

**PEN ANALYTICAL BRIEF**

# Five lessons for Kosovo's next EU-integration step



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# Introduction

Much like its Balkan neighbors, European integration is one of Kosovo's main foreign policy objectives. Having signed a Stabilization and Association Agreement with the European Union in 2016 – establishing the first contractual relationship between the two entities – Kosovo's next step in the procedure will be to launch a candidate-status application. If successful, Kosovo would obtain the status of "candidate country", which would allow it to gradually apply to commence negotiations on the 35 chapters of EU integration. This would also send a strong political signal to countries that have yet to recognize Kosovo's independence. However, various criteria must be met, a political willingness from EU member states will be required, and the legality of such a procedure to Kosovo's peculiar situation is uncertain. Numerous obstacles must therefore be overcome before Kosovo is eventually granted the status of an EU candidate country.

This analytical brief will aim to advise Kosovo's government authorities as to how they can formulate an effective application for the EU candidate status and potentially achieve recognition as a candidate country. It will discuss the candidate status and its legal implications, suggest legal pathways that may be undertaken to attain this objective, and give recommendations to successfully manage the process.

# The candidate status

## The candidate status:

### What is it?

The candidate status is a significant step towards accession to full membership. This is despite the fact that such a status is not mentioned in the treaties as a required stage of EU integration. Rather, it was mainly put in place to demonstrate a country's progression towards EU integration and to convey the EU's political commitment to establish a closer relation with the applicant state. It is therefore a political, rather than legal, acknowledgement that a closer relationship between the two entities has been initiated. If Kosovo were to obtain the status, it would also be a significant step towards cementing its place as a durable political actor in the region. It would send a political signal to other nations that Kosovo is here to stay as it engages more deeply with the EU.

The criteria to obtain the status have remained flexible over the years. They are open to interpretation by the European institutions and most importantly EU member states, which play a prominent role in the procedure. Recently, the approach to the membership conditionality has become stricter and more detailed, rendering progress to the candidate status and the overall accession

process more difficult. The candidate status is now considered by the European Council under the "New Accession Approach of the EU".<sup>1</sup> The fight against corruption and organized crime, the maintenance of the independence of the judiciary and the rule of law, efficient public administration, freedom of the media and civil society involvement in the country's EU integration effort have become more strictly interpreted and applied in the EU's enlargement criteria. After the applicant status is obtained, negotiations can begin on the 35 chapters that correspond to different policy areas that make up the body of EU law (the *acquis communautaire*). Reaching the candidate status is, however, by no means a guarantee of eventual EU membership.<sup>2</sup>

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<sup>1</sup> Zwaan, J. W. De, Flora A. N. J. Goudappel, and Hirsch Ballin E. M. H. "Democracy and Rule of Law in the European Union: Essays in Honour of Jaap W. De Zwaan."

<sup>2</sup> Turkey, for example, obtained this status in 1987 but has yet to accede to full membership.

## The legal procedure

The legal procedure, if Kosovo applies for EU membership and is eventually granted the candidate status, would be as follows:

1. Kosovo formally submits its EU application to the Council.<sup>3</sup>
2. The Council informs the European Parliament, the European Commission and national parliaments of the application.
3. The application is placed on the agenda of the Foreign Affairs Council.<sup>4</sup>
4. The Council invites the European Commission to initiate the drafting of its opinion on the membership application.
5. The European Commission delivers a questionnaire to the applicant state. This questionnaire contains numerous questions regarding different areas of state functioning, institutions and economy.
6. The applicant state answers and returns the questionnaire within several months.
7. 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 that the applicant opens 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.<sup>5</sup>
8. If the opinion on the application is positive, the Council of the European Union may decide by unanimous vote to grant the country the candidate status, subject also to the endorsement of the European Council.<sup>6</sup>

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<sup>3</sup> Potential candidates often make a unilateral public declaration of intent before submitting their application in order to seek out a reaction from the Commission to evaluate their chances of obtaining the status, but this is not a mandatory.

<sup>4</sup> If the application is not placed on the agenda, it was either refused or delayed until further notice.

<sup>5</sup> 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 organizations, as well as on the progress made regarding the SAA's implementation.

<sup>6</sup> It is also worth noting that the Council is not legally obliged to take into account the Commission's recommendations.

