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WHAT IS THE FUTURE OF STABILIZATION AND ASSOCIATION AGREEMENT WITH KOSOVO (RISK OF INCOHERENCE IN THE EU LAW)?

Abstract

Kosovo unilaterally declared independence without Serbia's agreement and without approval of the UN Security Council. Today, Kosovo has been recognized by 110 UN member countries, including 23 EU Member States. The negotiation of the Stabilisation and Association Agreement (SAA) started in 2013 and the SAA was signed in October 2015, which means that Kosovo is included in the EU accession process. Stabilisation and Association Agreement is the accession instrument that presumes legal cooperation of the EU with the potential candidate state. In that respect, there is a risk of incoherence between EU policies and between EU and MS politics towards Kosovo.

Firstly, the Treaty of Lisbon puts a major imperative on the process of straightening the coherence between Unions policies and activities. It is the

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obligation of the Union to ensure consistency between the different areas of Union's external action and between these and its other policies. Also, the Treaty prescribes stronger obligations for Member States to support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. Secondly, following the Lisbon Treaty, which conferred legal personality to the European Union, the Stabilization and Association Agreement was concluded in the form of an EU-only agreement, involving the EU on one side and Kosovo on the other side. Moreover – five EU countries have not recognized Kosovo. Conclusively, this is a case of a potential candidate state that is not recognized by five Member States, which causes concern over the future functioning of the EU. This paper will analyze the current regulation that produced this situation and propose changes that could contribute to a better functioning of the EU.

Keywords: EU law, coherence, consistency, Stabilisation and Association Agreement, Kosovo.

1. Introduction

Kosovo unilaterally declared independence on 17 February 2008 without Serbia's agreement and without approval of the UN Security Council, but with the support of the United States of America and the majority of EU Member States (MS). To date, Kosovo has been recognized by 110 UN member countries, including 23 EU Member States. In terms of Kosovo, the EU is in a very specific situation: responsible for the EULEX mission, while five Member States have not recognized Kosovo to date (Greece, Spain, Cyprus, Slovakia and Romania). Nonetheless, Kosovo is included in the process of accession to the EU (the European Commission proposed the concluding of the Kosovo Stabilization and Association Agreement (SAA) and the Council proposed to open SAA negotiations, which started in October 2013) and the Agreement was signed in October 2015. Following the entering into force of Lisbon treaty the Stabilization and Association Agreement was concluded in the form of an EU-only agreement, involving the EU on the one side and Kosovo on the other. This means, contrary to previous SAA practice, that there will be no need for MS to ratify this agreement.

Given situation triggers the question of coherence between EU and MS policies towards Kosovo, due to the fact that there is potential candidate state not recognised by five MS. The Treaty of Lisbon puts a major imperative on the process of straightening the coherence between Unions policies and activities. Treaty of the European Union (TEU) proscribes the obligation to ensure

coherence (consistency) in five articles (13(1) TEU; 16(6) TEU; 18(4) TEU; 21(3) TEU and 26(2) TEU), whereas the Treaty on the Functioning of the European Union (TFEU) proscribes the obligation to ensure coherence in six articles (7 TFEU, 121(3) TFEU, 196 TFEU, 256(2) TFEU, 256(3) TFEU and 334 TFEU). It is the obligation of the Union to ensure consistency between the different areas of Union's external action and between these and its other policies. Also, the Treaty prescribes stronger obligations for Member States to support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. It is specified in the Treaty that Member States (MS) shall comply with the Union's action in the area of external and security policy. Kosovo is a country that is connected with the EU via the foreign policy as well as via the enlargement policy and will serve as a case study in this paper for the purpose of analysing the effectiveness of the Lisbon changes that aimed at the better functioning of the Union's external actions. First, the paper shall define what coherence is and what dimensions there are. Furthermore, the paper shall analyze the process of opening negotiations and conclusion of the Stabilization and Association Agreement with Kosovo, which should lead to the conclusion on what is the future of SAA with Kosovo and is the obligation of achieving coherence fulfilled in this particular situation.

2. What is coherence?

Coherence is the subject of research in numerous scientific disciplines, with particular significance being given to it by theoreticians in the field of philosophy of law.[1] The term coherence comprises several levels and is intertwined with other legal terms, which is why it is necessary to determine what coherence is prior to analysing Treaty provisions. It is important to notice that, different languages of the Treaty do not use the same term for coherence (to exemplify, Italian, German and Spanish language versions use the terms *coerenza*, *Kohärenz*

[1] N. MacCormick, *Legal Reasoning and Legal Theory*, Clarendon Press, Oxford, 2003, p. 106-108; N. MacCormick, Coherence in legal justification, in: W. Krawietzet (ed.), *Theorie der normen*, Duncker and Humblot, Berlin, 1984, p. 37-53; A. Peczenik, *On law and reason*, 2nd edn, Springer, Dordrecht, 2008, p. 131-152; J. Raz, The relevance of coherence, (1992) 72 *Boston University Law Review*, p. 273–321; R. Dworkin, *Taking rights seriously*, Harvard University Press, Cambridge, 1978, p. 81-130; R. Dworkin, *Law's empire*, Fontana, London, 1986; S. L. Hurley, Coherence, Hypothetical Cases, and Precedent, (1990) 10 *Oxford Journal of Legal Studies*, p. 221–251; J. M. Balkin, Understanding legal understanding: The Legal subject and the problem of legal coherence, (1993) 103 *Yale Law Journal*, p. 105–176.

