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How to Get Things Moving in EU-Western Balkan Relations

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Abstract

The EU's enlargement policy with regard to the Western Balkan countries is in tension with the necessary internal reforms. Therefore, the promise of admission contrasts with the slow realisation of this promise. The dilemma results less from the Western Balkan countries' readiness for accession than from the admission capacity of the Union itself. Against this background, a further evolution of the association agreements – for example, in the direction of a customs union and 'decision-shaping' – could buy the Union time to carry through its own reforms. The legal regulations contained in other association agreements – such as the Europe Agreements and agreements with countries of the European Free Trade Area as members of the European Economic Area – offer some templates.

Keywords: Western Balkans, EU accession, association, legal basis, EU reform

JEL classification: F53, F55, K33

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1. INTRODUCTION

Croatia was the first Western Balkan country to apply for membership in the European Union (EU), in February 2002; Kosovo is the last to have done so, in December 2022. All the countries bar Kosovo have been accepted by the EU as accession candidates, and Croatia joined the Union back in July 2013. Accession negotiations have been opened[1] with Albania, Montenegro, North Macedonia, and Serbia, leaving only Bosnia and Herzegovina, and Kosovo without official candidate status (Table 1). In the Western Balkan countries that have remained outside the Union following Croatia's admission – and also among independent commentators[2] – the impression is that there is now greater uncertainty surrounding the prospect of accession negotiations being concluded – to say nothing of a date being set for the countries' admission to the Union[3] – and that progress towards their accession may end up the same way as Turkey's: it has been considered a candidate country since 1999; accession negotiations were opened in 2005, but these have been frozen since 2018 because of increased doubts in its democratic and human rights policy (the first Copenhagen criterium). On the EU side, it is the limited absorption capacity that prevents the Western Balkan countries (also Ukraine and Moldova) from being admitted in short order.

The EU has concluded bilateral Stabilisation and Association Agreements (SAAs) with all the Western Balkan countries. The preamble to those agreements mentions the 'European perspective' – and explicitly the potential for the country concerned to gain EU membership candidate status in the event of successful implementation of the agreement. This last formulation, however, is missing from the SAA with Kosovo. In this respect, the SAAs with all the other countries can be regarded as *de facto* pre-accession instruments, just as in the earlier cases of the association agreements with Greece and Turkey (1964).

Table 1 / The status of the EU-Western Balkan accession process, as of July 2023

Country	Application for membership	Stabilisation and Association Agreement effective since...	Accession candidate since…	Accession negotiation opened …	Accession
Albania	28/4/2009	1/4/2009	24/6/2014	19/7/2022	—
Bosnia and Herzegovina	15/2/2016	1/6/2015	15/12/2022	—	—
Kosovo	15/12/2022	1/4/2016	—	—	—
Montenegro	15/12/2008	1/5/2010	17/12/2010	18/12/2012	—
North Macedonia	22/3/2004	1/4/2004	17/12/2005	21/7/2022	—
Serbia	22/12/2009	1/9/2013	1/3/2012	21/1/2014	—
Memorandum item: Croatia	21/2/2003	1/2/2005	18/6/2004	4/10/2005	1/7/2013

Source: European Union: https://european-union.europa.eu/principles-countries-history/joining-eu_en (accessed 20/07/2023).

1 According to the EU's negotiation framework, negotiations are opened officially with the first Intergovernmental Conference.

2 For the latter, see the list of references in Emerson et al. (2021).

3 In February 2018, the European Commission set an indicative deadline of 2025 for admission to the EU of the two most advanced candidates – Serbia and Montenegro (European Commission, 2018); from the perspective of 2023, this would appear unlikely.

This policy note discusses the possibility of accelerating and deepening integration into the EU through the further evolution of SAAs: on the one hand, to overcome what may be perceived as deadlock in the Western Balkan states' attempts to join the Union; and on the other hand, to give the EU time to put its own affairs in order. My remarks begin with a presentation of the legal basis for accession and association. This is followed by a description of those association agreements that the EU concluded with the Central-Eastern European transition countries (the Europe Agreements; further: EAs), and with the countries of the European Free Trade Association (EFTA) creating the European Economic Area (EEA) with the EU in the 1990s. The next step is to pinpoint the main legal differences between SAAs and those earlier agreements. The final section presents conclusions, looking at the options open to the EU in how to deal with its capacity to admit new members as an additional assessment criterion.

