

EU ENLARGEMENT AS A GEOSTRATEGIC INVESTMENT: LEGAL AND POLITICAL CHALLENGES

Prof. Peter Van Elsuwege

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I. INTRODUCTION

EU enlargement is a driving force for long-term stability, peace and prosperity across the continent. EU membership is a **geostrategic investment** in a strong, stable and united Europe based on **common values**. It is a powerful tool to promote democracy, the rule of law and respect for fundamental rights. A credible, merit-based prospect of EU membership is the **key driver of transformation** and thus enhances our collective security and socio-economic prosperity. It is essential for fostering reconciliation and stability on the European continent. The geopolitical significance of EU enlargement was further underlined in 2022, when Ukraine, the Republic of Moldova¹ and Georgia applied to become EU members in the wake of Russia's unprovoked and unjustified war of aggression against Ukraine, with the European Council² recognising the European perspective of Ukraine, Moldova and Georgia and granting Ukraine and Moldova candidate status. The granting of candidate status to Bosnia and Herzegovina in December 2022 was an important step in maintaining the momentum of the enlargement process.

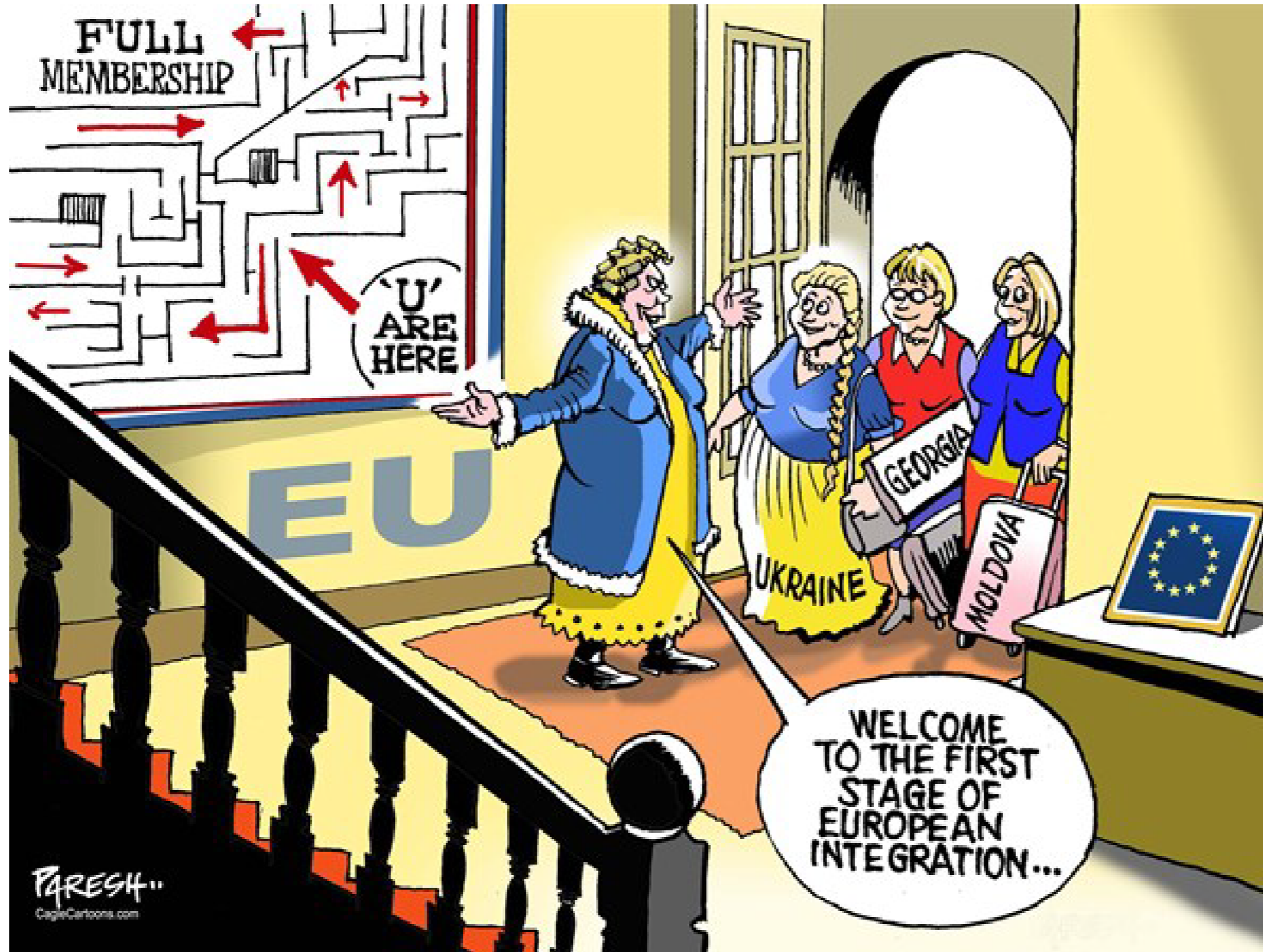
Today, the Western Balkans, Türkiye³, Ukraine, Moldova and Georgia have a **historic window of opportunity** to strongly bind their future to the European Union. Accession is and will remain a merit-based process fully dependent on the objective progress achieved by each enlargement partner. Therefore, the enlargement countries will have to act with determination to implement the necessary reforms and make tangible and irreversible progress, starting with the **fundamentals of the EU accession process**. The rule of law, in particular the independence and functioning of the judiciary and the fight against corruption, fundamental rights, the economy, the functioning of democratic institutions and public administration reform continue to be the cornerstones of the enlargement policy.

