Georgia’s Integration into a Contested World:  
Finding the Middle Way between Differentiation and Inclusiveness

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Abstract

Nowadays, inter-state relations are well organized, and even present some similarities to human relations. This realization has led to the elaboration of the concept of ‘societies of states’, to describe how states with similar interests and values come to elaborate common rules to which they accept to submit themselves. Some of these societies have been institutionalized: the United Nations Organization, the North-Atlantic Treaty Organization, the European Union, the Council of Europe etc. Georgia as a relatively new state has deployed considerable efforts to join some of these societies, notably the EU. However, the success of such endeavours does not depend only upon the efforts of the candidate state: it also depends upon the willingness of the older member states of these societies to accept a new member. This article is aiming at measuring this willingness on the side of the EU member states, in relation to Georgia’s integration efforts. It also tries to expose the mechanisms beyond the EU’s requests for changes to Georgia, requests presented as accession conditions.

Introduction: Georgia’s inclusion into ‘states societies’

According to H. Bull\(^1\) and his followers,\(^2\) a group of states aware of sharing common values and interests who take the decision to be bound by a common set of rules and to establish common institutions can be deemed to represent a ‘society of states’. This idea, formulated for the first time in 1977,\(^3\) has turned out to represent quite an accurate description of states relations.

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\(^{3}\) Year of the first edition of *The Anarchical Society* (see footnote 1).
The United Nations (UN) is, maybe, the most known embodiment of this idea. The UN is, however, probably the loosest states' society currently in being. Undeniably, the UN’s impressive set of common institutions has performed somewhat smoothly⁴ and efficiently⁵. However, the extent to which the states that are members of this society are actually bound by common rules is questionable. First, negotiating and agreeing upon common rules is a long, tiresome and sometimes frustrating process,⁶ and second, the UN lacks an effective enforcement system.⁷ Besides, the member-states of the UN society only adhere to the most minimalist set of common values (if they adhere to them at all...⁸): even the most fundamental UN document, the Universal Declaration of Human Rights, was adopted under abstention of all state representatives from the Soviet block,⁹ as well as one of the leading Arab states, Saudi Arabia.¹⁰ These states were unable to agree to some of the principles set out in the declaration.

As in human societies, the larger the membership, the more difficult it is to agree on common values and norms.¹¹ This theory can also be put to the test with the example of two European state societies. The Council of Europe (CoE) with its 47 member-states experiences more difficulties in producing a normative output in the field of environment protection by means of criminal law, than the European Union (EU) with its 28 member-states. In 1998 The CoE has opened a convention to this effect to signature. As of today, this convention has only been signed by 14 states, and ratified by only one state (Estonia).¹² The requirements for the Convention to enter into force have been set low: only three

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⁴ Comp. D. PANKE, Unequal Actors in Equalizing Institutions, Palgrave MacMillan 2013, p 90 ff.
⁵ However, the UN’S failures are more widely discussed than its successes: for instance, one of the UN efforts has succeeded in stopping the Iranian nuclear programs so far, and instead of criticising Iran’s unwillingness to cooperate, authors directly blame the UN ... See D. FIROOZ-ABADI, „Iran and the ideal international system” in A. ETHASHAMI, R. MOLAVI, Iran and the International System, Routledge 2012, pp. 43-58.
⁸ According to some authors, the UN’s pretended consensus on shared values is at the best a ‘strategic compromise’ without real adherence: J. MUGERZA, „The Alternative of Dissent “in G. B. PETERSON, The Tanner Lectures on Human Values, Cambridge University Press, 2011, pp. 73-130 (95.)
⁹ For more information, see J. MORSINK, The Universal Declaration of Human Rights: Origins, Drafting and Intent, University of Pennsylvania Press, 1999, p. 28 ff.
¹¹ This has been stated in relation to both the WTO (L. YAGER, E. SIROIS, N. PFEIFFER, WTO- Early Decisions are Vital in Ongoing Negotiations, Diane Publishing, 2002, p. 19) and several European Organizations (comp. J. SIMON, S. KEY, „NATO: European Security and Beyond?”, in R. TIERSKY, Europe Today: National Politics, European Integration and European Security, pp. 89-118 (114).
¹² Source: Council of Europe, Signature and Ratification Charts of the Convention on the Protection of Environment through Criminal Law, CETS No. 172. Available at:
ratifications are needed.\textsuperscript{13} The Convention has not come into force during its 16 years of existence. The EU by contrast has first adopted a directive with the same purpose\textsuperscript{14} in 2008, which had to be (and actually was) fully transposed by the member-states by December 2010.\textsuperscript{15} This example seems to confirm that a larger membership represents an impediment to effective normative actions. Indeed, producing effective normative input requires a consensus of all states member of a society: the more members, the harder it becomes to conciliate possibly diverging opinions and interests. In other words, the EU is much more integrative than both CoE and UN, in the sense that it is much more „directed at „integration”,\textsuperscript{16} i.e. at „integration as equals into society.”\textsuperscript{17} For instance, in the EU system, abstention is not an option: refusing to comply, i.e. refusing to acknowledge a norm, means either sanction,\textsuperscript{18} withdrawal\textsuperscript{19} or exclusion.\textsuperscript{20}

The number of EU members is restricted because admission into this society is restrictive. Indeed, the conditions of admission (unanimous vote of all member states in addition to a majority decision of the European Parliament\textsuperscript{21} after the Commission itself has declared the candidate state fit for admission\textsuperscript{22}) are \textit{per se} restrictive: reaching consensus on such an important question is anything but easy. On a more positive note, restricting admission ensures the operability and efficiency of the EU: many authors have warned against favouring enlargement to the detriment of integration.\textsuperscript{23}

The UN and the CoE both being societies with much looser ties than the EU, integrating them has proven much easier for Georgia than coming closer to the EU society.\textsuperscript{24} Integrating the EU requires approximation to the EU’s value and normative standards. Here it should be noted that the EU’s values

\url{http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=172&CM=8&DF=30/11/2014&CL=ENG}

(consulted upon the 30th Nov. 2014).

