
DISCUSSION PAPER

Kosovo's EU candidate status: a goal within reach?

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Executive summary

Ever since its declaration of independence in 2008, Kosovo has made European integration one of its key foreign policy objectives. Having made headway over the past years in its efforts to draw nearer to the European Union – most recently by signing a Stabilisation and Association Agreement (SAA) with the EU – Kosovo is now eager to take the next step in its EU integration process: to apply for EU membership and receive candidate status. However, with five member states still unwilling to recognise its statehood, Kosovo finds itself in a unique and difficult position regarding its eligibility to advance towards the EU and eventually accede to the European Union.

This paper argues that the absence of a common position among the member states on Kosovo's status does not prevent the EU from substantial engagement with Kosovo. The legal obstacles facing Kosovo's bid for candidate status may be surmountable. Article 49 of the Treaty on the European Union, which *prima facie* seems to impose a condition that Kosovo is unable to meet – that is, being qualified as a "state" – does not in fact require or entail Kosovo's recognition as a state by the European Union, seeing that the Treaties do not foresee such a competence for the EU. Furthermore, Kosovo's SAA seems to endorse a legal European perspective for the entity and may have already set a legal precedent that Kosovo could invoke in order to continue to strengthen its contractual relations with the Union.

The problem of Kosovo's European integration is therefore less of a legal and more of a political nature. The five non-recognisers may veto its attempt to move forward on the EU track due to their own domestic concerns. The broader EU context in which Kosovo seeks to advance its membership bid is also rather unfavourable, with the member states in general – not just the non-recognisers – currently indisposed to treat the dossier as a policy priority, let alone to ponder further expansion.

To overcome such political hurdles, Kosovo should use diplomatic channels, including as a means to emphasise that the candidate status does not imply state recognition. Equally important is that Kosovo should do its utmost to deliver on its reforms commitments – such as in the framework of the European Reform Agenda, the visa liberalisation process and the dialogue with Serbia – and thus build a strong and persuasive case for itself (which 'friends' of Kosovo could also draw upon) when addressing reluctant EU partners. The statehood issue could then be discussed at a later phase of the European integration process, during the accession negotiations. Such avenues may help Kosovo to tackle some of the political stumbling blocks that could hinder its EU integration, and to apply for membership and seek candidate status within the next few years.

Introduction

Having made headway over the past years in its efforts to draw nearer to the European Union (EU), Kosovo is now eager to take the next step in its EU integration process: to apply for EU membership and receive candidate status. What are the political and legal stumbling blocks that Kosovo might encounter in aiming to reach this new phase in its relations with the EU? How should Kosovo prepare to overcome possible hurdles standing in its way, and what is a realistic timeframe for it to act effectively towards this goal?

Ever since its declaration of independence in 2008, Kosovo has made European integration one of its key foreign policy objectives. Most citizens in Kosovo are also very supportive of EU integration, with 93% of the population in favour of Kosovo becoming an EU member.¹ For Kosovo, EU membership would not only signify successful economic and institutional progress, but also recognition that it has become a political player in Europe. Croatia's accession to the EU in 2013, which is considered as a "model of inspiration"² for Kosovo, has reinforced these aspirations. Croatia's entry in the EU gave a signal of hope that enlargement is still possible for the aspiring countries in the region. Moreover, European institutions have confirmed on numerous occasions that, much like its Balkan neighbours, "Kosovo is Europe".³ Furthermore, a 2009 feasibility study by the European Commission stated that the entity possesses a "European perspective, in line with the European perspective of the region"⁴ and that "the absence of an agreed position on Kosovo's status does not prevent the EU from substantial engagement with Kosovo."⁵

Kosovo has made gradual progress towards European integration (although much remains to be done) and has set up a Ministry of European Integration to consolidate its aspirations. Kosovo's latest achievement has been the signing of the Stabilisation and Association Agreement (SAA) with the European Union on 27 October 2015. The SAA establishes, for the first time, a contractual relationship between the EU and Kosovo, entailing mutual obligations. Its objective is to help Kosovo achieve the necessary reforms to align with European standards, as well as creating trade and investment opportunities. The SAA is also commonly considered to be the formal step that precedes the launch of an EU membership application.⁶

However, unlike the SAAs that the EU has signed with Kosovo's Balkan neighbours, Kosovo's SAA contains several peculiarities. These exceptional measures – designed to satisfy the 'dual-track policy' of the five EU member states that do not recognise Kosovo's independence (Greece, Cyprus, Slovakia, Romania, and Spain) – take various forms. First, "rather than asking individual member states to specifically sign the agreement", which has been the procedure with previous SAAs to date, Kosovo's SAA was signed "on behalf of the European Union".⁷ This was possible because the agreement took place after the entry into force of the Lisbon Treaty, which conferred a legal personality on the EU.⁸ Second, the SAA refers to Kosovo with an asterisk⁹, emphasising that the European Union remains status-neutral in its relations with Kosovo and that the agreement does not amount to recognition or non-recognition by the member states.