EU membership is a **strategic choice**. Partners must embrace and promote EU values firmly and unequivocally. Alignment with the EU's **common foreign and security policy** is a more significant signal than ever of shared values and strategic orientation in the new geopolitical context.

OUTLINE

- Article 49 TEU and the conditions for membership
- The revised enlargement methodology
- Legal pathways to the gradual integration of candidate countries

EU ENLARGEMENT: RULES AND PROCEDURES



ARTICLE 49 TEU

1. 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.**

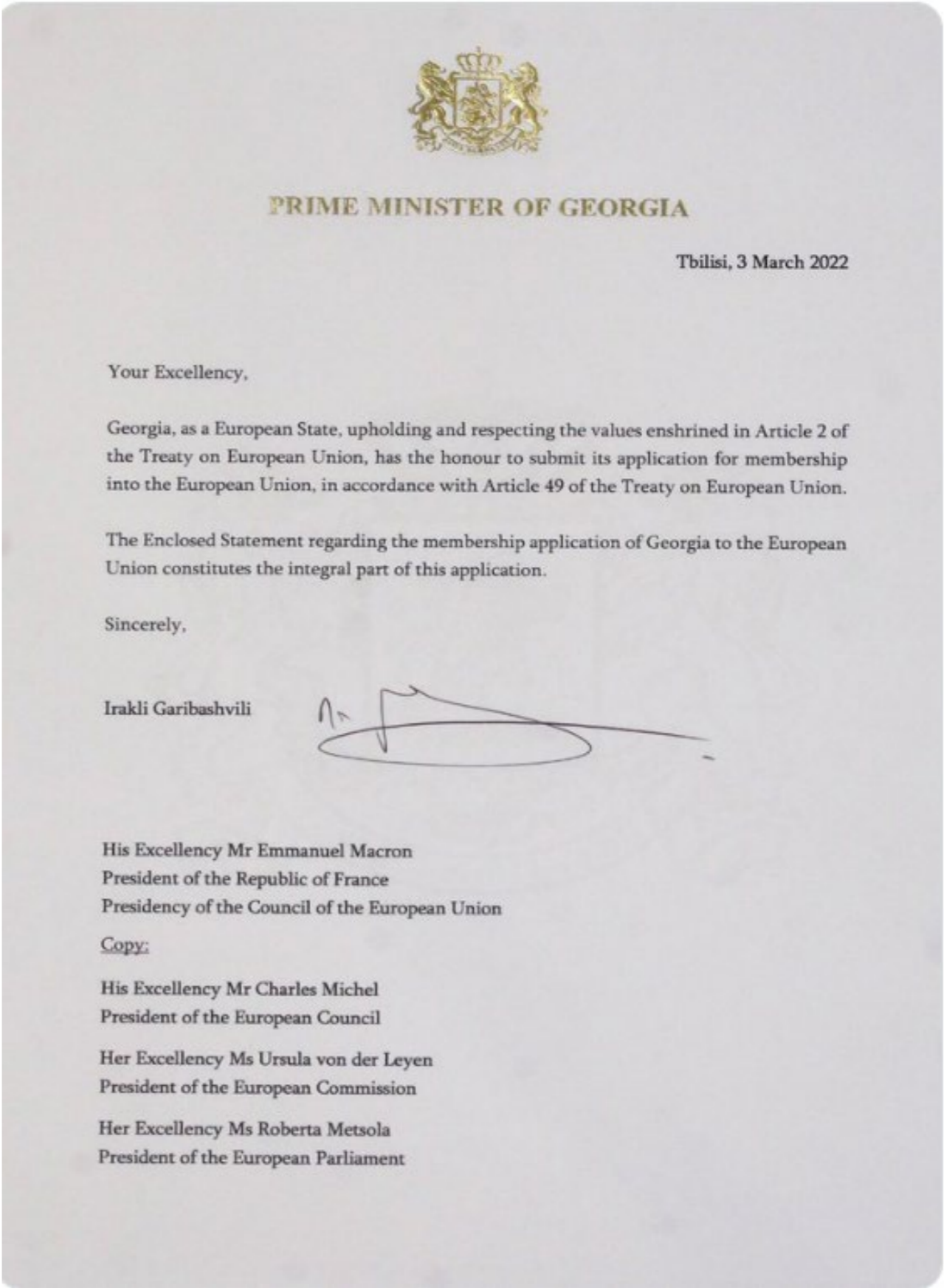
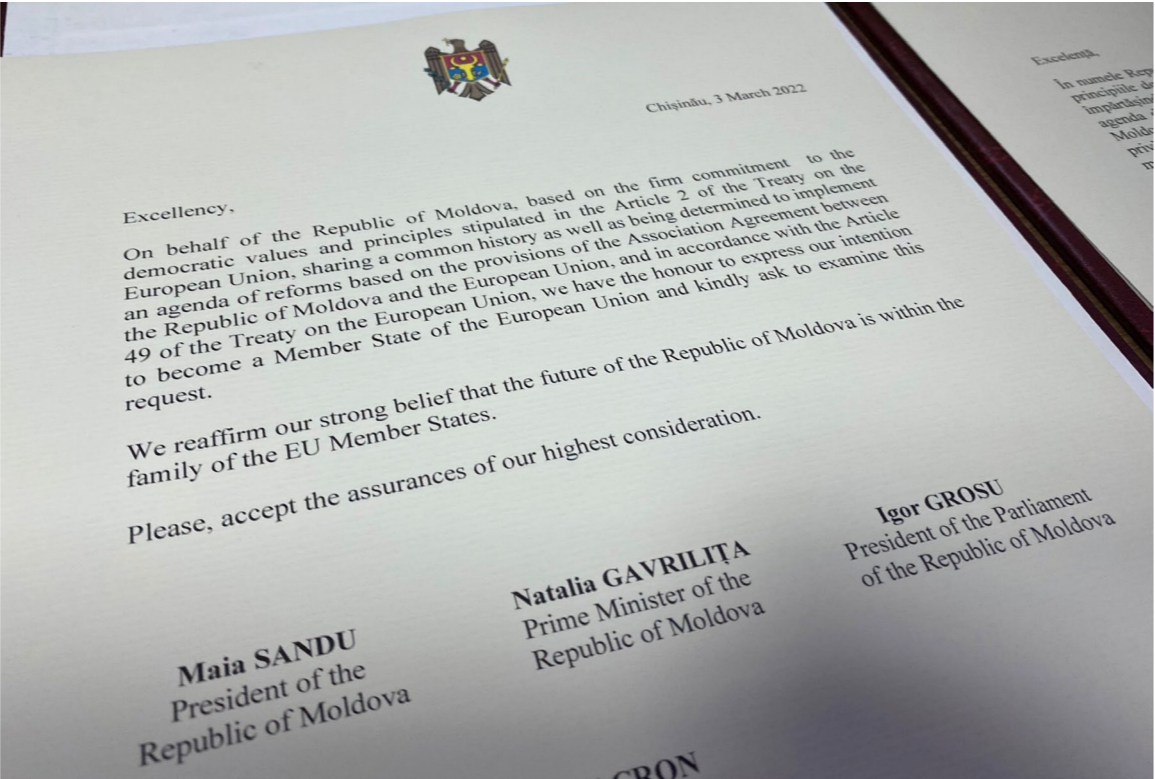
2. The **conditions of admission** and the adjustments to the Treaties on which the Union is founded, which such admission entails, **shall be the subject of an agreement between the Member States and the applicant State.** This agreement shall be submitted for ratification by all the contracting States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