\textsuperscript{13} Art. 13 al. 3 of the CETS No. 172.
\textsuperscript{15} Art. 8 of the directive 2008/99/EC.
\textsuperscript{16} After the „integrative“ definition of the \textit{Merriam Webster’s Collegiate Dictionary}, 11\textsuperscript{th} edition 2004.
\textsuperscript{17} „Integration“ definition of the \textit{Merriam Webster’s Collegiate Dictionary}, 11\textsuperscript{th} edition 2004.
\textsuperscript{18} A sanction procedure is provided for in art. 260 II, III TFEU.
\textsuperscript{19} A withdrawal procedure is provided for in art. 50 TEU.
\textsuperscript{20} An exclusion procedure is provided for in art. 7 TEU.
\textsuperscript{21} More precisely of the European Council: art. 49 I TEU.
\textsuperscript{22} This is not a formal requirement but the natural consequence of the Commission’s preponderant role in the admission talks: art. 49 I TEU).
\textsuperscript{24} Georgia integrated the CoE on the 27\textsuperscript{th} April 1999, and the UN as early as the 31\textsuperscript{st} July 1992.
are often incorporated into norms: legal approximation therefore amounts to value approximation. However, the EU Enlargement Commissioner Füle had stated that both „integrativeness“ (in the sense of this paper, read: ‘approximation’) and „differentiation“ are equal purposes of the EU’s Eastern European policy. Approximation is at best expressed by the idea of ‘becoming alike’: it means that the legal standards, economic systems etc. of the concerned countries should become similar to those of the EU; while differentiation allows both aspiring and actual member states to remain ‘different’ from each other instead of uniformly implementing an EU standard.

This raises the question of how far Georgia has to go into the direction of approximation if it wishes to integrate the EU or at least to strive for a closer partnership, and how much room is left for differentiation.

This paper shall first illustrate how Georgia came closer to the EU, therefore approximating its own standards to the EU ones (I). But approximation is not uniformisation: even the tightest of state societies, the EU, balances, due to both practical and ideological reasons, between approximation and differentiation (II).

I. The extent of Georgia’s current inclusion into the EU society

Many observers of EU-Georgia relations are currently a little bit confused as to where these relations are heading to: a mere (probably ‘privileged’27) partnership, or are officials on both sides already paving the way for Georgia’s accession to the EU? The paper first sheds light on the current state of these relations, by analysing its nature, and its possible future developments.

The EU’s existence is characterized mostly by its normative (i.e., legislation) output. But in the founding treaties, the place of honour is not held by dispositions regarding legislation and/or the legislative process, 

26 See EU Commissioner FÜLE, “EU Eastern Partnership Meeting in Baku: next steps to enhance relations”, statement on the 9th September 2014, STATEMENT/14/248.
27 The adjective has been used several times by EU institutions: see for instance „Georgia and Moldova closer to a privileged trade relation with the EU“, 29th September 2013. Available under: http://trade.ec.europa.eu/doclib/press/index.cfm?id=994 (last consulted upon the 7th December 2014).
but by those dispositions that state the EU’s common values.\textsuperscript{28} The paper explores to what extent these values inform the EU’s normative choices and, therefore, shape EU-Georgia relations. The EU had started as an economic community and has, due to both internal and external pressure, come to its present self of a value-driven union. Consequently, it cannot be denied that current EU-Georgia relations do involve a value aspect.

A. Georgia’s current relations to the EU: taking stock

1) Georgia and the EU: between partnership and accession

There is a long way to go for every state wishing to become an EU member-state and the length of it is not the major problem: the main difficulties arise from adhesion being a deeply politicized and subjective process,\textsuperscript{29} starting from the question whether the candidate state is a European state at all,\textsuperscript{30} to the blunt and final (in the two senses of the term) question of whether or not the other member-states are willing to welcome the candidate.\textsuperscript{31}

‘Adhesion procedure’ is here to be understood in its broadest sense,\textsuperscript{32} encompassing all steps prior to the actual adhesion negotiations and leading to an even closer approximation of the candidate state to the EU’s standards. Each adhesion procedure is unique, both in its contents and its length: only the final step, the opening of the adhesion chapters, represents a common feature.\textsuperscript{33} The mere fact that the EU has taken to group deals in dialoguing with candidates/potential candidates\textsuperscript{34} does not mean that adhesion