In fact, Kosovo's peculiar status within the international community creates an unprecedented situation in the history of EU enlargement. With its statehood being disputed, Kosovo finds itself in a unique and difficult position regarding its eligibility for EU accession. As it stands, Kosovo is a "potential candidate"¹⁰ to the European Union. The next step would be to achieve the much-coveted "candidate status", which would eventually pave the way for the subsequent formal stages of the accession process. However, as suggested by the legal stipulations of the SAA and the unwillingness of the five EU member states to recognise Kosovo's independence, the European perspective of Kosovo seems for now unclear, with numerous obstacles still ahead. Can Kosovo tilt the odds in its favour?

The candidate status

What is it?

The candidate status is a significant step towards EU accession. In many ways, it is a reward for a country's progress in aligning with European standards and the Copenhagen criteria.¹¹ The candidate status is a political acknowledgement that a closer relationship between the EU and the respective country has been initiated. The criteria to obtain the candidate status have remained flexible over the years. They are open to interpretation by the European institutions and, most importantly, the EU member states.

In time, the approach to membership conditionality has become stricter and more detailed, making it increasingly challenging for aspirant countries to achieve candidate status and eventual full membership. The candidate status is now considered by the European Council under the 'New accession approach of the EU'.¹² The fight against corruption and organised crime, the maintenance of an independent judiciary and the rule of law, an efficient public administration, freedom of the media and the involvement of civil society in the European integration effort have all become important considerations in assessing a country's progress and ability to advance on the EU's accession track.

Once the candidate status is obtained, negotiations can begin on the 35 chapters that correspond to as many different policy areas comprising the body of EU law (the *acquis communautaire*). Reaching the candidate status is by no means a guarantee of eventual EU membership.¹³

The legal procedure

Seeing that the Treaties are not explicit as to how the enlargement process is meant to occur, the procedure is primarily political in nature.¹⁴ The legal steps that Kosovo would need to follow in order to be considered for candidate status include:

- Kosovo formally submits its EU application to the Council.¹⁵
- The Council informs the European Parliament, the European Commission and national parliaments of the application.
- The application is placed on the agenda of the Foreign Affairs Council.
 - › If the application is not placed on the agenda, it was either refused or delayed until further notice.
- The Council invites the European Commission to initiate the drafting of its opinion on the membership application.
- The European Commission delivers a questionnaire to the applicant state. This contains questions regarding different areas of state functioning, institutions and economy. The applicant state answers and returns the questionnaire within several months.
- The European Commission forms an opinion, which assesses the preparedness of the country to take on the responsibilities of membership. The Commission's *avis* also gives a recommendation regarding the possibility of the applicant opening accession negotiations with the EU. The opinion of the European Commission represents a foundation for the decision of the Council on whether a state can obtain the candidate status.¹⁶
- If the opinion on the application is positive, the Council may decide by unanimous vote to grant the country candidate status, subject also to the endorsement of the European Parliament.¹⁷

Legal framework and risks

Article 49 TEU

The beginning of Article 49 of the Treaty on the European Union (TEU), which provides the legal basis for a country to join the EU, specifies that:

"Any European state which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the 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 assent of the European Parliament, which shall act by an absolute majority of its component members."

The remainder of the article specifies the legal procedure to be followed.

Thus, Article 49 establishes three explicit criteria that a country must meet in order to be eligible to apply for EU membership. First, the applicant must be a "European state". Second, the applicant must respect and uphold the values set out in Article 2, namely: respect for human dignity, freedom, democracy, equality and the rule of law; respect for human rights, including the rights of persons belonging to minorities; and respect for a pluralistic society and for non-discrimination, tolerance, justice, solidarity and equality between women and men. Third, the applicant country must satisfy the EU eligibility conditions, referred to as the Copenhagen criteria. However, these are not explicit in the Treaties and may technically be up to political interpretation and change.

