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The External Dimension of Joining and Leaving the EU

Central Issues

- The EU's membership has expanded from the 'original six' countries that founded the European Coal and Steel Community to more than two dozen countries from across the continent during the course of the past decades. At the same time, as the referendum in the United Kingdom from June 2016 and the ensuing events show, a Member State may also decide to leave the European Union.
- Neither joining nor leaving the EU are easy tasks. Both have not only wide-ranging internal legal and political consequences for the Union; they also have important external repercussions. Acceding to the EU provides access to its large internal market but requires candidate countries to adapt their legal systems to conform with the EU's values and *acquis communautaire* of legislation. Hence, the prospect of membership is an important tool of the EU's external action. At the same time, disentangling a withdrawing Member State from the Union not only turns it from subject to object of EU external action; it also, to a large extent, redefines that state's relations with the rest of the world.
- This chapter outlines the legal dimension of joining and leaving the EU from the point of view of EU external relations. Given that the EU has a decades-long history of accessions, but much more recent experience with a Member State willing to leave, the former will be addressed in greater detail than the latter.

I. Joining the EU

A. The History of the EU's Enlargement

Since the High Contracting Parties to the Treaty of Rome came together in 1957, the original Community of six Members has gone through seven rounds of enlargement, with the last in July 2013.

- First enlargement – 1 January 1973: Denmark, Ireland and the United Kingdom
- Second enlargement – 1 January 1981: Greece
- Third enlargement – 1 January 1986: Portugal and Spain
- Fourth enlargement – 1 January 1995: Austria, Finland and Sweden
- Fifth enlargement – 1 May 2004: Cyprus, Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia
- Sixth enlargement – 1 January 2007: Bulgaria and Romania
- Seventh enlargement – 1 July 2013: Croatia

That EU membership also has implications for a country's place in the wider world was well captured in 1975 by Margaret Thatcher, then leader of the British Conservative Party, in a speech that launched her party's campaign to remain in the then European Economic Community:

M Thatcher, *Speech to Conservative Group for Europe (opening Conservative referendum campaign)*, 16 April 1975

And as Harold Macmillan, who made Britain's first application to join the Community, said: 'We are European, geographically and culturally and we cannot, even if we would, disassociate ourselves from Europe.'

That vision of Europe took a leap into reality on the 1st of January 1972 when, Mr. Chairman [Edward Heath], due to your endeavours, enthusiasm and dedication Britain joined the European Community.

- The Community gives us peace and security in a free society, a peace and security denied to the past two generations.
- The Community gives us access to secure sources of food supplies. This is vital to us, a country which has to import half of what we need.
- The Community does more trade and gives more aid than any group in the world.
- The Community gives us the opportunity to represent the Commonwealth in Europe. The Commonwealth want us to stay in and has said so. The Community wants us.

The largest and in many ways most significant enlargement remains that of 2004, when no fewer than ten countries, eight of which were formerly communist Central and Eastern European countries (CEECs), became Member States of the EU. As noted by then European Commission President Romano Prodi, it was an important step in overcoming the division of Europe imposed by the Iron Curtain during the second half of the twentieth century and redefined the EU's role in the world:

R Prodi, President of the European Commission, *Accession Day*, Press Conference, Dublin Castle, 1 May 2004, SPEECH/04/221

This is truly an historic and a happy day … For many long years we have been preparing the ground for the accession to the European Union of these 10 countries from central and eastern Europe and the Mediterranean. The negotiations we have conducted, while difficult at times, bear witness to our common commitment to unify our continent and finally to end the artificial division the Iron Curtain imposed on us for more than half a century.

First, I want to pay tribute to the peoples of Europe who are joining us today. Even in the darkest days of Stalinism, they never lost hope. Since the fall of the Berlin Wall, they have carried out a quiet revolution based on the democratic values that are our common heritage today.

I also want to pay tribute to the leaders of these countries – to the Governments and Parliaments that have followed since the fall of the Berlin Wall. Despite difficulties of all sorts, they have managed to mobilise the whole population in their countries and implement courageous reforms. And I also want to pay tribute to the peoples of the 15 older members for welcoming in the new countries and sharing their area of prosperity and security with them …

In an increasingly complex world, the enlarged Union, based on democratic values, economic openness and a strong social model, can achieve far more than any country can ever hope to achieve on its own.

It can provide a reference for all those across the world who seek their own path, from Latin America to Africa and to Asia.

This does not mean that Europeans want to impose their model on others. Particularly as our 'model' is based on the recognition and safeguarding of our diversity.

But Europe has a great responsibility to help build a world based on the principles of partnership, fairness and justice.

B. The Legal Framework

The legal framework for joining the EU is laid down in Article 49 TEU.

> **Article 49 TEU**
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> Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.
>
> The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

Thus, both the conditions for accession and the necessary amendments to the EU treaties are set out in accession agreements. Although the European Union – and in particular the Commission – is the key negotiator, the final agreement is concluded 'between the Member States and the applicant State' and requires the ratification by each state. Accession agreements are thus not concluded by the Union (in contrast to withdrawal agreements, as we will see later). For these reasons, they form a special category of international agreements under EU law, as opposed to 'normal' international agreements concluded by the EU, which follow the procedure laid down in Article 218 TFEU (see Chapter 4).

The procedure in Article 49 TEU can be described as predominantly intergovernmental with significant supranational aspects. First, there is the unanimity requirement in the Council at the outset to decide whether a third country can indeed receive applicant status. At the end of the procedure, it is the 'contracting' parties (to the EU Treaties) that must all ratify the Treaty of Accession with the new Member State. Upon ratification, the accession agreement becomes part of EU primary law.

What is now Article 49 TEU has changed through successive treaty changes: notably, consent of the European Parliament is now required, and the provision speaks of 'consulting' the Commission. Additionally, the article now also includes a few substantive requirements. In the Treaty of Rome, the only substantive accession condition was that a *European State* can apply to become a member, but in the post-Lisbon version we find the explicit need for a commitment to the values stated in Article 2 TEU, as well as respect for the 'conditions of eligibility agreed upon by the European Council'.

The latter sentence is important, as it opens the door to the application of an extensive 'EU accession *acquis'* which has been elaborated in a piecemeal fashion through successive enlargements. This occurred predominantly during the 1990s, where we saw various European Council meetings laying the bricks of a pre-accession policy in preparation for the fifth enlargement in 2004. This also explains why the Commission is 'to be consulted': it indicates that over time enlargement has become a *policy* in its own right, whereby the Commission plays a crucial policy function in ensuring convergence and compliance with the criteria set out by the Member States reunited in the European Council. Thus, Article 49 TEU provides the general framework, but not the full picture of the steps a third country must take to become a member of the European Union.

C. Procedure for Accession to the EU: A Sketch

In what follows we provide an overview of the path towards EU accession for a third country. The description below is at a relative level of abstraction, since the path towards accession of any third country will be specific to the political, socio-economic, historical and cultural background of the applicant country.