\textsuperscript{28} Art. 2 and 3 TEU.
\textsuperscript{30} art. 49 TEU.
\textsuperscript{31} States being consulted in the framework of both the unanimous Council decision on accession and the ratification of the accession agreement by all other member states.
\textsuperscript{32} For instance, even the European Commission sees the establishment as a road map prior to the decision to formally open accession talks as a part of accession process. See „The Accession process for a new Member State”, available under \url{http://europa.eu/legislation_summaries/enlargement/ongoing_enlargement/l14536_en.htm} (last consulted upon the 7th December 2014).
\textsuperscript{33} For more information, see P. VAN ELSUWEGE, \textit{From Soviet Republics to Member States: A Legal and Political Assessment of the Baltic States’ Accession to the EU}, Martinus Nijhoff Publishers, 2008, p. 310.
\textsuperscript{34} For instance, the accession of the 10 Eastern member states in 2005 had the object of group talks - as depicted in P. VAN ELSUWEGE, \textit{loc. cit.} (footnote 33). The EU has always been discussing with Georgia and other Eastern European Countries as a group.
procedures have become standardized: the steps and timings may be similar or even identical within the same group, but few similarities can be noted across the different groups.\textsuperscript{35}

This means, that in the case of Georgia, it cannot be inferred that the adhesion option must be ruled out as a possible future for Georgian-EU relations, from the simple fact that the EU is not proceeding in the same way as with already member states, or even as with other actual candidates. However, it cannot be predicted that it will end up on more than a privileged partnership. Besides, it is questionable whether the EU Neighbourhood Policy, which also extends to Georgia, constitutes a substitute to actual EU membership.\textsuperscript{36}

Indeed, the EU has been sending mixed signals over the recent years. On the one hand, the use of the description „Eastern European State“ in the recently ratified Deep and Comprehensive Free Trade Agreement (DCFTA) has raised the issue of whether the drafters had meant to point out to Georgia’s Europeanness (whether clearly recognizing Georgia as a valid adhesion candidate), or to the contrary to rule out any adhesion possibilities (adhesion being only possible for ‘European states’).\textsuperscript{37} On the other hand, then-Commissioner Füle had clearly stated at the end of his term in office that accession was the only consistent future of EU-Georgia relations.\textsuperscript{38} In a next sentence, he also criticized the hypocrisy of the EU’s policy towards Georgia, a policy excluding perspectives for a future EU membership but seeing in an Eurasian Union membership a reason to cut off any further privileged relations.\textsuperscript{39}

The authorization of the ratification of the Association Agreement by the EU Parliament on the 18\textsuperscript{th} December 2014 points to neither directions. Both the Georgian delegation to the European Parliament and the Parliament itself have chosen to see the ratification as a step towards accession.\textsuperscript{40} Yet, Commissioner Hahn evoked merely Georgia “coming closer” to the EU and a “deepening of economic and

\textsuperscript{35} The accession of the 10 ex-Soviet states in 2005 has nothing in common with the common accession of Austria, Finland and Sweden in 1995, or of Portugal and Spain in 1986.

\textsuperscript{36} Comp. D. Cadier „Is the European Neighborhood Policy a substitute for enlargement?” in IDEAS Report The Crisis of EU Enlargement, LSE, 2013.

\textsuperscript{37} See A. RETTMAN, „EU-Georgia Treaty highlights enlargement fatigue“, on EU Observer, 8\textsuperscript{th} July 2013. Available at: http://euobserver.com/enlargement/120789 (last consulted upon the 7\textsuperscript{th} December 2014).

\textsuperscript{38} Ch. B. SCHILTZ, Interview with Commissioner Füle: „Ukraine, Moldau und Georgien müssen in die EU“ on Die Welt, 30th May 2014. Available under: http://www.welt.de/politik/ausland/article128540032/Ukraine-Moldau-und-Georgien-sollen-in-die-EU.html (last consulted upon the 7\textsuperscript{th} December 2014).

\textsuperscript{39} Quoted in Ch. SCHULT, R. NEUKIRCH, „Gescheitertes Assoziierungsabkommen: EU-Verhandler geben Bundesregierung Mitschuld an Ukraine-Krise“ on Spiegel Online, 26\textsuperscript{th} November 2014. Available under: http://www.spiegel.de/politik/ausland/ukraine-eu-verhandler-geben-bundesregierung-mitschuld-an-krise-a-1005001.html (last consulted upon the 7\textsuperscript{th} December 2014).

\textsuperscript{40} „Georgia is an European Country says EU Parliament“ on Agenda.ge“ on the 18\textsuperscript{th} December 2014. Available under: http://agenda.ge/news/26706/ (last consulted upon the 22\textsuperscript{nd} December 2014).
political ties” in his address to the Georgian people after the EU Parliament’s decision\(^41\). The future of the EU-Georgia relationship plainly has not been settled as of yet.

2) **Georgia and the EU: quo vadis?**

Some have questioned both the need and the possibility of EU enlargement so far East. The possibility for a membership is real: Georgia is already a UN member, thus acknowledging at least the Westfalian order,\(^42\) and Georgia’s CoE membership points to at least minimum commitment to democracy, human rights and the rule of law.\(^43\) However, as explained above, both those societies are ‘looser’ than the EU: membership in them does not automatically open the doors to EU membership. It merely means that a possibility for membership does exist and could be cultivated. Besides, for the past few years, Georgia has been calling for the EU assistance in implementing democratic principles\(^44\), thereby demonstrating a certain degree of identification with EU values. This identification seems all the stronger since claims have been heard from both the EU\(^45\) and the Georgian sides,\(^46\) according to which, Georgia is “the cradle of European civilization”.