Kosovo's ability to fulfil the second and third criteria of Article 49 seems undisputed. Kosovo has affirmed on numerous occasions¹⁸ its commitment to the promotion of European values and has no choice but to follow the legal procedure set out in Article 49 if it wishes to obtain candidate status. Although Kosovo still has a long way to go in terms of undertaking structural reforms, improving its governance and modernising its economy, it is clearly devoted to European values. Kosovo is a recipient of Pre-Accession Assistance, which is only available to "enlargement countries"¹⁹, and it has signed an SAA with the EU. Therefore, these two criteria should not pose legal problems for Kosovo's ability to be granted candidate status and, in the long run, when it is ready, EU membership.

However, Kosovo may potentially encounter a legal obstacle as regards the requirement that the applicant be a "European state". Two sub-criteria seem to be contained in these two words. The applicant entity must first be "European", which, most likely refers to historical and cultural ties to the European continent, as well as geographic location. This is suggested by the fact that Article 49 was used once in the case of Morocco, when that country applied for membership to the European Union in 1987. In response, the Council found that Morocco could not be considered a "European state" given its geographic position. In contrast, Kosovo is historically and geographically part of Europe, which means that it fulfils the first sub-criteria.

The second sub-criteria, which will be scrutinised in this paper and may be tricky in the case of Kosovo, is for the entity to be recognised as a "state". In the case of Morocco, for example, the legitimacy and recognition of Morocco's statehood was not questioned by the Council. What constitutes a state remains undefined in the Treaties, and whether recognition by other member states is necessary in order to be eligible as such is unknown. Rather, the problem lies in the fact that five member states do not recognise Kosovo's independence and therefore refute its statehood.

This situation suggests that Article 49 could become a legal barrier for Kosovo's accession to the EU. But would accepting Kosovo's EU membership application implicitly constitute recognition of Kosovo's independence, accepting its status as a "European state"?

The state recognition dilemma

Kosovo's recent admission to the Union of European Football Associations (UEFA) may help to clarify who are the political players that have the competence to recognise Kosovo. The UEFA's decision in 2016²⁰ to accept Kosovo as member caused controversy because its statutes hold that membership can only be granted to a football association "based in a country which is recognised by the United Nations as an independent state."²¹ Kosovo did not fulfil this criterion.²²

However, UEFA legal director Alasdair Bell said that a literal reading of that article "would not make sense from a legal point of view."²³ He explained that: "the United Nations has no competence to recognise states; states recognise states; you are either a member of the UN or not, the fact that you are not a member of the UN does not mean you are not a state; this is a legal matter."²⁴ Kosovo has indeed joined numerous international organisations without necessarily having acquired statehood recognition by the entirety of their members. Kosovo is a member of the World Bank, the International Monetary Fund and the Fédération Internationale de Football Association (FIFA), to name but a few. Yet this has not impacted its bilateral relations with other member states, nor has it amounted to it being recognised as a state by the members of these organisations. In fact, the five non-recognisers are part of these organisations.

In the context of Kosovo's European integration, it must be recalled that the EU's legal competences are defined by the Treaties. The ability to recognise states, even though the Lisbon Treaty has given the Union a legal personality²⁵, is absent from the Treaties. If the EU were to recognise states, it would constitute a breach of the Treaties and a transfer of competences from nation states to the European Union. Although the EU plays a significant legal and political role in the international system, states remain the primary agents in an interstate system. The recognition of states is thus an exclusively national competence.

This is also shown by the fact that the EU has so far acted in a status-neutral manner in its relations with Kosovo and will most likely continue to do so until a consensus is found on this issue among the EU member states. Although European institutions have never explicitly acknowledged their lack of competence regarding state recognition, the Council of the European Union has emphasised that member states had to "decide, in accordance with national practice and international law, on their relations with Kosovo."²⁶ Receiving candidate status would therefore not constitute a recognition of Kosovo's statehood by the member states, because this is a national prerogative. The "European state" requirement of Article 49 would also not imply statehood recognition by the EU, because it does not possess such a competence. Kosovo would be on the path to EU accession, but this would not denote that all EU member states recognise its independence or have changed their stance in any way about Kosovo's statehood.

