The European Union from its very beginning has accepted more than 20 states, and various criteria and standards for the accession were developed and implemented by its institutions. Among the most important criteria for accession are the ones accepted in 1993 in Copenhagen, and a candidate state is obliged to satisfy them. A special importance is given to the criterion of the rule of law and to the demand for its guarantee, which still needs to be clarified despite the condition of its sufficient application.

As a result of the USSR collapse, a new geopolitical situation was created on the European continent, which resulted in the accession of many Central and Eastern European states to the EU. Since the initial stages of enlargement included only three states, the established situation demanded the creation and implementation of new principles and tools to regulate and control the EU accession process for more number of states. To face challenges and to solve the proposed issues, the European Council laid down the EU accession criteria in Copenhagen in 1993, which were integral and essential conditions for a candidate state to meet. The following provision of the conclusions of the EC agreed that “[t]he associated countries that so desire shall become members of the EU”. The membership will take place as soon as a candidate state will assume the obligations by satisfying political and economic conditions required.

The conditions to abide by candidate states are as follows:

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2 European Council in Copenhagen, Conclusions of the Presidency, (21-22 June, 1993, SN 180/1/93) 12:
Political: stability of institutions safeguarding democracy, the protection of human rights, rule of law and the protection of minorities;

Economic: existence of viable market economy, the ability to respond to pressure of competition and market forces within the EU;

Legal: the adoption of the law of the EU (acquis communautaire).

With the guidance of this principle, where the EU legal norms are to be applied in the given country from the day of accession, which are prioritized over the national legal system, implemented directly and endowed with legal protection, Madrid European Council proposed another condition, which is:

The enlargement of administrative structures through the efficient adoption of the EU law in the national legal system.

The EU also assumes definite obligations besides candidate states. Particularly, Copenhagen European Council provided that “[t]he EU ability to include new states simultaneously maintaining the activeness of integration process is one of the most important condition in the context of common interests between a candidate state and the EU.”.

To safeguard and ensure the efficient and integral implementation of the conditions, the EU defined and deeply implemented the administrative system of conditionality through which the EU would assist the states willing to meet the proposed conditions and evaluate the fact of the criteria sufficiently established. The aim of the European Commission was to create a transparent and competitive environment for candidate states throughout their pre-accession stage. This reality was clearly defined in the conclusions of Copenhagen European Council in 1993 and in the “White Paper on Enlargement”, where in the awaited enlargement process the accession of new states to the EU was directly linked with the progress to satisfy the EU defined criteria by that state.

Within the framework of this article, a great attention will be
paid to the political requirements of an accession, in particular, to the requirement for the stability of institutions guaranteeing the rule of law, the respect for and protection of human rights and minorities\(^3\).

The rule of law requirement is essential for the EU membership, in accordance with the ensued criteria defined by the European Council and by the practice of further enlargement. To answer the question of what this principle means for the EU itself and for member-states, it is necessary to go back to the Europe of Middle Ages, where ruling brutal traditions, distorted values and the aspirations of totalitarianism caused numerous pains and sufferings to the peoples of Europe. Ongoing conflicts and ceaseless wars, political persecutions, law violations and its implementation at will resulted in the struggle among the societies and in the long-lasting debate among various ideologies. During the centuries, as a result of this continuous struggle and debates, peoples and states of Europe succeeded in establishing a comprehensive and commonly accepted situation where social ideals would be shaped and formed by including all layers of the society and their all expectations. As a result, the rule of law became the pillar of the European civilization that laid the foundation for the integration of European countries after the World War II. This principle was common not only for the EU institutions, but also for the constitutions of its member states. During some time, the rule of law became a common value, which should be respected in the EU as well as should be encouraged in third states by frequently mentioning it as a precondition for the establishment of bilateral and unilateral international relations and for the provision of technical assistance. In the terminology of international relations, this is called conditionality, which is applied within the scope of both political and economic cooperation.

As it has been mentioned above, the rule of law is of great significance in the Copenhagen criteria, particularly, in the sphere of EU and a third state relations and in the preconditions defined for the provision of technical assistance. Nonetheless, prior to the settlement

of the requirement of the principle of the rule of law for the third countries, it is necessary to figure out how this principle is understood in the supra-national and interstate legal systems and how the EU being a political body, will carry out the protocoled progress and failures made by these states in the sphere of the rule of law, at the same time informing the double standards applied by the EU. The point is that by establishing requirements for candidate and non-candidate states the EU faces two problems. The first one lies in the question of how to evaluate the fact of this principle’s preservation and its implementation in the reality and the second one is in the question of what to do if in reality this law is not prioritized in concrete legal systems of a state, yet a political decision for this country’s accession to the EU is to be made. This problem became apparent in the EU enlargement process after 2004, as a result of which states that were quite far from being legal states and far from the implementation of the rule of law still became EU members. This issue needs to be studied in complex, which aims at forming a complete concept of the “rule of law” and to reveal the scope of tools with the help of which it will be possible to evaluate the level of the principle’s functioning and its efficiency in the legal system of a third country.

Before 1993 the conclusions made by the Copenhagen European Council were aimed at clarifying, improving and depoliticizing the process of the EU accession, since “[a]ll candidate states were to join the EU on the basis of the same criteria and equal standards”⁴, in reality the process led to unpredictability and obscurity⁵. The EU requires meeting indefinite and common criteria from states willing to access, which resulted in the compatibility and incompatibility of the evaluations of obscure nature given by the European Commission⁶.