2. THE LEGAL BASIS

Admission to and association with the EU are legally different instruments of EU policy. Under international law, *association* is an instrument of foreign policy, whereas *membership* is an instrument of 'internal' policy. Both are based on bilateral treaties with a third country. Article 49 of the Treaty on European Union (TEU) regulates the admission of only European states.[4] The European Council decides on the details of the admission process. At the Copenhagen Summit in 1993, it developed criteria for admission in light of the accession aspirations of the Central and Eastern European transition countries. Previous enlargements of the then European Economic Community (EEC) – the 'Northern Enlargement' of 1973 (Denmark, Ireland, Great Britain) and the subsequent 'Southern Enlargement' (Greece in 1981; Spain and Portugal in 1986) – occurred without these criteria being in place; however, the following 'EFTA Enlargement' (Finland, Austria, Sweden) in 1995 included those criteria.

Article 49 of TEU makes no reference to association as an instrument of EU accession, or even as a precondition for accession. Association of a third country is regulated in various articles of the Treaty on the Functioning of the European Union (TFEU). Article 217 states: '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.' Article 218(6 & 8) of TFEU states that an association agreement negotiated by the Commission requires the unanimous consent of the European Council and of the European Parliament. Part IV of the TFEU also provides for the association of (non-European) territories of member countries, but this is not dealt with further here.

According to a 1986 ruling by the European Court of Justice (ECJ) in the *Demirel* case, an agreement based on Art. 217 of TFEU creates 'special privileged links with a non-member country', allowing the third country concerned to 'take part in the [Union] system'.[5] An association agreement thus creates a contractual state that lies somewhere between membership and other bilateral treaties, such as trade agreements. Unlike the latter, an association agreement implies the privileged relationship of a non-member country in the political practice of the Union vis-à-vis third countries, with, according to Van Elsuwege and Chamon (2019, 10-14), three main features:

(1) The defining aspect in Article 217 is 'common action and special procedure', which in practice means the creation of common institutions with competence to take binding decisions.

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4 EU jurisdiction does not provide a definition of 'Europe.'

5 See Case 12/86, *Demirel*, ECLI:EU:C:1987:400, para. 9.

(2) These decisions form an integral part of the EU legal system, as stated in another ECJ decision of 1989 on relations with Greece.[6] This allows for a deepening of the association beyond the original content of the agreement itself (but evidently within this framework). This means that the association can be further developed through decisions of the joint institutions (association councils) – as happened, for example, in the case of Turkey, whose association agreement was supplemented by a customs union through Decision 1/95 of the association council.

(3) While Article 217 of TFEU is not explicit in terms of the possible scope and depth of the privileged relationship established by an association agreement, the Court (again in the *Demirel* case) noted that Article 217 of TFEU empowers the Union 'to guarantee commitments towards non-member countries in all the fields covered by the treaties'. As a result, the Court draws a parallel between the EU's internal scope of action and the relationship it may set up with an associated country or international organisation. This implies that the instrument of association can develop in line with the evolution of EU integration itself and with the international context in which the EU operates.[7] Association agreements must be ratified by the European Council and by all member states of the EU. This implies that the member countries must also incorporate the agreements into their economic order through their own constitutional procedures.

A relationship privileged based on an association agreement can take various forms (and names), ranging from little more than a free trade agreement to a level of integration approaching membership. In other words, Art. 217 of TFEU is a flexible instrument that allows for a variety of links between the EU and states interested in a formal relationship with the Union.

It should be underlined, however, that the TFEU does not contain a link to Article 49 of TEU: association thus does not establish a legal claim to EU membership; nor is it (as it is sometimes read)[8] membership of the EU below 'full' membership. Partial or stepwise membership is not provided for in the EU treaties.

3. ASSOCIATION AS A POSSIBLE PRE-ACCESSION INSTRUMENT

The admission of a country to the EU is also possible without prior association. Examples of this are the 'Northern Enlargement' and the admission of Spain and Portugal; except for Spain, all the countries involved were EFTA members. In practice, since 1986 no country has been admitted to the EU without a previous association agreement. What was still an exception in the cases of Greece and Turkey (both their association agreements contained the identical clause that EEC support should promote the accession of the associated country later) has become common practice for the EU – ever since the Europe Agreements were signed with the transition countries. Even the fulfilment of the three Copenhagen criteria by a candidate country does not provide a legally binding basis for its admission. What is decisive is how the EU sees its own absorption capacity; and that is an internal political matter.

6 Case 30/88, *Greece* v. *Commission*, ECLI:EU:C:1989:422, para. 13.

7 For example, monetary cooperation might become necessary to smooth excessive fluctuations of the associated country's exchange rate against the euro, triggered by its monetary policy.