The SAA precedent

The European Commission defines the Stabilisation and Association Process as "the European Union's policy towards the Western Balkans, established with the aim of eventual EU membership."²⁷ Kosovo's SAA differs, however, from the association agreements established by the EU with the other Balkan states. Several provisions ensure that the agreement can in no way be interpreted as a recognition of Kosovo's statehood by the EU member states. The signing of the agreement by the EU Council rather than the member states and the presence of the asterisk in the treaty seem to suggest that Kosovo's peculiar statehood status may resurface in its pursuit of EU membership. The political chapter also presents unique stipulations regarding Kosovo's place in the international community that were not part of other countries' SAAs. The nature of these provisions suggests that Kosovo's European perspective is ambiguous.

The political chapter provides an insight into the legal stipulations of the SAA. Article 11, clause 2(a) of the SAA states that the agreement aims to promote political dialogue, as well as Kosovo's participation in the international democratic community, "should objective circumstances so permit." What these objective circumstances are is unclear, but there is no doubt that they refer, at least partially, to the EU member states

that refuse to recognise Kosovo's independence. However, the same article, clause 2(b), emphasises that the agreement also aims to promote the "advancement of Kosovo's European perspective and rapprochement with the EU, in line with the European perspective of the region." There is no mention of "objective circumstances" in this clause, and a clear distinction is made between the two.

By omitting these "objective circumstances" for Kosovo's European rapprochement, the SAA may indirectly suggest that state recognition of Kosovo by the member states will not be necessary for Kosovo's future European integration. It may also imply that the five non-recognisers are supportive of Kosovo's European perspective. At the very least, the article indicates that the EU as an entity is committed, through the agreement, to Kosovo's European integration. While the legal value of the SAA and of this article in particular are uncertain, and seeing that such provisions are not explicitly defined in the Treaties, the fact that the political chapter does not pose legal obstacles for Kosovo is an encouraging sign.

Another argument that underscores Kosovo's European perspective laid out in the SAA may be found in Article 218 of the Treaty on the European Union. This Article describes the procedure for conducting European external relations, particularly agreements with foreign entities, by resorting to the term "state"²⁸ in reference to the entities with which association agreements have been established. This could indicate that if no legal obstacle was found regarding the signing of an SAA with Kosovo as an external "state", then there should be no legal barrier regarding Article 49 and its use of the term "European state". Therefore, the signing of the SAA may have already set a legal precedent, which Kosovo could invoke when applying for EU membership. Moreover, the fact those unique stipulations were made in the SAA to accommodate the political wishes of the non-recognisers towards Kosovo shows that European institutions and the member states are capable of legal flexibility and may well wish to apply it again when Kosovo submits its EU membership application. Furthermore, such agreements are "binding upon the institutions of the Union and on its Member States", according to Article 216 TEU. Due to the legally binding nature of the SAA, member states may not be able to openly backtrack on Kosovo's "European perspective".

Overall, the SAA seems to endorse a legal European perspective for Kosovo. At the very least, the content of the agreement does not establish legal conditions that would manifestly obstruct Kosovo's eligibility to apply for EU membership.

Kosovo's political outlook

Although it may appear Kosovo's legal path to the European Union is smooth, politics – both in Pristina and the EU capitals – could get in the way of progress.

The domestic to-do list

To give a new impetus to the initially slow pace of implementation of Kosovo's SAA, a list of priorities was adopted, the so-called European Reform Agenda (ERA). It identifies three key policy areas (I) good governance and the rule of law, (II) competitiveness and investment climate and (III) education and employment, on which Kosovo should focus in the immediate period. However, a lack of political will, weak and inefficient inter-institutional cooperation as well as overambitious plans for the short term are among the domestic factors that continue to undermine Kosovo's ability to effectively tackle these reform areas and thus to reap the benefits of its first contractual relationship with the Union.²⁹

In addition, deep internal political divisions and polarisation have obstructed both Kosovo's visa liberalisation process, – with the parliament unable to ratify the all-important border demarcation deal with Montenegro – and progress in the EU-mediated talks between Pristina and Belgrade. Breaks in the dialogue have been triggered by the controversial agreement regarding the creation of an Association/Community of Serb majority municipalities in Northern Kosovo but also by several more recent incidents between the two sides.

These political fractures persuaded President Hashim Thaci to call for early elections – that eventually took place on 11 June 2017 – following a parliamentary motion of no confidence passed with 78 votes back in May. The previous coalition between the Democratic Party of Kosovo (PDK) and the Democratic League of Kosovo (LDK) was never able to establish itself as a cohesive political force, as it was often weakened by strong protests of the opposition parties, such as the Vetevendosje Movement (LVV).