and *la coherencia*, which translate to coherence, whereas the English version uses consistency). In order to clearly determine coherence as a term, it is essential to delimit it or equalize it with the term *consistency*. The CJEU takes a stand that *coherence* and *consistency* are not mutually interchangeable, but rather have different meanings,[2] which is confirmed by legal theory.[3] Taking into account that the majority of official Treaty versions use the term coherence, the use of the term consistency in the English version may be regarded as an exception.[4] Even though it uses the term consistency, the English version should be regarded as encompassing the term coherence content-wise. Conclusively, the terms *coherence* and *consistency* are related as such, but should nonetheless be differentiated.

Coherence has an ambiguous nature[5] and represents a multi-layered concept. Consistency refers to the nature of certain outcomes or states that are compatible or incompatible and coherence determines the quality of the process in which ideally the subjects are united in the process of achieving positive connections.[6] Furthermore, coherence is a matter of degree, whereas consistency is a static concept.[7] This would mean that a certain set of elements, a concept or legal system may be more or less coherent, but cannot be more or less consistent: it either is or is not consistent.[8] Consistency and coherence are not interchangeable terms, but may be considered as mutually strengthening. Coherence is a wider and more flexible term than consistency and may be regarded as including the term consistency, yet not being limited by it.[9] Authors who examine coherence

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[2] Case C-266/03 *Commission v. Luxemburg* (2005) ECR I-4805, p. 60; Case C-433/03 *Commission v. Germany* (2005) ECR I-6985, p. 66; Case C-264/07 *Commission v. Sweden* (2010) ECR I-3317.

[3] Dworkin 1978 (n 1), p. 81–130; Balkin (n 1), p. 105-176; MacCormick 2003 (n 1), p. 106-108; Raz (n 1), p. 272-321.

[4] Case C-63/06 UAB Profisa v Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos (2007) ECR I-03239.

[5] M. Cremona, Coherence through Law: What difference will the Treaty of Lisbon make, (2008) 3 *Hamburg Review of Social Science*, 1, p. 11-36, 13.

[6] MacCormick 2003 (n 1), p. 106; A. Missiroli, Coherence for security studies, *Occasional Paper*, (2001) 27, Institute for Security Studies, Western European Union, p. 4.

[7] C. Franklin, The Burgeoning Principle of Consistency in EU law, (2011) 30 *Yearbook of European Law* 1, p. 42–85, 45.

[8] C. Tietje, The Concept of Coherence in the TEU and the CFSP, (1997) 2 *European Foreign Affairs Review* 2, p. 211–233, 213.

[9] M. Cremona (n 5), p. 14.

undoubtedly agree on the fact that coherence does not solely involve the achieving of consistency, but rather represents something more.[10] For this reason, prior to analysing the effectiveness of the Lisbon changes on the obligation of achieving coherence, it is imperative that the levels of coherence be defined. Building on the classification of coherence from the two authors – *Nuttall and Cremona* below is the proposition for defining the three levels of coherence that harmonize the legal and the political-science approach. [11]

The first level of coherence should be named *positive coherence* and/or *coherence of norms* that represents the absence of contradiction between prescribed norms and acts of actors, i.e. consistency. The term *positive coherence* denotes the fact that this level represents an obligation of performance: the obligation to resolve conflict between concurrent and contradicting norms (absence of contradiction), i.e. consistency. The second level of coherence should be named *negative coherence* and/or *coherence of actors*. Negative coherence represents the obligation of institutions and actors to refrain from conflict over achieving objectives in accordance with the powers conferred on them by Treaties. The term *negative coherence* stems from the fact that this level represents the obligation of non-performance: obligation for actors to refrain from manufacturing conflicts over competence as a proxy for inter-institutional power battles. The positive and negative coherence should be perceived as two equal levels, whereas the third level of coherence represents a higher, superordinate level. The *added value* and/or *system coherence* (third level of coherence) represents a positive interaction between institutions, i.e. a synergy between norms and instruments. It follows that positive and negative coherence lead to the third and highest level of coherence. In order to achieve added value (to make the system coherent), i.e. to achieve complementarity, synergy and system integrity, it is necessary to achieve consistency and remove conflicts over competency. The third level of coherence

[10] S. Pethick, Solving the Impossible: The Puzzle of Coherence, Consistency and Law, (2008) 59 *Northern Ireland Legal Quarterly* 4, p. 395–410; K. J. Kress, Why No Judge Should Be Dworkinian Coherentist, (1999) 77 *Texas Law Review*, p. 1375–1426; A. Marmor, *Interpretation and Legal Theory*, Clarendon Press, Oxford, 1992, p. 27–62.