## The candidate status in the Balkans

Kosovo is the only country in the Balkans that has yet to apply for the candidate status.<sup>7</sup> All other Balkan nations are either candidate countries or EU members, with the exception of Bosnia and Herzegovina which submitted its application in February of 2016 and whose candidacy is currently being evaluated by the European Commission. The duration of the overall procedure to obtain the candidate status is often quick, and they have all eventually been successful. Previous Balkan countries, with the exception of Albania,<sup>8</sup> obtained the candidate status soon after the conclusion of the SAA, or in numerous cases even before.<sup>9</sup>

## EU integration in the Balkans<sup>10</sup>



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<sup>7</sup> As of April 2017

<sup>8</sup> Albania's application was delayed for five years until it was accepted.

<sup>9</sup> For more details regarding the timelines of applicant states, see: "Current Status." European Neighborhood Policy and Enlargement Negotiations. European Commission, 04 Feb. 2017.

<sup>10</sup> Source: The European Commission website.

## Candidate Status Timeline of the Balkan States

Albania	SAA 01-04-2009	EU Application 24-04-2009	Candidate Status 27-06-2014
Bosnia and Herzegovina	SAA 01-06-2015	EU Application 15-02-2016	
Croatia	EU Application 21-02-2003	Candidate Status 01-06-2004	SAA 01-02-2005
Kosovo	SAA 01-04-2016	EU Application	Candidate Status
Montenegro	EU Application 15-12-2008	SAA 01-05-2010	Candidate Status 17-12-2010
Macedonia(FYROM)	EU Application 22-03-2004	SAA 01-04-2004	Candidate Status 16-12-2005
Serbia	EU Application 22-12-2009	Candidate Status 01-03-2012	SAA 01-09-2013

Having recently signed an SAA with the EU, the candidate status is the next step in Kosovo's European perspective. Croatia and Macedonia (FYROM) both obtained the candidate status the same year, yet the former joined the EU in 2013 while the latter still has not.<sup>11</sup> Becoming a permanent EU member state is mostly dependent on other factors. It must be emphasized that the candidate status is after all a symbolic gesture. Moreover, the varying orders of the timelines, with some countries obtaining the status before signing an SAA, suggest that not only is the procedure not set in stone, it is also not tied to the conclusion of an SAA.

Kosovo's upcoming application will therefore be in compliance with the timelines of other successful Balkan nations. It should aim to apply soon after proving it has sufficient capacities to implement the SAA, in order to initiate the procedure which will potentially face numerous delays due to the question of its relationship with the five non-recognizers. Albania waited five years (from 2009 to 2014) to obtain the status due to complications in the negotiations and the country's alignment towards EU standards, and Kosovo should expect similar difficulties.

<sup>11</sup> As of April 2017.

# Kosovo and the candidate status

## Kosovo's peculiar situation

Even though Kosovo may find itself at an opportune moment in the conventional timeline to apply for the candidate status, this does not guarantee the success of its application. In fact, the peculiar nature of Kosovo's non-recognition by five EU member states may prove to be a detrimental obstacle. Article 49, the article which provides the legal basis for a country to join the EU, states that the applicant must be a "European state". Yet, according to 5 member states of the European Union, Spain, Cyprus, Slovakia, Romania and Greece, Kosovo is not a state. These countries have yet to recognize Kosovo's independence, and as such may decide to oppose its accession to the candidate status. The EU, which does not possess the legal competence to recognize states seeing as this remains a prerogative of member states, has acted in a status-neutral manner as a result. Following Kosovo's declaration of independence in 2008, the Council of the European Union declared that member States had to "decide, in accordance with national practice and international law, on their relations with Kosovo".<sup>12</sup>