The PDK-led coalition won the June elections capturing 34% of the votes, defeating the LVV, which received 27% and stopping the LDK-led coalition at 26%. The deeply divisive campaign leading up to the elections was characterised by nationalistic themes and motifs, shifting attention away from the more concrete and tangible policy topics of the economy and unemployment. Without a clear majority for the PDK-led coalition, its nominee for Prime Minister, Ramush Haradinaj, will now have 45 days to seek alliances inside a tri-polar parliament to form a new coalition government. However, a lengthy stalemate of the executive could be just around the corner, with potential negative consequences for the ability of Kosovo to focus and deliver on EU-related reforms and commitments.

The EU context

Yet, while in many respects the ball might now be in Kosovo's court, the EU member states too could frustrate the process, acting as gatekeepers. First, the non-recognisers could allow Kosovo's integration process to fall hostage to fears of the impact that Kosovo's statehood might have on their own domestic situation, preventing an objective assessment of Kosovo's reform efforts. Second, at the EU level, anxieties related to internal institutional, political and economic pressures, combined with daunting regional and country-specific issues in the Balkans, are known to have dampened the member states' appetite for enlargement over the past years.

So although the accession track remains open, Kosovo, like its Balkan neighbours, now faces both a heavy load of rigorous conditionality as well as EU capitals and European citizens who are ever less enthusiastic about the prospects of welcoming new members in their ranks. This makes for an enlargement process that is more unpredictable and dependent on politics in the EU member states (such as on issues related to minorities, immigration or Euroscepticism) rather than on progress according to Brussels-based institutions. The result is not just a fizzling commitment of the member states to the integration of the region – Kosovo

included – but also a shrinking purse (whereby the level of EU investments in the Balkans is now lower than in previous rounds) and a greater readiness on the side of the EU capitals to interfere and derail the process (often overruling or ignoring the opinion of the European Commission).³⁰

Therefore, Kosovo must work that much harder to demonstrate its commitment to European integration and its ability to be a constructive partner inside the 'club'. In this sense, without a strong track record of results in the next few years, it is difficult to imagine how Kosovo could persuade the member states to accept its membership application and grant it candidate status, irrespective of what legal considerations might advise in this regard. Likewise, without a strategic logic in favour of engaging meaningfully with Kosovo (and the other Balkan applicants, for that matter), the member states may well continue to diverge at any time in functional terms from agreed standards and procedures, delaying the process.

If there's a will, there might be ways

The "flexibility clause"

Against the backdrop of 'enlargement fatigue', the member states could be inclined to invoke the argument that Kosovo does not fulfil the "state" requirement in order to refuse its application for EU membership through the conventional procedure of Article 49. This can occur even if Kosovo delivers on the EU-related priorities. But it becomes an all-the-more-likely scenario if Kosovo drags its feet on reforms. Should such a situation arise, Article 352 TEU may prove indispensable in allowing Kosovo to continue its quest for European integration by other means.

Referred to as the "flexibility clause", Article 352 TEU allows the EU, if the Treaties have not provided the necessary powers, to fill in legal gaps and undertake action deemed necessary. However, such action must not increase the EU's powers and must be executed with the aim of attaining the objectives laid out by the Treaties. Resorting to this Article would signify that the Treaties could not accommodate a case such as that of Kosovo. Engaging Article 352 could also provide a way to deal with the hesitation of the five non-recognisers: it would create an unconventional procedure for Kosovo's European accession, therefore rejecting altogether Article 49's notion of "European state" and any need for direct or indirect state recognition.

But would it be legally possible to trigger Article 352? In an opinion of the European Court of Justice (ECJ), regarding the European Communities' accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1996³¹, the ECJ found that Article 352 could not be engaged because the issue was of "constitutional significance". The measure aimed at modifying the system of protection of human rights of the European Communities, thus constituting a fundamental change in the functioning of the entity.

Kosovo's case may not be of constitutional significance since its European integration could *de facto* occur like any other previous EU enlargements. Kosovo's accession would not alter the powers of the Union. Therefore, Article 352 could potentially offer an alternative pathway for Kosovo to pursue its European aspiration if the conventional accession procedure proves unfeasible.

