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in European and International Law (Ed.)

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## Preface

This publication is the first volume of the series of papers of the SEE | EU Cluster of Excellence in European and International Law. The series is a compilation of articles from authors of different partner law faculties in Germany and South Eastern Europe.

The Europa-Institut of Saarland University is the leading partner of the SEE | EU Cluster of Excellence in European and International Law, along with the law faculties of: the University of Belgrade (Serbia), Montenegro (Podgorica, Montenegro), Sarajevo (Bosnia and Herzegovina), Skopje (Macedonia), Tirana (Albania) and Zagreb (Croatia), and the South East European Law School Network. The project is supported and sponsored by the German Academic Exchange Service (DAAD) as well as the German Federal Ministry of Education and Research, and aims to promote the outstanding capabilities in research and teaching in the field of European and International Law.

The SEE | EU Cluster of Excellence in European and International Law will improve not only the cooperation between Germany and the South East European countries but also the cross-border regional and local cooperation in the areas of teaching and research as well as the development of common structures and strategies. The Cluster of Excellence seeks to explore new avenues in the transfer of knowledge; sharing expertise and experiences will strengthen the profile of each partner and the network as a whole. Therefore, the Cluster will implement various measures and activities aspiring to achieve the set goals: eLearning modules, a model curriculum, a graduate school, a number of research projects, summer schools, library cooperation and various publications.

This collection of papers can serve as a forum for academic staff and young academics of the partner faculties in the SEE | EU Cluster of Excellence to publish their research results on relevant questions in European and International Law. In addition to the traditional areas of law, specific areas of interest include: the integration of SEE countries in the European Union, issues of legal reform and implementation of the *acquis communautaire*, best practices in legal reform, and approximation of legislation in the region of South Eastern Europe and

## *Preface*

the EU. The series will be published on a yearly basis and is peer-reviewed by the Editorial Board.

The SEE | EU Cluster of Excellence in European and International Law • Series of Papers 2015 encompasses twelve papers of academic staff and junior researchers from the law faculties in Belgrade, Osijek, Rijeka, Skopje and Tirana. This issue covers a broad variety of topics and illustrates the wide range of topics connected to European and International Law. Particular topics in this volume discuss e.g. refugee law, company law, and comparative law. Most notably, several of these published papers constitute adaptations of the presentations held at the Cluster of Excellence's Launch Conference at the Europa-Institut in Saarbrücken in November 2015.

We thank the German Academic Exchange Service (DAAD) and the German Federal Ministry for Education and Research for their financial support. We owe our special thanks to all authors for their contribution as well as to Ass. iur. Mareike Fröhlich LL.M. and Ass. iur. Anja Trautmann LL.M. who made this book possible.

We are confident that the SEE | EU Cluster of Excellence in European and International Law • Series of Papers will raise the interest in European and International Law and contribute to the achievement of the SEE | EU Cluster of Excellence in European and International Law's goals.

Saarbrücken, December 2015

Prof. Dr. Marc Bungenberg LL.M., Director  
Europa-Institut of Saarland University

Prof. Dr. Thomas Giegerich LL.M., Director  
Europa-Institut of Saarland University

Prof. Dr. Goran Koevski, Manager  
Centre for the South East European Law School Network (SEELS)

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# **The Enlargement of the Western Balkan Countries in the European Union: A Comparison with the Accession Criteria for Eastern Europe Countries**

*Fjoralba Caka\**

## **Abstract**

*The European Union has experienced different waves of enlargements starting from 1973 where three countries, Great Britain, Ireland and Denmark acceded. In the largest wave of enlargement, i.e. the fourth wave of enlargement, in 2004, ten countries from East and Southeast Europe acceded to the EU. In the Thessaloniki meeting in 1999, five countries of the Western Balkan, Albania, Montenegro, Macedonia, Croatia, Serbia and Bosnia Herzegovina, were considered as countries that have the perspective of being members of the European Union. In the same year the Process of Stabilization and Association between the EU and these countries started, and beyond the measures for the stabilization, the instruments that would precede the accession were foreseen. This paper aims to analyse the general conditions for membership in the European Union. First we will analyse the accession criteria for enlargement. Then we will shift in an analysis of the conditionality policy for the Eastern Europe Countries and the conditionality policy for the Western Balkan Countries to determine whether there is any substantial change between thereof.*

## **A. Criteria, Principles and Conditions for Membership**

The first criteria for membership was determined in the Treaty of Rome, namely Article 237, where the European identity criterion was set – “Any European state may apply to become a member of the Community”. On this basis it was denied the membership of Morocco in 1988 as the European Council stated that “Morocco is not a European state”.