8 Recently found in a report by the Konrad-Adenauer-Stiftung on the SAA with Croatia. https://www.kas.de/de/laenderberichte/detail/-/content/erster-schritt-zur-vollmitgliedschaft-in-der-eu (accessed 31/7/2023).

The story of the Europe Agreements shows how effective this 'fourth' criterion for enlargement can be. Originally, the European Communities (EC) entered negotiations with the transition countries with the intention of having the EAs as an alternative to EU membership. As well as being dependent on the success of the political and market-economy reforms in the old communist countries (something that was still considered far from certain), the EC were themselves caught up in a major reform phase on the way to becoming the EU (key words: political union, internal market, monetary union) – a process that at the time had not yet been completed. Faced with the urgent desire of the transition countries of becoming an EC member, in the course of the negotiations the EC accepted mention of membership in the preambles to the Europe Agreements – albeit in carefully weighed formulations, according to which the ultimate goal of the associated countries was accession to the EC and that association, in the views of the parties, will help the associated countries to achieve this objective (Maresceau, 1993). The reluctance of the EC to admit new members encouraged commentators to consider the countries' accession to the EEA as instead (Maresceau, 1993: 233; Gabrisch and Werner, 1995: 89-93). Three arguments were advanced: first, membership of the EEA would bring the countries significantly greater economic benefits than their status as a separate association country. Second, their involvement in economic policy coordination would help the EC achieve greater economic policy stability (especially regarding currency devaluations). And third, the EC would gain time for the necessary reforms to establish the EU. But when the transition countries were admitted to the EU in a first wave in 2004 (Poland, the Czech Republic, Slovakia, and Hungary) and then in 2007 (Romania and Bulgaria), the EAs proved to be *de facto* pre-accession instruments.

The bilateral agreements that the Union concluded with the remaining EFTA countries 1994/1995 - after Denmark, Ireland, Great Britain, and Portugal left EFTA earlier - to create the European Economic Area (EEA), , are, by their legal nature, association agreements concluded under Art. 217 of TFEU. However, they were conceived with far more clarity than the Europe Agreements as an alternative to EU membership: in their preambles, the goal of membership is neither mentioned explicitly nor even hinted at in diplomatically tortuous language.

Although the agreements with the EFTA countries were conceived of as offering an alternative, the possibility of applying for EU membership is, of course, always open to an EFTA country. Finland, Austria, and Sweden joined the EEA as EFTA members on 1 January 1994 and became EU members on 1 January 1995. Austria had submitted its application for EU membership back in 1989, and Sweden and Finland in 1991 (i.e., the accession process took five and four years, respectively). Thus, the EEA actually served as a one-year transit room, allowing the countries to adapt to EU rules that did not correspond to EFTA rules: for example, the transition from a free trade area to a customs union and preparation for the later monetary union. In this respect, the EEA took on the character of a *de facto* political pre-accession instrument for those three countries; it has retained its original function as an EU alternative only for the three remaining EFTA countries of Iceland, Liechtenstein, and Norway. (The EFTA member Switzerland did not join the EEA and has concluded bilateral treaties with the EU.)

Because the EEA agreements are the most far-reaching association agreements to date, they are of interest when we consider the accession aspirations of the Western Balkan countries; thus the question arises as to whether some EEA institutions and regulations may be able not only to give their accession aspirations a considerable fillip, but also to furnish the EU with time to implement its own reforms.

According to the preamble and Article 1 of the -EEA agreements, these aim at 'the fullest possible realization of the free movement of goods, persons, services and capital', equal conditions for competition, as well as strengthened cooperation with respect to so-called 'flanking policies', such as research and development, the environment, education, and social policy. For this purpose, the EEA agreements embody a sophisticated institutional structure that ensures the 'homogenous interpretation and application of the shared legal rules' (Baudenbacher, 2008). What separates the EFTA members in the EEA from membership of the Union, however, is their lack of full implementation of the EU's internal market, including monetary union, customs union, and the current arrangements for political union (i.e., participation in the Union's decision-making). In fact, this is a form of 'integration without membership,' but it implies that the EEA countries are under a direct legal obligation to apply selected parts of EU legislation 'as if they were part of the EU' (Maresceau, 2013). In other words, the participating countries have become 'virtual' EU members, applying the eligible single-market legislation by analogy.