- A third country first presents its application to the Council of the EU. This is a highly political act and usually, such an application will already have been preceded by (extensive) political discussions. This formal request is not quite unlike a proposal for marriage: it will usually not occur until it is relatively certain that a positive reply will follow, and this within a reasonable time period.
- Once the third country has submitted its application, the Council requests the opinion of the Commission. A response of the Council may then come rather swiftly, or it may not. In the case of Morocco, the rejection came soon after its application in 1987, but Turkey received its formal candidate status only in 1997 – ten years after its application. In any case, when the third country has presented its application, the Council will request the Commission to submit its opinion on this application in line with Article 49 TEU.
- The Commission's opinion is published rather quickly after the request by the Council. For example, Serbia presented its application on 22 December 2009, the Council requested the Commission's opinion on 25 October 2010, and the Commission delivered this opinion one year later in October 2011.[1] In this opinion, one will find a macroscopic overview of the extent to which the applicant lives up to the accession criteria at that moment in time (see further below on the accession criteria). The granting of the status of 'candidate country' based on this report is not automatic. It is an important hurdle to be overcome. Granting such status may be conditional upon continued efforts in certain problematic areas. In the case of Serbia, the Commission's positive recommendation was predicated 'on the understanding that Serbia re-engages in the dialogue with Kosovo'.[2]

[1] Communication from the Commission to the European Parliament and the Council, *Commission Opinion on Serbia's Application for Membership to the European Union*, COM(2011) 668 final, Brussels, 12 October 2011.

[2] Ibid, 12.

- Contrary to Article 49 TEU, the practice is such that the final decision on granting candidate status is made by the European Council, rather than the Council. Thus, in the case of Serbia, on 28 February 2012, the General Affairs Council stated that it 'recommends to grant Serbia candidate status and looks forward to the confirmation of this decision by the European Council'.[3] This confirmation followed in March of that year.[4]
- The fact that the applicant is granted candidate status does not mean that formal accession negotiations are immediately opened. That decision is again taken by the Council and European Council on the basis of strict conditionality. For Serbia, the 11 December 2012 Council outlined the need for further progress on Kosovo – among other issues – as precondition for opening accession negotiations. In these conclusions, the Council invited the Commission to report on progress in 2013, stating that a positive recommendation from that institution would lead to opening formal negotiations during the following rotating Presidency.
- Once the Council – again as confirmed by the European Council – agrees, negotiations are opened based on a negotiation framework proposed by the Commission. For Serbia, this step at European Council level occurred in June 2013, with the first round of negotiations starting in January 2014. Such negotiations concern the adoption, implementation and enforcement of the EU *acquis* which is composed of 35 chapters divided according to policy field.[5] One should not understand these 'negotiations' in the traditional sense of negotiating an international agreement between equal sovereign nations. In fact, it concerns a lengthy process of agreeing on how and when to adopt and implement EU rules, without flexibility on defining the substance of the rules themselves. In these negotiations, chapters are not taken all at once, imposing further hurdles of conditionality in the pre-accession process: the Council may politically prioritise which to open first, before it is possible to move to other areas of the *acquis*. For instance, it has become common practice to tackle the chapters on 'judiciary and fundamental rights' and 'justice, freedom and security' early in the negotiations to allow maximum time to establish the necessary legislation, institutions and solid track records of implementation before the negotiations are closed.[6] The negotiations take place between representatives of the EU and the candidate country in so-called intergovernmental conferences.

[3] General Affairs Council, *Conclusions on Enlargement and the Stabilisation and Association Process*, Brussels, 28 February 2012.

[4] Conclusions of the European Council, 1/2 March 2012, EUCO 4/3/12 REV 3.

[5] These are: (1) free movement of goods, (2) free movement of workers, (3) right of establishment and freedom to provide services, (4) free movement of capital, (5) public procurement, (6) company law, (7) intellectual property law, (8) competition policy, (9) financial services, (10) information society and media, (11) agriculture and rural development, (12) food safety, veterinary and phytosanitary policy, (13) fisheries, (14) transport policy, (15) energy, (16) taxation, (17) economic and monetary policy, (18) statistics, (19) social policy and employment, (20) enterprise and industrial policy, (21) trans-European networks, (22) regional policy and coordination of structural instruments, (23) judiciary and fundamental rights, (24) justice freedom and security, (25) science and research, (26) education and culture, (27) environment, (28) consumer and health protection, (29) customs union, (30) external relations, (31) foreign, security and defence policy, (32) financial control, (33) financial and budgetary provisions, (34) institutions, and (35) other issues.

[6] Council of the EU, First Accession Conference with Serbia, Brussels, 21 January 2014, doc 5486/14.

For each chapter, the European Commission first carries out a detailed examination (called 'screening') to determine the level of preparedness of the candidate country. On this basis, the Commission either recommends the opening of the negotiations or requires certain conditions to be fulfilled: the so-called 'opening benchmarks'. During the negotiations – which can take many years – the EU then provides extensive support to the candidate country for the effective incorporation of the *acquis*. Overall, this 'negotiation' is a constant back and forth between the third country, the Commission and the Council consisting of regular progress reports, strategy papers etc in order to progressively 'close' the chapters and prepare the applicant for membership. For most chapters, the Council will set 'closing benchmarks' which need to be met by the candidate country before negotiations in the policy field concerned can be closed. The pace of negotiations thus depends upon the progress in complying with the relevant benchmarks. This implies that the accession negotiations are an open-ended process the outcome of which cannot be guaranteed beforehand.

Conclusions of the General Affairs Council, 25 June 2013, 11443/13, 7

The Council recommends to the June European Council [held three days later], with a view to holding the first intergovernmental conference with Serbia in January 2014 at the very latest, to invite the Commission to submit without delay a proposal for a framework for negotiations in line with the European Council's December 2006 conclusions and established practice, also incorporating the new approach to the chapters on the judiciary and fundamental rights and justice, freedom and security. The steps leading to the normalisation of relations between Belgrade and Pristina will also be addressed in the framework. Prior to the first intergovernmental conference, this negotiating framework will be adopted by the Council and confirmed by the European Council. The Council also recommends to the June European Council to invite the Commission to carry out the process of analytical examination of the *acquis communautaire* with Serbia, starting with the above-mentioned chapters to facilitate rapid early progress in these negotiations.

- Once the negotiations and accompanying reforms have been completed, the country can join the Union. This will be signalled by a 'Commission Opinion on the application for accession to the EU' by the third country. For Croatia, this 'favourable opinion' addressed to the Council was given on 12 October 2011.[7]
- A candidate country accedes to the Union once it and all the Member States have ratified the accession agreement between them and that country. This agreement

[7] Commission Opinion on the application for accession to the European Union by the Republic of Croatia, COM(2011) 667 final, Brussels 12 October 2011.

is specific in that the EU itself is not a party, and the agreement is ratified by all EU Member States as contracting parties. The accession treaties are nevertheless part of the primary law of the EU. The content is rather technical as it will usually make adjustments to the TEU and the TFEU which are largely of an institutional nature (allocation of seats in the EP etc) so as to prepare the Union (institutions) to welcome the new Member State.

D. The 'Conditions of Eligibility': The Copenhagen Criteria

Article 49 TEU states that any *European* state may apply to become a member, a criterion which is open to interpretation. In the run-up to the June 1993 Copenhagen European Council, the Commission captured the difficulty of defining what it means to fulfil this condition for eligibility.

European Commission, *Europe and the Challenge of Enlargement*, 24 June 1992, Bulletin of the EC, supplement 3/92, para 7

The term 'European' has not been officially defined. It combines geographical, historical and cultural elements which all contribute to the European identity. The shared experience of proximity, ideas, values, and historical interaction cannot be condensed into a simple formula, and is subject to review each succeeding generation. The Commission believes that it is neither possible nor opportune to establish now the frontiers of the European Union whose contours will be shaped over many years to come.