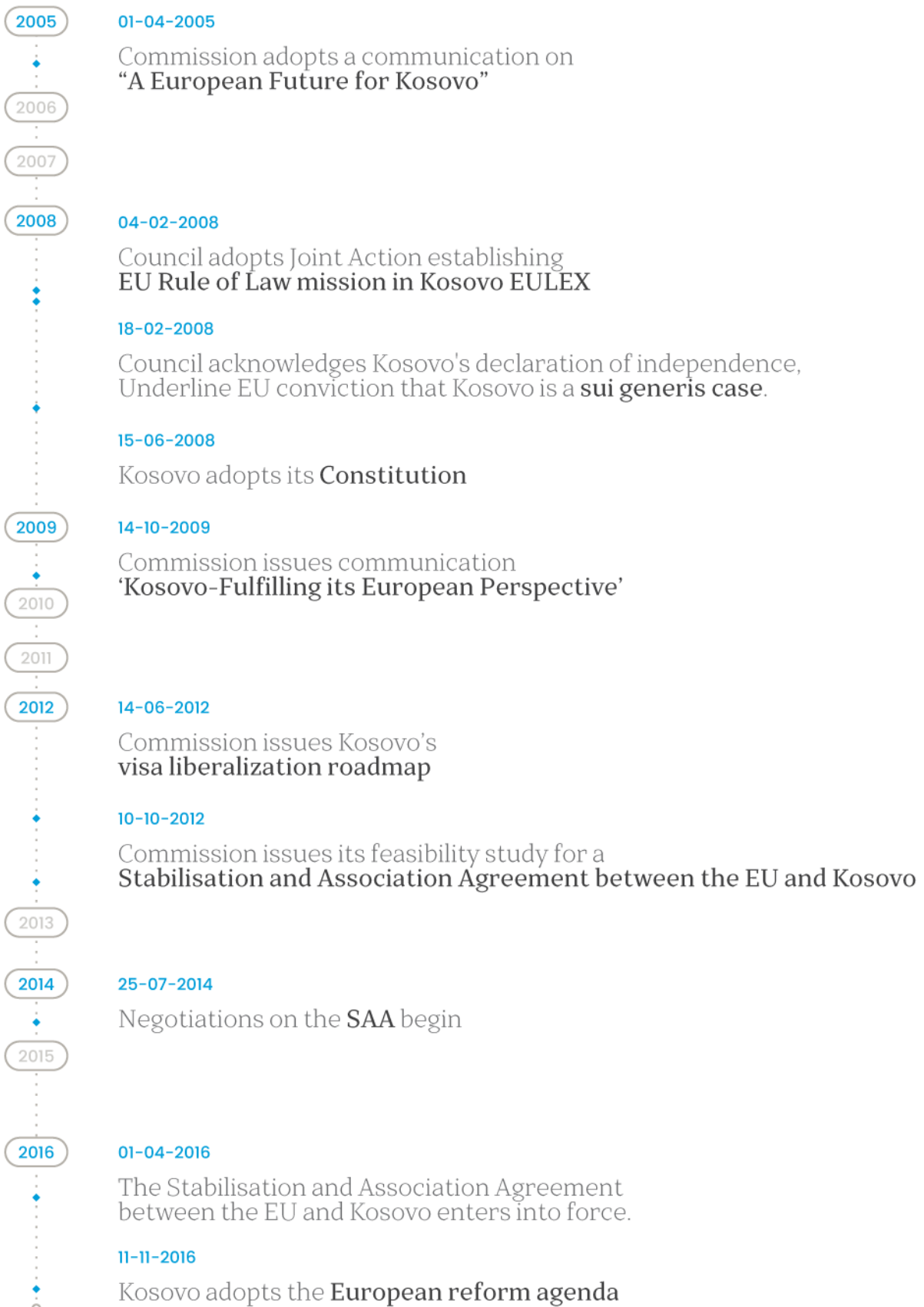
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<sup>12</sup> "Press Release: 2851st Council Meeting." Council of the European Union 6496/08 (Presse 41). 18 Feb. 2008.



# Timeline of Kosovo-EU relations

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Moreover, the SAA signed between Kosovo and the EU possesses unique clauses that differ from the agreements signed with other Balkan states. These suggest the EU's reluctance to fully commit to a European integration for Kosovo. First, unlike the previous procedure with other SAAs, the agreement with Kosovo was concluded "on behalf of the European Union" rather than by each individual member state in addition to the EU. This was done in order to satisfy the 5 non-recognizers' demand to not directly engage with Kosovar government. The SAA also refers to Kosovo with the asterisk, emphasizing 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.

