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research paper

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**THE WAR IN UKRAINE AND THE
ENLARGEMENT OF THE EUROPEAN
UNION: SECURING THE BLESSINGS OF
LIBERTY AND ITS CHALLENGES**

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ABSTRACT

This paper examines how the war in Ukraine had an impact upon the enlargement of the European Union (EU) and transnational cooperation in Europe. It explains how, in response to Russia's illegal aggression of Ukraine, the EU relaunched its enlargement process – notably by opening accession negotiations with Ukraine –, promoted the establishment of a new European Political Community, and deepened its ties with both other regional organizations like the Council of Europe and NATO, and a former member like the United Kingdom. It is argued that the return of largescale warfare in the European continent for the first time since the end of World War II ultimately contributed to reaffirming the role of the EU as a beacon of peace, security, freedom and prosperity, and to highlighting the dynamism of the European integration project. Nevertheless, a number of challenges lie ahead, especially regarding enlargement, as there are issues concerning both the candidates' preparation and the EU's own readiness. As such, the paper concludes by mapping the debate about EU reforms, its stalemate, and the open questions concerning the future of Europe.

Keywords: War in Ukraine, European Union, Enlargement, Transnational Cooperation, Liberty

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1. Introduction

Wars have transformative consequences.¹ On 28 February 2022, four days after Russia's large-scale illegal aggression of Ukraine, the Ukrainian President, Prime Minister and Chairman of Parliament jointly submitted to the European Union (EU) institutions their country's application for EU membership.² Ukraine's EU membership application was quickly followed by that of Moldova, which in October 2024 will also hold a constitutional referendum on EU accession.³ Moreover, the war has revitalized the accession process for other candidate countries from Eastern Europe and the Western Balkans which were waiting at the EU's entry door. In fact, European Commission President Ursula von der Leyen has hailed the prospects of enlarged union as "an investment in [EU] security,"⁴ and European Council President Charles Michel has indicated his ambition to accelerate the EU's Eastward expansion, completing the entire process by 2030.⁵

The purpose of this paper is to examine, from an EU law and policy perspective, the key steps that the EU has taken, since Russia's blatant breach of international law,⁶ towards enlargement and transnational cooperation more broadly. In particular, the paper provides an overview of the start of the EU accession negotiations with Ukraine and Moldova, the grant of candidate status to Georgia and Bosnia Herzegovina, as well as the relaunch of the enlargement process towards Albania, Kosovo, Montenegro, North Macedonia, and Serbia, which together with Turkey had been already on the waiting list to join the EU. At the same time, the paper underlines how in the aftermath of Russia's aggression of Ukraine the EU promoted the establishment of a new organization – the European Political Community – to cooperate with the wider Europe before the completion of the enlargement process, and deepened its partnerships with other European and transatlantic entities like the Council of Europe (CoE) and the North Atlantic Treaty Organization (NATO), as well as with other European states, including a former member like the United Kingdom (UK).

¹ Please notice this paper reflects the state of law and policy as of 30 September 2024.

² Council of the EU General Secretariat, 'Application of Ukraine for membership of the European Union', 4 March 2022, CM 2003/22.

³ Parliament of the Republic of Moldova, Press Release, 'Republican constitutional referendum to be held in Moldova on 20 October 2024', 16 May 2024, https://www.eeas.europa.eu/delegations/moldova/republic-moldova-statement-high-representative-behalf-european-union-constitutional-referendum-and_en.

⁴ European Commission President Ursula von der Leyen, Statement on the 2023 Enlargement Package, 8 November 2023, Statement/23/5641.

⁵ European Council President Charles Michel, Speech at Bled Strategic Forum, 28 August 2023, <https://www.consilium.europa.eu/en/press/press-releases/2023/08/28/speech-by-president-charles-michel-at-the-bled-strategic-forum/>.

⁶ See UNGA Res ES-11/1, 'Aggression against Ukraine' (2 March 2022) UN Doc A/RES/ES-11/1; International Court of Justice, *Ukraine v Russian Federation*, order of 16 March 2022.

It is submitted that the EU has responded to the return of large-scale warfare on the European continent for the first time since the end of World War II by opening a path to EU membership for Ukraine and other Eastern European states, and setting up or strengthening other organizations for transnational cooperation among like-minded countries. At a time when the security and independence of Ukraine and other post-Soviet states was under threat from Russia's outright military aggression, or destabilization efforts, the EU confirmed its attractiveness as a beacon of freedom, democracy, security and prosperity – and the European integration project proved its ongoing dynamism. If the very decision by Ukraine to request EU membership within days of the full-scale Russian aggression is a testament to how the EU is seen externally as the best way to “secure the blessings of liberty”⁷ – to paraphrase the celebrated words of the United States Constitution's Preamble –, through the enlargement process the EU constitution foresees a mechanism to achieve that hopeful promise. At the same time, the EU has also promoted the establishment of a new forum – the EPC – to connect with the wider Europe before enlargement, and fostered closer partnerships with other organizations such as the CoE and NATO, which also pool sovereignty among its members, albeit with mechanisms which are different from those of the EU.

Nevertheless, as the present contribution maintains, the prospect of a Union with 35 or more members raises profound internal constitutional challenges for the EU. On the one hand, the experience of prior enlargements has revealed that pre-accession conditionality has not always worked, particularly as a number of new member states such as Hungary and Poland have increasingly experienced democratic backsliding, known as the rule of law crisis.⁸ On the other hand, future enlargements would further strain the governance structures of the EU, which heavily depend on unanimous decision-making in the Council and the European Council. In fact, if taking decisions within the EU at 27 has proved daunting, especially in areas related to common foreign and security policy (CFSP) and financial matters, increasing the number of member states to possibly 35 will only make things worse. In this context, growing calls have been made for the EU to adjust its institutional structures to be ready for enlargement. Yet, due to national vetoes, so far the EU has failed to advance in any meaningful way along the path of treaty reforms, which means it is as of now unprepared for enlargement.

As such, this paper is structured as follows. Section II examines the core steps that the EU has taken in response to Russia's war of aggression to support the aspiration for freedom of Ukraine, and other countries of Eastern Europe and the Western Balkans, including the relaunch of the enlargement process, the establishment of the EPC, and the strengthening of partnership with the CoE, NATO as well as other European states like the UK. Section III discusses the major consequences for the EU enlargement policy of the decision to start accession negotiations with Ukraine in reaction to Russia's war of aggression and highlights the dynamic nature of the current European governance landscape. Section IV, however, highlights the constitutional challenges that the prospect of enlargement poses for the EU, and underlines both the limited preparation of candidate countries, and of the EU itself – given the impossibility so far to agree much-needed EU reforms. Section V, finally concludes, reflecting on the open questions about the future of Europe.

⁷ US Const., Preamble, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/us>.

⁸ See W Sadurski, *Poland's Constitutional Breakdown* (OUP 2019); A Sajo, *Ruling by Cheating* (CUP 2021).

2. The core measures

2.a The relaunch of the enlargement process

The war in Ukraine had major consequences for the EU enlargement process. As is well known, following Croatia's accession to the EU in 2013, the enlargement process had stalled. While several countries of the Western Balkans were formally on the path to join the EU, European Commission President Jean-Claude Juncker had clarified in 2014 that no new state would join the EU during his mandate.⁹ Moreover, a major row erupted among member states in 2019 on whether to authorize accession talks with Albania and North Macedonia.¹⁰ In particular, France – with the backing of Denmark and the Netherlands – objected to any bureaucratic automaticity in the accession process, and called for greater political steering on decisions about enlargement.¹¹ In the absence of the necessary unanimity within the European Council, the issue was referred back to the European Commission, which in February 2020 put forward a new methodology for accession negotiations:¹² this confirmed a credible EU membership perspective for the Western Balkans, but also subjected the enlargement talks to further conditionality, with negotiations on the fundamentals, including the rule of law, to be opened first and closed last, and with the possibility of suspending *tout court* the accession process. In the end, however, no real progress occurred.

Yet, the war in Ukraine profoundly changed the circumstances, and led the EU to revitalize its enlargement process. On 23-24 June 2022 – just four months after the start of Russia's aggression – the European Council granted to Ukraine, and Moldova, the status of EU candidate countries, while also recognizing the European perspective of Georgia.¹³ Moreover, on 15 December 2022, the European Council granted candidate status to Bosnia-Herzegovina.¹⁴ At the same time, on 8 November 2023, the European Commission released a new Communication on EU enlargement policy in which it hailed the benefits of enlargement for the EU, and recommended to advance accession negotiations with the countries from the Western Balkans and Eastern Europe.¹⁵ On this basis, on 14-15 December 2023 the European Council decided to open accession negotiations with Ukraine and Moldova,¹⁶ granted candidate status to Georgia,¹⁷ and indicated its willingness to open accession talks with Bosnia Herzegovina¹⁸ and advance them with North Macedonia.¹⁹ In fact,

⁹ European Commission President-elect Jean-Claude Juncker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the Next European Commission', 15 July 2014, 12, https://commission.europa.eu/system/files/2019-09/juncker-political-guidelines-speech_en.pdf.