In 1987, Morocco submitted an application to become a member of the (then) European Communities but was rejected by the Council on the grounds that it was not a European state.[8] Turkey also applied in 1987 and it received candidate status a decade later. However, its accession negotiations have been significantly hampered by the political debate in Member States over whether this criterion has indeed been fulfilled. The EU institutions and Member States have never explicitly defined what it means to be 'European'. At the 1993 Copenhagen European Council, which authoritatively codified the essential conditions for accession, the focus was entirely political and economic in nature. These 'Copenhagen criteria' have been incorporated into the Article 49 TEU procedure in the statement 'the conditions of eligibility agreed upon by the European Council shall be taken into account'.

[8] European Parliament Legal Service, *Briefing No 23 Legal Questions of Enlargement*, Luxembourg, 19 May 1998, PE 167.617, 5.

Presidency Conclusions, Copenhagen European Council, 21–22 June 1993, 13 (numbering added)

Membership requires that the candidate country has **[1]** achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, **[2]** 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 **[3]** the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

[4] 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 countries.

The first criterion is one of political conditionality, the second is an economic criterion, the third entails the need to fully adopt the *acquis* and the fourth pertains to the Union's own 'absorption capacity' and the debate over widening versus deepening the EU. We will discuss these 'Copenhagen criteria' in turn.

(i) First Criterion: Political Conditionality and Stability of Institutions

Article 49 TEU refers to the need for applicant countries to respect and show commitment to the values listed in Article 2 TEU. These include human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. This reference was not present in the pre-Amsterdam version of the accession procedure, hence this inclusion represents the constitutionalisation of the political conditionality embedded in the first Copenhagen criterion.[9] The notion of a European community based on free and democratic European states was already stated in the Treaty of Rome itself and was explicitly taken up as a criterion during the second and third enlargements of 1981 and 1986 applied to countries transitioning from non-democratic regimes.

C Hillion, 'The Copenhagen Criteria and their Progeny' in C Hillion (ed) *EU Enlargement: A Legal Approach* (Oxford, Hart Publishing, 2004) 4–5

[T]he political conditionality first materialised in the context of the EEC relations with Greece, Portugal and Spain. Discussions on their potential membership were made conditional to their acceptance and establishment of democracy.

[9] C Hillion, 'The Copenhagen Criteria and their Progeny' in C Hillion (ed) *EU Enlargement: A Legal Approach* (Oxford, Hart Publishing, 2004) 3.

> Indeed, the development of Greece's relations with the EEC was frozen following the coup of the 'Colonels', while Spain and Portugal had to free themselves of their dictatorships before they could eventually be regarded as admissible states … the Preamble of the Commission's opinions on the applications of the three southern candidates … underlined that: the principles of pluralist democracy and respect for human rights form part of the common heritage of the peoples of the States brought together in the European communities and are therefore essential elements of membership of the said Communities.

The concrete implementation of the political conditionality criterion means that the Commission carries out a systematic examination of the main ways in which the applicant country's public authorities are organised and operate, as well as the mechanisms for the protection of fundamental rights. Therefore, it aims to assess the extent to which democracy and the rule of law operate *in practice*, and indeed this is not merely a formal or abstract requirement. This examination, therefore, includes a substantive assessment of the structure, powers and functioning of the legislative, executive and judicial branches; and a close look at the actual exercise of civil and political rights and the protection of minorities.

During later European Councils, political conditionality was fleshed out further due to specific (geo)political requirements. In particular, the requirement to solve all bilateral disputes before accession, if needed through involvement of the International Court of Justice, has become an increasingly important condition for membership. Whereas this is sometimes considered to be part of the general political conditions for membership, it may also be regarded as part of a separate condition of 'good neighbourliness'.

(ii) Second Criterion: Functioning Market Economy

Membership of the Union requires a functioning and competitive market economy. If an applicant acceded without it, membership would be more likely to harm than benefit the economy of such a country, but it would also disrupt the good functioning of the internal market.[10] The reasoning goes that in the absence of flexibility in the economy and without a sufficient level of human and physical capital and infrastructure, competitive pressures upon entering could soon be considered too intense by some sections of society. The consequence could be calls for protective measures and a national reflex which, if implemented, would undermine the internal market.

[10] European Commission, *Europe and the Challenge of Enlargement*, 24 June 1992, Bulletin of the EC, supplement 3/92, 9.

(iii) Third Criterion: Taking on the Obligations of Membership

Membership equally implies the acceptance of the EU *acquis* (eg, the rights and obligations, actual and potential, of the Union legal and political system, and its institutional framework). The *acquis* is a broad notion which includes (1) the principles and political objectives of the Treaties, (2) the secondary legislation adopted to implement the Treaties as well as the case law of EU Courts, (3) soft legal documents such as declarations and resolutions adopted in the Union framework as well as (4) international agreements concluded by the Union and its Member States in relation to Union policies. The criterion that an applicant must take on the obligations of membership then has two predominant implications, which essentially mean that if a country wishes to accede, the *acquis* is very much a take-it-or-leave-it affair.

First, the applicant must *accept the entire acquis*. This obligation of full legal approximation means that any difficulties on the side of the applicant should be resolved through transitional measures in the third country rather than by adapting EU rules.[11] During the Maastricht Treaty negotiations, both Denmark and the UK had negotiated opt-outs to the third stage of Economic and Monetary Union, and Britain also to the Social chapter. In relation to the subsequent fifth enlargement, the Commission thus strongly expressed its view that the *acquis* must be accepted as a whole to safeguard the achievements of European integration.[12] The possibility of past opt-outs becoming the rule rather than the exception was to be severely limited. This implies that new Member States are expected to work towards joining the Euro and that they must accept and implement the CFSP as it stands upon accession and its subsequent evolution. If an applicant country's stance in international affairs does not permit this, it cannot be satisfactorily integrated into the Union. For CFSP, this was particularly relevant for the accession of Austria, Finland and Sweden in 1995, due to their long-standing policies of neutrality or non-alignment. This was resolved with the phrase in the Treaty on European Union that the European (now Common) Security and Defence Policy (CSDP) 'shall not prejudice the specific character of the security and defence policy of certain member States'[13] (current Article 42(2) TEU; see Chapter 9).

Second, taking on the obligations of membership also means that the applicant state needs to *effectively apply and implement* the *acquis*. In this sense, it means that the applicant state should have the legal and administrative framework in the public and private sectors to implement and enforce all aspects of the acquis (and thus also the first two Copenhagen criteria).[14] This consideration was particularly acute in relation to the CEECs during the fifth enlargement. It is for that reason that the 1995

[11] Hillion (n 9) 9.
[12] European Commission (n 10) 12.
[13] K Smith, 'The Evolution and Application of EU Membership Conditionality' in M Cremona (ed) *The Enlargement of the European Union* (Oxford, Oxford University Press, 2003) 112.
[14] European Commission (n 10) 9.

Madrid European Council expanded on this third Copenhagen criterion by stating the EU pre-accession strategy should also include the 'adjustment of their administrative structures'. Below we expand on how EU enlargement *policy* has been devised exactly to guarantee that countries fulfil what is essentially a horizontal accession requirement: the institutional capacity to *in concreto* apply, support and implement the legal, political and economic obligations of EU membership.