Ukrainian president signs formal request to join the European Union

Reuters



Ukrainian President Volodymyr Zelenskiy poses with Prime Minister Denys Shmygal (R) and Parliament Speaker Ruslan Stefanchuk after signing an official request for Ukraine to join the European Union, in Kyiv, Ukraine, February 28, 2022. Ukrainian Presidential Press Service/Handout via REUTERS



Signature of the Accession Treaty of Croatia
Signature du Traité d'adhésion de la Croatie
Brussels 09.12.2011 Bruxelles



Table 1 – The main steps in the accession process

STEP 1	Country submits membership application to Council (EU Member States).
STEP 2	Commission submits opinion on the application.
STEP 3	EU Member States decide unanimously to grant the country candidate status.
STEP 4	Once the conditions have been met, the accession negotiations are opened, with the agreement of all Member States.
STEP 5	Commission proposes a draft negotiating framework as a basis for the talks. Member States must agree on this negotiating framework before accession negotiations can formally begin.
STEP 6	During the negotiations, divided into clusters and chapters, the country prepares to implement EU laws and standards. In each case, all EU Member States must agree that all requirements have been met.
STEP 7	Once negotiations on all areas are finalised, the Commission gives its opinion on the readiness of the country to become a Member State.
STEP 8	Based on this opinion, EU Member States decide unanimously to close the negotiation process. The European Parliament must also give its consent.
STEP 9	All EU Member States and the candidate country sign and ratify an accession treaty, which enables the country to become an EU Member State.

Data source: [European Commission](#), 2022.

CONDITIONALITY REQUIREMENTS

- **Article 49 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 **conditions of eligibility agreed upon by the European Council** shall be taken into account.’”
- No legal right to join the EU for applicant countries

CASE 93/78 MATTHEUS VS. DOEGO

- These provisions lay down a precise procedure encompassed within well-defined limits for the admission of new member states, during which **the conditions of accession are to be drawn up by the authorities indicated in the article itself**
 - Thus **the legal conditions for such accession remain to be defined in the context of that procedure without its being possible to determine the content judicially in advance**
- EU enlargement as a Member State driven process !**

A 'EUROPEAN STATE'

- European Commission report (1992)
 - Combination of geographical, historical and cultural elements
 - “[t]he shared experience of proximity, ideas, values, and historical interaction cannot be condensed into a simple formula, and is subject to review by each succeeding generation”.
- The application of Morocco
- The application of Turkey
- The application of Cyprus
- What about [Canada](#)?