¹⁰ European Council Conclusions, 18 October 2019, EUCO 23/19, para 5.

¹¹ See French non-paper, 'Reforming the European Union Accession Process', November 2019, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/757575/EPRS_BRI\(2023\)757575_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/757575/EPRS_BRI(2023)757575_EN.pdf).

¹² European Commission Communication, 'Enhancing the Accession Process – A Credible EU Perspective for the Western Balkans', 5 February 2020, COM (2020)57 final, 2-3.

¹³ European Council Conclusions, 23-24 June 2022, EUCO 24/22, para 10.

¹⁴ European Council Conclusions, 15 December 2022, EUCO 34/22, para 30.

¹⁵ European Commission Communication on 'EU Enlargement Policy', 8 November 2023, COM (2023) 690 final.

¹⁶ European Council Conclusions, 14-15 December 2023, EUCO 20/23 para 15.

¹⁷ *ibid* para 16.

¹⁸ *ibid* para 17.

¹⁹ *ibid* para 18.

following a positive assessment by the European Commission,²⁰ on 21-22 March 2024 the European Council decided to open accession negotiations also with Bosnia Herzegovina.²¹

As a result, on 25 June 2024 the EU officially started accession negotiations with Ukraine, and Moldova, through a first intergovernmental conference on enlargement.²² On the same day, the EU also published its general position, including its negotiating framework, which had been formally approved by the Council of the EU on 21 June 2024.²³ The EU general position hailed the “historic moment [...] which marks a milestone in [EU-Ukraine] relationship”²⁴ and emphasized how the accession of Ukraine to the EU had a particular significance in view “of Russia’s unjustified and unprovoked war of aggression.”²⁵ It affirmed that accession talks would be based on the Copenhagen criteria and the new accession methodology,²⁶ hence clarifying that progress on the fundamental cluster – relating to democracy, the rule of law and human rights – will be opened first and closed last, and “will determine the overall pace of the negotiations.”²⁷ The negotiating framework further specified the principles, procedures and substances of the negotiations, stating that their pace “will depend on Ukraine’s progress in meeting the requirements for membership”²⁸ but opening to forms of “accelerated integration and ‘phasing in’ to individual EU policies.”²⁹ The negotiating framework also made explicit that the Commission retained the power to suspend negotiations, subject to a reverse qualified majority vote in the Council, in case “of a serious and persistent breach by Ukraine of the values on which the [EU] is founded”³⁰, while reaffirming the role of the Council, acting by unanimity, in deciding “on the provisional closure of”³¹ each of the 32 negotiating chapters.³²

2.b The establishment of the European Political Community

However, beyond EU enlargement, and in the awareness that despite the best intentions this process may take years, the war in Ukraine has also led the EU to establish a new entity: the EPC. More specifically, the EPC is the brainchild of French President Emmanuel Macron, who launched the idea to create it on 9 May 2022³³ – at the concluding event of the Conference on the Future of

²⁰ European Commission press release, ‘Commission proposes to open EU accession negotiations with Bosnia and Herzegovina and updates on progress made by Ukraine and Moldova’, 12 March 2024, https://neighbourhood-enlargement.ec.europa.eu/news/commission-proposes-open-eu-accession-negotiations-bosnia-and-herzegovina-and-updates-progress-made-2024-03-12_en.

²¹ European Council Conclusions, 21-22 March 2024, EUCO 7/24, para 30.

²² Council of the EU press release, ‘EU opens accession negotiations with Ukraine’, 25 June 2024, 577/24.

²³ See Conference on Accession to the European Union – Ukraine, General EU Position, AD 9/24, 21 June 2024.

²⁴ *ibid* para 2.

²⁵ *ibid* para 3.

²⁶ *ibid* para 8.

²⁷ *ibid* para 11.

²⁸ *ibid*, Negotiating Framework, para 2.

²⁹ *ibid* para 13.

³⁰ *ibid* para 16.

³¹ *ibid* para 49.

³² *ibid* Annex II.

³³ See French President Emmanuel Macron, speech, 9 May 2022, https://multimedia.europarl.europa.eu/en/video/conference-on-the-future-of-europe-closing-event-speech-by-emmanuel-macron-president-of-the-french-republic_1224701.

Europe.³⁴ According to Macron: “Cette organisation européenne nouvelle permettrait aux nations européennes démocratiques adhérant à notre socle de valeurs de trouver un nouvel espace de coopération politique, de sécurité, de coopération en matière énergétique, de transport, d’investissements, d’infrastructures, de circulation des personnes et en particulier de nos jeunes.”³⁵ From this viewpoint, the EPC would serve as a larger forum connecting both states which, like Ukraine, aimed at joining the EU, but also states, like the UK, which had just left it. As Macron stated, joining the EPC “ne préjugerait pas d’adhésions futures à l’Union européenne, forcément, comme elle ne serait pas non plus fermée à ceux qui ont quitté cette dernière.”³⁶ President Macron’s idea was further developed in a non-paper by the French Government, which also drew on older proposals in favour of a European Confederation.³⁷

The European Council, however, quickly endorsed the EPC project on 23-24 June 2022,³⁸ at the same meeting which granted Ukraine candidate status for EU membership, and the EU played a lead role in organizing this new forum. The first meeting of the EPC was held in Prague, the Czech Republic – the EU member state then holding the rotating presidency of the Council of the EU – on 6 October 2022. The second meeting of the EPC occurred in Chisinau, Moldova, on 1 June 2023. The third meeting took place in Grenada, Spain, in October 2023, again under the aegis of the rotating presidency of the Council of the EU. The fourth meeting was hosted by the UK, a former EU member state, in July 2024, and a fifth meeting is due in Budapest, Hungary, in November 2024. So far, 44 European states have participated in the first EPC meeting³⁹ – all 27 EU member states and the leaders of the EU institutions, plus the UK, Ukraine, and 15 other countries – while 45 states attended the following ones (with Andorra and Monaco joining too, but Turkey absent).⁴⁰ Essentially, the members of the EPC match almost exactly the members of the CoE, with minor exceptions – e.g. Kosovo, which is part of the EPC but not the CoE, and San Marino, which is part of the CoE but not the EPC. There is some ambiguity with regard to Turkey, a CoE member which attended some but not all EPC meetings.

At this stage, the EPC remains fairly underdeveloped, and is more a forum than an organization.⁴¹ As Bruno de Witte has perceptively pointed out, the EPC founding summit “did not adopt any formal written document apart from press releases by various participants, nor did it create a secretariat or other organ for the EPC.”⁴² From this point of view, “the EPC is not an organization, nor a structure, nor even a process.”⁴³ However, the use of the term *Community* to define the EPC

³⁴ See infra section IV.C.

³⁵ See E Macron (n 33) (translation: ‘This new European organization would allow European democratic nations abiding by our core set of values to find a new space of cooperation on political affairs, security, in the field of energy, transport, investment, infrastructure, movement of persons, and especially youths’).

³⁶ *ibid.* (translation: ‘would not foreclose future accession to the European Union, necessarily, as it would not be closed to those who have left the latter’).

³⁷ See also former Italian Prime Minister Enrico Letta, ‘A European Confederation : A Common Political Platform for Peace’, Foundation for European Progressive Studies, 25 April 2022.

³⁸ European Council conclusions, 23-24 June 2022, EUCO 24/22, para 1.

³⁹ See <https://www.consilium.europa.eu/en/meetings/international-summit/2022/10/06/>.

⁴⁰ See <https://www.consilium.europa.eu/en/meetings/international-summit/2023/06/01/>.

⁴¹ See also L Lonardo, ‘The European Political Community: A Nebulous Answer to the Strategic Question of How to Unite Europe’ (2023) 8 *European Papers* 755.

⁴² B De Witte, ‘The European Political Community and the Future of the EU’ (forthcoming, on file with author) 1.

⁴³ *ibid.*

is not meaningless. The EU emerged out of the European Coal and Steel Community and European Economic Community, and indeed a European Political Community was negotiated in 1954 in conjunction with the European Defence Community – which ultimately failed. As such, while the concrete achievements of the EPC are so far limited, the forum holds potential. The EPC can serve not only as an ante-chamber for EU membership – which is admittedly the primary driver for this initiative, born out of the awareness that EU enlargement will take some time.⁴⁴ The EPC can also become a platform to enlarge cooperation between the EU and the wider Europe, including both a former member like the UK and a country at war like Ukraine.