As for the need for membership, this aspect corresponds to the „common interests” partly defining a state society, according to H. Bull. By EU membership, Georgia wants to achieve economic welfare, stronger international representation, and both political and military protection\(^47\) against somewhat threatening neighbours. And this interest is reciprocated: EU membership is expected to bring more stability to the region as a whole, thus securing the EU’s Eastern borders. Admitting Georgia as a member would also mean an extension of the Common Market, which might in the long run prove beneficial to the economies of the older EU member states. To what extent these goals could also be achieved by a mere

\(^{41}\) J. HAHN, Enlargement Commissioner, „Address to the Georgian People“, 18th December 2014. Available under: http://ec.europa.eu/avservices/video/player.cfm?ref=1097069 (last consulted upon the 22nd December 2014).


\(^{43}\) Of which Georgia’s UN membership does not represent a valid proof, blatantly authoritarian states also being members of the UN society.


‘privileged partnership’ is disputable. The relations between Georgia under the Association Agreement has already be deemed to be “beneficial” to both parties, even in the eyes of the Commission represented by its Enlargement Commission.\textsuperscript{48} Whether the EU has any interest in proposing further rapprochement in the form of integration is a question to be answered after the mechanisms provided for in the Association agreement and the Deep and Comprehensive Free Trade agreement have started running smoothly.

At any rate, in order for Georgia to become an acceptable candidate to entrance into the EU society, it has to demonstrate it shares the interests and values that brought the current EU member states together. Another aspect of a state society is a certain degree of similarity, or at least convergence,\textsuperscript{49} between its members, both in political and economic aspects. Georgia therefore also has to approximate EU standards in order to acquire, and/or demonstrate this similarity.

**B. Georgia and the EU: from norms to values**

1) **The EU, an economic community**

The whole EU construction was launched in order to achieve a pragmatic, not idealistic, goal:\textsuperscript{50} it was about making war virtually impossible on the European continent,\textsuperscript{51} and not about promoting values. It soon became also about fostering economic welfare: the EU construction was first and foremost an economic one, which was also reflected in the successive names given to this construction.

Bearing this in mind, the logical conclusion would be that Georgia must undergo mere economic transformations in order to become similar enough to the EU - to approximate EU standards. Even legal approximation would, in this theory, remain restricted to the field of economic law, in spite of law being ‘a product of culture’. This task would already prove trying enough for both Georgian people and state.


\textsuperscript{51} A goal still at least partially acknolwaged in the TEU’s preamble, through the reference to „an ever closer union“ and to the preservation of „peace and liberty“.
This view is mistaken. If only because economics never remain restricted to economics, and thus economic life is not regulated only by economic law: spill-over effects onto all other aspects of human and social life can be noticed. For instance, education aspects are intimately intertwined with economics, since a high level of education in an economy produces a highly-skilled and therefore highly-productive workforce. Improving education also involves modifying to some extent the contents of the educational programmes. The EU, aiming at fostering economic welfare, naturally became concerned about educational issues. However, the member states decided to contain the EU’s action by allotting it only a supporting competence in all education-related matters. The EU can only support member state efforts to improve education but cannot impose anything. The main visible result of this is the extensive financing of university exchange programmes: the EU cannot compel member states to impose such exchanges in their curricula, but can only provide financing facilities to encourage exchanges.

However, the EU could not, or would not, be contained as easily out of other cultural or value aspects. One could even argue that its founders never meant it to be contained: Jean Monnet had based his whole doctrine of European integration onto the very spill-over effects described above. Cultural and value aspects were never meant to remain excluded from the scope of EU integration. Therefore, an approximation of values seems unavoidable if Georgia is to integrate the EU.

2) The EU, a union of values

As foreseen, and perhaps wanted, by the EU’s founders, the EU gradually expanded from an economic union into a union of values. This expansion was sustained by different mechanisms.

The first of these mechanisms could be described as direct spill-over effects. However, the EU has not always been contained as in the case of education policy. For instance, the need for common customs tariffs on the external borders of the EU arose as a natural consequence of the abolishment of such tariffs on internal borders. These direct spill-over effects are unintentional in the sense that they were foreseen by neither national nor EU institutions: neither the one nor the other aimed at conferring or recognizing such competences to the EU - it just proved necessary in the course of time. This mechanism has been consecrated by art. 5 (3) of the Treaty on the EU (TEU), conferring on the EU the power to act in all areas

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52 Art. 6 (e) TFEU.
54 Comp. J. VAN OUDENAREN, Uniting Europe: an Introduction to the EU, Rowman and Littlefield, 2005, p. 36.
not falling within its field of exclusive competences only to the extent that EU action proves necessary to achieve the objectives pursued with said action.

The second mechanism resulted from *external calls* upon the EU to act as a full-fledged actor onto the international scene. Back in the 1980’s, the EU had concluded trade agreements with almost all existing states and organizations, and was also considered an altogether mighty organization. The disturbing question as to why the EU never made use of its mighty negotiation power in order to encourage the spread of democracy and the end of human right abuses soon arise. Even more so since the EU wanted to be ‘taken seriously’ as an international actor in discussing trade-related issues, but would shy away from the international scene as soon as other issues were discussed. This, and also the fact that conflicts at its borders threatened not only the development, but the very stability of the EU, brought the EU to act on the international scene, by both ‘natural’ tools of foreign policy (such as military force, even though such deployments remain subjected to the approval of member states, sought by national constitutional mechanisms), and secondary tools (proposing trade agreements as a recompense for an improvement of the human right situation etc.). However, this decision put the EU in front of the necessity to define more clearly what it would stand for on the international scene, in other words, to define the values it would promote in its external action.