RESPECT FOR AND PROMOTION OF EU VALUES

- “As is apparent from Article 49 TEU, which provides the possibility for any European State to apply to become a member of the European Union and to which Article 50 TEU, on the right of withdrawal, is the counterpart, the European Union is composed of States which have freely and voluntarily committed themselves to those values, and **EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values.**” (Case C-621/18, *Wightman* e.a., para. 63)

CASES C-156/21 AND C-157/21 – HUNGARY/EP AND COUNCIL - POLAND/EP AND COUNCIL, § 124-127

- “That premiss is based on the **specific and essential characteristics of EU law**, which stem from **the very nature of EU law** and the **autonomy** it enjoys in relation to the laws of the Member States and to international law.”
- That premiss implies and justifies the existence of **mutual trust between the Member States** that those values will be recognised and, therefore, that the EU law that implements them will be respected.”
- Compliance with the values contained in Article 2 TEU is a **condition for the enjoyment of all the rights deriving from the application of the Treaties** to that Member State [...]
- “Compliance with those values **cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession.**”

 Those values “**define the very identity of the European Union as a common legal order.**”

GHENT
UNIVERSITY

CASE C-896/19, REPUBBLIKA

- 61 Article 49, which provides for the possibility for any European State to apply to become a member of the European Union, states that the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them
- 62 In particular, it follows from Article 2 TEU that the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in that article (see, to that effect, Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014, EU:C:2014:2454, paragraph 168, and judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 30).

- 63 It follows that compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU (see, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 108).
- 64 The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary (see, by analogy, judgment of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)*, C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraph 40).

‘COPENHAGEN’ PRE-ACCESSION CRITERIA

- Stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- A functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union;
- The ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union

THE 'FOURTH' COPENHAGEN CRITERION

“The Union’s capacity to absorb new members while maintaining the momentum of European integration is also an important consideration in the general interest of both the Union and the candidate states” (Copenhagen European Council, 1993)

“Integration capacity is about whether the EU can take in new members at a given moment or in a given period, without jeopardising the political and policy objectives established by the Treaties” (European Commission, 2006)

EUROPEAN COMMISSION, REPORT 2006-2007

3. The EU's capacity to integrate new members is determined by two factors:
 - maintaining the momentum to reinforce and deepen European integration by ensuring the EU's capacity to function. This is in the interest of both present and future EU citizens;
 - ensuring that candidate countries are ready to take on the obligations of membership when they join by fulfilling the rigorous conditions set. This is assessed by the Commission on the basis of strict conditionality.
4. The EU's integration capacity will be reviewed at all key stages of the accession process. In its opinions on applications for membership and in the course of accession negotiations, the Commission will provide impact assessments of accession on key policy areas. This will help Member States to define EU common positions for the negotiations of the chapters concerned, including, where relevant, transition periods or other arrangements.

THE CONDITION OF 'GOOD NEIGHBOURLINESS'

- Essen European Council (1994) + Zagreb summit (2000)
- “A *policy of good neighbourliness* based on the negotiated settlement of disputes, respect for the rights of minorities, respect for international obligations, including with regard to the ICTY, a lasting resolution of the problem of refugees and displaced persons and respect for States' international borders”
- Obligation of *result* or obligation of *conduct* ?
- See: P. Van Elsuwege, “[Good neighbourliness as a condition for accession to the European Union](#): Searching the balance between law and politics”, in: D. Kochenov and E. Basheska (ed.), *Good Neighbourly Relations in the European legal context* (Brill Nijhoff, 2015).

AD HOC CONDITIONS

- Closure of a nuclear power plant
 - Ignalina (Lithuania)
- Extradition of suspected war criminals
 - Ante Gotovina (Croatia)
- etc.