[11] Cremona (n 5), p. 13; S. Nuttall, *European Foreign Policy*, Oxford University Press, Oxford, 2000, p. 25–26; C. Hill and M. Smith, *International relations and the European Union*, Oxford University Press, Oxford, 2011, p. 111; S. Nuttall, Consistency and the CFSP: A Categorization and its Consequences, (2001) EFPU Working Paper, London, London School of Economics and Political Science, *http://www.lse.ac.uk/Depts/intrel/pdfs/EFPU%20 Working%20Paper%203.pdf.*, accessed 25 March 2015.

represents a coherence that is prescribed as an obligation under the Treaty. Therefore, coherence is a multi-layered term that represents system integrity, i.e. complementarity and synergy of legal norms, acts and legal concepts. Coherence is achieved through avoiding contradiction and refraining from conflict over competency. [12]

In view of the multidimensionality of coherence as a term, it is necessary to analyze the dimensions of coherence with the aim of better understanding of the term. Legal science and political science recognize vertical and horizontal coherence (institutional coherence) as main dimensions of coherence**.**

Vertical coherence represents the coherence between EU policies and national policies of Member States as well as the coordination of foreign policies of Member States. It particularly relates to situations where the EU and Member States simultaneously take actions in the sense of a policy or a problem. Vertical coherence implies general compliance of national policies with obligations under the Treaty, but also technical compliance of individual national policies with EU policies. Consequently, vertical coherence includes: solidarity, integration, readiness to harmonize national policies with the Treaties and harmonization of regulations.[13] It follows that vertical coherence is the dimension of coherence that needs to be achieved between actors on different decision-making levels. The Lisbon Treaty provides for the obligation to ensure vertical coherence in Articles 4(3) TFEU, 5 TFEU, 24 TEU, 31(2) TEU and 32(1) TEU. Sources of vertical incoherence we can find in the differences in Member States policies and the refusal to use EU institutions and their mechanisms. The core stone of the vertical coherence obligation in the Treaty is the principle of loyalty and mutual trust. Due to the fact that Treaty only prescribes the obligation to ensure coherence, but it does not prescribe the mechanisms for the control of MS in their fulfillment of this obligation, the achievement of vertical coherence depends largely on the political will and less so on legal obligations.[14] It is precisely the question of the insufficiently defined manner of fulfilling the obligation of loyal cooperation that is suitable for proving vertical coherence pursuant to Article 24 TEU. It is

[12] D. Duić, The concept of coherence in the EU law, (2015) 3/4 *Zbornik Pravnog fakulteta u Zagrebu*, p. 537-555.

[13] Hill and Smith (n 11), p. 107.

[14] H.-J. Blanke and S. Mangiameli Stelio (eds.), *The Treaty on European Union (TEU) commentary*, Springer, London, 2013, p. 924.

questionable whether such wording in the Treaty is precise enough for the Member States to abide by it.

Horizontal coherence represents the coherence between different EU policies. It is equivalent to the concept of coherence between "pillars" due to the fact that it covers two types of relationship: it refers to the compatibility of political content, i.e. agreement or disagreement in wider foreign policy goals as well as the process and technical procedures that suggest that issues in terms of disagreement may arise at all decision-making levels.[15] Horizontal coherence represents the basis for the ability of the EU to influence other international actors and the capacity of the EU to speak with one voice. In fact, horizontal coherence tries to answer the following questions: how can institutions become more coherent in their work and how to achieve unity among EU policies.[16] The need for horizontal coherence is prescribed by Articles 7 TEU, 13 TEU, 21(3) TEU and 40 TEU. The Lisbon Treaty in its Article 21(3) TEU attempts to strengthen coherence by prescribing to the Union two obligations of ensuring coherence between different areas of EU external actions (such as trade, humanitarian aid etc.) and ensuring coherence between external actions and other policies (such as agriculture, environmental protection or migration policy).[17] This is in fact a step forward, due to the fact that it is the first time that the Treaty provides not only for the obligation of ensuring of coherence of foreign policies with one another, but also with other Union policies. To conclude, the main issue in achieving horizontal coherence is the same as it is for vertical coherence: there are no mechanisms for controlling institutions in their fulfilling of the obligation to ensure coherence. We have to recognise that the achieving of coherence does not depend solely on the good will of institutions, which in point of fact cannot be an indicator of coherence strengthening.

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[15] Hill and Smith (n 11), p. 108.

[16] P. Koutrakos, *European foreign policy: legal and political perspectives*, Edward Elgar, Cheltenham, 2011, p. 21.

[17] Art. 21 (3) TEU: The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies. The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