2.c The renewal of partnership with the Council of Europe, NATO and the UK

Finally, the war in Ukraine led the EU to strengthen its partnerships with other regional organizations, including the CoE and NATO, and to deepen bilateral cooperation with like-minded European countries, including the UK, as well as Switzerland⁴⁵ and Norway.⁴⁶

First, the EU strengthened its partnership with the CoE. As is well known, the CoE was originally established in 1949, by a Treaty concluded in London, as the first post-WWII forum for pan-European cooperation. The CoE focuses on the protection of fundamental rights, and the promotion of democracy and the rule of law, and constitutes the institutional framework of the European Convention on Human Rights (ECHR) and its Court:⁴⁷ the European Court of Human Rights (ECtHR), which since the approval of Protocol 11 in 1998 acts as the court of last instance on judicial review of human rights claims raised against any of the contracting parties.⁴⁸ The CoE had become the organization with the wider membership in the European continent, and as of early 2022, it included 47 member states: all 27 EU countries, and 20 others, including Russia. Following the illegal military aggression of Ukraine, however, the CoE decided to suspend Russia,⁴⁹ which eventually withdrew from the CoE – a step that had occurred only once in the past, when Greece temporarily exited the ECHR in the 1960s, during the Colonels' dictatorship.

Given the similarities and partial overlap between the EU and the CoE, since the 1990s multiple efforts have been made institutionally to link these organizations, and also to increase the

⁴⁴ See also R Petrov and C Hillion, Guest editorial: 'Accession through war' - Ukraine's road to the EU' (2022) 59 *Common Market Law Review* 1289.

⁴⁵ See e.g. Council of the EU press release, 'EU-Switzerland: Council adopts mandate for negotiations on future relationship', 12 March 2024, <https://www.consilium.europa.eu/en/press/press-releases/2024/03/12/eu-switzerland-council-adopts-mandate-for-negotiations-on-future-relationship/>; and Swiss Confederation press release, 'Federal Council approves parameters for EU negotiating mandate', 21 June 2023 (calling for a re-opening of negotiation with the EU for an institutional framework agreement), <https://www.eda.admin.ch/missions/mission-eu-brussels/en/home/news/news.html/content/eda/en/meta/news/2023/6/21/95910>.

⁴⁶ See e.g. European Union External Action Service press release, 'Security and Defense: EU and Norway sign new partnership', 28 May 2024, https://www.eeas.europa.eu/eeas/security-and-defence-eu-and-norway-sign-new-partnership_en.

⁴⁷ See S Schmahl and M Breuer (eds), *The Council of Europe: Its Law & Policies* (OUP 2017).

⁴⁸ See F Fabbrini, *Fundamental Rights in Europe* (OUP 2014).

⁴⁹ Council of Europe newsroom, 'The Russian Federation is Excluded from the Council of Europe', 16 March 2022, <https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe>.

coherence of the European system of human rights protection.⁵⁰ In fact, Article 6(2) TEU, as modified by the Lisbon Treaty, entered into force in 2009, states the EU “shall accede to the [ECHR],” while Article 59 ECHR, as modified by Protocol No. 14, entered into force in 2010, states that “the [EU] may accede this Convention.” Yet, such attempts had failed: first in 1996⁵¹ and then, more recently, in 2013,⁵² the EU Court of Justice (ECJ) invalidated a draft treaty negotiated by the EU to accede to the ECHR. In the much discussed 2/2013 Opinion,⁵³ the ECJ held *inter alia* that the draft accession agreement negatively interfered with the preliminary reference procedure under Article 267 TFEU, and gave to the ECtHR greater jurisdiction on foreign affairs than that the ECJ has under Article 24 TEU – a stance that seemed to foreclose any door to EU accession to the ECHR. With Russia’s aggression of Ukraine, however, in January 2023 the EU has reaffirmed its support for “the [CoE], the [ECtHR] and the Human Rights Convention system as the principal instruments for upholding human rights in Europe”⁵⁴ and re-intensified its efforts to secure the EU’s accession to the ECHR.⁵⁵

Second, the EU also strengthened its cooperation with NATO. As is well known, NATO was originally established in 1949, with the Washington Treaty, by the United State of America (US), with Canada and 10 Western European countries. As a defensive military alliance set up in the aftermath of World War II, NATO had progressively expanded during the Cold War, incorporating West Germany in 1955, and eventually enlarged to most of Central and Eastern Europe after the fall of the Berlin wall.⁵⁶ In fact, following Russia’s aggression of Ukraine, Finland and Sweden – two other EU member states which had historically embraced the principle of neutrality – applied together to enter NATO in 2022 and were admitted to the alliance in 2023 and 2024 respectively.⁵⁷ The accession of Finland and Sweden is highly significant, not only because it increased NATO member states to 32, but also because it reduced the number of EU member states who are not in NATO to just four, relatively small, countries, namely Austria, Cyprus, Ireland, and Malta.

Building on this reality, the EU itself has upgraded its institutional partnership with NATO, which, as explicitly recognized in Article 42(7) TEU, remains “for those States which are members of it, [...] the foundation for their collective defense and the forum for its application”. In particular, in January 2023 the leaders of the two organizations released a joint declaration on EU-NATO

⁵⁰ See also F Fabbrini and J Larik, ‘The Past, Present and Future of the Relations between the European Court of Justice and the European Court of Human Rights’ (2016) 35 *Yearbook of European Law* 1.

⁵¹ Opinion 2/94, ECLI:EU:C:1996:140.

⁵² Opinion 2/13, ECLI:EU:C:2014:2454.

⁵³ See V Kosta, N Skoutaris, and V Tzevelekos (eds), *The EU Accession to the ECHR* (Hart Publishing 2014).

⁵⁴ See Council of the EU, Conclusions on EU priorities for cooperation with the Council of Europe 2023-2024, 30 January 2023, 53/23, para 16.

⁵⁵ See also European External Action Service, press release, ‘Major progress on the path to EU accession to the ECHR: Negotiations concluded at technical level in Strasbourg’, 31 March 2023, https://www.eeas.europa.eu/delegations/council-europe/major-progress-path-eu-accession-echr-negotiations-concluded-technical-level-strasbourg_en?s=51.

⁵⁶ See W Jacoby, *The Enlargement of the European Union and NATO: Ordering from the Menu in Central Europe* (CUP 2004).

⁵⁷ See C Bildt, ‘NATO’s Nordic Expansion’, *Foreign Affairs* 26 April 2022) <https://www.foreignaffairs.com/articles/europe/2022-04-26/natos-nordic-expansion>.

cooperation – the third ever in their history⁵⁸ – in which they re-affirmed their “strategic partnership”⁵⁹ and committed to take it “to the next level”⁶⁰ with cooperation on “growing geo-strategic competition, resilience issues, protection of critical infrastructure, emerging and disruptive technologies, space, the security implications of climate change, as well as foreign information manipulation and interference.”⁶¹ In fact, the EU is increasingly a key institutional partner to NATO on a plurality of war-related and post-conflict tasks.⁶²

Third, in response to the war in Ukraine, the EU also re-built bridges towards the UK, a former member state. As is well known, after the Brexit referendum of June 2016⁶³ and complex negotiations, the UK withdrew from the EU in January 2020 in accordance with the terms of a Withdrawal Agreement (WA).⁶⁴ Subsequently, the EU and the UK negotiated a Trade and Cooperation Agreement (TCA) regulating their new bilateral relationship, which entered into force provisionally in January 2021, and fully in May 2021.⁶⁵ At the insistence of the UK Government led by Prime Minister Boris Johnson, however, the TCA established only a bare-bones free trade agreement between the parties, with limited free movement of goods, minimal cooperation in justice and home affairs, and no partnership in defence and security. Indeed, the UK pursued a ‘sovereignty first’ Brexit, and its “preoccupation with sovereignty, which dominated its discourse, demands and action, dramatically narrowed what the UK could agree to and what the EU could offer.”⁶⁶

Following Russia’s invasion of Ukraine, however, a major rapprochement between the EU and the UK occurred – also thanks to changes in the UK premiership. In particular, in the autumn of 2022 the UK asked to join the EU’s Permanent Structured Cooperation (PESCO) project on military mobility as a third country, which the Council of the EU readily accepted.⁶⁷ Moreover, in February 2023, the then Prime Minister Rishi Sunak brokered a deal with the EU to adjust the Protocol on Ireland / Northern Ireland (NI) attached to the WA,⁶⁸ leading to the approval of the Windsor Framework.⁶⁹ The Protocol, by establishing a border in the Irish sea had caused much tension in

⁵⁸ See 2016 Warsaw Joint Declaration, <https://www.europarl.europa.eu/delegations/en/dnat/documents/eu-texts>; and 2018 Brussels Joint Declaration, <https://www.consilium.europa.eu/en/press/press-releases/2018/07/10/eu-nato-joint-declaration/>.