However, it must be noted that this opinion may well be challenged on the grounds that accepting Kosovo, which is not recognised as a country by all member states, would set a significant legal precedent. It would effectively modify the accession requirements as to what type of entity is able to join the EU and this change could perhaps be deemed "constitutionally significant". Consequently, Article 352 may theoretically provide a legal instrument to consider for Kosovo's European integration, should member states be willing to see Kosovo advance on the EU track, notwithstanding its unresolved statehood.

Diplomatic channels

Still, the fact that the five non-recognisers may invoke their veto right remains the most significant political threat facing Kosovo's accession. Due to their domestic concerns, these member states have been unwilling to recognise Kosovo to date. They may not only veto Kosovo's accession, but they could also prove intransigent regarding the possibility of Kosovo advancing towards the EU.

To circumvent such a situation, European and Kosovar institutions must emphasise that a vote in favour of accepting Kosovo's EU membership application and then granting it candidate status would not imply its recognition as a country. As explained, such recognition remains entirely up to the member states, and is not an automatic corollary of EU integration. They should also highlight that recognition of Kosovo's candidate status would be similar to the signing of the SAA. Although the association agreement was signed by the EU rather than each individual member state, it represents indirect support from the member states for a contractual relationship with Kosovo. If the non-recognisers agreed to the SAA without actual recognition in the past, they may be inclined to continue in this direction in the foreseeable future. These are, however, legal arguments, which must be acknowledged, but their pertinence may be neglected when taking into account political considerations.

The five non-recognisers can further be encouraged to grant Kosovo candidate status if Kosovar and European institutions stress that the problem of recognition can be dealt with at a later point in time, such as during the accession negotiations. Chapters 30, 34 and 35 of the *acquis* all relate to Kosovo's lack of international recognition. It is during negotiations on these chapters that the five non-recognisers could effectively see that their demands are met and that a political compromise is achieved.

Kosovo's main diplomatic objective should be to bring the five non-recognisers to a stage where they are keen on demonstrating political willingness and flexibility, in the same way as they did for the SAA. Diplomatic efforts should be backed and reinforced by a critical mass of results on reforms. The more Kosovo manages to advance on its to-do list over the coming years, the more convincing it can be in front of the member states, and the easier for Kosovo's supporters among EU institutions and member states to make a case in favour of Kosovo's European integration.

In addition, progress in the EU-facilitated talks between Kosovo and Serbia may help to assuage the five non-recognisers' concerns. However, the dialogue is currently suspended due to several incidents. On 4 January, the French police arrested Kosovo opposition leader Ramush Haradinaj, on the basis of a Serbian arrest warrant, for alleged war crimes. This triggered wide public debate in Kosovo and frequent calls for the government to withdraw from the dialogue. Moreover, on 14 January a Serbian government-sponsored train, painted in Serbian national colours and marked with the phrase "Kosovo is Serbia" in 20 languages, tried to enter Kosovo illegally. Public pressure for the Kosovo government to react led to the Kosovo Parliament suspending the dialogue with Serbia until Haradinaj was released. These incidents raised the level of tensions between Pristina and Belgrade to new heights, and a direct confrontation between the two sides was only avoided after the EU intervened with the then Serbian Prime Minister Aleksandar Vucic. Although Haradinaj was eventually released this April, there is still no open discussion in Kosovo about the future of the dialogue. Without progress in the harmonisation of relations between Kosovo and Serbia, both sides stand to remain blocked on their respective EU tracks.

Overall, to promote its European aspirations and reassure the non-recognisers of the negligible repercussions that the candidate status would entail, Kosovo must focus in the short to medium term on mobilising its diplomatic channels and European allies with solid evidence that it can deliver on reforms and contribute to good neighbourly relations in the Balkans.

Conclusion

This study finds that the legal obstacles facing Kosovo's bid for candidate status may be surmountable. Article 49, which *prima facie* seems to impose a condition that Kosovo is unable to meet, – that is, being qualified as a "state" – would not entail state recognition by the European Union, seeing that such a competence is not defined in the Treaties. As a result, the term "European state" does not entail statehood recognition by either the EU, which does not have the powers to do so, or the member states, which independently possess the right to recognise whomever they wish. Furthermore, the SAA is not only free of legal obstacles for Kosovo's European integration but it also amounts to a motivating step forward. This study therefore suggests that Kosovo may be legally eligible to apply and join the European Union through the conventional procedure laid out in Article 49.

