic nature to justify failure to observe obligations arising under EU law”.³¹

Consistency and sincere cooperation in implementing EU strategic decisions

The second reform to prepare the EU for admitting new members concerns the enlargement process itself. If the latter is as geo-strategically important as the European Council, Parliament and Commission have proclaimed, then both Member States and institutions must correspondingly engage, notably by sharpening the pre-accession strategy, and their involvement therein.

First, Member States and institutions should consistently apply the method they have themselves crafted and which structures the entire accession process, namely “fair and rigorous conditionality”.³² It is a truism: it entails that they do acknowledge and commensurately reward the candidates’ fulfilment of the accession conditions, wherever and whenever progress effectively occurs – which unfortunately they do not.³³ Conversely, a candidate’s lack of preparation, or indeed regression as regards the fulfilment of membership conditions, should be met with a correspondingly negative EU (Member States) response, including by way of slowing down or even suspending the accession process, in line with the terms of EU negotiating

30. See “Commission intends to close Article 7(1) TEU procedure for Poland”, *Daily News* (6 May 2024), available at <ec.europa.eu/commission/presscorner/detail/en/ip_24_2461>; “Commission decides to close the Article 7(1) TEU procedure for Poland”, *Daily News* (29 May 2024), available at <ec.europa.eu/commission/presscorner/detail/en/mex_24_2986>. The Commission’s considerations seem all the more premature in view of the action it itself launched against Poland, and which is still pending before the Court of Justice, following the declaration by that problematic “Constitutional Tribunal” that several provisions of the TEU as interpreted by the Court of Justice are incompatible with the Polish Constitution. See “Case C-448/23: Action brought on 17 July 2023 – European Commission v Republic of Poland”, O.J. 2023, C 304/17.

31. Case C-123/22, *Commission v. Hungary*; also confirming the well-established case law. See e.g. Case 93/79, *Commission v. Italy*, EU:C:1979:296.

32. COM(2024)146 final, “Communication on pre-enlargement reforms and policy reviews”, p. 2.

33. Consider in this respect how Member States have stalled North Macedonia’s accession process.

frameworks.³⁴ In other words, Member States should not reward prevaricating candidates – which regrettably they do.³⁵

As it has been recalled, “Europe’s transformative power is only as great as the credibility of the accession process to offer a clear prospect for membership”.³⁶ It is also only as great as the reliability of its accession methodology. Failing a consistent application of conditionality, Member States and institutions alike (again) fuel distrust in the EU enlargement policy, both among the candidates, but also across the Union.

Second, and in connection to the previous point, Member States’ sincere cooperation is essential to the preparation and success of any EU enlargement. Since the episode of 2004, they have significantly tightened their grip on the overall accession process. Instances of unanimous decision-making have thus proliferated, notably throughout the negotiations, whereby the opening and closing of, and indeed progress in each of the 35 accession negotiation chapters are subject to their unanimous approval. This development has not only considerably slowed down the accession process, but it has also led to its increased politicization. Some Member States have thus (ab)used the increased veto opportunities to obtain concessions from candidates, or indeed from other Member States, on matters unrelated to the membership requirements or actual preparation of candidates – or to the EU itself.³⁷

While bolstering the involvement of Member States could propel more quality control over the candidates’ accession preparation, and more pressure on them to deliver³⁸ – after all, Member States are, and must act as, the custodians of membership – it has had the reverse effect. Enabling vetocracy, itself boosted by the bigger number of Member States involved, this evolution has instead generated numerous unilateral blockages, thereby hampering the implementation of the strategic European Council enlargement decisions. It

34. Point 4 of the negotiating framework for the accession negotiations with Montenegro (2012) foresees that: “In the case of a serious and persistent breach by Montenegro of the values on which the Union is founded, the Commission will, on its own initiative or on the request of one third of the Member States, recommend the suspension of negotiations and propose the conditions for eventual resumption. The Council will decide by qualified majority on such a recommendation, after having heard Montenegro, whether to suspend the negotiations and on the conditions for their resumption”; see in the same vein pt. 17 of the EU Negotiating Framework for Ukraine, cited *supra* note 9.