⁵⁹ See Joint Declaration on EU-NATO Cooperation, 10 January 2023, para 9.

⁶⁰ *ibid* para 12.

⁶¹ *ibid*.

⁶² See P Mariani and D Genini, ‘EU and NATO: The Legal Foundation of an Extraordinary Partnership’ (2023) 4 *Eurojus Rivista* 187.

⁶³ F Fabbrini (ed.), *The Law & Politics of Brexit* (OUP 2017) (‘Brexit I’).

⁶⁴ F Fabbrini (ed.), *Brexit II* (OUP 2020).

⁶⁵ F Fabbrini (ed.), *Brexit V* (OUP 2024).

⁶⁶ B Laffan, ‘Sovereignty’, in F Fabbrini (ed.), *Brexit III* (OUP 2021) 240, 250. See also P Syrpis and C Gammage, ‘Sovereignty Fictions in the United Kingdom’s Trade Agenda’ (2022) 71 *ICLQ* 563.

⁶⁷ Council of the EU press release, ‘PESCO: the UK will be invited to participate in Military Mobility project’, 15 November 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/11/15/pesco-the-uk-will-be-invited-to-participate-in-military-mobility-project/>.

⁶⁸ F Fabbrini (ed.), *Brexit IV* (OUP 2022).

⁶⁹ Windsor Political Declaration by the European Commission and the Government of the United Kingdom, 27 February 2023, https://commission.europa.eu/publications/windsor-political-declaration-european-commission-and-government-united-kingdom_en.

NI.⁷⁰ Through technical changes, the Windsor Framework contributed to rebuilding trust between the EU and the UK,⁷¹ and the dividends of a more positive EU-UK relationship quickly spilled over into other areas, including financial services,⁷² research and space,⁷³ and trade.⁷⁴ Furthermore, following the landslide victory of the Labour Party in the general elections held in the UK on 4 July 2024 discussions are opening to use the TCA mandated *rendez-vous* of 2026 to expand EU-UK cooperation into new sectors – e.g. via an *ad hoc* security treaty – on the understanding that democracies based on the rule of law have to partner together to face the return of war in the European continent.⁷⁵

3. The consequences

The EU's response to the war in Ukraine in the field of enlargement and external relations reveals the dynamism of the European integration project. Most significantly, the EU reacted to Russia's aggression of Ukraine by re-launching its enlargement policy "as a geo-strategic investment"⁷⁶, thus confirming that EU membership remains the main avenue towards peace, freedom, security and prosperity. As such, one of the most important consequences of Russia's aggression of Ukraine has been to open the EU's doors to up to 9 new countries from the Western Balkans and Eastern Europe – thus setting the stage for a much larger and wider EU. In fact, as Ukraine Foreign Minister Dmytro Kuleba pointed out, "Ukraine acted as a true European integration locomotive for Moldova, Georgia, and the Western Balkan countries, as well as a catalyst for the historic process of the European Union expanding to Europe's natural political borders."⁷⁷ When the Brexit vote occurred in 2016, many were concerned that this would be the end of European integration, and that other member states would follow the UK in leaving the EU. Instead, 8 years later, the EU is as lively as ever and gearing towards a new Eastward expansion – in many ways more significant even than the 2004 big bang enlargement in which 10 new countries joined the EU.⁷⁸

In particular, the grant of candidate status to Ukraine in June 2022, and the official start of accession negotiations in June 2024, is a momentous historical development. Ukraine is a country at war, and

⁷⁰ See D Schiek, 'Brexit and the Implementation of the Withdrawal Agreement', in F Fabbrini (ed), *Brexit III* (n66), 49.

⁷¹ See also House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, 'The Windsor Framework', 25 July 2023, HL Paper 237.

⁷² See European Commission Draft Memorandum of Understanding establishing a framework for financial services regulatory cooperation between the European Union and the United Kingdom of Great Britain and Northern Ireland, 17 May 2023, https://finance.ec.europa.eu/document/download/7410cb0a-8cab-4009-9a55-3975bd026752_en?filename=230627-memorandum-understanding-financial-services-eu-uk_en.pdf.

⁷³ European Commission press release, 'EU-UK Relations: Commission and UK reach political agreement on UK participation in Horizon Europe and Copernicus', 7 September 2023, IP/23/4374.

⁷⁴ European Commission press release, 'Commission proposes one-off extension of the current rules of origin for electric vehicles and batteries under the Trade & Cooperation Agreement with the UK', 6 December 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6369.

⁷⁵ See further F Fabbrini, 'Review and Reform Options for Deepening EU-UK Cooperation in a Renewing Europe', in F Fabbrini (ed.), *Brexit V* (n65) 235.

⁷⁶ European Council Granada Declaration 6 October 2023, <https://www.consilium.europa.eu/en/press/press-releases/2023/10/06/granada-declaration/>.

⁷⁷ D Kuleba, 'Ukraine's EU accession brings added value and serves historic justice', Foundation Robert Schuman, 25 June 2024, <https://www.robert-schuman.eu/en/the-letter/1073>.

⁷⁸ See M Cremona (ed), *The Enlargement of the European Union* (OUP 2003).

there is no precedent for such a situation in any of the prior seven rounds of EU enlargement (1973, 1981, 1984, 1995, 2004, 2007, 2013). The only exception to this may be Cyprus, an island which since 1974 has been divided, with the Northern part of its territory under illegal occupation by the Turkish military, and forming a state which has not been recognized internationally by anyone except Turkey itself. However, the Cypriot conflict has been frozen for decades, and the United Nations Secretary General Kofi Annan had successfully brokered in 2004 a plan to re-unite the island: despite being supported by residents of the Turkish Republic of Northern Cyprus, the plan was rejected by a majority in the Republic of Cyprus – which thus entered the EU in 2004 divided, with the effects of EU law suspended for its territory over the Green Line.⁷⁹ Yet, Cyprus poses geographical and geostrategic challenges which are of a different order of magnitude from those of Ukraine: so the EU's decision to promise membership to Ukraine and to start accession negotiations reveals the EU institutions' ambition to leverage enlargement as a prime geopolitical tool.

At the same time, in the aftermath of Russia's aggression of Ukraine, the EU's integrationist dynamic has co-existed with a phase of institutional experimentalism in the broader European governance landscape. On the one hand, the EU has promoted the establishment of a brand new organization – the EPC – designed to bring together the EU27 with the other countries of the wider Europe. While this forum remains currently under-institutionalized, it holds potentials both to assist candidate countries during their process of accession to the EU, and to re-connect the EU with other European states, including a former member like the UK. On the other hand, the EU has deepened its cooperation with other regional and transatlantic organizations such as the CoE and NATO. In fact, the CoE and NATO have themselves been revitalized by the war – suggesting that Russia's illegal aggression has contributed to strengthening the bonds that tie together European states, and reminded everyone of how *l'union fait la force*, union makes strength

With regard to the CoE, it is well known that the jurisprudence of the ECtHR had increasingly caused a sovereigntist backlash during the 2010s, especially in the UK. As such, several diplomatic efforts had endeavoured to limit the ECtHR's – a process which started with the Brighton Declaration and concluded with the approval of Protocols 15 and 16 to the ECHR, enshrining the principle of subsidiarity and margin of appreciation in the ECHR's preamble and a preliminary reference system by which national courts can request advisory opinions from the ECtHR. Yet, following Russia's aggression and such blatant breach of international law, the members of the CoE have rallied around the organization established to promote democracy, human rights and the rule of law. In particular, in a major summit held in Reykjavik on 16-17 May 2023, the heads of state and government of the 46 member states of the CoE reaffirmed their unity around the common values of freedom and democracy.⁸¹ In what constituted only the 4th summit of heads of state and government since the establishment of the CoE, the contracting parties adopted a declaration

⁷⁹ See N Skoutaris, 'The Application of the *acquis communautaire* in the Areas Not under the Effective Control of the Republic of Cyprus: The Green Line Regulation' (2008) 45 *Common Market Law Review* 727.

⁸⁰ See J Christoffersen and M Rask Madsen (eds), *The European Court of Human Rights between Law & Politics* (OUP 2011).