THE REVISED ENLARGEMENT METHODOLOGY

EUROPEAN COMMISSION, COM (2020) 57 FINAL

- A ‘revised methodology’ to make the enlargement process “more credible, predictable, dynamic and subject to stronger political steering”
- Focus on ‘fundamentals’ (rule of law, public administration, economic reform)
- Clustering of chapters into 6 thematic areas; to identify opportunities for an “*early alignment and integration into EU policies*”
- Stronger involvement of Member States
- Positive and negative conditionality

Clusters of negotiating chapters

Following the introduction of the **revised methodology for the accession negotiations** in **February 2020**, negotiating chapters are now divided in **six thematic clusters**:

- 1

Fundamentals
- 2

Internal market
- 3

Competitiveness & inclusive growth
- 4

Green agenda & sustainable connectivity
- 5

Resources, agriculture & cohesion
- 6

External relations



Negotiations on each cluster **open as a whole** – after the country fulfils the opening benchmarks. Each chapter will be dealt with individually with respect to its provisional closure. Negotiations on the **fundamentals open first and close last**; progress under the fundamentals' cluster will determine the overall pace of negotiations. If there is sufficient progress on reform priorities, this should lead to closer integration with the European Union, through accelerated integration and increased investments and funding.

LEGAL PATHWAYS TO GRADUAL INTEGRATION

I. ASSOCIATION AGREEMENTS

Article 217 TFEU

“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.”

ECJ definition of ‘association’ (case 12/89 *Demirel*):

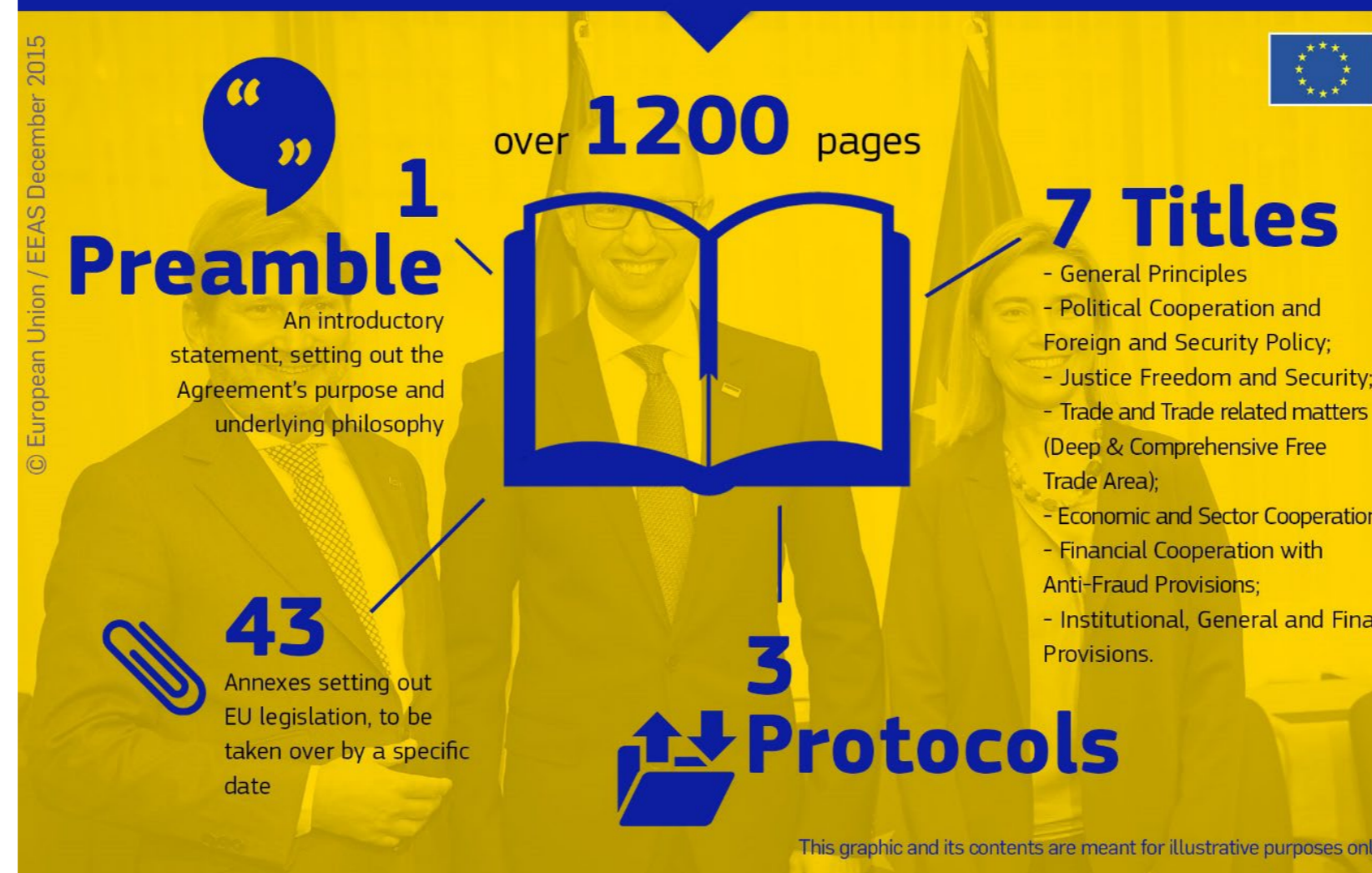
‘the agreement ... is an association agreement creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system’.