The functioning of the EEA is based on a two-pillar institutional structure, with the EU and its institutions on the one hand, and the EFTA states and their institutions on the other.[9] Between the two pillars, a number of joint bodies were established by the EEA Agreement, including the EEA Council (representatives at ministerial level), the EEA Joint Committee (representatives at civil servant level), the EEA Joint Parliamentary Committee (representatives at parliamentary level) and the EEA Consultative Committee (representatives of the social partners). All EU legislation with EEA relevance (i.e., concerning an area covered by the EEA agreements) is incorporated into the annexes or protocols to the agreements. Given the dynamic development of EU law, the common rules of the EEA agreements are constantly subject to revision: following the adoption of new EU legislation, it is the task of the EEA Joint Committee to amend the annexes as soon as possible, to ensure consistency of the common rules.

The EEA agreements do not give an EFTA state any decision-making powers within EU institutions. Such powers at the EU level cannot be granted based on association, being among the prerogatives of EU membership. This basic rule stems from the autonomy of the EU legal order and was, for instance, reiterated during the Brexit discussions.[10] However, EFTA states do have a role to play at the level of 'decision-shaping', in that their representatives are involved in the preparation of legislation that is of relevance to the EEA. They have the right to participate in expert groups and committees of the European Commission and should be consulted in the same manner as EU experts. Moreover, they have the right to submit comments on legislative initiatives, which are officially noted by the EEA Joint Committee after they have been sent to the relevant services of the European Commission, the European Parliament, and the Council.

9 The following draws on an Elsuwege and Chamon (2019: 28).

10 The European Council guidelines on the framework for the future EU-UK relationship explicitly provide that 'the Union will preserve its autonomy as regards its decision-making, which excludes participation of the UK as a third country in the EU Institutions and participation in the decision-making of EU bodies, offices and agencies' (Van Elsuwege and Chamon, 2019: 29).

4. SAA WITH WESTERN BALKAN STATES AS A *DE FACTO* PRE-ACCESSION INSTRUMENT

In contrast to the EAs and even more so to the EEA agreements, the SAAs emphasise the 'European perspective' for the Western Balkan countries. The preamble to five of the six SAAs (Kosovo being the exception) states:

> 'RECALLING the European Union's readiness to integrate to the fullest possible extent [*name of country*] into the political and economic mainstream of Europe and its status as a potential candidate for EU membership ...'

The goal of candidate status did not appear in the EAs. In this respect, the SAAs can be regarded as *de facto* pre-accession instruments. This role is underlined by additional Instruments for Pre-accession assistance (IPAs), through which the Union has provided financial and technical support for reforms in the region since 2007. In the agreement with Kosovo, however, there is no mention of the territory as a potential candidate for accession, which is related to the careful avoidance by the EU of recognising Kosovo as a state.[11] On the other hand, Kosovo also benefits from IPAs; this, however, does not legally confer any promise of candidacy or accession.

Despite the explicit mention of each country being a 'potential candidate for EU membership,' the SAAs do not form a basis for some 'virtual membership' associated with the EEA agreements. Rather, they are conditional and transitional in nature, which is reflected in their time limit of 5-10 years, depending on the country concerned. The phased implementation of a country's SAA within this period is gauged by the country's progress in *regional* cooperation. (It should be recalled that cooperation between the six post-Yugoslav countries was damaged by bitter conflicts surrounding Yugoslavia's disintegration.) All the countries – plus now Albania – ought to negotiate with the other SAA countries to establish political dialogue, free trade, mutual concessions on free movement of workers and services, movement of payments and capital, cooperation on justice, freedom and security. This imperative stands in marked contrast to the Europe Agreements, where regional cooperation among the countries was not a central issue,[12] and where conditionality was more implicit and focused on economic and political reforms. As far as the Western Balkan countries' influence on EU decision-making processes is concerned, the same applies here as in the case of the EFTA countries of the EEA: they have no voting rights in the European Council, Council of Ministers, or European Parliament. Nor is the relatively close dovetailing between EFTA and EU institutions to be found in the SAAs: even the 'decision-shaping' role is lacking. Like the agreements of the EU with the EFTA countries (= EEA), all the agreements provide for an SAA Council, a Parliamentary Council, and a committee. However, the sole responsibility of these bodies is to ensure implementation of the SAAs. In all cases (except Kosovo) the SAA Council is made up of representatives of the European Council and the government of the country concerned. In the case of Kosovo, the provisions follow the EU's general diction of verbally avoiding state recognition. Here the treaty speaks only of 'representatives' of both sides, whose tasks are to evaluate progress in the association process and to decide on entry into the next phase of the agreement. Unlike the EEA agreements, the SAAs do not provide for participation or consultation in EU expert groups and committees, and nor do they grant the right to comment on Union legislative initiatives.

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[11] The preamble reads: 'NOTING that this Agreement is without prejudice to positions on status and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence …'

[12] Not least since the countries formed the Central European Free Trade Agreement (CEFTA) for regional cooperation.