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\* Doc. Fjoralba Caka, Lecturer of European Union Law, Faculty of Law, University of Tirana.

The formulation of a political accession criterion was first mentioned in the declaration on European identity (1973) and the conclusions of the Copenhagen council (1978).<sup>1</sup> The Declaration on European identity (1973) noticed that the European Union is a construction that gathers all European countries who share the same ideals and objectives.<sup>2</sup> Further, Article 1 of the Declaration stated the common principles on which the Community was based:

“The nine [...] are determined to defend the principles of representative *democracy*, of the rule of law, of social justice [...] and of respect for human rights”.<sup>3</sup>

Regarding the “European identity” criteria, the conclusions of the 1978 Copenhagen council were tacit. Rather it emphasized the importance of European Union common principles, in particular the respect for human rights and the representative democracy – “respect for and maintenance of representative democracy and human rights in each member state are essential elements of membership of the European Communities”.<sup>4</sup>

This was a clear signal to Greece, Portugal and Spain, that if they wanted to accede to the EU, they had to proceed with democratization.<sup>5</sup>

In the Lisbon European Council of June 1992, the Commission, apart the European identity, democratic status and respect of human rights conditions, stressed the ability of the new member state to implement the *acquis communautaire*. This included the single European market and the Maastricht provisions on the Economic and Monetary Union. An applicant state had to have a functioning and competitive market economy; if not, “membership would be more

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<sup>1</sup> *Kahn-Nisser*, Drawing the Line: The EU's Political Accession Criteria and the Construction of Membership, Jean Monnet Working Paper 07/10, p. 10.

<sup>2</sup> Article 4 of the declaration reads: “The construction of a united Europe [...] is open to other European nations who share the same ideals and objectives”.

<sup>3</sup> Emphasis added.

<sup>4</sup> *Kahn-Nisser*, (fn. 1), p. 10 et seq.

<sup>5</sup> *Pridham*, The International Dimension of Democratisation: Theory, Practice and Inter-Regional Comparisons, in: Pridham/Herring/Sanford (eds.), *Building Democracy?, The International Dimensions of Democratisation in Eastern Europe*, 1994, p. 24.

likely to harm than to benefit the economy of such a country, and would disrupt the working of the Community".<sup>6</sup>

The European Council of Copenhagen in June 1993, when examined the application for membership of the Central and Eastern European Countries (CEEC), declared that those CEECs that had concluded a Europe agreement were eligible for EU membership, provided they could meet the criteria of:

- Political stability and respect for democratic principles
- Respect of the rule of law, human rights and protection of minorities;
- Having a functioning market economy with the capacity to cope with competitive pressures and market forces within the EU;
- Taking on the obligations of EU membership including adherence to the aims of economic and political union.<sup>7</sup>

The Copenhagen criteria are by and large similar to the criteria set out in the Commission's 1992 report, with two important additions: respect for and protection of minorities<sup>8</sup> and the absorption institutional capacity of the Union.<sup>9</sup> These conditions were designed to minimise the risk of new entrants becoming politically unstable and economically burdensome to the existing EU. They were thus formulated as much to reassure reluctant member states as to guide the candidates, and this dual purpose of the conditionality has continued to play an important role in the politics of accession within the EU.

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<sup>6</sup> *Sjursen/Smith*, *Justifying EU Foreign Policy: The Logics Underpinning EU Enlargement*, ARENA Working Papers, WP 01/1, p. 7.

<sup>7</sup> *Verrilli*, *Diritto dell' Unione Europea: Aspetti istituzionali e politiche comuni*, XV ed. 2007, p. 537.

<sup>8</sup> *Sjursen/Smith*, (fn. 6), p. 8.

<sup>9</sup> *Cameron*, *The European Union and the Challenge of Enlargement*, OP973, Paper presented at the Halki International Seminars (31 August-7 September 1996), p. 4: "The European Council added a further criteria when it linked enlargement to institutional reform by concluding that 'the Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries'".