Aside from the two dimensions of coherence, there is also mention of a third dimension of coherence in literature – institutional coherence. It should be pointed out that all authors who write about the dimensions of coherence classify vertical and horizontal coherence.[18] However, among the authors who write about coherence, some do not mention the third dimension of coherence, i.e. institutional coherence.[19] All authors who write about institutional coherence agree on two points: institutional coherence represents a type of sub-dimension of horizontal coherence and denotes the compliance of policy creation within the Council and the Commission as well as lower structures within these institutions.[20] Neither of them states the sources for this type of definition, which leads to the following conclusion: either all of them came to the same findings or neither of them questioned the meaning of the introduction of a third dimension of coherence and analyzed the essence thereof. Nevertheless, the question is: are cooperation and coherence the same? What is institutional coherence if we look at it through levels of coherence? This is thus an aspect of coherence that deliberates solely the activity of institutions and does not take into account the first level of coherence. The aforesaid suggests the following: institutional coherence is not a third dimension of coherence nor should it be part of the official classification of coherence. Institutional coherence should be considered as the second level of the total coherence in vertical and horizontal coherence analysis in other words prerequisite for achieving all levels of coherence. Institutional coherence is the product of achieving vertical and horizontal coherence. To exemplify: if the Treaty prescribes that the Union shall ensure coherence between different areas of its activity and has authorized the Council, the Commission and the High Representative therefor, then the coherent conduct between them is the product of the fulfillment of the objective that has been assigned to them, i.e. the result of an attempt to achieve horizontal coherence. Thus, if horizontal coherence is achieved, the institutions are acting in line with each other and properly distributing their function, which ultimately leads to the strengthening of interinstitutional cooperation.

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[18] J. Gaspers, The quest for European foreign policy consistency and the Treaty of Lisbon, p. 21, <*http://www.sbc.katowice.pl/Content/11990/gaspers.pdf*>, accessed 20 April 2015; Cremona (n 5),p. 25; Nuttall 2001 (n 11), p. 8.

[19] See for example: Tietje (n 8), p. 211–233; P. Gauttier, Horizontal Coherence and the External Competences of the European Union, (2004) 10 *European Law Journal* 1, p. 23–41.

[20] Gaspers (n 18), p. 21; Cremona (n 5), p. 25; Nuttall 2001 (n 11), p. 8.

The above discussion demonstrates the existence of legal obligation to ensure coherence in the Treaty – specifically the obligation to ensure vertical and horizontal coherence. Furthermore, innovation in the Treaty focus on the straightening the coherence in the area of external actions, both vertical (for example Article 4(3) and Article 24 TEU) and horizontal (Article 21(3) TEU).

3. Is there coherence in policies towards Kosovo?

Kosovo unilaterally declared independence on 17 February 2008 without Serbia's agreement and without approval of the UN Security Council, but with the support of the United States of America and the majority of EU Member States. At the request of Serbia, the General Assembly of the UN asked for the advisory opinion of the International Court of Justice. In 2010, the Court concluded that Kosovo did not violate international law by declaring independence. To date, Kosovo has been recognized by 110 UN member countries, including 23 EU Member States.

In terms of Kosovo, the EU is in a very specific situation. Firstly, the EU is responsible for the European Rule of Law Mission in Kosovo (EULEX),[21] which is the largest EU civilian mission and gives the EU role in assisting Kosovo authorities and law enforcement agencies in their progress towards sustainability, accountability, multi-ethnicity, freedom from political interference, and compliance with internationally recognized standards and European best practices.[22] On the other hand, MS are divided over the question of Kosovo's international status; five Member States have not recognized Kosovo to date (Greece, Spain, Cyprus, Slovakia and Romania).[23] Nonetheless, since the declaration of Kosovo independence, the EU has had the main role in peace

[21] M. Spernbauer, EULEX Kosovo – Mandate, structure and implementation: essential clarifications for an unprecedented EU mission, CLEER Working paper 2010/5,, available at: <*http://www.asser.nl/upload/documents/7302010_24440CLEER%20WP%202010-5%20-%20SPERNBAUER.pdf*>, accessed 30 June 2015.

[22] Council of the European Union, Council Joint Action on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, 2008/124/CFSP (2008), at: *http://www.eulex-kosovo.eu/en/info/docs/JointActionEULEX_EN.pdf* (accessed 10 Jan. 2015) and S. Rozée, Order-Maintenance in Kosovo: The EU as an Increasingly Comprehensive Police Actor?, (2015) 20(1) *European Foreign Affairs Review*, p. 97–114.

[23] W. Koeth, State Building without a State: The EU's Dilemma in Defining Its Relations with Kosovo, (2010) 15(2) *European Foreign Affairs Review*, p. 227–247.

negotiations between Kosovo and Serbia. On 19 October 2012 negotiations between Kosovo and Serbia started under the patronage of the High Representative. A total of nine meetings were held prior to reaching an agreement on 19 April 2013 and the prime ministers of both countries agreed on the "First agreement of principles governing the normalisation of relations".[24] Three days later, on 22 April 2014, the European Commission proposed the concluding of the Kosovo Stabilization and Association Agreement (SAA) and on 25 June 2013 the Council proposed to open SAA negotiations, which started on 28 October 2013.[25]

Given the existence of obligation to ensure coherence in the Treaty – specifically the obligation to ensure vertical and horizontal coherence, Kosovo should serve as case study for the purpose of determining whether the Union and Member States fulfill this obligation. At this point it is necessary to explain why Kosovo and SAA were selected as an example. There are three main reasons behind it: firstly – the Union and Kosovo have been collaborating on a legal and political plan for a longer period of time, secondly – Kosovo is suitable a case study since it asks for the activation of the several EU external actions policies (enlargement, CFSP, trade, humanitarian aid, etc.) finally Kosovo is in the Stabilization and Association Process and it is the first country that will be sign the SAA with the EU after the Lisbon changes.