‘*Inside calls*’ were also to be heard, urging the EU to equip itself with a human right catalogue. These calls were actually prompted by the direct spill over effects: economic law does not merely regulate economics; it regulates human behaviour, and thus sometimes collides with the exercise of a fundamental right or freedom. This problem showed early enough in the history of the EU in the day-to-day work of tribunals, and was first addressed by an extensive use of judicial margin of appreciation, and then by normative action: the EU gave itself a Charter of fundamental rights and is preparing itself for a ratification of the European Convention of Human Rights. The main issue arise from the fact that the EU lacks a direct human right competence. Human rights are conceived of as a negative obligation of the EU, which must merely refrain from harming them. But there is neither an obligation nor a right for the EU to protect them, and it consequently lacks any traditional human rights enforcement mechanism. What was first thought as a mean to refrain an ever-growing EU expansion came to be experienced as a failure.

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55 The German Constitutional Tribunal’s *Solange I* decisions are maybe the best example. For more information, see P. L. LINDSETH, *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford University Press, 2010, p. 159.
during the Hungarian crisis, where the EU could not enforce against Hungary the very principles it is
supposed to stand for.\textsuperscript{56}

By contrast, actions taken to enforce EU principles and value in the form of \textit{forced spill-over effects}
turned out to be a success of efficiency:\textsuperscript{57} as a result of the various calls for the EU to become more active
to enforce its values and principles, EU institutions discovered a new possible use to already existing
competences, such as the use of the harmonization competence in the Single Market in order to protect
the environment. These are spill-overs in the sense that such action has been made possible by already
conferred competences, and ‘forced’ because the EU deliberately sought to make use of its powers to
achieve new goals, which became also enshrined in the Founding Treaties.\textsuperscript{58}

The EU is actively supporting Georgia in its approximation efforts by monitoring them and supplying
guidance and „to-do lists,”\textsuperscript{59} as well as in the purely financial and economic aspects as in the ones where
values issues are involved. Potentially, Georgia has to approximate EU standards in all areas where such
standards and norms exist.

\textbf{II. Balancing approximation and differentiation}

Why would a country be willing to undergo such tremendous changes as currently required by the EU in
the framework of the approximation process? The recognition and acknowledgement by the state (and
most importantly, by its population!) of the fact that these norms, values and principles are worth having
\textit{per se} is of course not to be excluded, but more often than not, approximation is also motivated by other
considerations,\textsuperscript{60} especially where the object of approximation is located outside economic governance
rules. The promise of an EU adhesion, or at least of a more or less privileged with the EU, has proven the
most powerful tool in the EU’s efforts to promote democracy, human rights and rule of law beyond its
(contemporary) borders. However, taken away by their reformatory spirit, it could be feared that EU

\textsuperscript{56} Such were the reaction in the press: see Human Rights Watch, „Hungary: Media Freedom under Threat”, on the
(last consulted on the 7th December 2014).

\textsuperscript{57} For such an assessment of the results obtained with EU criminal law, see R. SICURELLA, „Some Reflexions for a

\textsuperscript{58} Art. 83 (2) TFEU confers on the EU the right to define criminal offences and sanctions where this should prove
necessary to the effective enforcement of other EU policies.

\textsuperscript{59} Such as EU-Georgia Action Plans, roadmaps or European Neighbourhood Policy Country Reports.

\textsuperscript{60} These considerations can relate to the welfare level in the countries from which the norms are „imported”: the
„recipient country” expects to reach similar levels of welfare by implementing similar norms. Sometimes, the
population hopes for greater freedoms, with the imported norms leading to a “relaxation” of the local legal
framework.
institutions sometimes blur the line between approximation and assimilation, and actually request from Georgia a higher degree of approximation than it would - and even could - expect of its own member states, or that was ever achieved by them.

If the EU’s motto of “unity in diversity” is not to remain mere words, the EU must allow for a certain degree of diversity, and therefore of differentiation. The acknowledgment of this necessity is partly induced by practical reasons: allowing differentiation ensures higher levels of acceptance for the EU and also for the efforts an EU membership or partnership demands. However, the consideration that diversity enriches and strengthens also plays a role. Therefore, diversity and differentiation do have their place within the EU itself and in its relation to its closest partners. This place is secured through two legal mechanisms: first, some mechanisms allows for differentiation in a general manner. The second mechanism consists of granting exceptions, i.e. derogations, upon request, where these do not impeach integration. Possible exceptions for Georgia are overviewed below.

A. The case for approximation

1) Accession and/or partnership as foreign policy tools

The idea to use foreign economic policy in order to foster democratic change or to promote other values in the framework of general foreign policy is not new. This use is nothing but the extension of age-old pressure tools in foreign policy: in order to put pressure on certain states to comply with their wishes, states have been using economic embargoes as far back as the 18th century. Nowadays, states are using similar mechanisms to promote principles and values: authoritarian regimes see their states threatened with, or actually submitted to, economic exclusion. However, the chilling effect of such measures is not proven the leaders of the concerned regimes often dispose of other access means to foreign goods. They are therefore less affected by the income reductions caused by the closing of export markets to the country’s own production. The population also suffers from such measures- and often suffers the most.