⁸¹ Reykjavik Summit of the Council of Europe, Reykjavik Declaration, United around our values, 16-17 May 2023, <https://rm.coe.int/4th-summit-of-heads-of-state-and-government-of-the-council-of-europe/1680ab40c1>.

expressing unwavering support for liberal-constitutional principles and “recommitting to the Convention system as the cornerstone of the Council of Europe’s protection of human rights.”⁸²

Similarly, with regard to NATO, it is well known that its function had become increasingly questioned in recent years. NATO had played a role during the so-called war on terrorism, with its core provision Article V – which enshrines a mutual defence pledge by all members – triggered for the first time ever after 11 September 2001. Yet, due to recurrent quarrels among its members, in 2019 French President Emmanuel Macron had famously declared the alliance “brain dead”,⁸³ and despite diplomatic attempts to re-define its purpose,⁸⁴ its role had become less clear at a time when Russia seemed more a partner than a threat. Russia’s illegal aggression in Ukraine, however, represented a turning point. The return of war on the European continent has revitalized NATO, which quickly became the main institutional framework to coordinate military assistance to Ukraine, including war materiel and intelligence. Moreover, the Russian invasion, which had often been presented in the regime’s propaganda as an attempt to prevent a NATO encirclement, produced exactly the opposite effect, with Finland and Sweden’s accession to the alliance.⁸⁵

In fact, the strengthening of transnational cooperation in Europe through multiple fora has generated interplays, for instance between NATO expansion and EU enlargement. In particular, while the EU granted Ukraine candidate status for EU membership, at the NATO summit in Vilnius, on 11 July 2023, NATO also promised that Ukraine’s future is in the alliance – “when Allies agree and conditions are met.”⁸⁶ In the same meeting, moreover, Turkey agreed to remove its veto on Sweden’s accession to NATO, also thanks to political reassurances offered by European Council President Charles Michel that the EU would re-energize its ties with Turkey, whose EU membership application has been pending since 1987.⁸⁷ Consequently, in November 2023 the European Commission and the EU High Representative for Foreign Affairs published a joint communication on the state of play of EU-Turkey political, economic and trade relations, which suggested among others a pathway to upgrade the EU-Turkey customs union.⁸⁸ As such, it appears that the war in Ukraine has had profound consequences for transnational cooperation across the continent, through different forms of sovereignty-sharing.

⁸² *ibid* Appendix IV.

⁸³ See ‘Emmanuel Macron warns Europe: NATO is becoming brain-dead’, *The Economist* (7 November 2019) <https://www.economist.com/europe/2019/11/07/emmanuel-macron-warns-europe-nato-is-becoming-brain-dead>.

⁸⁴ See ‘NATO 2023: United for a New Era’ (25 November 2020) <https://www.ndc.nato.int/news/news.php?icode=1509>.

⁸⁵ See C Bildt, “NATO’s Nordic Expansion”, *Foreign Affairs*, 26 April 2022 <https://www.foreignaffairs.com/articles/europe/2022-04-26/natos-nordic-expansion>.

⁸⁶ NATO Vilnius Summit Communiqué, 11 July 2023, para 11, https://www.nato.int/cps/en/natohq/official_texts_217320.htm.

⁸⁷ See M Stevis-Gridneff, ‘Will Turkey become a member of the E.U. now?’, *The New York Times* (Toronto, 11 July 2023) <https://www.nytimes.com/2023/07/11/world/europe/turkey-eu-membership.html>.

⁸⁸ European Commission and High Representative, Joint Communication on the State of Play of EU-Turkiye political, economic and trade relations, 29 November 2023, JOIN (2023) 0050.

4. The challenges

Nevertheless, the prospects of European transnational cooperation generally, and of EU enlargement specifically, face a number of major obstacles. In fact, it cannot be down-played how not only the entry of Sweden into NATO was unnecessarily delayed for idiosyncratic reasons by Turkey and Hungary – but even the opening of accession negotiation with Ukraine in December 2023 was the result of theatrical politicking: since Hungary opposed this decision, and technically had a right to veto it, the European Council could agree to open accession negotiations with Ukraine⁸⁹ only after Hungary's Prime Minister Viktor Orban conveniently left the meeting room at the time of voting, allowing the other 26 heads of state and government to greenlight the process.⁹⁰ Because according to EU enlargement rules, progress in the negotiations of each accession chapter requires unanimity among the EU27, which must also unanimously approve a final accession treaty, ultimately, from a political point of view, the entry of a new member state in the EU “is by no means certain.”⁹¹ Furthermore, from a legal point of view, there are a number of challenges that surround enlargement, having to do with the candidate countries' preparation, the EU's preparation and the stalemate in EU reforms.

4.a Candidate countries' preparation

Article 49 TEU proclaims that “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 [EU].” The values indicated in Article 2 TEU are “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.” Since the European Council meeting of Copenhagen in 1993, accession of new member states to the EU has been governed by four criteria – the Copenhagen criteria, which are: (i) respect for the rule of law; (ii) a functioning market economy; (iii) compliance with the EU *acquis*; as well as (iv) the EU's internal ability to absorb new member states (which is discussed below). Specifically, “Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership.”⁹²

As things currently stand, leaving aside the fact that support for EU membership is low in most candidate countries, none of them is ready to join the EU and meet the Copenhagen criteria.⁹³ Just by way of examples, North Macedonia is experiencing a nationalist turn and has refused to amend

⁸⁹ European Council Conclusions, 14-15 December 2023, EUCO 20/23, para 15.

⁹⁰ See P Jacqué *et al*, ‘Accession Talks with Ukraine: How the EU Managed to Avoid an Hungarian Veto’, *Le Monde* (Brussels, 15 December 2023) https://www.lemonde.fr/en/international/article/2023/12/15/the-european-union-opens-accession-talks-with-ukraine_6346150_4.html.

⁹¹ S Fabbrini, ‘From Multi-Speed to Multi-Tier: Making Europe Fit for Herself’ in G von Sydow and V Kreiling (eds), *Fit for 35? Reforming the Politics and Institutions of the EU for an Enlarged Union* (Swedish Institute for European Political Studies 2023) 69, 76.

⁹² European Council, Conclusion of the Presidency, Copenhagen, 21-22 June 1993, sec. 7, para A, iii).

⁹³ D Bechev, ‘Can EU Enlargement Work?’, *Carnegie Europe* (20 June 2024), <https://carnegieendowment.org/research/2024/06/can-eu-enlargement-work?lang=en>.

its Constitution to recognize the Bulgarian minority, as the EU requested;⁹⁴ Serbia has not aligned with any of the EU CFSP measures, nurturing relations with China and Russia; and Georgia has recently passed a law, inspired by Russia and opposed by the EU and the US, that requires any organization receiving foreign funding to register as a foreign agent and be subjected to pervasive governmental controls.⁹⁵ Most importantly, Ukraine faces major challenges in its preparation for moving towards EU membership:⁹⁶ the country suffers from systemic problems of corruption, as evident by the arrest for bribery of the President of the Supreme Court;⁹⁷ and has ratified the International Criminal Court only in summer 2024; martial law introduced in response to Russia's war of aggression has led to the indefinite suspension of elections, the most basic form of democratic accountability;⁹⁸ and there are questions whether an hyper-nationalist country emerging from a life-or-death struggle can fit into the EU, a supranational organization which has been designed to tame nationalism.⁹⁹

The EU Commission has openly acknowledged these problems. In its November 2023 Communication on enlargement it duly reported the systemic problems faced by accession countries¹⁰⁰ – from “political instability, tensions, the weak functioning of democratic and judicial institutions” in Montenegro,¹⁰¹ arguably the most advanced candidate state, to “the complete disagreement with the EU approach of Turkey”¹⁰², a state with which negotiations are “at a standstill.”¹⁰³ In fact, the example of Turkey provides a cautionary tale about enlargement, as the country has been a candidate to join the EU since 1999, but no progress has really been made on the accession negotiations. While internal political developments in Turkey, with the rise of authoritarian governance especially since 2016, have for all practical purposes closed the door towards accession, the EU has never faced politically the matter, simply freezing the negotiations. Yet, this state of uncertainty has not led to any improvement, rather resulting only in increased frustration in that country. Nevertheless, the lessons of that failed enlargement have apparently not been digested. In fact, in the latest enlargement package, the Commission's deeds have not

⁹⁴ K Kolozova, 'Freins nationalistes et impensés géopolitiques: le cas spécifique de la Macédoine du Nord' *Fondation Robert Schuman* (Skopje, 6 May 2024), <https://www.robert-schuman.eu/questions-d-europe/748-freins-nationalistes-et-impenses-geopolitiques-le-cas-specifique-de-la-macedoine-du-nord>.

⁹⁵ I Nechepurenko, 'Georgia's Ruling Party Secures a Contentious Law on Foreign Influence', *The New York Times* (Georgia, 28 May 2024), <https://www.nytimes.com/2024/05/28/world/europe/georgia-foreign-agents-law-passes.html>.