The problem of Kosovo's European integration is therefore less of a legal and more of a political nature. The five non-recognisers may veto its attempt to move forward on the EU track due to their own domestic concerns. The broader EU context in which Kosovo seeks to advance its membership bid is also rather unfavourable, with the member states in general – not just the non-recognisers – currently indisposed to treat the dossier as a policy priority, let alone to ponder further expansion. Yet, in the name of strategic considerations, several alternatives could enable EU-Kosovo relations to continue to evolve and strengthen. Kosovo and its European partners should continue to use diplomatic channels to defend their case and emphasise that the candidate status does not imply state recognition.

Likewise, Kosovo should do its utmost to deliver on the reforms and commitments assumed today – such as in the framework of the European Reform Agenda, the visa liberalisation process and the dialogue with Serbia – and thus build a strong and persuasive case for itself (which 'friends' of Kosovo could also draw upon) when addressing reluctant EU partners. The statehood issue could then be discussed at a later phase of the European integration process, during the accession negotiations. Such avenues may go some way towards allowing Kosovo to tackle some of the political obstacles that could hinder its EU integration, and to apply for membership and seek candidate status within the next few years.

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The views expressed in this Discussion Paper are the sole responsibility of the authors.

Endnotes

- 1 Prishtina Institute of Political Studies (2016), "Citizens' general knowledge and perception on SAA", *PIPS Policy Report*.
- 2 Cormaic, Ruadhan (2014), "Kosovo aims to join EU within a decade", *The Irish Times*.
- 3 European Union External Action (2016), "Mogherini stresses European path for Kosovo", *Press Release*.
- 4 European Commission (2009), "Kosovo – Fulfilling its European perspective", *EU Commission Reports*.
- 5 *Ibid.*
- 6 Kosovo is the last aspirant in the Balkans to sign an SAA. Most Balkan countries formally submitted an EU membership application shortly before or after their respective SAAs entered into force.
- 7 Balkan Insight (2013), "Kosovo launches crucial SAA talks with EU", available at: <http://www.balkaninsight.com/en/article/kosovo-launches-saa-dailogue-with-the-eu>, last accessed on: 15/06/2017.
- 8 World Bulletin (2013), "Kosovo to negotiate on Stabilisation and Association Agreement."
- 9 The asterisk refers to the following footnote: "This designation is without prejudice to positions on status, and is in line with UNSC 1244 and the ICJ Opinion on the Kosovo Declaration of Independence."
- 10 The status of "potential candidate" does not appear to hold any legal value. It is not mentioned in the Treaties and is not legally binding. Rather, the European Commission explains that "the potential candidates were promised the prospect of joining when they are ready."
- 11 The Copenhagen criteria, first defined in 1993 and reinforced in 1995, require countries wishing to join to have: i) stable institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities; ii) a functioning market economy and the capacity to cope with competition and market forces in the EU; and iii) the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union. In addition, the EU's capacity to absorb new members while maintaining the momentum of European integration is also an important consideration in the accession process.
- 12 Goudappel, Flora A. N. J. and Ballin, Hirsch E. M. H. (eds.) (2016), *Democracy and rule of Law in the European Union: essays in honour of Jaap W. De Zwaan*, The Hague, The Netherlands: Asser Press: Springer.
- 13 Turkey, for example, obtained this status in 1987 but has yet to be granted full membership.
- 14 That is until the accession negotiations stage is reached, where the procedure is a mixed political and technical exercise.
- 15 Potential candidates often make a unilateral public declaration of intent before submitting their application in order to seek out a reaction from the Commission and evaluate their chances of obtaining the status. However, this is not a mandatory course of action.
- 16 As part of the new approach to enlargement, and as seen also in the case of Croatia, the Commission also relies on information from EU member states and a variety of international organisations, as well as on the progress made in the SAA, in order to form an opinion.
- 17 It is also worth noting that the Council is not legally obliged to take into account the Commission's recommendations.
- 18 *EU Business* (2015), "EU, Kosovo ink deal opening possible membership route", Cormaic (2014), *op cit*.
- 19 European Commission (2017), "Instrument for pre-accession assistance", European Neighbourhood Policy and Enlargement Negotiations, available at: https://ec.europa.eu/neighbourhood-enlargement/instruments/overview_en, last accessed on: 15/06/2017.
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- 21 UEFA (2014), "UEFA statutes: rules of procedure of the UEFA congress regulations governing the implementation of the UEFA statutes."
- 22 Homewood (2016), *op. cit*.
- 23 *Ibid.*
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