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62 Comp. N. VON ONDARZA, „Strenghtening the Core or Splitting Europe?“, SWP Research Paper, March 2013.
The EU, as well as other international organizations, has therefore transformed its foreign economic policy from a deterrence tool into an incentive tool. The conclusion of treaties over a reduction of import duties, or over the establishment is proposed as a recompense for successful democratic reforms. The more inclusive the treaty is, the more reforms are requested: for instance, the conclusion of a free-trade agreement must be preceded by the complete eradication of any dumping policy by the EU’s future partner, in order to ensure equality between producers of both contracting parties.

Proposing the creation of a free-trade zone is one of the highest possible rewards for a state, and although the EU might not be the fastest state to conclude trade agreements, the market opened by such agreements is one of the world’s largest. However, the EU is in the position to offer even more to any state deemed ‘European’: EU membership. EU membership is said to have brought back prosperity to the post-Soviet countries entered in 2004, to have ensured stability to the post-dictatorial Greece, Spain and Portugal. Indeed, EU membership seems to be something worth having.

However, this tool also has its weaknesses: for instance, the EU has been accused of holding only aspiring or new member states accountable for the Maastricht criteria, while older member states never met these standards, nor did they try to. An EU membership may thus lead only to those temporary changes that are strictly necessary in order to be granted membership, before having the state reverting back to its old ways. Besides, the fulfilment of these criteria is also almost impossible to really monitor - the narrowly escaped financial collapse of the Greek state testifies to this. Furthermore, this tool is efficient only if, and as long as, the concerned state is interested in membership.

In Georgia’s case, the country has been striving to adopt and implement EU standards for over twenty years – “slowly but surely”: the very slowness of the Georgian reform process can be seen as a sign that

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long-lasting changes are underway. The EU has also complimented Georgia upon its transparency and openness throughout the transformation process: the work of the EU institutions in monitoring Georgia’s actual progression has been greatly facilitated by Georgian officials. Finally, various Georgian governments have repeatedly asserted their wish for adhesion. The way seems well paved for a full approximation to EU standards.

2) Walking the line between approximation and assimilation

But is full approximation really necessary? A brief overview of the Georgian constitution reveals that at least on the paper, Georgia seems as committed as the EU itself to core values such as the rule of law, human rights, a democratic order or even freedom of speech and religion. Actual implementation and enforcement do not systematically follow commitments in writing: with the agreement and to some extent the support of the Georgian government, both the UN and the EU initiated programmes in order to promote gender equality in Georgia, and the President of Georgia himself announced that 2015 would be the “Year of Women” even though Georgia is not the first country whose name would spring to mind when it comes to gender equality issues. On the whole, active efforts are being made to implement not only EU but also various international standards regarding gender equality. Some may see the mere need for such efforts as a sign that said standards are not met yet: however, at least one other EU member states have been known to experience many struggles in regard to legal gender equality and women’s autonomy: Ireland, with its ever-increasing pay gap and where women are deemed to be

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71 Such had been the hopes of ex-President Saakashvili: comp. PanArmenian Network, „French PM opposed to expediting EU accession for Georgia, Ukraine“ on Eurasiareview, 2nd October 2011 (available under: http://www.eurasiareview.com/02102011-french-pm-opposed-to-expediting-eu-accession-for-georgia-ukraine/, last consulted upon the 7th December 2014); President Garivashvili issued similar declaration: see „Georgia, EU sign association agreement“, on Civil.ge, on the 27th June 2014. Available under: http://www.civil.ge/eng/article.php?id=27417 (last consulted upon the 7th December 2014).
72 Preamble of the Georgian Constitution.
73 Art. 19 of the Georgian Constitution.
74 Such as the Women for Conflict Prevention and Peace-building in the Southern Caucasus which ended in 2006, with the hiring of a Gender Advisor for Georgia in 2008...
underrepresented in politics. The notion that Georgia is ‘lagging behind’ actual EU member states in those respects must therefore be relativized.

However, approximation does not mean exact similarity or uniformity – and this is true not only of legal approximation, but also of ‘political’ approximation. For instance, when it comes to monitoring compliance with the ECHR standards, the CoE institutions, including the ECtHR, have adopted a rather functional approach: the means do not matter - only the result. This allows room to preserve certain traditions and to avoid putting all the people’s habits head over heels. A priori, the EU also follows this functional approach - the best example of this approach would be the EU’s relation to secularity. Any form of discrimination on the basis of religion is strictly prohibited in the field of application of the EU law, and EU institutions also denounce any such discrimination occurring outside their field of competences. However, they do so without criticising national conceptions of state–church relations - the EU being prohibited from intervening in those matters. Indeed, the EU involves states with a strict separation (French) as well as states whose heads also happen to be the heads of the national Church (England). Therefore, Art. 9 of the Georgian Constitution is safe.