(iv) Fourth Criterion: Integration (or Absorption) Capacity

The 1993 Copenhagen European Council added a fourth accession criterion which applies to the Union itself. Namely, it is important to take into consideration the general interest of the Union in terms of 'absorption capacity' to ensure the momentum of European Integration. In its 2006–2007 enlargement strategy paper, the Commission introduced the concept 'integration capacity' to point at the EU's ability to function effectively after enlargement.

European Commission, *Enlargement Strategy and Main Challenges 2006–2007*, COM(2006) 649 Brussels, 8 November 2006, 17

The EU's absorption capacity, or rather integration capacity, is determined by the development of the EU's policies and institutions, and by the transformation of applicants into well-prepared Member States. The capacity of would-be members to accede to the Union is rigorously assessed by the Commission on the basis of strict conditionality. Integration capacity is about whether the EU can take in new members at a given moment or in a given period, without jeopardizing the political and policy objectives established by the Treaties. Hence, it is first and foremost a functional concept.

E. The Condition of 'Good Neighbourliness'

The enlargement policy of the EU aims to create security, stability and prosperity on the European continent. It is, therefore, no coincidence that the promotion of regional cooperation and good neighbourly relations constitutes an essential part of the EU's pre-accession strategy. This was explicitly recognized for the first time in the Presidency Conclusions of the 1994 Essen European Council[15] and later developed in subsequent European Council meetings.[16]

[15] Presidency Conclusions, Essen European Council 9/10 December 1994, Pt 12.
[16] See, eg, Presidency Conclusions Helsinki European Council 10–11 December 1999, Pt 4.

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 (eds) *Good Neighbourly Relations in the European Legal Context* (Leiden, Brill/Nijhoff, 2015) 217

… the 1993 Copenhagen European Council ignored the principle of good neighbourliness when it defined the political, economic and legal conditions for accession to the EU. It was only one year later, at the 1994 Essen European Council, that the promotion of good neighbourly relations formally entered the EU's pre-accession strategy. This evolution cannot be disconnected from the so-called *Pact on Stability in Europe*. The latter had been initiated in 1993 on the initiative of the French Foreign Minister Eduard Balladur and became the first EU Joint Action within the framework of the Common Foreign and Security Policy (CFSP). The main objective was to bring together all Central and Eastern European countries into a pan-European conference in order to discuss outstanding issues related to the protection of minorities and the delimitation of borders … The work conducted within the context of the Stability Pact for Europe helped to operationalize the principle of good neighbourliness as a precondition for EU accession. Derived from the UN Charter, the 1975 CSCE Helsinki Final Act and the 1990 CSCE Charter [of Paris for a New Europe], it requires the candidate countries' respect for ten principles, including (1) sovereign equality of states, (2) refraining from the threat or use of force, (3) inviolability of frontiers, (4) territorial integrity of states, (5) peaceful settlement of disputes, (6) non-intervention in internal affairs of other countries, (7) human rights and fundamental freedoms, including the freedom of thought, conscience, religion and belief, (8) equal rights and self-determination of peoples, (9) cooperation among states and (10) fulfilment in good faith of obligations under international law.

Good neighbourliness has gained particular importance during the EU accession preparations of the Western Balkan countries. The obligation to foster cooperation and good neighbourly relations with the other countries of the region is included in all Stabilisation and Association Agreements (SAAs) and has become a standard item in the annual Commission monitoring reports assessing the preparedness of candidate countries for accession to the European Union. Moreover, it found its way into the process of EU accession negotiations. For instance, the negotiating framework with Serbia explicitly refers to the normalisation of relations with Kosovo, which should lead to a legally binding agreement by the end of Serbia's accession negotiations. This issue is addressed as a specific item under chapter 35 on 'other issues'.[17]

[17] Council of the EU (n 6).

The Prespa Agreement settling the name dispute between Greece and the Former Yugoslav Republic of Macedonia, based on which the latter officially became the Republic of North Macedonia, may be regarded as an example of good neighbourliness. It removed an important obstacle towards the possible start of accession negotiations, which had been recommended by the European Commission since 2009. Following the conclusion of the Prespa Agreement, as well as the Treaty on Good Neighbourly Relations with Bulgaria, the Council envisaged it would decide on this question no later than October 2019.[18]

II. EU Enlargement Policy in Practice

In this section, we examine the development of a fully-fledged EU enlargement *policy* in preparation for the 2004, 2007 and 2013 enlargements. As a starting point it is notable that there is a world of difference between the latest three rounds and the preceding rounds of enlargement because, beforehand, one could not speak of a strategy or 'policy of pre-accession'. We have seen that acceding to the Union requires the aspiring Member State to make numerous legislative, institutional, economic and political adaptations. During the first four enlargements, difficulties for the applicant to adapt to the *acquis* were commonly resolved during transitional periods included in the accession agreement, therefore taking place *after* accession. However, in the lead-up to the 2004 enlargement of the Central and Eastern European countries, a true strategic pre-accession process unfolded based on the 1993 Copenhagen criteria. This was a consequence of the fact that the complexity and volume of the *acquis* had grown significantly between the 1970s and the 1990s, but more importantly because greater convergence between the EU and the aspiring CEECs was required to ensure a successful enlargement for both sides.

The EU's general enlargement policy *vis-à-vis* the countries of Central and Eastern Europe basically started with the formulation of the 1993 Copenhagen criteria and the formal proclamation of a 'pre-accession strategy' at the December 1994 Essen European Council.[19] The latter involved a bilateral and multilateral dimension. At the bilateral end, it meant a substantive re-orientation of the Europe Agreements from association to pre-accession instruments, without actually renegotiating the texts of these agreements. It was rather through a pragmatic policy process that the Europe Agreements and its institutions became the bilateral conduit for intensified, tailor-made pre-accession collaboration.[20] On the multilateral side, there was the creation of a so-called 'Structured Dialogue'. This relationship covered all areas of the *acquis* and was meant to familiarize the candidate countries with the various activities of the Union by allowing CEECs representatives to meet with their EU counterparts, mostly

[18] Council conclusions on enlargement and stablisation and association process, 18 June 2019. The final decision on opening accession negotiations with North Macedonia (and Albania) still had to be taken when this manuscript was finished.

[19] European Council Conclusions, Essen, 9–10 December 1994, Annex IV.

[20] K Inglis, 'The Europe Agreements Compared in the Light of their Pre-Accession Reorientation' (2000) 37 *Common Market Law Review* 1173, 1182.

in the margins of formal Council meetings.[21] Finally, it is important to recall that the launch of the pre-accession strategy was also meant to prepare the EU itself in line with the fourth Copenhagen criterion. Thus, the European Council announced as part of its strategy that the institutional conditions for ensuring the proper functioning of the Union must be created at the 1996 Intergovernmental Conference (ICG), in what became known as the Amsterdam Treaty.

Meanwhile, Malta and Cyprus had also submitted applications for EU membership and were also included in the pre-accession process. In December 1995, the Madrid European Council decided that accession negotiations could start six months after the end of the 1996 IGC. In June 1997, the European Council reached the following conclusions:

European Council Conclusions, Amsterdam, 16–17 June 1997

The European Council notes that, with the successful conclusion of the Intergovernmental Conference, the way is now open for launching the enlargement process in accordance with the conclusions of the Madrid European Council.