⁹⁶ R Petrov, 'Bumpy Road of Ukraine towards the EU Membership in Time of War: 'Accession through War' v 'Gradual Integration' (2023) 8 *European Papers* 1057.

⁹⁷ See D Victor, 'The Chief of Ukraine's Supreme Court has been detained and accused of taking a \$2.7 million bribe', *The New York Times* (New York, 16 May 2023), <https://www.nytimes.com/2023/05/16/world/europe/ukraine-supreme-court-chief-bribery.html>.

⁹⁸ See 'Volodymyr Zelensky's presidential term expires on May 20th', *The Economist* (16 May 2024), <https://www.economist.com/leaders/2024/05/16/volodymyr-zelenskys-presidential-term-expires-on-may-20th>.

⁹⁹ See S A Bellezza, *Identità ucraina: storia del movimento nazionale dal 1800 a oggi* (Laterza 2024).

¹⁰⁰ European Commission Communication on “EU Enlargement Policy”, 8 November 2023, COM (2023) 690 final.

¹⁰¹ *ibid* p. 17.

¹⁰² *ibid* p. 22.

¹⁰³ *ibid* p. 21.

followed its words.¹⁰⁴ Despite the abovementioned structural problems, the Commission has recommended advancing enlargement and opening the accession negotiations – in the case of Ukraine and Moldova with the qualification “provided it continues its reform effort,”¹⁰⁵ and in the case of Georgia “on the understanding that” the country will take several further steps.¹⁰⁶ Yet, despite official proclamations that enlargement will be based on the candidate country’s “own merits,”¹⁰⁷ this approach sends the wrong signal that accession is largely driven by political priorities.

Furthermore, the Commission has also weakened the internal EU mechanisms of rule of law enforcement and conditionality that could have assisted in the enlargement process. In particular, in September 2023, the Commission terminated the post-accession Cooperation and Verification Mechanism (CVM) with Romania and Bulgaria¹⁰⁸ – a special process of enhanced surveillance which had been put in place for the two member states that joined the EU in 2007, and that still suffer from severe problems of corruption. This abrupt decision was not motivated by any real improvement by the two member states concerned. Moreover, it was followed in May 2024 by the decision to end the Article 7 TEU procedure against Poland,¹⁰⁹ which had started in 2017 following the Polish government’s attack against the independence of the judiciary.¹¹⁰ Yet, once again, no real legal change had occurred in Poland – save for the election of a pro-EU government. But the latter’s effort to undo the actions of its predecessor had been blocked by the Polish President and courts. All in all, therefore, besides weakening the EU’s internal rule of law enforcement mechanisms,¹¹¹ the Commission appears to have conveniently disregarded egregious failures in the preparation of accession countries, which does not bode well either for accession negotiations or the future of the EU.

4.b EU preparation

Besides the preparation of candidate countries, in line with the Copenhagen criteria a fourth factor that should shape enlargement is the EU’s preparation. Already at the time of the big-bang enlargement of 2004, the European Commission had recognized that a critical factor in managing

¹⁰⁴ See also European Commission President Ursula von der Leyen, Statement on the 2023 Enlargement Package, 8 November 2023, https://neighbourhood-enlargement.ec.europa.eu/news/statement-president-von-der-leyen-2023-enlargement-package-and-new-growth-plan-western-balkans-2023-11-08_en.

¹⁰⁵ European Commission Communication on “EU Enlargement Policy”, 8 November 2023, COM (2023) 690 final p. 23, 24.

¹⁰⁶ *ibid* p. 25.

¹⁰⁷ See e.g. Conference on Accession to the European Union - Ukraine, General EU Position, 21 June 2024, AD 9/24, Negotiating Framework, para 2.

¹⁰⁸ European Commission press release ‘Rule of Law: Commission formally closes the Cooperation and Verification Mechanism for Bulgaria and Romania’, 15 September 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4456.

¹⁰⁹ European Commission press release, ‘Commission intends to close Article 7(1) TEU procedure for Poland’, 6 May 2024, IP/24/2461.

¹¹⁰ European Commission reasoned proposal in accordance with Article 7(1) Treaty on European Union for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, 20 December 2017, COM (2017)835 final.

¹¹¹ See K L Scheppele, ‘The Treaties Without a Guardian: The European Commission and the Rule of Law’ (2023) 29 *Columbia Journal of European Law* 93.

the accession of new member states was the EU's "absorption capacity, or rather integration capacity."¹¹² The Commission defined this "functional concept"¹¹³ as the EU's capacity to "take in new members at a given moment or in a given period, without jeopardizing the political and policy objectives established by the Treaties."¹¹⁴ From a substantive perspective, the Commission connected this absorption capacity with the functioning of the EU institutions, the delivery of EU policies, and the operation of the EU budget, while also emphasizing the importance of maintaining public support for the enlargement process.

By this standard, the prospect of enlargement by admitting to up to 9 new member states raises major challenges for the EU. In particular, Ukraine's potential accession poses a puzzle. On the one hand, the country is currently at war, with 1/5th of its territory under enemy occupation. On the other hand, with a pre-war population of circa 41 million people and a GDP of per capita of circa 4500\$,¹¹⁵ Ukraine would become the 5th most populous EU Member State, the primary beneficiary of structural and agriculture funds, and a major game-changer for the functioning of the EU.¹¹⁶ In fact, also considering the cost of post-war reconstruction, early estimates have concluded that Ukraine's accession to the EU would have significant budgetary consequences for the EU – and while some analysts have called these costs as "manageable",¹¹⁷ others have rather highlighted how adding 9 new EU states would turn most current members into net contributors to the EU budget.¹¹⁸

In March 2024 the European Commission published a Communication on pre-enlargement reforms and policy review,¹¹⁹ where it explored "the implications of a larger EU in four main areas: values, policies, budget and governance."¹²⁰ In this document, which also indicated the possibility of partial integration of candidate countries in EU policies before their accession, the Commission clearly reaffirmed the importance of safeguarding the values of democracy and respect for the rule of law in the enlargement process,¹²¹ and openly outlined the consequence of enlargement for the EU's functioning and funding. With regard to the EU budget, the Commission acknowledged that the accession of new, poorer member states "will put pressure on the future long-term EU budget",¹²²

¹¹² European Commission Communication 'Enlargement Strategy and Main Challenges 2006-2007, including annexed special report on the EU's capacity to integrate new members', 8 November 2006, COM(2006) 649 final, p. 17.

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ World Bank, GDP per capita Ukraine, <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=UA>.

¹¹⁶ See S Blockmans, 'The Impact of Ukrainian Membership on the EU's Institutions and Internal Balance of Power', International Centre for Defense and Security, November 2023, <https://icds.ee/en/the-impact-of-ukrainian-membership-on-the-eus-institutions-and-internal-balance-of-power/>.

¹¹⁷ M Emerson, 'The Potential Impact of Ukrainian Accession on the EU's budget – and the importance of control valves' International Centre for Defense and Security, September 2023, <https://icds.ee/en/the-potential-impact-of-ukrainian-accession-on-the-eus-budget-and-the-importance-of-control-valves/>.

¹¹⁸ L O'Carroll, 'Adding nine countries to EU to cost existing members more than €250 billion', *The Guardian* (Brussels, 4 October 2023) <https://www.theguardian.com/world/2023/oct/04/adding-nine-countries-eu-cost-existing-members>.

¹¹⁹ European Commission Communication on 'Pre-enlargement reforms and policy reviews', 20 March 2024, COM (2024) 146 final.

¹²⁰ *ibid.* p. 2.

¹²¹ *ibid.* p. 4.

¹²² *ibid.* p. 18.

and consequently stated that “future EU spending program should be developed with future enlargement in mind.”¹²³ With regard to EU governance, furthermore, the Commission underlined how “an enlarged Union of 30+ Member States triggers immediate questions on the composition of the EU institutions”¹²⁴ – and will also “inevitably entail more work for the EU institutions in many areas.”¹²⁵

Nevertheless, the Commission has been very cautious in outlining what institutional and constitutional changes would be needed to prepare the EU for enlargement.¹²⁶ This also reflects the ambiguities of the European Council: in the October 2023 Granada Declaration – delivered on the occasion of the third EPC summit – the European Council stated that “[I]ooking ahead to the prospect of a further enlarged Union, both the EU and future Member States need to be ready. [...] the Union needs to lay the necessary internal groundwork and reforms”¹²⁷ – a statement it repeated with the same words in its December 2023 conclusions.¹²⁸ However, the European Council only referred generally to the EU’s “capacity to act” without clarifying what reforms to the functioning and funding of the EU would be needed to achieve this objective; and in March 2024 it just recalled “that work on both tracks needs to advance in parallel to ensure that both future Member States and the EU are ready at the time of accession.”¹²⁹ Eventually, in June 2024 the Belgian Presidency of the Council of the EU published a progress report on the Future of Europe,¹³⁰ which condensed the state of the discussion on EU reforms at member-state-level, and restated the objective to work on four priority areas – namely, EU values, EU policies, EU budget and EU governance – with a tentative roadmap.