5. CONCLUSIONS: FURTHER EVOLUTION OF SAAS

The options for an enlargement of the Union – and the political elites not only in the Western Balkans, but also in all other current and potential accession candidate countries know this – depend on the Union's capacity to admit new members.[13] Given the current state of the Union – and in view of the many global and internal crises – enlargement carries with it the danger of 'overexpansion,' as Paul Kennedy points out in his book *The Rise and Fall of the Great Powers* (Kennedy, 1987). Overexpansion in the contemporary case of the EU means the structural inability to harmonise national interests with the European interest, and a lack of resources for the protection of common borders and for the internal enforcement of EU jurisdiction and majority decisions, to name just a couple of the most pressing problems. Overexpansion would lead to an end to European integration. Nor can this problem be resolved through the stepwise admission of countries to an unreformed Union via technical changes to the 35 negotiation chapters, as outlined in the recent Centre for European Policy Studies proposal (Emerson et al., 2021).[14]

Two options present themselves as solutions to the EU's precarious state of its enlargement policies. The first is to downsize the Union into an economic community and dismantle the technocratic bureaucracy in Brussels, following more rigidly the principle of subsidiarity, so that it comes to resemble the European Communities of the 1980s or even the earlier EEC. A comprehensive political union would then no longer be on the agenda as a European project. Membership would essentially involve membership of the internal market, together with flanking policies (such as foreign trade and agricultural policy). This (let us call it) 'Orbanisation' of the Union)[15] would undoubtedly defuse many conflicts, which primarily revolve around the restriction of national sovereignty to political matters (Calliess, 2023), and might accommodate the accession wishes of the Western Balkan countries. Negotiations with the Western Balkan countries could be concluded relatively quickly, if the 35 chapters were 'purged' of overly rigid political and legal adaptations to EU law. However, several objections could be raised to such a dismantling of the Union (I have written about this in length in Gabrisch, 2023), perhaps the most important of which concerns the overly theoretical understanding of the idea of subsidiarity. With national economic, monetary, fiscal – and, for that matter, migration – policies, the worldwide crises that are spreading through the global networks could no longer be warded off nationally.

The second option is the further targeted evolution of the Union into a political union. However, it is precisely the indeterminacy of the reform debate in the European political arena that is the reason for the delay in the accession process for the Western Balkan states. Although the Union's absorption capacity is mentioned in its documents, no concept exists by now to measure and, if necessary, resolve overexpansion. Since this will not change in the short term, the accession candidates can only wait patiently. Premature admission could lead to extended derogations – as a sign of an incipient overexpansion of the Union. However, there are opportunities available to bolster candidates' integration

[13] The EU opening statement for accession negotiations with all Western Balkan countries includes a description of the framework, where we read unequivocally and in bold letters in clause 4: '… the pace of enlargement must take into account the Union's capacity to absorb new members, which is an important consideration in the general interest of both the Union and the country'. See: https://data.consilium.europa.eu/doc/document/AD-5-2022-INIT/en/pdf, here in the case of Albania.

[14] It is irritating when the authors write of the absorption capacity argument as an 'infamous' attempt to delay the admission of new members (Emerson et al., 2021: 17); see also footnote 13.

[15] The deconstruction of the Union into small and medium-sized nation states also finds a willing audience on the left of the political spectrum, for example in Streeck (2021).

into the existing Union. Following the above-mentioned legal interpretation of Art. 217 of TFEU, which allows for a further institutional evolution of the association agreements, SAAs could be further developed in several directions that would make them a *de facto* transit zone for EU accession: customs union, decision-shaping, flanked by supplementary instruments. A customs union was part of the association agreement with Cyprus (1984) and Turkey (1995). The EU thus has experience of coordinating the financial policies to address issues that result from a customs union with a non-member (money laundering, organised crime, human trafficking, etc.). The Western Balkan states would thus become an integral part of an important area of economic policy coordination and participation. A customs union does not have to cover *all* trade: it may include only selected sectors. With respect to the second option, there is also the experience garnered from the EEA constitution, where the possibilities of decision-shaping for the EFTA members extend beyond those contained in the SAAs. (EEA membership itself, as has also been proposed,[16] would then make little sense, because it presupposes accession to EFTA and thus double accession negotiations.) These two options could be complemented by further regulations: for example, targeted regulation of the free movement of workers, as in the EFTA case.

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[16] *Neue Zürcher Zeitung*, 22 July 2021, https://www.nzz.ch/meinung/balkan-die-realistische-alternative-zum-eu-beitritt-waere-der-ewr-ld.1634975 (accessed 20/7/2023).

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