It welcomes the Commission's intention to present by mid-July its opinions on the accession applications as well as a comprehensive communication ('Agenda 2000') covering the development of Union policies including the agricultural and structural policies, the horizontal questions related to enlargement and finally the future financial framework beyond 1999.

The European Council notes that the Commission in its Agenda 2000 communication will draw the main conclusions and recommendations from the opinions and give its views on the launching of the accession process including proposals on reinforcing pre-accession strategy and further developing pre-accession assistance building on ongoing reforms of PHARE.

The Commission Communication entitled 'Agenda 2000: For a stronger and wider union' was published in July 1997[22] and contained Commission opinions on each application for membership. The individual country opinions were contentious, as the Commission stated that only five CEECs were ready to open accession negotiations: Poland, Hungary, the Czech Republic, Slovenia and Estonia. The Commission opinion on Cyprus was positive, whereas Malta had excluded itself by freezing its application for membership. The December 1997 Luxembourg European Council confirmed the choice for the five CEECs made by the Commission and agreed upon Agenda 2000's *enhanced* pre-accession strategy which – sensitive to negative political responses from excluded applicants – was applied to all CEECs. Enhanced pre-accession was applied to Cyprus and Malta from 2000 onwards.

[21] M Maresceau, 'Pre-accession' in M Cremona (ed) *The Enlargement of the European Union* (Oxford, Oxford University Press, 2003) 20.

[22] European Commission, *Agenda 2000: For a stronger and wider Union*, 15 July 1997, COM(97) 2000 final.

The enhanced pre-accession strategy established a comprehensive legal framework for supporting and monitoring the situation in the applicant countries, with the introduction of Accession Partnerships (APs) as the core instrument. For each candidate country, an individual AP laid down, in a single framework, the priority areas for further progress towards accession, the financial assistance available for implementing these priorities and the conditions applicable to that assistance. The priorities were identified on the basis of the Commission's opinions and, later on, its annual progress reports. Consequently, the Commission played a crucial role in the preparation of the APs even though, from a legal point of view, they took the form of unilateral Council decisions.

The December 2002 European Council in Copenhagen confirmed the conclusion of accession negotiations with the CEECs (minus Romania and Bulgaria), Cyprus and Malta. The Accession Treaty between the candidates and the (then) 15 Member States was signed in April 2003 and entered into force on 1 May 2004. However, the fifth accession did not come without its caveats. Significant transitional arrangements were included in the accession agreement, including post-accession conditionality.

K Inglis, 'The Union's Fifth Accession Treaty: New Means to Make Enlargement Possible' (2004) 41 *Common Market Law Review* 937, 971–72

The current Accession Treaty distinguishes itself from previous accession treaty practice for a number of reasons. While this is the first enlargement where the in-comers are not acceding to the entirety of the Union's activities, the new Member States are given no option to permanently derogate from the *acquis* nor to opt out from those chapters where certain of the Fifteen have opted out – Schengen and EMU. Also, the trust of the Fifteen Member States in the new Member States' capacity and willingness to meet the obligations of membership has arisen in the current enlargement. Trust arises as an issue because of the lack of proven performance of the ex-communist countries. In the context of an enlarged Union, expectations with respect to the incoming Member States' future behaviour is put under further strain due to the dramatic increase in the number of Member States combined with the deepening and widening of EU integration, and the consequent intensification of monitoring and enforcement efforts to ensure the integrity of the *acquis* in a Union of twenty-five …

Perhaps the single most controversial topic in the months that preceded enlargement was that of the movement of workers. Public fears of mass migration to the Fifteen led most of them to make use of the transitional arrangements for workers in respect of workers from the eight CEEC Member States.

The EU's sixth accession treaty regarding the enlargement towards Bulgaria and Romania introduced new mechanisms of conditionality. For instance, it included a 'membership postponement safeguard clause' giving the Council the possibility to postpone the envisaged date of accession by twelve months should the acceding countries fail to fulfil their commitments following the end of accession negotiations. This unique clause was not used in practice. Both countries could join the EU on 1 January 2007.

A Łazowski, 'And Then They were Twenty-Seven… A Legal Appraisal of the Sixth Accession Treaty' (2007) 44 *Common Market Law Review* 401, 416

The membership postponement safeguard clause was not used; nevertheless, it can be argued that its mere existence played an important political role. It served as a stick to discipline the forthcoming members in their last-minute pre-accession efforts. Had it been used, its potential benefits would have been rather limited. The postponement of membership by 12 months would not have saved the European Union from admitting the two countries struggling with their accession commitments.

In addition, the European Commission set up a Cooperation and Verification Mechanism (CVM) on the legal basis of the internal market and justice and home affairs safeguard clauses.[23] This allowed the Commission to continue assessing the two countries' progress in relation to judicial reform, corruption and (only for Bulgaria) organised crime on the basis of a benchmarking procedure. The Commission issued its first assessment report on 27 June 2007 and, more than ten years after the Romania's and Bulgaria's accession, this practice still exists.[24] The Commission reports are discussed and endorsed by the Council. In practice, the Schengen accession of Romania and Bulgaria has been tied to removal of the CVM.

Council Conclusions on the Cooperation and Verification Mechanism, Brussels, 12 December 2018, doc 15187/18

The Council reiterates that the Cooperation and Verification Mechanism continues to be instrumental for progress. It remains an appropriate tool to assist Bulgaria and Romania in their respective reform efforts, in order for each of them to achieve a record of concrete and lasting results required to fulfil the objectives of the Mechanism. The Council recalls its continued readiness to support efforts of Bulgaria and Romania in this regard through EU and bilateral assistance. Pending the satisfactory fulfilment of all respective benchmarks through a substantial and lasting reform process, which the Council expects in this framework, the Mechanism stays in place.

[23] Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption [2006] OJ L 354/56; Commission Decision 2006/929/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organized crime [2006] OJ L354/58.

[24] The annual CVM reports are available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm_en.

The EU's seventh accession agreement was signed on 9 December 2011 between Croatia and the, at that time, 27 EU Member States. It includes a new monitoring mechanism based on conditionality and benchmarking particularly (but not exclusively) in the area of the judiciary and fundamental rights. Apart from the 'membership postponement safeguard clause', it also covers a set of safeguard clauses known from previous accession treaties (ie, the general economic safeguard clause, the economic market safeguard clause and the Justice and Home Affairs safeguard clause).[25] Hence, it seems fair to conclude that the evolution of the EU's pre-accession conditionality since the preparation of the EU's fifth enlargement goes hand in hand with increased attention for post-accession conditionality in the treaties of accession.

III. The Future of EU Enlargement Policy

Each year, the European Commission adopts its 'enlargement package', setting out the state of play of the EU's enlargement policy together with country reports assessing the situation in each candidate country and potential candidate.

European Commission, *2018 Communication on EU Enlargement Policy*, COM(2018) 450 final, Strasbourg, 17 April 2018, 1

The enlargement process continues to be built on established criteria and fair and rigorous conditionality. Each country is assessed on the basis of its own merits. The assessment of progress achieved and the identification of shortcomings aim to provide incentives and guidance to the countries to pursue the necessary far-reaching reforms. For the prospect of enlargement to become a reality, a firm commitment to the principle of 'fundamentals first' remains essential. Structural shortcomings persist, notably in the key areas of the rule of law and the economy. Accession candidates must deliver on the rule of law, justice reform, fight against corruption and organised crime, security, fundamental rights, democratic institutions and public administration reform, as well as on economic development and competitiveness. Given the complex nature of the necessary reforms, it is a long-term process.