EU-Ukraine Association Agreement

The **EU – Ukraine Association Agreement** reflects the importance of **EU-Ukraine relations**.
The comprehensive document, ambitious and pioneering, will support core reforms in Ukraine.

The Association Council monitors the Association Agreement periodically, this happens at least once per year.

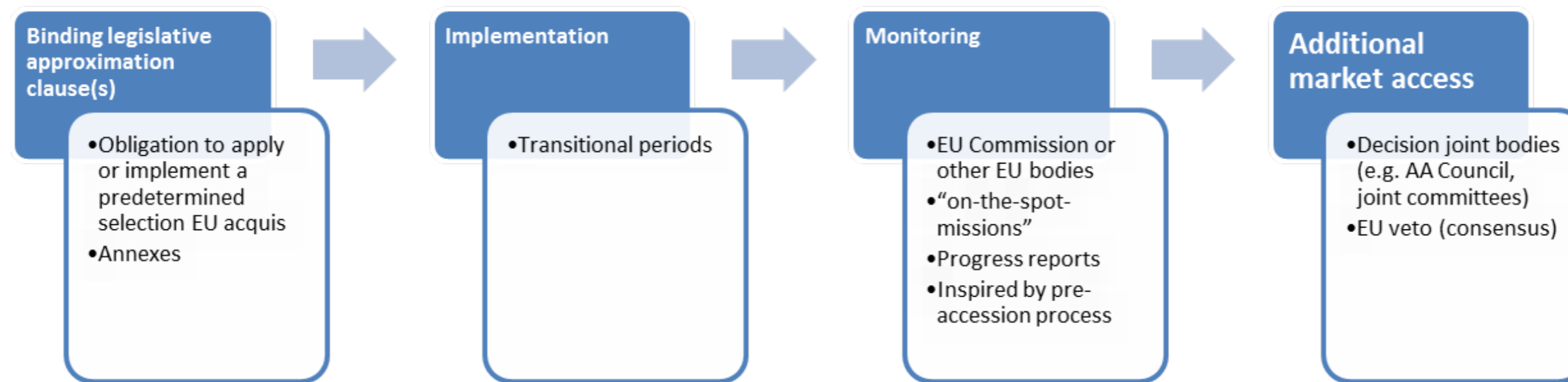
The Association Agreement comprises



See: G. Van der Loo, P. Van Elsuwege, R. Petrov, *The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument*, EUI Law Working Paper 2014/09.

MARKET ACCESS CONDITIONALITY

- In several DCFTA chapters, additional market access is granted after approximation of domestic legislation to a predetermined selection of EU *acquis*
- Differentiation between various DCFTA chapters



See: G. Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Association. A New Legal Instrument for EU Integration without Membership*, Brill, 2016.