However, in regard to membership, a problem may appear in relation to the cases of the so-called ‘enhanced cooperation’, a procedure enabling those states that are interested in organizing a greater cooperation in a certain field to set rules applying only to these participating states by using EU legislative procedures and institutions. However, a minimum of nine member states is required in order to create such an enhanced cooperation. The Commission, whose opinion is taken into account upon establishing such enhanced cooperation, usually regards such initiatives with a favourable eye. This positive attitude towards enhanced cooperation seems logical since this mechanism aims at taking integration further. Besides, experience has shown that the circle of participating states tends to grow over time. The

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79 D. U. STIKKER, „The Functionnal Approach to European Integration” in Foreign Affairs, April 1951.
80 Art. 17 TFEU.
81 The Commission has never (to the best of our knowledge) expressed a negative opinion or refused to submit proposals for an enhanced cooperation.
82 As is usually the case with flexible forms of cooperation: comp. European Ideas Network, Think Tank Cooperation 2006, TF4 European Governance and Democracy, p. 6.
Commission being the key and main actor in Georgia’s interactions with the EU when it comes to (legal) approximation, this institution, well-deserving its name of “motor of integration,” may be tempted to pressure Georgia to ‘import’ immediately the legislation produced within the framework of enhanced cooperation. The temptation to do so would be even greater in those enhanced cooperation fields that were at first supposed to be completely integrated. These fields are those that would have been submitted to EU legislation within the general EU framework, and with the participation of all EU member states, but for the refusal of some of them. The odds are that the costs of non-participation are going to exceed its benefits over the years, and that non-participating member states will finally join in. The Commission might be tempted to “prepare the ground” for this future outcome - or even attempt to bring it about ‘forcibly’ by pressuring Georgia to take over this legislation, even though it would not be in a position to do so vis-à-vis an EU member state. The enhanced cooperation reforming the applicable patent law for 25 (out of 28) member states by creating a unified patent, as well as a Unified Patent Court, could become the first example. How likely is Georgia to be submitted to such pressure?

The first answer would be that the EU in its external actions, (and therefore the Commission in its negotiations with third states such as Georgia), disposes of same competences it can exert within the EU. This means that the EU does not dispose of more competences in foreign affairs than in domestic affairs: therefore, the Commission could not legally pressure Georgia to take over the patent legislation. Having a rule is one thing, having it enforced is an altogether different one: who is going to check the legality of the Commission’s behaviour toward Georgia? Third states cannot contest EU legal acts in front of the European Court of Justice (ECJ), the court responsible of the legality of the EU’s behaviour. However, the assessments, action plans and other documents issued by the Commission in respect to Georgia are not legal acts. But this does not mean ignoring them would remain without consequences for Georgia: a refusal to comply with the Commission’s wishes could put an - even definitive - end to any further rapprochement.

This does not mean, however, that Georgia has to assimilate itself completely, either in legal or in legal-cultural aspects, to the EU, in order to be able to hope even for a further rapprochement- without even yet considering membership. There is still some room for differentiation in relation to the EU.


84 According to art. 263 (2) TFEU, only EU member states and institutions can defer an EU legal act to the ECJ.
B. Why differentiation?

1. Making room for diversity

The EU’s general mechanisms already provide for some differentiation. One form of differentiation is allowed by the two existing types of EU legislations: regulations that are directly applicable in the phrasing given by the EU institutions\textsuperscript{85}, and directives, which have to be transposed into national laws and leave the states free as to the means to achieve the objectives they set.\textsuperscript{86} The latter was the means adopted in order to regulate the repression of hate crimes in the EU, and even though the sanctions are the same in all member states, member states adopted completely different approaches: Germany found out provisions similar in substance to the EU dispositions were already present in its Criminal Code, and just attracted the attention of its judiciary to this recent piece of EU legislation, while France decided to create a new corresponding incrimination from scratch and add it to its criminal code. Georgia can also make use of the same margin of appreciation those EU provisions provide for EU member states themselves. Yet, over the years EU institutions have been more and more criticized for drafting such detailed and precise directives that reduce the states’ margin of appreciation to naught.\textsuperscript{87}

Besides, the EU and its member states have developed over the years an uncanny ability to navigate – and even circumvent - those issues, over which no consensus has been found. The most striking example of this is nothing less than the very place of EU law within national hierarchies of norms: is EU law as a whole above the Constitution - and therefore imposes itself to the Constitution? Or only the Founding treaties can be over the Constitution? There seems to be as many answers as member states. However, EU law in relation to Georgia is nothing else than international law and the Georgian constitution already deals extensively with the place of international law within the national hierarchy of norms.\textsuperscript{88}

On the whole, the EU system allows more room for diversity where such diversity is going in the direction of integration than of differentiation, as illustrated by the very existence of the enhanced cooperation mechanisms. The general, „system“ exemptions and exceptions for diversity cannot be considered meaningful – to the opposite of the individual exceptions, that will be discussed in the next paragraph.

\textsuperscript{85} Art. 288 (2) TFEU.
\textsuperscript{86} Art. 288 (3) TFEU.
\textsuperscript{87} See OECD, Better Regulation in Europe, 2010, p. 126.
\textsuperscript{88} Art. 6 of the Georgian Constitution.
2. Making exceptions for diversity