The EU's enlargement process currently includes the countries of the Western Balkans, which are all given the prospect of EU membership in the framework of the so-called Stabilisation and Association Process (SAP), and Turkey, which has been recognised as a candidate country at the December 1999 Helsinki European Council. For a substantive analysis of the EU's relations with these countries, see Chapter 13 on 'The EU and its neighbours'.

[25] A Łazowski, 'European Union Do Not Worry, Croatia is Behind You: A Commentary on the Seventh Accession Treaty' (2012) 8 *Croatian Yearbook of European Law and Policy* 1.

A. Accession Prospects for the Western Balkans

The EU remains committed to ensure a credible enlargement perspective for the Western Balkans. In this respect, the European Commission envisaged an enhanced engagement with the region, based upon the well-known principles of conditionality and differentiation.

European Commission, *A credible enlargement perspective for an enhanced EU engagement with the Western Balkans*, COM(2018) 65 final, 2

Accession negotiations are already well underway with Montenegro and Serbia. With strong political will, the delivery of real and sustained reforms, and definitive solutions to disputes with neighbours, they could potentially be ready for membership in a 2025 perspective. This perspective is extremely ambitious. Whether it is achieved will depend fully on the objective merits and results of each country.

…

The Western Balkan countries now have a **historic window of opportunity** to firmly and unequivocally bind their future to the European Union. They will have to act with determination. Accession is and will remain a merit-based process fully dependent on the objective progress achieved by each country. The countries may catch up or overtake each other depending on progress made.

The Commission is ready to prepare recommendations to open accession negotiations with Albania and the former Yugoslav Republic of Macedonia, on the basis of fulfilled conditions. With sustained effort and engagement, Bosnia and Herzegovina could become a candidate for accession. Kosovo* has an opportunity for sustainable progress through implementation of the Stabilisation and Association Agreement and to advance on its European path once objective circumstances allow.

The Commission's ambitious strategy for the Western Balkans implied, amongst others, a road map for Montenegro and Serbia to complete their accession process in a 2025 perspective and the opening of accession negotiations with Albania and North Macedonia. In its 2019 Communication on the EU's enlargement policy, the Commission explicitly asked the EU Member States to take 'concrete and fast action' in order to ensure the EU's credibility in the region and beyond.

European Commission, *Communication on EU Enlargement Policy* COM(2019) 260 final, 1–2

The EU's enhanced engagement with and commitment to the region over the last year is already yielding concrete and significant **results**. North Macedonia

not only continued its ambitious reform agenda, but also reached a historic agreement with Greece resolving a 27-year old name dispute. This, together with the bilateral agreement with Bulgaria, is an example of how to strengthen good neighbourly relations for the entire region, and testimony to the power of attraction of the European perspective. Similarly, Albania is pursuing profound reforms, in particular a major transformation of its justice system, including an unprecedented re-evaluation of judges and prosecutors.

This welcome progress achieved now calls for the Union's concrete and fast action. The EU has the opportunity, and a strong self-interest, to lock in long-term positive momentum across the region. The Union must live up to its commitments and give credit where credit is due. Failure to reward objective progress by moving to the next stage of the European path would damage the EU's credibility throughout the region and beyond. A tepid response to historic achievements and substantial reforms would undermine stability, seriously discourage much needed further reforms and affect work on sensitive bilateral issues like the Belgrade-Pristina dialogue. Strategically, it would only help the EU's geopolitical competitors to root themselves on Europe's doorstep.

However, the 17–18 October 2019 European Council failed to reach a consensus on the next steps. France, in particular, opposed the start of accession negotiations with Albania and North Macedonia and requested a fundamental revision of the EU's enlargement policy. The French position was clarified in a non-paper, published in November 2019.

Non-Paper on Reforming the European Union Accession Process, November 2019

Twenty years after recognizing the European perspective of the Western Balkan countries, despite the reforms undertaken and the courageous acts of reconciliation undertaken (such as the Prespa Agreement), the profound political, economic and social transformations required for a future accession to the European Union continue to be too slow and the concrete benefits for citizens in candidate countries remain insufficient.

A renewed approach to the accession process is therefore necessary to support the Western Balkan countries in concrete terms with regard to the reforms necessary to fully comply with the rule of law and generally to apply the European acquis. This approach should be accompanied by a strong commitment by the European Union in order to help them to confront the numerous and complex challenges related to their economic and social development, to have command of the competences regarding their territory, and confront their migration and security challenges.

A renewed approach should be based on 4 principles: gradual association; stringent conditions; tangible benefits; reversibility

- Negotiations organized around policy blocks, in which candidate countries would gradually be included;
- Stringent conditions, in order to effectively converge towards European norms and standards over the long term, in the field of the rule of law, but also economic and social convergence;
- Concrete benefits during the process (which are currently lacking and prevent migratory movements from being stemmed, posing problems for both parties), particularly through increased financial support;
- A reversible process to ensure its credibility and incentive nature.

This new approach would also be based on enhanced political governance

B. Turkey: A Candidate Destined to Join the Union?

Turkey occupies a special place in the EU's enlargement policy. Already the 1963 EU-Turkey association agreement (see Chapter 13) provides that the contracting parties 'shall examine the possibility of the accession of Turkey to the Community' as soon as the operation of the agreement had advanced far enough.[26] In 1987, Turkey formally applied for EEC membership. In its 1989 opinion, the Commission concluded that it was not the appropriate moment for starting accession negotiations taking into account the difficult economic and political situation in Turkey. Nevertheless, it confirmed Turkey's eligibility for membership and suggested that the completion of the customs union would be helpful to deepen the bilateral relationship.[27] After the adoption of association council Decision No 1/95 and against the background of the EU's enlargement policy including the CEECs, Malta and Cyprus, the 1999 Helsinki European Council significantly upgraded the position of Turkey within the EU enlargement process when it concluded that 'Turkey is a candidate state destined to join the Union on the basis of the same criteria as applied to the other candidate countries.'[28]

The opening of accession negotiations started in October 2005 but rather quickly the Council blocked the opening of a series of important negotiating chapters in reaction to Turkey's refusal to open its air and sea ports to planes and vessels from the Republic of Cyprus. This, in turn, is the direct result of Turkey's refusal to recognise the authorities of the Republic of Cyprus as the legitimate representatives of the entire island.[29] Despite several attempts to re-energise the negotiations, Turkey's accession process has been stalled since the failed coup attempt of July 2016.

[26] Agreement establishing an association between the European Economic Community and Turkey [1977] OJ L361/1, Art 28.

[27] Commission Opinion on Turkey's request for accession to the Community, SEC (1989) 2290 final, 8.

[28] Presidency Conclusions Helsinki European Council, 10–11 December 1999, para 12.

[29] S Lauhlé Shaelou, *The EU and Cyprus: Principles and Strategies of Full Integration* (Leiden, Martinus Nijhoff, 2010) 62–68.