NEW TOOLS OF GRADUAL INTEGRATION

- New Growth Plan for the Western Balkans
- New financial instrument: ‘Facilities’
- Reform Agendas
- Aim: integration in policy areas with concrete benefits for citizens (e.g. digital agenda, single payments area, etc.)

Call for applications:

Up to **500 municipalities**
from across the
Western Balkans
to benefit from

free public



#GrowthPlan

Implemented by

giz Deutsche Gesellschaft
für Internationale
Zusammenarbeit (giz) GmbH

European Commission welcomes



Moldova



North Macedonia

to the
Single
Euro
Payments
Area



II. ACCESSION AGREEMENT

Legal basis : Art. 49 (2) TEU

Derogations, transitional arrangements
and safeguard clauses

DEROGATIONS AND TRANSITIONAL PERIODS

- **Economic and Monetary Union**
 - No permanent opt-out
 - Participation on basis of [Art. 139 TFEU](#)
- **Schengen *acquis***
 - Schengen rules are binding but only full participation after unanimous decision of the Council
 - See e.g. [Romania and Bulgaria](#) joined on 1/1/2007
- **Transitional periods**
 - Free movement of workers
 - 2+3+2 arrangement
 - Free movement of capital
 - Restrictions to acquisition of agricultural land
 - ...

SAFEGUARD CLAUSES

- Typology of safeguard clauses (see example of [Croatia](#))
 - Art. 36 AA: ‘general monitoring clause’
 - Art. 37 AA: ‘general economic safeguard clause’
 - Art. 38 AA: ‘Internal Market safeguard clause’
 - Art. 39 AA: ‘Area of Freedom, Security and Justice safeguard clause’
- Postponement clause (Art. 39 AA – Bulgaria and Romania)
- ‘[Cooperation and Verification Mechanism](#)’ with Romania and Bulgaria
 - Commission Decision legally based on internal market and JHA safeguard clauses
 - Benchmarks in areas of judicial reform and fight against corruption
 - Bi-annual Commission reports

CJEU, JOINED CASES
C-83/19 ASOCIATIA 'FORUMUL JUDECATORILOR DIN ROMÂNIA' V INSPECTIA JUDICIARA ET AL.
(18 MAY 2021)

Findings of the Court

In the first place, the Court, sitting as the Grand Chamber, finds that Decision 2006/928 and the reports drawn up by the Commission on the basis of that decision constitute **acts of an EU institution**, which are amenable to interpretation under Article 267 TFEU. The Court holds, next, that as regards its legal nature, content and temporal effects, Decision 2006/928 falls within the scope of the Treaty of Accession, because that decision is a measure adopted on the basis of the Act of Accession which has been binding on Romania since the date of its accession to the European Union.

As regards the legal effects of Decision 2006/928, the Court holds that that **decision is binding in its entirety on Romania as from its accession to the European Union and obliges it to address the benchmarks, which are also binding, set out in the annex to the decision**. Those benchmarks, defined on the basis of the deficiencies established by the Commission before Romania's accession to the European Union, seek in particular to ensure that that Member State complies with the value of the rule of law. **Romania is, therefore, required to take appropriate measures to meet the benchmarks and to refrain from implementing any measure which could jeopardise their being met.**

As regards the legal effects of the **reports drawn up by the Commission** on the basis of Decision 2006/928, the Court makes clear that those reports formulate requirements with regard to Romania and address '**recommendations**' to it with a view to the benchmarks being met. In accordance with the principle of sincere cooperation, **Romania must take due account of those requirements and recommendations, and must refrain from adopting or maintaining measures in the areas covered by the benchmarks which could jeopardise the result prescribed by those requirements and recommendations.**

CONCLUSIONS

- Enhanced pre-accession conditionality, with increased focus on EU values
- New initiatives towards ‘gradual integration of candidate countries’
- Two main legal pathways to gradual integration
- EU accession as a merit-based, objective process?