Article 24(3) TEU prescribes that Member States shall actively and unreservedly support the Union's external and security policy and refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness. Also, article 21(3) TEU prescribes the obligation of the Union to ensure the coherence between areas of EU external actions and between external actions and other policies. The compliance with the obligations prescribed in both articles can be analyzed in this case study. This chapter of the paper shall analyze whether there is coherence between the enlargement policies (that is part of the Union's external actions) toward Kosovo and the actions of the Member States (MS). The analysis should provide the answer to the question of whether they are mutually coherent in their actions. In terms of policy implementation toward Kosovo, this

[24] W. Koeth, The Serbia-Kosovo Agreement on Kosovo's Regional Representation and the 'Feasibility Study': A Breakthrough in EU – Kosovo Relations?, (2013) 18(1) *European Foreign Affairs Review*, p. 127–144.

[25] EU relations with Kosovo, *http://eeas.europa.eu/kosovo/index_en.htm*, accessed 30 April 2015.

means that the actors (EU and MS) must adopt acts that are non-contradictory to EU policy and refrain from actions that are mutually contradictory in order to achieve coherence, i.e. added value.

4. Case study: Opening of Stabilization and Association Agreement negotiations with Kosovo

In the meeting held on 26 June 2013, the Council decided to recommend to the European Council the adoption of the decision to open SAA negotiations between Kosovo and the EU without prejudice to the issue of Member States position toward Kosovo.[26] Furthermore, on 28 June 2013, the Council adopted by written procedure two decisions authorizing the opening of SAA negotiations.

To prove the existence of vertical coherence, the author requested from the Council the access to documents that are not public. The entire correspondence with the General Secretariat of the Council is available online and is enclosed.[27] The author requested access to documents and appealed following a negative answer from the Council. The Council responded to the appeal within the prescribed period, but access to most documents was not granted. The Council stated that the next step were proceedings against the Council before the General Court or the European Ombudsman. Following the answer, the author decided to draw conclusions from the available documents. There are no significant differences between the first and second Council responses. The rationale for refusing access to documents was either personal data protection or the protection of interests in international negotiations.

Of the requested documents, the most useful for this case study were the following:

Document 11327/13 and its revised version in document 11327/2/13 REV 2 contain the Council Decision authorising the opening of negotiations on a Stabilisation and Association Agreement between the European Union and Kosovo with regard to the provisions relating to readmission.

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[26] General Affairs Council, 11443/13, 25 June 2013, <http://www.auswaertiges-amt.de/cae/servlet/contentblob/649860/publicationFile/182009/130625-PM-RfAA.pdf>, accessed 15 April 2015.

[27] Complete Council response available at: http://www.parlament.gv.at/PAKT/EU/XXV/EU/00/19/ EU_01927 /imfname_10422684.pdf, accessed 20 March 2015.

Document 11329/13 and its revised version in document 11329/2/13 REV 2 contain the Council Decision authorising the opening of negotiations on a Stabilisation and Association Agreement between the European Union and Kosovo with the exception of the provisions relating to readmission.

They involve two Council Decisions that were adopted in written procedure (as evident in the press release),[28] but their content is classified. Such actions, even though it has been standard practice of the Council not to make public its decisions authorising the opening of international treaty negotiations, must be deemed unacceptable considering that the Decisions are the basis for the final decisions adopted by the European Council.[29]

Release of the documents was denied in the rationale as follows: "Release to the public of these documents would reveal aspects of the strategic objectives the EU intends to achieve in these international negotiations and would enable its negotiating partners to assess the measure of its willingness to compromise. This would not only prejudice the EU's position in its current negotiations but would also negatively affect the climate of confidence in the on-going negotiations and harm EU relations with Kosovo".[30]

The rationale of the Council is certainly an expression of non-transparency, though it should be emphasized that non-transparency does not automatically mean incoherence. The Court itself in its recent judgment Case C-350/12 P, *Council v. Sophie in't Veld* declares that statement of reason for decision of the EU institution to deny the access to a specific document must demonstrate how disclosure would specifically and actually harm the protected interest, which is not the case in this situation.[31] Therefore, non-transparency does not prove incoherence, but non-transparency itself prevents the proving of coherence since

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[28] General Affairs Council, 11443/13, 25 june 2013, <http://www.auswaertiges-amt.de/cae/servlet/contentblob/649860/publicationFile/182009/130625-PM-RfAA.pdf>, accessed 20 March 2015.

[29] European Council Conclusion, 27-28 June 2013, EUCO 104/2/13, par 20, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/137634.pdf>, accessed 02 May 2015.

[30] Complete Council response available at: http://www.parlament.gv.at/PAKT/EU/XXV/EU/00/19/ EU_01927/imfname_10422684.pdf, accessed 20 March 2015.