Most EU institutions (Commission, Parliament), are supposed to protect first and foremost the interests of the EU itself, and usually interpret this task as a duty to take integration always further. This tendency is (sometimes) counterbalanced by the European Court of Justice, whose task is to guarantee the application of “the law”. And “the law” sometimes also limits the EU’s possibilities for action: an act can be contested on the grounds of having been taken in a field outside of the EU’s competences - though it is widely assumed that the ECJ would more often than not rule in the favour of EU integration, and therefore be reluctant to overturn pieces of EU legislation. However, sometimes the Court has ‘twisted’ Union law, i.e. proposed such an unexpected and far-fetching interpretation of it, as to make room for the admittance of national exceptions in EU law. The most talking example would be the ‘Laser Game’ or ‘Omega’ ruling of 2004: German local authorities had prohibited the installation of a laser game company in a given city. This decision was upheld by both German jurisdictions and the Court, on the ground of human dignity being a value worth protecting in both the German and the EU legal order - even though the Court acknowledged that the German conception of human dignity was a very particular one. This decision really took the individuality of differentiation exceptions to a new degree: laser games are not prohibited per se in Germany, so that what the Court upheld was a precise interdiction opposed to a precise company in a precise city. Although Georgia cannot (yet?) benefit of the ECJ’s protection for some of its national particularisms, this mechanism proves that EU institutions are not only bent on integration: they also make room for differentiation where the situation seems to call for it.

Finally, the most favourable moment for Georgia to defend its claims to some differentiation is right now. Georgia is right now negotiating the terms of its future relations with the EU - be it in the framework of a close partnership or of EU membership, or anything in-between. Many substantial differentiation exceptions have been granted to member states in protocols added to the Founding Treaties, i.e., during negotiation phases. And even if the EU stops at less than membership - a partnership - the terms of such a form of cooperation are also to be negotiated.

However, in order to negotiate how much differentiation is allowed, and how much assimilation is required, Georgia first has to take the measure of its negotiation power vis-à-vis the EU.

90 ECJ, Omega Spielhallen, Case C-36/02, 2004.
Conclusion: is differentiation an issue of negotiation power?

The question of how much differentiation is allowed, or how much assimilation is required, has not been discussed yet between Georgia and the EU partly because the answer depends, at least in part, on the framework and form of their future relationship. And in that respect, the indecision of the EU has been often highlighted during the past years, lastly by the ex-EU enlargement Commissioner himself.\(^91\)

Negotiations between sovereign states, or with sovereign states such as Georgia and an international organization such as the EU, is supposed to be based upon “sovereign equality”. The impression may nonetheless endure that Georgia and the EU have not negotiated on an equal footing during the past years, and be sustained by several elements: the EU’s indecision, the numerous concessions required of Georgia, etc. However, this apparent inequality between the respective negotiation powers of the parties actually reveals an inequality of interest. Georgia wants, and maybe even needs, a partnership with the EU, for both political and economic reasons. Georgia feels its sovereignty threatened by the “crawling” Eurasian Economic Union headed by Russia\(^92\), almost as much as by potential Russian military actions, and yet still entertain strong ties to the Russian economy, which means that the Georgian Lari could not have remained unaffected by the recent negative evolution of the Russian currency (roubles).\(^93\) Yet the EU also needs Georgia: Georgia has always since the 19th century\(^94\) been recognized as the key to the stability in the region, a perception reinforced in the light of the most recent events.\(^95\) Georgia also presents itself as the EU’s natural partner in the region.\(^96\) The EU, therefore, also has something to gain form the partnership with Georgia - and in any case, something to lose if Georgia was to turn towards the Eurasian Economic Union. In addition to these political and strategic gains, more or less meaningful economic gains are also to be expected in the long run\(^97\). Some of the EU experts have already realized

\(^91\) See footnote 39.
\(^92\) ECONOMIC POLICY RESEARCH CENTER, Focus on Armenia: Eurasian Customs Union Crawling Closer to Georgia, December 2014, p. 19.
\(^94\) For more information, see H. MÜNCKLER, Mitte und Maß, Rororo Verlag, 2012, p. 254 ff.
\(^97\) Georgian customers would enlarge the EU Single Market, Georgian producers would ensure both a greater variety of available products and heightened competition, etc.
this: it is only to be hoped that this realization will lead to more directness and more transparency in the EU’s behaviour towards Georgia.

The new EU Enlargement Commissioner stated in a speech in December 2014 that in the framework of the EU neighbourhood policy, “the EU only delivers when the aspiring countries deliver.” The EU seems to have kept its promises towards Georgia. However, the time has come now for the EU to be more specific as to what it would deliver to Georgia - membership or partnership? - so that Georgia can also determine what it is ready to deliver, i.e., to what extent it is ready to adapt to EU standards.

The EU can be (and has been) criticized for not being clear enough about its intentions, and maybe also for a certain lack of consistency in effectively implementing its decisions. For instance, it has regularly over the years provided Georgia with detailed to-do lists of measures to be taken. However, not much effort has been put into helping Georgia to actually meet these requirements. One of the EU’s most useful tools in this regard is the so-called “twinning” procedures, which implies the creation of pairs of one Georgian and one EU administrator each. Such twinnings aim at providing concrete guidance as to how EU standards and procedures are and can be implemented by embedding them into already existing (Georgian) administrative practices. Such twinnings represent the ideal combination of integration and differentiation. They have traditionally been used in states which were about to become EU members, but recently have also been opened in states whose aim do not seem to be membership (Ukraine for example).

Georgia could ask for such a twinning programme to be also opened with the Georgian administrations. The acceptance of this proposition by the EU could be read as the first step on the middle way between integration and differentiation.

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100 Such as the twinning project “Supporting Ukrainian in approximating its phytosanitary legislation and administration with the EU standards”, or on the approximation of social standards.
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