The fourth condition reflects member states anxieties about the impact that enlargement might have on EU institutions and policies because of the increase in numbers and diversity, apart from the specific problems that CEE members might bring along. It is a condition for enlargement, whereas the others are conditions for entry.<sup>10</sup>

The Madrid European Council in December 1995 confirmed these criteria and referred also to the need “to create the conditions for the gradual, harmonious integration of the candidate countries particularly through: the development of the market economy, the adjustment of their administrative structures and the creation of a stable economic and monetary environment”.<sup>11</sup> Both summits in Madrid and Luxembourg underlined the challenge of making domestic laws and judiciary practices compatible with EU’s structure and values.

The Helsinki European Council in December 1999 stressed that “compliance with the political criteria laid down at the Copenhagen European Council is a prerequisite for the opening of accession negotiations”.

It was the Amsterdam Treaty that formalized the political criteria of membership in a Treaty level, declaring that “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States” (Article 6) and that “[a]ny European state that respects these principles may apply to become a member of the Union” (Article 49).<sup>12</sup> These new Treaty provisions in fact, did not bring any new criteria or principle on membership, but rather they were considered as a reflection of the substantive facet of customary enlargement law of the European Union, which was created mainly in European Councils meetings.<sup>13</sup>

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<sup>10</sup> *Grabbe*, The Implications of EU Enlargement, in: White/Lewis/Batt (eds.), *Developments in Central and Eastern European Politics* 3, 2003, p. 5.

<sup>11</sup> *Cameron*, (fn. 9), p. 4.

<sup>12</sup> *Sjursen/Smith*, (fn. 6), p. 10.

<sup>13</sup> *Kochenov*, EU enlargement Law: History and recent developments: Treaty-Customs Concubinage?, EIOP 9 (2005) of 14/4/2005.

Thus, the political criteria was the most emphasized during the European Council meetings, and was, moreover, set as the basic criteria to open negotiations with the new applicants of the 2004 enlargement. This was an expression that European Union is an entity based on values and democratic principle, and also an important factor in the international arena that promotes democracy, the rule of law and the protection of human rights. The threshold, which the new applicants had to pass, was moreover a guarantee for the Union itself, because it would avoid troublesome company within the club. The last remark we can make with regard to this is that the political criteria as well as the other set of criteria stated in the Copenhagen European Council and reaffirmed afterwards, were merely vague, hard to be identified and evaluated, since there were not any benchmarks or monitoring agencies to evaluate them. This left a lot of discretion to the Commission and the Council, and also to the Members States to decide on the merits of the applicant, making the process more of political rather than of legal nature.

Further, we will stop on a specific analysis of the conditionality, or the “carrot and stick” policy the EU has set for the CEEC and the Western Balkan and judge on the nature and extent of the criteria and conditions for enlargement.

## **B. The CEEC Conditionality**

Conditionality is not a term provided in the fundamental Treaties. According to some scholars,<sup>14</sup> its origins date back to the fourth and fifth wave of enlargement, i.e. when ten countries, mainly from Central and Eastern Europe applied for entering the EU or with the accession of Rumania and Bulgaria.<sup>15</sup>

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<sup>14</sup> Ibid.

<sup>15</sup> Anyway there are other scholars that date conditionality since 1980, see *Anastasakis/Bechev*, EU Conditionality in South East Europe: Bringing Commitment to the Process, South East European Studies Programme – European Studies Centre, St Antony’s College, University of Oxford, April 2003; or since the Copenhagen European Council in 1993. Conditionality refers to the linking of perceived benefits to fulfillment of a certain program. According to *Kubicek*, The Application and Acceptance of Democratic Norms in the Eastward Enlargement, in: Sjursen (ed.), Enlargement in process, 2005,