[31] M. Hillebrandt and V. Abazi,The Legal Limits to Confidential Negotiations: Recent case law developments in Council transparency: Access Info Europe and In 't Veld, (2015) 52(3) *Common Market Law Review*, p. 825–846.

there is no possibility for analysing the mention documents. The known fact remains that five Member States did not recognize Kosovo, which may be regarded as the cause of non-transparency in the document release procedure. Based on the Council Decisions that were previously found to be inaccessible to the public, the European Council in its conclusion adopts the decision on authorizing Kosovo SAA negotiations.[32]

Prior to entering into force of the Lisbon Treaty, all the SAA were concluded as a mixed agreements[33] signed by Member States, the EU and the state that was to enter the EU accession process (in this case, Kosovo), meaning that every Member State had to ratify the Agreement. The situation with Kosovo is specific given that Kosovo was not recognized by five Member States: Greece, Romania, Spain, Cyprus and Slovakia. Furthermore, pursuant to the instructions from Council of the European Union at the time of declaration of independence of Kosovo, Member States do not have the obligation to recognize Kosovo.[34]

It should be noted that the main Stabilization and Association principles were established in Commission Communication from 1999 and confirmed in the same year by the Council,[35] whereas the legal basis for the signing of the SAA was previously Article 310 TEC (Nice) and now Article 217 TFEU, stipulating: "The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure."[36]

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[32] European Council Conclusion, 27-28 June 2013, EUCO 104/2/13, par 20, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/137634.pdf>, accessed 02 May 2015.

[33] More about mixed agreements, See: E. Cannizzaro, *International law as law of the European Union*, Martinus Nijhoff, Leiden, 2012, p. 325–352.

[34] General Affairs Council, 18 February 2008, "The Council notes that Member States will decide, in accordance with national m practice and international law, on their relations with Kosovo", *http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/98818.pdf*, accessed 27 April 2014.

[35] Communication from the Commission to the Council and the European Parliament on the stabilisation and association process for countries of South-Eastern Europe - Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia, former Yugoslav Republic of Macedonia and Albania, COM (1999) 235 final.

[36] Art. 217 TFEU.

In all Union documents, the Stabilization and Association Process implies the signing of the agreement with a certain "state", whilst Article 217 TFEU allows the option of concluding the Agreement with an international organization. However, in the 2012 Communication, the European Commission provided a surprising rationale. It stated that the possibility of the Union concluding international agreements was not limited solely to internationally recognized countries or international organizations, but rather that the Union may conclude an agreement with any "entity" that the public international law recognizes as eligible for concluding international agreements with. Furthermore, the Communication also states that Article 217 TFEU does not represent a legal obstacle for the concluding of the Agreement with Kosovo since it does not include a clear definition of "entities", but rather indicates that the result is an Association Agreement that includes mutual rights and obligations, mutual actions and special procedure.[37]

It is evident that such a stand from the Commission has no legal grounds whatsoever, Article 217 TFEU clearly stipulates that the Union may conclude agreements with one or more third countries or international organizations. All the Stabilization and Association Agreements concluded thus far were concluded with countries that should join the EU. The Commission states in its Communication that certain international agreements were concluded with certain entities that are not sovereign states (e.g. Grenland or Palestinian Territories) using this rational for the legality of the SAA with Kosovo. This is not acceptable justification in the contexts of the enlargement process where, beside the legal ground in the Treaty for the international agreement (SAA) which is the begging of the process (Article 217 TFEU), also in the Treaty there is a clear definition of suitability of for the membership in the Union. Article 49 TEU stipulates 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". Clearly not an "entity" or a "territory" but only a European State can be a part of enlargement process. Just to remind that since June 2000 all EU partners in the Western Balkans involved in the Stabilisation and Association process, which are not yet recognised as candidates, are considered potential

[37] Communication from the Commission to the Council and the European Parliament on a Feasibility Study for a Stabilisation and Association Agreement between the European Union and Kosovo, COM(2012) 602 final, p. 3, <*http://ec.europa.eu/ enlargement/pdf/key_documents/ 2012/package/ ks_feasibility_2012_en.pdf*>, accessed 27 April 2014.

candidates for EU membership.[38] Therefore, the Commission rationale for the possibility of concluding a Stabilization and Association Agreement with Kosovo has no grounds whatsoever and represents an attempt of bypassing legal frameworks established by the Treaty and the existing practice.

From 2008 to date, certain Member States softened their policies toward Kosovo and there are indications that Cyprus, Greece and Slovakia might recognize Kosovo.[39] However, Spain stands firmly behind its decision to not recognize Kosovo. For example, in March 2013, the Prime Minister of Spain stated that Spain continues to stand firmly behind the fact that it will not recognize Kosovo.[40] The reason is the national situation in Spain, i.e. the fear of unilateral declaration of independence of Catalonia. It is prescribed in the Treaty that Member States should refrain from behaviour that contradicts the interests of the Union. The statement was issued one month before Serbia and Kosovo reached the agreement that lead to the possibility of opening SAA negotiations with Kosovo. Stabilization and Association Agreement negotiations with Kosovo were being opened at the same time when the Prime Minister of the largest Member State emphasized that they will never recognize Kosovo. Most recently, after a Pristina-based website announced that EU High Representative Federica Mogherini has recognized Kosovo by including it in her Facebook list of countries she visited, Brussels underlined that the EU's position is clear - the EU is facilitating the Belgrade-Pristina dialogue, but the issue of the recognition of Kosovo is up to the Member States.[41] On the one hand we have the freedom of the Member States to decide on the recognition of Kosovo (based on the External relation Council Decision – CFSP field – one of the EU policies), on the other hand we have Kosovo in enlargement process (another EU policy). Most importantly, according to the Lisbon Treaty, which conferred legal personality on the European Union – the Stabilization and Association Agreement is concluded in the form of an EU-only agreement, involving the EU on the one side and

[38] European Commission - Enlargement - Potential candidates, http://ec.europa.eu/ enlargement/ policy/glossary/terms/potential-candidate-countries_en.htm, accessed 30 October 2015.