## Article 49 TEU: The standard procedure

The standard procedure of article 49 TEU, which we have outlined previously in this analytical brief, is Kosovo's clearest and perhaps only path towards obtaining the candidate status. In fact, article 49 TEU is the only procedure that has ever been used by applicants to engage the process of EU integration. Despite Kosovo's peculiar status, the conventional route is the most plausible way of attaining its objective for several reasons. Not only have the treaties not offered any other legal means for the EU accession procedure to be initiated, Kosovo would also be vindicated if it were to be treated like other applicant states through the article 49 TEU procedure. It would align with its goal to attain further recognition, and avoid a *sui generis* treatment which would essentially be a political setback for Kosovo's sovereignty.

For this procedure to be initiated and successful Kosovo must tackle the issue of the five non-recognizers, which remains the biggest obstacle to a successful application. Kosovo's main diplomatic objective is to bring these five member states to a stage in negotiations where they may be keen on demonstrating political willingness and flexibility, in the same way as they did during the negotiations and the conclusion of the SAA. If these countries refuse to change their stance on Kosovo's independence, but wish to facilitate its accession to the candidate status, potential legal work-arounds could then be negotiated. In addition, the ongoing EU negotiations with Serbia may also create the opportunity for an eventual political compromise between Kosovo and the five non-recognizers using Serbia's Chapter 35 criteria.

## Article 352 TFEU: The "flexibility clause"

Known as the "flexibility clause", Article 352 TFEU allows the European Union, if the treaties have not provided the necessary powers, to fill in legal gaps and undertake action deemed necessary. Such action must not increase the European Union's powers and must be executed with the aim of attaining the objectives laid out by the Treaties. While the legality

of such a procedure is uncertain, seeing as article 352 TFEU must be used to deal with an issue that is not “constitutionally significant”, it could provide Kosovo with a legal pathway towards the candidate status. The flexibility clause may prove to be indispensable if the EU concludes that Kosovo cannot apply for candidate status through the conventional procedure of Article 49 TFEU, yet still wishes to pursue its European perspective. This would signify that the Treaties cannot accommodate Kosovo’s case politically for the time being but that its integration is in line with its objectives.

Engaging article 352 TFEU could also provide a way to deal with the political obstacle that is the refusal of the five non-recognizers. 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 by the five non-recognizers for the time being. This may be possible if the five non-recognizers are unwilling to change their stance on Kosovo, but recognize the need to further integrate the entity into the union. It must be noted that such a procedure is highly unlikely, however. Article 352 TFEU has seldom been engaged, and its usage was once deemed illegal by the ECJ when the EU attempted to accede to the European Convention on Human Rights. Moreover, the flexibility clause would require strong political will from member-states to be activated, including the 5 non-recognizers.

For this to occur, the “Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures”.<sup>13</sup> This means that Kosovo should apply conventionally, but that the Commission may decide to redirect its application and create an ad hoc procedure to accommodate Kosovo’s case until the five non-recognizers recognize Kosovo’s independence.

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<sup>13</sup> Article 352 of the Treaty on the Functioning of the European Union

# Five lessons for Kosovo

This section will give various recommendations for Kosovar authorities to follow throughout the application process and particularly when dealing with the questionnaire. Whether Kosovo applies through the conventional procedure or article 352 TFEU, it will certainly have to answer the questionnaire and make its case to the EU institutions and its member-states. These recommendations are based on previous experience of applications by other Balkan nations, and may contribute to a more efficient case being made on the part of the Kosovar government.

## Preparing for the application:

- Significant reforms that aim to align Kosovar legislation to European standards and draw attention to Kosovo's progress in Europe should be undertaken **before autumn** – when the EU yearly report is presented. This report is the source of reference for EU policies and dictates much of European decision-making regarding Kosovo. Kosovar government authorities should therefore aim to show progress before the report is released.
- **Strict implementation of the SAA** must be undertaken in order to demonstrate Kosovo's commitment to European integration.
  - o The SAA being the only contractual relationship between the two entities, its success in being implemented would not only pave the **necessary reforms for Kosovo to align with European standards**, it would also demonstrate a **symbolic success of cooperation**. Its implementation will be one of the main criteria when considering Kosovo's application for the candidate status.
  - o The European Reform Agenda, adopted in November 2016, must serve as guide during the implementation course of action.
- The Parliamentary Committee for European Integration must play a crucial role in harmonizing the legal system of Kosovo with European standards and in implementing the SAA effectively.
- Kosovo's government should aim to submit its EU candidate status application soon after it demonstrates it has built a relatively good progress in implementing core reforms especially in the field of fight against organized crime and corruption, seeing as the application will most likely face delays. Launching a candidate status bid must however be executed under certain conditions:
  - o Kosovo should first have a **certain degree of preparedness** for the procedure, particularly for the questionnaire.
  - o Kosovo should aim to submit its application when a **"friendly" member**, or at least one that recognizes its independence, is presiding the European Council.
  - o It would be recommended to **submit the application under the council presidency of Malta, Estonia, Bulgaria or Austria**. This gives Kosovo a wide