European Commission Staff Working Document, Turkey 2018 Report, SWD (2018) 153 final, 3

Turkey remains a key partner for the European Union. … Within the framework of accession negotiations, 16 chapters have been opened so far and one of these was provisionally closed. The Turkish government reiterated its commitment to EU accession but this has not been matched by corresponding measures and reforms. On the contrary, Turkey has been moving away from the European Union. The Presidency conclusions of December 2016 stated that under the currently prevailing circumstances, no new chapters are considered for opening.

In March 2019, the European Parliament recommended the formal suspension of accession negotiations with Turkey and suggested a redefinition of the existing relationship based upon a modernisation of the customs union.[30] The Parliament's resolution is non-binding and requires further initiatives from the Commission and the Council.

IV. Leaving the EU

A. The Legal Framework

Before 2009, there was no clause setting out a procedure for leaving the Union. This changed with the entry into force of the Lisbon Treaty, which introduced Article 50 TEU.

Article 50 TEU

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

[30] European Parliament Resolution of 13 March 2019 on the 2018 Commission Report on Turkey, P8_TA(2019)0200.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.
   A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

B. The Procedure for Leaving the Union

Article 50 TEU calls upon the Union to negotiate and conclude 'an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union'. Reference is made to Article 218(3) TFEU, which is part of the EU's general procedure for the negotiation and conclusion of international agreements with third states (see Chapter 4). According to Article 50(2) TEU, such a withdrawal agreement 'shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament'. It is interesting to note that to join the Union a legal relationship with the current Member States needs to be established but to leave the Union, a State will have to settle the issue with the organisation of which it has become a member, which is a complex endeavour.

A Łazowski, 'Withdrawal from the European Union and Alternatives to Membership' (2012) 37 *European Law Review* 523, 539–41

This analysis demonstrates that a departure is politically and legally possible; at the same time it will be an extremely complex and controversial exercise. Article 50 TEU provides only a general legal framework for withdrawal and a lot of additional decisions would be required in order to develop this into a fully-fledged withdrawal *acquis*. Although theoretically one can come to the conclusion that art. 50 TEU allows for a unilateral withdrawal, the analysis above shows that this is rather illusory. It is argued that to facilitate an exit the European Union will have to negotiate an agreement with the departing State which will not only outline the terms of departure but also regulate future relations between the two sides. Such an agreement would be concluded in accordance with art. 218 TFEU, and therefore would fall fully under the

jurisdiction of the Court of Justice. Furthermore, lacunae left by the legislator will have to be filled by the decision-makers when the departure of a particular Member State from the European Union becomes a reality …

The best arrangement for future relations between a divorcée and the European Union remains uncertain. The two existing models of integration without membership may be tempting for those whose understanding of the idiosyncrasies of the European Economic Area and the Swiss model is limited. But as soon as the basic issues in these models are explored, it becomes clear that neither would now be acceptable for a former Member State of the European Union (or the European Union itself). Furthermore, one should also remember that if a country decides to leave the European Union, art. 50(5) TEU must be taken into account. In order to return to the European Union such a country would have to go through the entire accession process from scratch. In the case of a country like the United Kingdom, the renegotiation of existing opt-outs and budgetary rebate would be politically very difficult, if not impossible. One has to remember that any new entrant is obliged to accept participation in the Economic and Monetary Union and the Schengen Conventions.

In conclusion, a divorce from the European Union should not be the triumph of the imagination over intelligence or hope over experience, but a decision based on a very thorough political, economic and legal analysis – as the consequences in all possible respects will be profound.

In the wake of the referendum in the United Kingdom of June 2016, which resulted in a 52 percent overall majority in favour of leaving the EU, a number of developments have started to clarify how the process of withdrawal operates.

According to Article 50(1) TEU, the decision to leave must be taken based on a Member State's 'own constitutional requirements'. In the case of the UK, the question arose as to whether the British Government could issue the official notification that launched the withdrawal process mentioned in Article 50(2) on its own – as an exercise of so-called 'prerogative powers' in the area of foreign policy – or whether parliamentary consent would be required. This question was ultimately settled by the UK Supreme Court in the *Miller* case, in which it ruled that, due to the special nature of EU law, parliamentary consent was indeed necessary.

***R (on the Application of Miller and Another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5**

86 … the EU Treaties not only concern the international relations of the United Kingdom, they are a source of domestic law, and they are a source of domestic

legal rights many of which are inextricably linked with domestic law from other sources. Accordingly, the Royal prerogative to make and unmake treaties, which operates wholly on the international plane, cannot be exercised in relation to the EU Treaties, at least in the absence of domestic sanction in appropriate statutory form …

90 The EU Treaties as implemented pursuant to the 1972 [European Communities] Act were and are unique in their legislative and constitutional implications. In 1972, for the first time in the history of the United Kingdom, a dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law: Parliament and the courts. …

101 Accordingly, we consider that, in light of the terms and effect of the 1972 Act, and subject to considering the effect of subsequent legislation and events, the prerogative could not be invoked by ministers to justify giving Notice: ministers require the authority of primary legislation before they can take that course.

This judgment, of course, only applies to the constitutional system of the UK. Nevertheless, it creates a presumption that, given the wide-ranging effects that withdrawal from the EU on domestic legislation and individual rights would have in any Member State, parliamentary consent would likely be required elsewhere, too. Moreover and in contrast to the UK's 'unwritten' constitution, some Member States' constitutions explicitly presume or demand EU membership. Hence, the decision to leave the EU might even require constitutional amendment in these countries.

French Constitution, Article 88-1

The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common.

German Basic Law, Article 23(1)

With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. …

Once a Member State officially issues the notification to withdraw, negotiations between the withdrawing state and the EU commence. Negotiations on the EU's side, as with most international agreements with third countries, are conducted by the European Commission with a mandate from the Council.

An important feature of the Article 50 TEU procedure is that it starts a two-year countdown during which a Withdrawal Agreement must be concluded. This time limit can only be extended by a unanimous decision of the European Council and the withdrawing Member State as per Article 50(3) TEU. The time limit is a way to put pressure on the withdrawing Member State to come to an agreement with the EU and not keep the entire Union in a state of uncertainty for too long.

In this context, the question arose whether a notification of the intention to leave the EU can be revoked and, if so, under which circumstances. There were concerns that opening up that possibility would undermine the effect of the time limit, giving the withdrawing Member State the opportunity to gain time for obtaining more favourable terms from the EU. This issue was settled by the CJEU in the *Wightman* case.

Case C-621/18, *Wightman v Secretary of State for Exiting the European Union*, ECLI:EU:C:2018:999

73 It follows, in the first place, that, for as long as a withdrawal agreement concluded between the European Union and that Member State has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that provision, has not expired, that Member State – which enjoys, subject to Article 50(4) TEU, all of the rights and remains bound by all of the obligations laid down in the Treaties – retains the ability to revoke unilaterally the notification of its intention to withdraw from the European Union, in accordance with its constitutional requirements.

74 In the second place, the revocation of the notification of the intention to withdraw must, first, be submitted in writing to the European Council and, secondly, be unequivocal and unconditional, that is to say that the purpose of that revocation is to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end.

Thus, while a unilateral revocation is possible, the Court stressed that it needs to be 'unequivocal and unconditional' (ie, it must not be used as a tactic in ongoing withdrawing negotiations). At the same time, a Member State that decides to remain after all keeps all its rights, including any opt-outs that may apply to it.