35. Consider in this respect how Serbia’s accession process has not been adjusted.

36. Anghel and Jones, “Three lessons from the 2004 “Big Bang” enlargement”, 12 *Politics and Governance* (2024), 1.

37. See e.g. Fouéré, “EU enlargement and the resolution of bilateral disputes in the Western Balkans”, available at <www.ceps.eu/ceps-publications/eu-enlargement-and-the-resolution-of-bilateral-disputes-in-the-western-balkans/>; Hillion, “EU enlargement” in Craig and de Búrca (Eds.), *The Evolution of EU Law* (OUP, 2011), pp. 187–216.

38. As mentioned before, holding up the accession process should be the legitimate Member States’ reaction if the candidate fails to make progress in meeting the accession conditions.

has also generated more candidates' distrust, if not disillusion over the veracity of the EU and Member States' commitment, ultimately discouraging their leadership to pay the (sometimes high) political costs for introducing difficult (and controversial) reforms. Recall that one applicant (viz. North Macedonia) was asked to change its official name upon the request from one Member State (Greece), possibly to start accession negotiations. The latter were then blocked again by another Member State (Bulgaria), *inter alia* because of a dispute on the country's very language and identity.³⁹

Some member governments' unchallenged capture of the negotiation process for domestic political gains has unsurprisingly damaged the effective implementation of the enlargement policy as a whole. The phenomenon exposes a problematic discrepancy between the Member States' individual conduct on the one hand, and the decisions they commonly take in the European Council on the other and more generally a hazardous lack of cooperation that falls foul of their membership commitments.⁴⁰

If enlargement is the EU strategic investment in peace and stability it is proclaimed to be, it is debatable whether its preparation should be made subject to dozens of unanimous decisions by the Member States, and an equal number of veto opportunities. This inflated number is all the less justifiable considering the provisions of Article 49 TEU which envisage only *two* instances where Member States can hold up the process. Apart from the ratification of the accession treaty at the very end of the process, the recognition of an aspiring State's eligibility for membership and the start of accession negotiations requires their agreement. As specified in Article 49(1) TEU, it is the Council that decides by unanimity whether to *initiate* the admission procedure in response to a formal application. At this initial point, Member States – qua members of the Council – admittedly enjoy a wide political discretion.

That said, this discretion arguably diminishes once that fundamental decision is taken (Art. 49(1) TEU), and as the procedure proceeds to the *implementation* phase (Art. 49(2) TEU). Member States' obligation of sincere cooperation (under Art. 4(3) TEU) then proportionally increases. They must facilitate the achievement of the process which they have initiated as a Union, and refrain from measures that would impede it – if of course the candidate(s) otherwise meet(s) the accession conditions. In other words, the implementation of the (European) Council decision to start the enlargement

39. See <www.iemed.org/publication/north-macedonia-after-greece-bulgaria-appears-north-macedonias-obstacle-course-to-enter-the-eu/> and <www.reuters.com/world/europe/n-macedonia-votes-resolve-dispute-with-bulgaria-clears-way-eu-talks-2022-07-16/>.

40. Consider, in this regard, the Member States' obligations of sincere cooperation which the Court robustly recalled in Case C-620/16, *Commission v. Germany (COTIF II)*, EU:C:2019:256, esp. paras. 92 et seq.

process, by engaging in accession negotiations, therefore ought to limit the room for vetocracy.

A Member State's negative stance towards opening or closing one or more of the accession chapters, should therefore not have the effect of stalling the negotiation as such, and thus of hampering the application of the (European) Council decision, unless it is adequately justified. Such justification would require the compelling demonstration, by the Member State concerned to its peers,⁴¹ of a legitimate interest being affected by the ongoing negotiations, as well as the demonstration that holding them up is the proportionate means to protect it (i.e. that there is no other, less intrusive, method available for that purpose). The understanding should indeed be that unilateral suspension of the accession process should always be the last resort considering the latter's strategic importance for the Union as a whole.