However, in its conclusions of 27 June 2024 the European Council once again largely skirted the issue of EU reforms,¹³¹ rather focusing on the appointment of the new EU top jobs¹³² – Antonio Costa as European Council President, Ursula von der Leyen as the next European Commission President, and Kaja Kallas as the new EU High Representative – and approving the new EU Strategic Agenda 2024-2029,¹³³ which called for a free and democratic, strong and secure, as well as prosperous and competitive Europe. In the summit, the European Council once more underlined “the need to lay the necessary internal groundwork and reforms to fulfil the Union’s long-term ambitions and address key questions related to its priorities and policies as well as its capacity to act”¹³⁴ and repeated that work on reforms “should advance in parallel with the enlargement process.”¹³⁵ On substance, nevertheless, the European Council simply restated the four areas on

¹²³ *ibid.*

¹²⁴ *ibid.* p. 20.

¹²⁵ *ibid.*

¹²⁶ European Commission press release, ‘Commission prepares for pre-enlargement reforms and policy reviews’, 20 March 2024, https://neighbourhood-enlargement.ec.europa.eu/news/commission-prepares-pre-enlargement-reforms-and-policy-reviews-2024-03-20_en.

¹²⁷ European Council, Granada Declaration (n 76).

¹²⁸ European Council Conclusions 14-15 December 2023, EUCO 20/23 para 13.

¹²⁹ European Council Conclusions 21-22 March 2023, EUCO 7/24, para 29.

¹³⁰ Council of the EU, Presidency Progress Report: ‘Future of Europe’, 10 June 2024, Doc. 10411/24.

¹³¹ European Council conclusions 27 June 2024, EUCO 15/24.

¹³² *ibid.*, sec. VI.

¹³³ *ibid.*, Annex.

¹³⁴ *ibid.*, para 48.

¹³⁵ *ibid.*, para 49.

which reforms should focus – once again: values, policies, budget, and governance¹³⁶ – indicating that “it will review progress [in a year’s time,] in June 2025 and give further guidance as needed.”¹³⁷

Yet, this state of affairs is highly problematic. As Sylvie Goulard has pointed out, enlarging the EU without profoundly reforming it risks compromising the entire project of integration – as the Union will grow to the point of exploding.¹³⁸ In fact, as the war in Ukraine highlighted, the EU’s constitutional framework suffers from several substantive and institutional shortcomings which ultimately prevent it from rising to the geopolitical challenges of the moment. As things are, the EU itself cannot secure the blessing of liberty to which Ukraine aspires, as it lacks the fiscal capacity and military capability to deter a foreign aggression. And if Ukraine and possibly 8 other countries from Eastern Europe and the Western Balkans were to join the EU *à traité constant*, the ability of an EU at 35 to provide security and prosperity would further decrease, given the burden of unanimous decision-making. Hence internal constitutional reforms are needed to avoid making EU membership an empty promise, and properly to prepare for enlargement.

4.c The stagnation of EU constitutional reforms

The debate on EU constitutional reforms has been ongoing for several years – at least since Brexit.¹³⁹ In particular, a strong driver has been the Conference on the Future of Europe – which had been originally envisaged by French President Emmanuel Macron in March 2019¹⁴⁰ as a way to re-launch the project of European integration after the UK withdrawal. The Conference took off, after delays due to the Covid-19 pandemic, on 9 May 2021, and came to a close a year later on 9 May 2022, when the war in Ukraine was already raging.¹⁴¹ The Conference was organized as a citizen-focused, bottom-up exercise designed to gain input from European citizens on the key questions facing the EU. This innovative participatory process unfolded through a multi-layered structure. The core of the Conference was represented by 4 European citizens’ panels of 200 participants each, selected randomly to reflect the socio-demographic reality of the EU, which met both in person and remotely over several months. The input from these European citizens’ panels – together with that resulting from analogous national processes – were then reported to the Plenary of the Conference on the Future of Europe, which deliberated on it. Ultimately, the Plenary endorsed 49 proposals with a list of 326 detailed recommendations, which were submitted to the Executive Board and released in a final report published on Europe Day 2022.¹⁴²

The Conference on the Future of Europe’s final report explicitly identified a number of shortcomings in the current EU constitutional structure and made the case for several substantive and institutional amendments to the EU treaties. The Conference, in particular, called for a strengthening of EU powers, with the expansion of EU competences among others in the fields of

¹³⁶ *ibid*, para 50.

¹³⁷ *ibid*, para 51.

¹³⁸ S Goulard, ‘L’Europe enfla si bien qu’elle creva : De 27 à 36 Etats?’ (Tallandier 2024).

¹³⁹ F Fabbrini, *Brexit and the Future of the European Union: The Case for Constitutional Reforms* (OUP 2020).

¹⁴⁰ French President Emmanuel Macron, ‘Lettre Pour Une Renaissance Européenne’, 4 March 2019, <https://www.elysee.fr/emmanuel-macron/2019/03/04/pour-une-renaissance-europeenne>.

¹⁴¹ See also Conference on the Future of Europe digital platform, <https://futureu.europa.eu/>.

¹⁴² Conference on the Future of Europe, Report on the Final Outcome, 9 May 2022, p. 93, <https://www.europarl.europa.eu/resources/library/media/20220509RES29121/20220509RES29121.pdf>.

health, energy, digital technology, migration and foreign affairs. Moreover, the Conference requested an overhaul of the EU decision-making system, with the overcoming of the unanimity rule, particularly in the field of foreign affairs and defence, and a clarification of the roles of the EU institutions. Finally, the Conference also underlined the importance of endowing the EU with the financial means to back up its actions, including by reproducing the “Next Generation EU” (NGEU) funding model beyond the Covid-19 pandemic. At the same time, the Conference pleaded for ‘reopening the discussion about the [EU] constitution’¹⁴³ on the understanding that a constitution would make rules ‘more precise as well as involve citizens and agree on the rules of the decision-making process.’¹⁴⁴ All in all, therefore, the Conference called for a more sovereign federal EU.

In fact, a number of policy-makers immediately embraced the ambitious outcome of the Conference on the Future of Europe. Both French President Emmanuel Macron and then Italian Prime Minister Mario Draghi endorsed the idea of amending the EU treaties;¹⁴⁵ and European Commission President Ursula von der Leyen voiced support for this prospect.¹⁴⁶ Most importantly, the European Parliament (EP) called for a comprehensive follow up to the Conference’s outcome, including via treaty changes.¹⁴⁷ In fact, in a Resolution approved in November 2023 the EP proposed a detailed list of amendments to the EU treaties, dealing both with substantive competences and institutional mechanisms of decision-making, and called for the convening of a convention under Article 48(3) TEU to examine them.¹⁴⁸ Furthermore, in another Resolution adopted in February 2024, the EP called for a deepening of EU integration in view of future enlargements,¹⁴⁹ stating that “widening and deepening the EU must go in parallel”¹⁵⁰ but clarifying that “pre-enlargement reforms are needed to guarantee the efficient functioning of the enlarged EU and its capacity to absorb new members.”¹⁵¹

Nevertheless, the enthusiasm for constitutional change generated by the Conference on the future of Europe was met with equally resolute opposition in other quarters. In a joint non-paper released on the very same day of the Conference’s conclusion, in May 2022, 13 member states from Northern and Eastern Europe clearly indicated that they did ‘not support unconsidered and premature attempts to launch a process towards Treaty change.’¹⁵² In fact, visions of the EU as a polity, which requires greater federalization, are politically and institutionally contested by competing visions of the EU as a market, or an autocracy, which push in very different directions.¹⁵³ In particular,

¹⁴³ *ibid*, Proposal 39, Recommendation 7.

¹⁴⁴ *ibid*.

¹⁴⁵ Italian Prime Minister Mario Draghi, Speech at the European Parliament, 3 May 2022, official English translation <https://www.governo.it/en/articolo/prime-minister-mario-draghi-s-address-european-parliament/19748>.

¹⁴⁶ European Commission President Ursula Von der Leyen, speech, Strasbourg, 9 May 2022, SPEECH/22/2944.

¹⁴⁷ European Parliament Resolution of 4 May 2022 on the follow-up to the conclusions of the Conference on the Future of Europe, P9_TA (2022)0141.