The conditionality policy is based on the “carrot and stick” methodology. On one hand there is the “carrot”, the reward for complying with the EU conditions. The reward can be of two categories: accession advancement rewards which reflect the progress of the candidate country in the accession process and financial rewards (or financial assistance). The main accession advancement rewards include: granting membership perspective; signing association agreement; implementing association agreement; granting candidate status; opening accession negotiations; opening a chapter; provisionally closing a chapter; credible membership perspective; completing accession negotiations; signing accession treaty; ratification of the accession treaty; accession to the European Union. The financial rewards refer to the financial assistance provided by the EU to the candidate country through the pre-accession financial instruments: PHARE, SAPARD and ISPA and IPA programs.<sup>16</sup> On the other hand, there is the “stick” that are sanctions taken by the EU for non-compliance of the candidate/associated countries with the EU requirement. According to *Gateva*, these sanctions could be in the shape of implicit threats, such as sanction non-compliance by delaying the receiving of the accession advancement rewards (Bulgaria and Rumania in 2002), or explicit threats, such as financial sanctions which penalize non-compliance with EU rules by suspending or withdrawing funds, provided by Article 4 of Council Regulation (EC) No 622/98 of 16 March 1998, or specific precautionary measures (safeguard measures), ranging from economic and internal market safeguard clauses to specific measures in the areas of food safety and air safety.<sup>17</sup> Thus, by offering the “carrot” of accession, the EU has sought to consolidate the reform process and reduce the political and economic gap between existing and potential members. At the same time however, conditionality also clearly serves an internal EU purpose, to address the

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p. 180: “the clearest use of conditionality is in the 1993 Copenhagen Criteria to membership: meet these criteria, and you are eligible to join us and receive various benefits. Along with this ‘carrot’, there is an implied ‘stick’: failure to abide by the criteria will be costly since you will be excluded from membership”.

<sup>16</sup> See the model of stage-structured conditionality presented by *Gateva*, Post-Accession Conditionality-Support Instrument for Continuous Pressure?, Working Paper KFG, No. 18, October 2010, p. 10 et seq.

<sup>17</sup> *Ibid.*, p. 11.

potentially negative effects of enlargement for the EU itself and to reassure existing members that the values, standards and effectiveness of the EU will not be undermined by new member states.<sup>18</sup>

The conditionality differs from the membership criteria and principle mentioned in the EU documents cited in the first part of this article, in some aspects.

Previously, the Union made an overall judgment on the applicant Member State whether it fulfilled the minimal criteria, while conditionality presupposes the right of the Union to scrutinize all spheres of political, legal and economic reforms whether they are in compliance with the Union demands.<sup>19</sup>

*Grabbe* explicitly states that conditionality for accession has extended the reach of EU influence considerably more deeply into domestic policy-making in CEE than it has done in the member states, which have only had to implement policies resulting from “the obligations of membership” (the third condition) and have never been judged on the other two conditions.<sup>20</sup> The democracy and market economy conditions have led the EU (in the form of the Commission and Council) to influence many policy areas beyond the reach of Community competence in the member states. Indeed, the conditions cover several areas where member states have long been very resistant to extending Community competence for themselves. The political criteria take the EU into areas such as judicial reform and prison conditions; the economic criteria are interpreted to include areas such as reform of pension, taxation and social security systems; and the measures for “administrative capacity to apply the *acquis*” brings EU conditions to civil service reform in CEE, for example.<sup>21</sup>

In this regard, legal instruments mechanisms are raised in order to cope for the political, economic and legal reforms of the associated

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<sup>18</sup> *Barnes/Randerson*, Can Conditionality Counter Enlargement Fatigue?, International Conference, New frontiers of the EU: effects of enlargement; sustainable development, East-South dialogues of 11/5/2006, p. 7.

<sup>19</sup> See further *Kochenov*, (fn. 13), p. 14.

<sup>20</sup> *Grabbe*, Europeanisation Goes East: Power and Uncertainty in the EU Accession Process, in: Featherstone/Radaelli (ed.), *The Politics of Europeanization*, 2003, p. 307.

<sup>21</sup> *Ibid.*

country. The European Agreements, which provided the framework of reforms, combined with the creation of the Association Council and the structural dialogues of the heads of state or ministers in the pre-accession period, the White Papers drafted in the *Cannes* European Council on the steps which the associated country should take in order to prepare themselves to enter the Single Market, were used for the CEE countries to scrutiny whether this countries' policies comply with the EU conditions.<sup>22</sup>

Secondly, the principle of conditionality applies through the whole accession process. Different categories of conditions may be developed by the Union to access the process.<sup>23</sup>