Such an approach would help address and hopefully reduce the nationalization of the EU enlargement process. But it would also prevent the Member States' actually circumventing the procedure they have themselves included in the negotiating framework precisely for the purpose of suspending the negotiations in case the candidate deviates from the fundamentals of membership, or if its progress stagnates, and which requires a qualified majority decision in the Council.⁴²

The suggestion has indeed been (unsuccessfully) made to replace unanimity by qualified majority at various stages of the accession negotiations to reduce vetocracy.⁴³ Such a shift would only necessitate a change in the current *practice* of accession negotiations, not a modification of the law of Article 49(2) TEU itself which says very little about their organization. While it would not directly address the inflated number of Member States' decisions in the negotiations, such a change of modalities would still help prevent them from hijacking the process, at least until the ratification stage.

In fact, since the European Council is able to open accession negotiations by *consensus* (i.e. with one member not taking part in the decision, as occurred in December 2023), it is odd that the subsequent implementation of that decision should be made subject to dozens and dozens of *unanimous* Member States' decisions to implement it. The institutional practice, and the

41. One could consider involving the Commission in this evaluation too, considering the central role it actually plays in the accession negotiations, and in view of its continuous monitoring of the candidate countries.

42. See e.g. pt. 17 of the Negotiating Framework for Ukraine, cited *supra* note 9.

43. See e.g. Zweers, Ioannides, Nechev and Dimitrov, "Streamlining decision making in enlargement: Qualified majority voting as a way forward", Clingendael/DGAP/Eliamep (2024), available at <www.clingendael.org/publication/unblocking-decision-making-eu-enlargement>.

established rule in EU law is that a European Council decision is subsequently implemented by measures adopted by qualified majority in the Council (see e.g. Art. 31(2) TEU). Arguably, once the initial political decision is taken following demanding procedural requirements, then its implementation ought to unfold based on less constraining arrangements so as effectively to fulfil the agreed objectives, rather than the other way around – especially if it is in the strategic interest of the Union.⁴⁴

Anchoring candidates in EU governance

Linking up with the previous point, the third enlargement-related reform is for Member States and institutions progressively to integrate candidates into the Union's governance prior to their accession. In line with its original purpose, the enlargement policy ought to assist aspiring members to *become* Member States, thus able to operate as such within the Union. This requires far more than their scrupulous absorption of the EU acquis. It also entails their acquiring institutional familiarity which an incremental inclusion could provide, foreshadowing the full institutional integration resulting from full admission. The candidates' acclimatization with the EU governance,⁴⁵ which is arguably in the interest of the Union too, could take at least two complementary forms.

First, EU institutions should gradually include candidates' representatives in their structures by allowing them to take part in the Union policy discussions, in return – and as a tangible reward – for their effective progress in meeting membership obligations. Rather than waiting for the signature of the accession treaty to grant them observer status as traditionally done – though not legally required – the inclusion of candidates' representatives in the EU governance would take place earlier, on a policy basis.⁴⁶ The arrangements established by the (30-year-old) EEA agreement, and the Schengen association offer ample inspiration to craft appropriate mechanisms to allow such an institutional inclusion,⁴⁷ while respecting the sacrosanct principle of

44. In this regard, consider the way in which Member States and institutions interpreted and applied Art. 50 TEU to ensure the UK's "orderly withdrawal" from the EU. See also Dougan, *The UK's Withdrawal from the EU – A Legal Analysis* (OUP, 2021).

45. The need to familiarize the candidates with the EU operation was already recognized at the Luxembourg meeting of the European Council on 12–13 Dec. 1997; see Presidency Conclusions, pt. 19.

46. Consider in this regard the proposal of the Commission in COM(2020)57 final, "Enhancing the accession process – A credible EU perspective for the Western Balkans", cited *supra* note 12 p. 3, and that of Mihajlović, Blockmans, Subotić and Emerson, "Template 2.0 for staged accession to the EU", available at <cdn.ceps.eu/wp-content/uploads/2023/08/Template-2.0-for-Staged-Accession-to-the-EU.pdf>.