¹⁴⁸ European Parliament Resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties, P9_TA (2023)0427.

¹⁴⁹ European Parliament Resolution of 29 February 2024 on deepening EU integration in view of future enlargement, P9_TA (2024)0120.

¹⁵⁰ *ibid*, para K.

¹⁵¹ *ibid*, para U.

¹⁵² Non paper by Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Malta, Poland, Romania, Slovenia, and Sweden on the outcome of and follow-up to the Conference on the Future of Europe, 9 May 2022, www.movimento europeo.it/images/Documenti/Non_paper_9.5.2022.pdf.

¹⁵³ F Fabbrini (n 139) ch 4.

Hungarian Prime Minister Viktor Orban – who has recently established a new EP far-right parliamentary group named “Patriots for Europe” (now the 3rd largest fraction in the EP after the 2024 European Parliament elections) – has consistently called for a renationalization of EU competences. As a result, the implementation of the Conference on the Future of Europe’s outcome has stalled: 2 years after the Conference’s end its most ground-breaking proposals remain on hold, and the EP request to call a Convention to revise the Treaties has not even been considered by the Council.

Given the obstacles to amending the EU Treaties,¹⁵⁴ several alternative constitutional options have recently moved at the centre of debates on how to prepare for an enlarged EU. In particular, the use of *passerelle* clauses to change decision-making rules, notably in CFSP, has been increasingly considered.¹⁵⁵ *Passerelles* allow for a shift from unanimity voting to qualified majority voting (QMV) in the Council of the EU, *à traité constant*. Article 48(7) TEU foresees generally that when the EU treaties provide ‘for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case.’ Moreover, specific *passerelle* clauses are scattered across the treaties for specific policies.¹⁵⁶ Building on this, on 4 May 2023, 9 Member States – Belgium, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Spain, and Slovenia: all but the latter from Western Europe – released a joint statement launching the group of friends of QMV in CFSP.¹⁵⁷ This was followed by a supportive resolution of the EP on 11 July 2023, which called for using *passerelle* at the earliest opportunity.¹⁵⁸

Yet, the strategy to leverage the *passerelle* clauses has its hurdles. On the one hand, triggering a *passerelle* would still require unanimity in the European Council, which is not a given, due to the hold-out position of several member states. Furthermore, Article 48(7) TEU empowers a single national parliament to block the use of a *passerelle*, even if approved by heads of state and government in the European Council, within six months. Lastly, the same provision explicitly prohibits applying the *passerelle* ‘to decisions with military implications or those in the area of defence.’ On the other hand, there is no escaping that the *passerelle* can achieve only so much. The EU governance structure suffers from a number of shortcomings, and enhancing the legitimacy and effectiveness of the EU requires adjustments which can only be addressed through proper treaty changes. For example, a greater role for the EP in fiscal and budgetary matters is a

¹⁵⁴ See also D Hodson and I Maher, *The Transformation of EU Treaty Making* (CUP 2018).

¹⁵⁵ See R Wessel and V Szép, ‘The implementation of Article 31 of the TEU and the use of qualified majority voting’, study requested by the European Parliament Constitutional Affairs Committee, November 2022, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2022\)739139](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)739139).

¹⁵⁶ See Art. 81(3) TFEU (measures concerning family law), Art. 153(2) TFEU (measures concerning employment and social security), Art. 192(2) TFEU (measures concerning environmental policy), Art. 312(2) TFEU (measures related to the MFF).

¹⁵⁷ Joint Statement of the Foreign Ministries on the Launch of the Group of Friends on Qualified Majority Voting in EU Common Foreign and Security Policy, 4 May 2023, <https://www.auswaertiges-amt.de/en/newsroom/news/2595304-2595304>.

¹⁵⁸ European Parliament Resolution of 11 July 2023 on the implementation of the *passerelle* clauses in the EU Treaties, P9_TA (2023)0269.

democratic need, especially after the establishment of the NGEU, but this can be achieved only through revisions of several treaty provisions.¹⁵⁹

Given these challenges, however, policy-makers have increasingly looked at alternative options to advance European integration. In particular, a group of experts jointly appointed by the French and German Government proposed in September 2023 a series of recommendations to reform and enlarge the EU for the 21st century.¹⁶⁰ Their report outlined six options for reforms, including the approval of a supplementary reform treaty between willing member states if there is deadlock on treaty change.¹⁶¹ Indeed, there are precedents of groups of vanguard member states that have concluded separate *inter-se* intergovernmental agreements on the side of the EU, and differentiated integration has admittedly become a feature of the contemporary EU.¹⁶² Along these lines, a proposal would be to adopt a Political Compact to advance integration overcoming the veto of hostile member states.¹⁶³ Otherwise, Article 49 TEU states that institutional adjustments to the EU and its functioning can also be achieved in the framework of new accession treaties: while this provision has traditionally been interpreted to refer only to the minimal changes to the institutions that necessarily result from the entry of a new EU member state, a more ambitious reading of it would be to tie enlargement and wider reforms into a single agreement.¹⁶⁴ Yet, this avenue would delay EU reforms until enlargement happens – and it remains to be seen whether this is feasible, so it cannot be excluded that transnational cooperation through fora like the EPC will turn out to be the main way forward.

5. Conclusion

This paper has examined how the war in Ukraine had an impact on EU enlargement and transnational cooperation in Europe. It has been explained how, in response to Russia's illegal aggression of Ukraine, the EU relaunched its enlargement process – notably by opening accession negotiations with Ukraine – promoted the establishment of a new EPC, and deepened its ties with both other regional organizations like the CoE and NATO, and a former member like the UK. As the paper argued, the return of large-scale warfare in the European continent for the first time since the end of World War II ultimately contributed to reaffirming the role of the EU as a beacon of peace, security, freedom and prosperity. In fact, Ukraine's request to join the EU just days after

¹⁵⁹ F Fabbrini, *EU Fiscal Capacity: Legal Integration after Covid-19 and the war in Ukraine* (OUP 2022) 141.

¹⁶⁰ See Report of the Franco-German working group on EU institutional reform, 'Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century', Paris-Berlin, 18 September 2023, https://www.diplomatie.gouv.fr/IMG/pdf/20230919_group_of_twelve_report_updated14.12.2023_cle88fb88.pdf.

¹⁶¹ *ibid.* p. 35 ff.

¹⁶² See F Schimmelfenning and T Winzen, *Ever Looser Union? Differentiated European Integration* (OUP 2020).

¹⁶³ See further F Fabbrini, 'Possible Avenues towards Further Political Integration: A Political Compact for a More Democratic and Effective Union', study commissioned by the European Parliament Constitutional Affairs Committee, June 2020, [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/651849/IPOL_STU\(2020\)651849_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/651849/IPOL_STU(2020)651849_EN.pdf).

¹⁶⁴ See also B de Witte, 'Constitutional Challenges of the Enlargement: Is Further Enlargement Feasible without Constitutional Change', study commissioned by the European Parliament Constitutional Affairs Committee, March 2019, 4, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/608872/IPOL_IDA\(2019\)608872_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/608872/IPOL_IDA(2019)608872_EN.pdf).

Russia's invasion showcased how EU membership is seen by third countries in the European continent as the best way to secure the blessings of liberty. Furthermore, beyond the EU, the war in Ukraine served as a trigger to rejuvenate organizations like the CoE and NATO, to launch a new forum such as the EPC, and indeed to strengthen the interplay between these entities – all inspired by the belief in the benefits of transnational cooperation.

Nevertheless, as the paper pointed out, a number of challenges lie ahead, both for regional integration generally and for EU enlargement specifically. In particular with regard to the EU accession of Ukraine, and possibly 8 other countries from the Western Balkans and Eastern Europe, there are issues concerned both with the candidates' preparation and with the EU's own readiness: while accession countries are currently far from meeting the Copenhagen criteria – the minimal conditions to join the EU – the EU itself currently lacks the capacity to absorb, and integrate new members. This is a result of the stalemate in constitutional reforms, which despite being called for by multiple institutions – including the Conference on the Future of Europe, and the EP – have so far been blocked by a number of recalcitrant Member States. In this context, however, it remains uncertain whether the EU can really enlarge to 35 or more members, and, if it does, whether it would survive its expansion. Alternative avenues, including the EPC, may thus emerge as necessary to advance regional integration in the short term while, ironically, also opening an opportunity also for a former member like the UK to reconnect with the EU. In conclusion, if the war in Ukraine has reaffirmed the EU's "messianic" role,¹⁶⁵ and indeed the dynamism of the European project, creativity may be needed to shape the future of Europe ahead.

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¹⁶⁵ J H H Weiler, 'The Political and Legal Culture of European Integration' (2011) 9 *I-Con* 678.