Thus, the Accession Partnerships issued from 1998 onwards present a huge range of demands. The candidates have to implement the Accession Partnerships to move forward towards accession, and also to qualify for EU aid and other benefits. Moreover, in 1997 the Agenda 2000 report on the EU enlargement towards the CEEC was published. It stated the general criteria and conditions the CEEC should meet in order to accede to the EU. Apart the Copenhagen and Madrid criteria, the Agenda 2000 provided the adoption of yearly reports on the progress of applicant countries as well as a new condition, that of dispute resolution and good neighbourhood. Regarding the dispute resolution it was stated that the European Commission "considers that, before the accession, applicants should make every effort to resolve any outstanding border dispute among themselves or involving third countries. Failing this they should agree that the dispute be referred to the International Court of Justice."<sup>24</sup>

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<sup>22</sup> *Cameron*, (fn. 9), p. 9 et seq.

<sup>23</sup> See further *Kochenov*, (fn. 13), p. 14.

<sup>24</sup> The Helsinki European Council reiterated this condition in December 1999: it stresses the principle of peaceful settlement of disputes in accordance with the United Nations Charter and urges candidate States to make every effort to resolve any outstanding border disputes and other related issues. Failing this they should within a reasonable time bring the dispute to the International Court of Justice. The European Council will review the situation relating to any outstanding disputes, in particular concerning the repercussions on the accession process and in order to promote their settlement through the International Court of Justice, at the latest by the end of 2004. See *Sjursen/Smith*, (fn. 10), p. 10.

Thirdly, with the deepening of the EU integration between Member States, the range of conditions to be met in order to be in compliance with the EU *acquis* is widened.

Thus, the Maastricht Treaty added new policy areas to EU activities, such as justice and home affairs, and the Schengen area of passport-free travel; a common foreign and security policy, with a defence identity; and a common currency. All of these developments add to the requirements that the candidates have to meet before accession. The CEE countries have no possibility of negotiating opt-outs like those applying to some member states on the Schengen and the monetary union. The candidates also have to take on the EU's "soft law" of non-binding resolutions and recommendations.<sup>25</sup>

Furthermore, the EU has developed a new mechanism in judging upon the compliance of the legislation of the candidate/potential candidate country with the *acquis*, that is "the questionnaire". In 1996 the Commission sent to the ten countries of CEE questionnaires regarding the compliance of approximately 100.000 pages of EU legislation. The questionnaire had a twofold function: on the one hand they aim to give to the applicant countries a clear understanding of the extent and scope of EU policies, in order to take all the necessary internal measure to bring their national legislation into compliance, on the other hand the information taken by the questionnaire serves as an thorough information for the Commission for the preparation of its Opinions to open negotiations.

Fourthly, monitoring of the fulfilment of the conditions set by the EU towards the candidate/potential candidate countries is a key element of the conditionality.

From the first regular reports in 1998 and onwards the progress reports have gained a specific importance in the evaluation of the association process. The Commission significantly increased the relevance of monitoring reports as it started to use them not only as a basis for its recommendations (whether to grant a reward or impose a sanction), but as an instrument for prioritizing conditions as well as an instrument for establishing new conditions and introducing new

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<sup>25</sup> *Grabbe*, (fn. 10).

threats.<sup>26</sup> Furthermore, the monitoring of the conditions is not limited only during the negotiation, pre-accession and accession phase, but also after the gaining of membership. Thus, unlike new member states which joined the Union on 1 May 2004, Bulgaria and Romania had to accept an additional “super safeguard” clause which allowed the EU to postpone their accession by one year.<sup>27</sup> Although the clause was not activated, the Commission concluded that further progress was still necessary in the area of judicial reform and the fight against corruption and set up the Cooperation and Verification Mechanism (CVM) in order to monitor the progress in these areas after the accession of Bulgaria and Romania.<sup>28</sup>

### **C. Western Balkan Countries Conditionality**

The history of the Central and Eastern European Countries with the Western Balkan Countries is inextricably linked. All these countries have experienced the communist dictatorship and after its fall, they have entered into a transition period in order to restore democratic systems, the rule of law and the free trade market. Albeit the commons, the features of the transition period for the CEE and Western Balkan Countries differ, and as a consequence, it is understandable that the “stick and carrot” policy of the EU towards the Western Balkan countries would have different characteristic of that of the CEE countries.