47. Precedents which, surprisingly, the Council Legal Service hardly explored in its note to COREPER in response to a suggestion from the Commission that the Western Balkan

autonomy of EU decision-making. Hence, upon the closure of a particular chapter of the accession negotiations, that would certify the candidates' fulfilment of the related conditions, representatives of the State concerned could then participate in policy discussions relating to that chapter (e.g. transport or energy). This could be done, for example, through their inclusion in the relevant expert/working groups in the Commission, the Council, and/or Parliamentary committees, though short of any decision-making rights – as exclusive membership privilege and thus building on their existing participation in, for instance, the Transport and Energy communities.

Such a progressive inclusion in the EU governance, as inaugurated by the European Economic and Social Committee,⁴⁸ and various agencies, would instil new vigour into the conditionality method which, as discussed above, dearly needs it to recover some efficacy. It would in effect offer tangible, intermediate rewards to candidate States before their full accession – which may take time. It would in turn stimulate pre-accession reforms that are deeper and more in line with the requirements of membership than the mere EU *acquis* absorption. Preparing for policy discussions and contributions at Europe's level necessitates expertise and mobilization, and in turn commensurate research and education programmes, at state level.

Anchoring the candidates in the EU governance would also increase their sense of ownership in the future of the EU, in policy and strategic terms, a possible contribution to preventing the reversibility of pre-accession reforms. It would indeed lock them in, and allow EU institutions and Member States to keep them, and their drive to carry further reforms on, more closely in check – with the possibility to suspend/terminate that participation in case of regression, using the decision-making mechanism established by the negotiating framework.⁴⁹ It could thus help entrench candidates' pre-membership preparations and ascertain their readiness loyally to take part as fully operational Member States. Their inclusion in the Commission's annual rule of law reporting, and in the regular Council rule of law dialogue is a step in that direction.⁵⁰ It will incidentally bolster the consistency between accession conditions and membership obligations, thereby helping to

countries could participate in Council meetings or Council works on matters of substantial importance to them. See <data.consilium.europa.eu/doc/document/ST-6566-2020-INIT/en/pdf>.

48. EESC, "Enlargement Candidate Members' Initiative", available at <www.eesc.europa.eu/en/initiatives/enlargement-candidate-members-initiative>.

49. See e.g. pt. 4 of the negotiating framework for Montenegro, and pt. 17 of the Negotiating Framework for Ukraine, both cited *supra* note 34.

50. Further in this regard, "Towards an enlarged Union: Upholding the rule of law", International IDEA, Policy Paper No. 30, April 2024.

overcome the unhelpful perception of the EU applying double standards, alluded to above.

Second, and alongside their incremental policy-based institutional inclusion, candidates should be associated with the deliberations on EU (constitutional) reforms, the way applicants from central and eastern Europe were involved, prior to their accession, in the work of the Convention on the Future of Europe which drafted the Constitutional Treaty. Indeed, the preparations for enlargement and reforms should not take place “in parallel” as the European Council has alluded to,⁵¹ as if the two processes were entirely disconnected. On the contrary, they are intimately linked – as made clear by Article 49(2) TEU. While the European Political Community does provide a forum for candidates and Member States to meet and talk about important matters, that gathering, whose *raison d’être* remains to be elucidated, and which also involves other – and very diverse – European countries, is obviously not the right setting to contemplate the future of the enlarged EU constitutional order.

In sum

If enlargement is to be a genuine “geo-strategic investment in peace, security, stability and prosperity”,⁵² the EU must engage and act accordingly. However, it cannot do this if its institutions and Member States are incapable and unwilling to neutralize free riders and vetocrats within their midst. Enlarging such a captured Union would further cripple its functioning, ultimately threatening its existence and in turn “peace, security, stability and prosperity” on the continent – a geo-strategic failure for Europe and a geo-political victory for its foes.

51. European Council, Conclusions, 22 March 2024, pt. 29.

52. Granada Declaration cited *supra* note 4.