timeframe from January 2017 until December 2018. Romania, a non-recognizer, will take the presidency during the first semester of 2019. This would allow greater chances for Kosovo's application to be rapidly, if at all, placed on the EU council agenda.

- Diplomatic relations were established with these states shortly following Kosovo's declaration of independence, suggesting they **may be positively inclined** to help place Kosovo's application on the EU Council agenda.
- **Consulting the authorities of the member-state presiding the council beforehand** would be highly recommended in order to coordinate the presidency's plans. It will also help to understand where the country stands on Kosovo's potential application.
- **Consulting European partners**, particularly member-states but also EU institutions and agencies is also highly recommended beforehand. It will enable Kosovar authorities to evaluate the support Kosovo would receive if it launched its candidate status application.
- **A pre-application declaration** is also recommended. Potential candidates often make a unilateral public declaration of intent before submitting their application in order to seek out a reaction from the Commission to evaluate their chances of obtaining the status, although this is not a mandatory.

## Conducting the application and dealing with the questionnaire:

1. Internal divergences at local, parliamentary or executive level regarding the questionnaire **must be settled before the questionnaire is received**.
  - The coordination of a national agenda could be orchestrated by the already established "Ministerial Council for the Coordination of the European Integration Process". It must ensure political support across all political parties, including opposition parties. Opposition parties should be requested to join this effort in all respects. The Council should also play a crucial role in **building a governmental and national consensus**.
  - It is highly recommended that a specific and realistic "Diagnostic Report" be drafted before a candidate status application is launched to **explicitly advise the necessary steps** to reach the candidate status. The objective of this report will therefore be to provide a comprehensive analysis on the progress achieved by Kosovo in all areas of public policies, and identify the challenges for these policy areas.
  - It is of utmost importance that Kosovo's political parties and institutions **show unity throughout the process**. This unity will not only be reflected in their answers to the questionnaire, but will also lead to the presentation of a more

convincing case to the European authorities. It will also demonstrate a symbolic gesture as to the administration's efficiency and Kosovo's ability to unite.

## 2. Understanding the modalities of the Questionnaire

- The European Commission Questionnaire (ECQ) is a formal instrument used by the European Union **to evaluate the readiness of a country** to initiate the process of candidate status.
- The time period between submitting the candidate application and receiving the questionnaire can vary: 5 months (Croatia), 8 months (Montenegro and Albania) and 1 year (Serbia).<sup>14</sup>
- There is a **2 to 6 months deadline** to respond. After receiving the answers, the European Commission reserves the right to send more questions and ask for clarifications.
- Kosovar authorities must prepare to answer a questionnaire of at **least 4000 questions**, based on the questionnaires submitted to similar applicants. Kosovo's special status may lead to a greater amount of questions being received.

## 3. Preparing for the Questionnaire

- A large portion of **answers can be prepared in advance**. Many questions are not country-specific.
  - o For example, Serbian authorities answered 85% of the questions of questionnaires sent to other Balkan countries before they even received their own questionnaire.<sup>15</sup>
- Kosovo's government, particularly the Minister of European Integration, and more specifically the Ministerial Council for the Coordination of the European Integration Process, should **establish an overall plan of action and argumentation** to follow and emphasize throughout the questionnaire.
- The Minister of European Integration must be given the **financial means to constitute, oversee and coordinate a group of experts** that will undertake the task of eventually answering the questionnaire.
  - o Much like Albania, Serbia and other countries that have previously reached the candidate status, this group of experts could take the form of an **inter-administrative structure with 35 working groups** corresponding to the structure of the Questionnaire. Kosovo's government should determine the formation and structure of the group with the objective to optimize its efficiency.
  - o This structure could be built on the already established "Working Committee for European Integration" and could utilize resources from the