[39] EU makes headway on healing Kosovo independence rife, http://www.ft.com/cms/s/0/ fab1da78-2e6f-11e3-be22-00144feab7de.html#axzz32pLmV1Gh, accessed 23 April 2015.

[40] B92, http://www.b92.net/eng/news/politics.php?yyyy=2013&mm=04&dd=25&nav_id=85886, accessed 23 April 2014.

[41] EU position clear, Kosovo recognition up to members, <http://www.tanjug.rs/full-view_en.aspx?izb =177295>, accessed 24 March 2015.

Kosovo on the other.[42] This means, contrary to previous practice, that there will be no need for MS to ratify this agreement.[43] As previously stated, there is no transparency in the decision making process in the Council but from the publicly available document of the UK Parliament European Scrutiny Committee it is evident that the SAA with Kosovo (as usually SAA's do) covers matters of shared competence. Normally, where an external agreement covers a matter where competence is shared, EU follows predecessors in favouring the Member States' exercising that competence (in the contexts of SAA it would require Member State signature and ratification). But in this specific situation, and with the EU having legal personality, the five EU countries which have not yet to recognize Kosovo opposed the negotiating of an SAA which would require Member State signature and ratification. On this specific matter UK position is: "The Minister then notes that the five EU Member States that do not recognize Kosovo insisted on an EU-only SAA: "The UK accepted this, in return for assurances that the agreement would make clear it is a unique case, that it does not change the current distribution of competence, and that it does not set a precedent for future EU agreements. We are also seeking the citation of a CFSP legal base."[44]

Kosovo signed the SAA on 27 October 2015 while there is a clear statement by one Member State that they will not ever recognize possible future Member State and a clear exception in the stabilisation and association process meaning that SAA was concluded in the form of EU-only agreement in order to bypass the process of ratification in the MS. It is a horizontal relation where there is no coherence and where there is no possibility of archiving it because all the EU institutions and MS are acting in accordance with the Treaty provision, meaning that legal provisions are allowing this kind of situation.

Consequently this produces a situation where we have Stabilization and Association Agreement leading to the possibly closed road or in other words an agreement that begins the accession process without being sure that accession is a possible outcome. To simplify, in order to avoid vertical incoherence towards

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[42] Stabilisation and Association Agreement negotiations successfully completed (02/05/2014), <*http://eeas.europa.eu/delegations/kosovo/press_corner/all_news/news/2014/20140502_03_en.htm*>; European Commission - Enlargement - Stabilisation and Association Process, <*http://ec.europa.eu/enlargement/policy/glossary/terms/sap_en.htm*>, accessed 25 April 2015.

[43] http://eur-lex.europa.eu/resource.html?uri=cellar:29aa6ffa-ef38-11e4-a3bf-01aa75ed71a1.0001.03/DOC_3&format=HTML&lang=EN&parentUrn=CELEX:52015PC0182.

[44] http://www.publications.parliament.uk/pa/cm201516/cmselect/cmeuleg/342-i/34230.htm.

Kosovo (there are no mechanism to ensure vertical coherence in this issue) the EU turns to the development of the ambiguous enlargement process towards Kosovo which is an example of horizontal incoherence. One of the EU policies (enlargement) supports Kosovo's path to the EU. The Union considers Kosovo to be competent to enter the process of the accession, whereas five Member States do not consider Kosovo to be a state that should be internationally recognized, which is an indication of incoherence.

This raises the question of the way the EU would function if Kosovo were to complete the path of joining the EU, i.e. the way in which Kosovo could exist as a possible future Member State. At this point, the question is purely hypothetical since there is no knowing of whether Kosovo will go through the accession process. The negotiations on the Stabilisation and Association Agreement (SAA) between the EU and Kosovo that started in October 2013 were completed in May 2014.[45] The SAA was initialled in July 2014 and the Council of the EU agreed to its signature on 22 October 2015 (Council Decision on the matter is not available). For the EU, it was signed by Federica Mogherini, High Representative for Foreign Affairs and Security Policy and Johannes Hahn, Commissioner for European Neighbourhood Policy and Enlargement Negotiations, while on the side of Kosovo it was signed by Prime Minister Isa Mustafa and Minister of European Integration and Chief Negotiator Bekim Çollaku.[46] Following consent by the European Parliament, the SAA is expected to enter into force in the first half of 2016.[47] Such progress shows that Kosovo has completed the first step in the Stabilization and Association Process; it remains to be seen what will happen in the future.