The withdrawal agreement negotiated under Article 50 TEU must be distinguished from future agreements between the EU and its former Member State. According to

Article 50(2) TEU, the withdrawal agreement only has to take into account 'the framework' for the withdrawing state's 'future relationship with the Union'. Having become a third country from the point of view of the EU, future agreements would be concluded following the general procedure of Article 218 TFEU (Chapter 4). Nevertheless, any withdrawal agreement is likely to include a transitional period to ease the disentangling of the relationship between the EU and its former Member State and provide time for negotiating agreements establishing the future relationship with as little disruption and legal uncertainty as possible.

C. The External Dimension of Leaving the EU

Leaving the Union has also important external repercussions. In the first place, a Member State which had control over the levers of EU external action from within the Union subsequently becomes an object of EU external action. As a third state, it will have to negotiate agreements with the EU in the various areas of EU competence as described in the previous chapters. Moreover, that state can become the target of unliteral EU actions such as sanctions or international dispute settlement at the WTO.

In addition, leaving the EU to a large extent also redefines that state's relations with the rest of the world. As was pointed out in Chapter 4, the EU is an active international-treaty maker. In areas of exclusive competence, the EU concludes international agreements with third parties on its own, without the need for the Member States to be parties as well. Therefore, once a country leaves the EU, these international agreements no longer apply to it. In the context of Brexit, it was estimated that more than 700 treaties with third countries would cease to apply to the UK.[31]

It is then up to the former Member State and the respective third countries to negotiate either 'continuity agreements' to replace the erstwhile EU agreements or to negotiate new agreements between them. However, negotiating such agreements already during the Article 50 TEU process (ie, while a country is still a Member State) might violate the duty of sincere cooperation set out in Article 4(3) TEU,[32] as explained in Chapter 2).

More importantly, the withdrawing Member State will not know what it may be able to offer during such negotiations until it has settled its future relationship with the EU. For example, if a former Member State opts for staying in a customs union with the EU or align its regulations with EU rules in an EEA-style setting (see Chapter 13), that limits its freedom to reduce tariffs or adopt laxer regulatory standards in its relations with other third countries.

A particularly intricate issue is the disentanglement of a Member State from the EU's mixed agreements (see Chapter 4), since the withdrawing Member State is a party to these agreements – at least at first glance – in its own right.

[31] Paul McClean et al, 'The Brexit Treaty Renegotiation Checklist', *Financial Times*, 20 August 2017.

[32] J Larik, 'Sincere Cooperation in the Common Commercial Policy: Lisbon, a "Joined-Up" Union, and "Brexit"' (2017) 8 *European Yearbook of International Economic Law* 83, 103–04.

RA Wessel, 'Consequences of Brexit for International Agreements Concluded by the EU and its Member States' (2018) 55 *Common Market Law Review* 101, 119–20

At first sight, the situation could be easier in the case of so-called 'mixed agreements' (concluded by both the EU and its Member States with one or more third States or international organizations) as the UK, as one of the signatories, seems to be a "party" in its own right and bound directly under public international law. Yet, in the case of bilateral mixed agreements in particular the Member States and the EU are presented as a 'team'. This is often underlined by the preamble, where it provides that the agreement is concluded between the third country, of the one part, and the European Union and its Member States, of the other part, jointly referred to as 'the Parties'. Significantly, several mixed agreements include a clause defining the term 'Parties' as 'the Union or its Member States, or the Union and its Member States, in accordance with their respective competences, on the one hand, and (the third country), on the other'. Furthermore, just as in the case of EU-only agreements …, mixed agreements (again primarily bilateral ones) often have territorial application clauses defined in terms of the territory of EU Member States. …

While most mixed EU FTAs contain specific provisions for the termination of their operation, they do not provide for a special termination clause in case of withdrawal of a State from the EU. For some, this leads to the conclusion that 'the UK's withdrawal from the EU will not as such affect its capacity as a formal 'party' to mixed EU FTAs'. Perhaps the better question is to what extent they will continue to *apply* to the UK …

In that respect, it is essential to recall that these are not just international agreements that the UK entered into individually, despite the remark made by Advocate General Sharpston [in Opinion 2/15] that Member States are parties to the agreement as sovereign States, 'not as a mere appendage of the European Union'. As an 'integral part of EU law' – in the words of the EU Court – these agreements are closely connected to other EU legislation and policies. Moreover, many mixed agreements are concluded without a strict indication of what falls under EU competences and what is still in the hands of the Member States …

Thus, for bilateral mixed agreements (ie between the EU and its Member States and one third party) renegotiation or some other form of joint understanding on the continued applicability to the former Member State might be the best way to ensure legal certainty. For multilateral mixed agreements, including those setting up international institutions in which the EU participates (Chapter 6), the situation of the former Member State is more secure. For instance, leaving the EU will not change that state's status as a member of the WTO, NATO or the UN, for instance. Nevertheless, in

certain instances, its term of membership may be affected. In the context of the WTO, for instance, tariff rate quotas that were negotiated for the entire EU would have to be split up.

Finally, it is important to note that – as we have seen in Chapters 4 and 5 – changes in EU membership may also have consequences under international law. In relation to EU agreements concluded with third states, at least a notification to those states (or members of other international organisations) may be required; occasionally, third parties may have to agree with changes resulting from the withdrawal of an EU Member State, for instance through an additional protocol.

V. The Broader Picture of EU External Relations Law

This chapter addressed both the accession to and withdrawal from the EU. As was shown, both processes are time-consuming, complex and require protracted negotiations. Even though both involve myriad technical issues, at their heart they raise both fundamental, if not existential, questions (What is 'European'? What is 'sovereignty'?) as well as highly sensitive political topics (How many new states can the Union 'absorb'? What should the future relationship with a state that decided to leave look like?). Having started with the six founding members, the Union's membership has more than quadrupled. It now includes states from the Atlantic to the Russian border, from the Mediterranean to the Arctic Circle, as well as former communist countries and countries that had not (re)gained their independence 30 years ago or have not known the many decades of peace enjoyed by other Member States.

At the same time, the referendum in the UK and its aftermath has shown that membership of the EU can come to an end. Thanks to Article 50 TEU, there is now a procedure to organise a withdrawal in a manner that minimises the potential for unravelling the European integration project more broadly and sets the stage for a friendly future relationship with states that choose to leave the Union.

As this chapter has shown, both joining and leaving the EU have strong external repercussions. Before a state can join the EU, it needs to go through the accession procedure to align itself with the EU's *acquis* and values. In that sense, its enlargement policy has been one of the EU's most effective forms of external action causing wide-ranging reforms in outside countries. For the EU, more Member States and more people have meant more capacity and greater global reach, including one of the largest markets in the world and a legal system that has become a standard setter in areas ranging from food safety to data protection. However, an expanded membership has also meant interests that are more diverse, which makes it more difficult to compromise.

At the same time, once a Member State decides to leave the EU it is, to some extent, treated as a third country right away, as it will have to negotiate the terms of its withdrawal with the rest of the EU. Once out of the EU, it will have become a third country and thus an object of the EU's external action. As the EU positions itself in an increasingly multipolar world, its membership will determine what kind of a community and what kind of an actor it will be on the international stage.

VI. Sources and Further Reading

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