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<sup>14</sup> EU Membership Candidate Status: Between Challenges and Weaknesses

<sup>15</sup> Office for European Integration, Government of the Republic of Serbia, accessed March 2017, <http://www.seio.gov.rs/info-service/questions-and-answers.258.html>

various departments already present in the ministry's organizational structure.<sup>16</sup>

- This structure must incorporate **legal experts and translators** which will be fundamental in ensuring that the form and answers to the questionnaire are impeccable.

#### 4. Answering the Questionnaire

- It is strongly recommended that Kosovar authorities **consult civil society actors** during this process. This will ensure transparency and public involvement in this process. Their expertise may also lead to more efficient and detailed answers.
- Efficient coordination must be implemented between the various ministries, the executive and parliamentary branches and the group of experts in order for the questionnaire to be **answered with a single voice**.
- The group of experts must be able to **work closely with the other ministries, governmental and local agencies** in order to be able to obtain precise information and expertise for its answers.
- **A clear political and legal mandate** must be given to the group of experts to answer the questionnaire. This will not only increase the legitimacy of the group and its work, but it will also limit potential post-questionnaire criticisms of the group.
- The answers must focus on arguing Kosovo's case, and should include:
  - **Economic reforms** which are the pillars of European criteria;
  - **Rule of law**, particularly the fight against organized crime and corruption due to the new approach to EU enlargement;
  - Specific laws, reforms and progresses undertaken to align with European standards;
  - Government commitment to channel core reforms in key sectors such as fight against organized crime and corruption.
- The group of experts must be devoted to **providing answers of the highest quality**, both in terms of form and substance.
  - The answers must promote Kosovo's willingness to join the EU and its ability to undertake the necessary reforms in the future.
  - Overall, the objective is to present a **positive depiction of Kosovo** and demonstrate **its ability to potentially join the EU** in the medium to long-term.

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<sup>16</sup> Ministry of European Integration (MEI), Government of the Republic of Kosovo, MEI Organizational Structure, accessed March 2017, [http://www.mei-ks.net/repository/docs/organogrami\\_2014\\_2.pdf](http://www.mei-ks.net/repository/docs/organogrami_2014_2.pdf)

## 5. Translating the Questionnaire:

- “The process of translating the answers to the questions from the European Commission’s Questionnaire has represented one of the greatest translation endeavors in the majority of states.”<sup>17</sup> Kosovo must learn from this experience.
- Kosovo’s government **may ask for technical help** from European authorities in this task.
- It would be highly recommended that proven professionals undertake the task of translating the questionnaire. Significant resources must be devoted for this task. To compare, Serbia hired over 70 translators during this process and the translation took over 40 days. The cost of translation was over 85,000 euros.<sup>18</sup>
- Laws and bylaws are also present in the questionnaire’s answers, and the task should therefore **be reviewed by translators as well as legal experts**.

## The result

- The Council **decides unanimously** to grant the candidate status to a country. However, if it sees that such a proposal will not reach consensus, Kosovo’s application will **not be placed on the agenda**. In such a case, Kosovo’s application will most likely face long delays, similar to what occurred with Albania.
- To overcome this stalemate, the issue of 5 non-recognizers will have to be dealt with before and tried to be politically neutralized.
- Kosovo can also attempt to demand **a legal clarification by seizing the ECJ**.
  - o The formal procedure can be engaged through Article 263 or 265 of the TFEU.
  - o Procedure must be initiated by an individual, a Member State, the European Parliament, the Council or the Commission in order to review “acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.”<sup>19</sup>
  - o If the ECJ is seized, it will be demanded to give its position on Kosovo’s ability to obtain the candidate status even without the recognition of the five non-recognizers.

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<sup>17</sup> EU Membership Candidate Status: Between Challenges and Weaknesses

<sup>18</sup> Office for European Integration, Government of the Republic of Serbia, accessed March 2017, <http://www.seio.gov.rs/info-service/questions-and-answers.258.html>

<sup>19</sup> See for more consolidated version of the Treaty on the Functioning of the European Union, Art. 263, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E263>