In 1999, the European Union launched a challenging project towards the Western Balkan, i.e. the Process of Association and Stabilization. This process aimed the political, economic and regional stabilization of the Western Balkan and to avoid future conflicts in the regions.

The Western Balkan perspective of potential Member States was for the first time mentioned in the Fiera European Council in 2000. In the Zagreb European Council in 2000 these countries were considered

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<sup>26</sup> *Gateva*, (fn. 16), p. 12.

<sup>27</sup> Articles 36-39 of the Treaty of Accession concerning the Accession of the Republic of Bulgaria and Romania to the European Union, OJ L 157 of 21/6/2005, p. 11.

<sup>28</sup> *Gateva*, (fn. 16), p. 7.

“potential candidates”; while in the Thessaloniki European Council in 2003 it was declared that “the future of the Balkan is within the EU”. In 2004, the European Commission in its Third Annual Report on the Stabilization and Association Process for South East Europe state that “[t]he same basic entry requirements apply to the countries of the Western Balkans as to other countries that aspire to join the Union, namely the political, economic and institutional criteria established by the Copenhagen European Council in 1993 and set out in Articles 6 and 49 of the EU Treaty”.

Similarly, with the CEE, the Commission presented some mechanisms and instruments for the association process: the European Partnerships, the Stabilization and Association Agreements, autonomous trade measures and substantial financial assistance.

The Commission report apart the general entry requirement, drafted some specific entry requirement for the Western Balkan Countries:

“The countries must also meet the criteria specific to the Stabilisation and Association process (SAp) as set out in the Conclusions of the General Affairs Council in April 1997 and in accordance with the Commission Communication of May 1999 on the establishment of the SAp. These criteria include full co-operation with the International Criminal Tribunal for the former Yugoslavia (ICTY), respect for human and minority rights, the creation of real opportunities for refugees and internally displaced persons to return and a visible commitment to regional co-operation. Important principles established during the present enlargement process also apply to the countries of the Western Balkans: each country proceeds towards membership on its own merits and at its own speed.”

When comparing the Western Balkan conditionality with the conditionality of the CEE countries during the 2004-2007 enlargements, some remarks can be drawn.

First, the process of Europeanization and state building in the Western Balkan is different from that in the CEEC and this has led to a more expanded conditionality towards the Western Balkan. *Jano* distinguishes two main differences in respect of the transition period of these countries: the political (democracy, rule of law, free elections) aspect and the economic sphere (liberalization, stabilization and privatization of trade). Thus, regarding the political situation, if the Cen-

tral Eastern European countries have been consider “free”, the countries of the Western Balkans have been considered at best only “partially free”.<sup>29</sup> As far as the economic transition is concerned, the gap is even more profound. The economic performance of all transition economies in the Balkans has been worse than that in the CEE.<sup>30</sup> This has led to an overstretching of the conditionality. Thus, the political conditionality is not limited to the rule of law and respect of human rights, but expanded to free and fair elections, democratic institutions, protections of refugees and minorities, stable governments and so on.

Moreover, to further tighten up on implementation, some of the conditions were given added procedural force by being written into the *acquis*, including judicial reform and human rights.<sup>31</sup> Thus, the European Charter of Fundamental Rights, entered in force with the Lisbon Treaty, has also its external dimension, i.e. it is the benchmark of respect of human rights the Western Balkan Countries have to guarantee. We can say that the process of state building and Europeanization is deeper in the Western Balkan and this has led the EU to put new standards for their accession and extend the political conditionality.

Second, the “regional dimension” is a new important condition imposed on the Western Balkan.

Regional cooperation was not formally provided for CEE, which had only the obligation to foster bilateral relations. The purely bilateral approach adopted towards the CEE accession candidates prompted competition between them at the expense of cooperation, which a region as fragile and fragmented as the Western Balkans can ill afford,

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<sup>29</sup> *Jano*, From ‘Balkanization’ to ‘Europeanization’: The Stages of Western Balkans Complex Transformations, *L’Europe en formation*, special issue on the Western Balkans between Nation-Building and Europeanisation, No. 349-350, Fall-Winter 2008, p. 62.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Pridham*, Securing fragile democracies in the Balkans: the European dimension, *Romanian Journal of European Affairs* 8 (2008), p. 11.