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[45] COMMISSION STAFF WORKING DOCUMENT KOSOVO* 2014 PROGRESS REPORT Accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Enlargement Strategy and Main Challenges 2014-2015/ SWD(2014) 306 final/10.10.2014, <*http://eeas.europa.eu/delegations/kosovo/documents/eu_kosovo/20141008 _kosovo_progress_report_2014_en.pdf*>, accessed 02 May 2015.

[46] Stabilisation and Association Agreement (SAA) between the European Union and Kosovo signed, *http://www.consilium.europa.eu/en/press/press-releases/2015/10/27-kosovo-eu-stabilisation-association-agreement/*, accessed 27 October 2015.

[47] http://www.consilium.europa.eu/en/press/press-releases/2015/10/27-kosovo-eu-stabilisation-association-agreement/, accessed 27 October 2015.

5. Conclusion

The starting point in this paper was the idea to answer the question what is the future of SAA with Kosovo and is the Treaty obligation of ensuring coherence in this particular situation fulfilled. Before starting the analysis of particular SAA Kosovo situation it was essential to define what does the term coherence (for which there is a legal obligation to ensure in several Treaty provisions) mean. It has been defined that coherence is a multi-layered term that represents system integrity, i.e. complementarity and synergy of legal norms, acts and legal concepts. Coherence is achieved through avoiding contradiction and refraining from conflict over competence. Aside from having three levels, a large number of authors also list three dimensions of coherence: vertical (coherence that needs to be achieved on different decision-making levels (EU-MS)), horizontal (coherence that needs to be achieved on the same decision-making level (two EU policies)) and institutional coherence. However it was concluded that institutional coherence should not be considered as a third dimension of coherence, nor should it be officially classified as such. Institutional coherence should be considered as a second level of the total coherence upon achieving vertical and horizontal coherence. Therefore, when analyzing horizontal or vertical coherence and comparing whether norms are mutually contradicting, the next analysis level is the coherence of actors, i.e. the analysis of institutional coherence that suggests that actors should be coordinated in their actions, which ultimately leads to the answer whether or not the interinstitutional cooperation has been strengthened. Institutional coherence is the product of achieving vertical and horizontal coherence. For this reason, coherence should be regarded as having two main dimensions: vertical and horizontal. This paper analyzed the case of negotiation and conclusion of the SAA with Kosovo, it started with the analysis of vertical coherence in this issue, and led to the conclusion about both vertical and horizontal coherence.

It has been inferred that vertical coherence is tackling the "high" politics wherein it is hard to access information and decisions that are adopted behind closed doors. It should be noted that – for the purpose of harmonizing the actions of Member States with obligations provided for by the Treaty – it would be necessary to introduce mechanisms of control (e.g. monetary sanctions) for actions that do not comply with the general obligation of loyalty and mutual solidarity provided for in Article 4(3) TEU and specifically provided for in Article 24(3) TEU or reduce the obligations of MS to realistic expectations, i.e. remove obligations from the Treaty for which it is clear that states do not want to comply with. The Lisbon Treaty does not solve the issue of vertical coherence by giving

the Union more authority in the area of foreign policy, it only managed to emphasize the limits within which the Union may act within its authority and retain parallel powers of Member States in policy creation. The Lisbon Treaty succeeded at making another political compromise that advocates greater authority of the EU on the one hand and does not reduce the authority of Member States on the other. For horizontal coherence there is a step forward in the Treaty with the legal obligation of not only ensuring of coherence of foreign policies with one another, but also with other Union policies. Unfortunately, the main issue in achieving horizontal coherence is the same as it is for vertical coherence: there are no mechanisms for controlling institutions in their fulfilling of the obligation to ensure coherence. In the light of legal regulation of coherence in Treaty, that looks more like a good intention, then an obligation.

Existence of the EU legal personality gave the legal basis for the SAA with Kosovo (Article 217 TFEU) and have put Kosovo in the specific situation where it is the first country to sign SAA as EU only agreement, meaning that there will be no need for MS to ratify the SAA, and there are five MS that have not recognised Kosovo. In order to avoid vertical incoherence towards Kosovo (there are no mechanism to ensure vertical coherence in this issue) the EU turns to the development of the ambiguous enlargement process towards Kosovo. This led to horizontal incoherence: one of the EU policies (enlargement) supports Kosovo's path to the EU; the Union considers Kosovo to be competent to enter the process of the accession, whereas five Member States do not consider Kosovo to be a state that should be internationally recognized, which is a clear indication of incoherence. Conclusively, the case study of the SAA with Kosovo only confirms that there is incoherence in the EU and Kosovo relations and that nonexistence of mechanism for ensuring coherence is the reason that produces this situation.

It should at the end be noted that involvement of Kosovo in the accession process must be seen as a political rather than legal decision. It is not that the aim of the paper is not to stop Kosovo accession to the EU, but to make the process of accession legally possible. Kosovo should not be the "new Turkey" or the "new Cyprus" – it should have the opportunity not only to be a political point of interest, but also to be respected as a potential candidate state if they sign the SAA. It is of great importance for the legal order of the EU as well as for the functioning of the Union that Member States and EU institutions respect the Treaty provisions and that Member States make the effort to organize their national foreign policies and make them coherent and coordinate them with EU policies. This would be the best way to make the Union a global player; otherwise it could not be possible.