The concept of the “principle of the rule of law” is quite wide in the EU’s internal and external agenda. It includes both the confirmation of common values, such as fundamental equality and dignity of all people and in the narrowest sense, e.g. the completeness of obligatory laws for EU member states and private entities. This principle is equally applied in the EU formation, as well as in the basis of the constitutions of member states, by this forming European constitutional heritage. All scientists agree that the principle of the rule of law should be viewed in terms of governance, i.e. in the correlations between the governing and governed ones. In these correlations the governing party is endowed with the ability to enact laws and mechanisms to implement administrative enforcement, whereas governed ones expect that they will use these mechanisms in a certain way and will undertake certain restrictions. The state is recognized as legal where the governed ones will manage to reach the utmost transparency in the decision making process by including wider public layers in this process, yet the governed ones will willingly accept the proposed laws and will respect their provisions in their everyday life. In this situation the laws will be legal and will be based and will not contradict the natural human rights and freedoms.

During the whole history of the application of the EU enlargement law, the requirements for democracy and the rule of law directly and indirectly were included as the preconditions for the EU candidate states. The links on these principles can be found in the introduction of the Treaty establishing a Constitution for Europe, the opinions\(^7\) of the Commission, in the numerous declarations and statements\(^8\) of the Council, Commission and Parliament as well as in


the Court decisions of the Community. The articles written in the initial founding treaties of the communities that had regulated the Community enlargement process, directly defined that “European states” could apply for the accession, whereas any direct link to the precondition of democracy and rule of law was not made in these articles\(^9\), which indeed did not mean that democracy and the rule of law were of less importance than other principles of the enlargement basis. The principle of “Europeanization” mentioned in the treaties, in practice was attributed with wider meaning, sometimes including the principles of democracy and the rule of law. In academic literature the possible meaning of the term “European” was discussed in two definitions, i.e. geographical and political, where democracy and the rule of law were included as the tradition and heritage of Europe\(^10\). Besides scientists, the European Commission, following the theories of the enlargement at an early stages brought forward by scientists, also expressed its position on this question by stating that the term “European” includes geographical, historical and cultural elements\(^11\). Besides theoretical formulations, the Commission also applied these two principles in the enlargement practice, rejecting the application supplemented by Greece that was in a military coup\(^12\) and application of Spain that was under the dictatorship of Franco\(^13\).

The preservation of the principle of democracy as the EU

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\(^9\) Article 98 of the European Coal and Steel Community, Article 237 of the European Economic Community and Article 205 of EURATOM.


accession requirement was clearly introduced by the arguments presented by the Commission in *Mattheus v. Doego*\(^\text{14}\) case by uniting geography and democracy. In the same decision the Commission gave the interpretation of Article 237 by declaring that a state can join the EU if only: 1) This state is European, and 2) The constitution of this state guarantees the presence and the continuation of democracy on one hand, and the protection of human rights on the other hand.

In fact, it may be concluded that prior to the definition of the Copenhagen criteria, for the enlargement of its borders the EU implemented more political rather than economic preconditions, as a result of which democracy and the rule of law acquired essential and prioritized importance in this enlargement process.

This condition is important for the reason whether the Copenhagen criteria within the scope of the importance of economic precondition had eventually changed the situation since 1993. The reality is that the criteria brought up for public discussion, developed and proposed by the European Union in Copenhagen were amended in the process of the further activity of the EU institutions by once again prioritizing political criteria. Particularly, the Luxembourg European Council in 1997 defined that for the start of any type of the accession negotiations the satisfaction of Copenhagen political criteria would be sufficient\(^\text{15}\). Despite the fact that in 1999 the European Council changed its position with regard to ascribing high significance to political criteria and by equally evaluating the Copenhagen criteria, the European Commission in 1999 accepting the Composite document adhered a policy adopted by the Council in 1997 which reconfirmed that for a candidate state to meet the Copenhagen criteria would be sufficient for the start of the accession negotiations. In fact, in 1993 in the Copenhagen criteria political requirement was determined essential and prioritized together with economic requirement and the requirement for the protection of


\(^\text{15}\) Luxembourg European Council 12-13 December 1997, 25.
minority rights. In Verheugen’s\textsuperscript{16} opinion, it became apparent that the EU was not ready to start an accession dialogue with countries, where democracy, human rights protection and the rule of law were still not on the appropriate level or in an obscure condition. Here it should be mentioned that the precondition to satisfactorily meet political requirements does not refer to the final accession to the EU, but it refers to the start of the accession negotiations with a candidate state by the Commission and the Copenhagen criteria are equally obliged to meet for the final accession. To prove the statement, it is sufficient to bring Romania and Bulgaria as an example, when in 2004 their accession was postponed for not meeting necessary economic requirements. If we compare the pre-Copenhagen and post-Copenhagen EU enlargement processes, it may be easily assumed that the requirements and conditions for the EU accession differ significantly. Particularly, if before 1993 the negative evaluation of the economic situation of a candidate state made by the Commission was not an obstacle for that country’s accession, nonetheless in the result of Copenhagen criteria an economic condition of a candidate state acquired essential significance.

In reference to the depth and limits of the applicability of the rule of law, there is no discrepancy between the EU and member-states, yet for states, desirous of accessing to the EU and of having economic and political cooperation, this principle is of mixed perception. As a common value, all mentioned states share the importance and significance of the principle of the rule of law, whereas opinions are different regarding the process of the practical preservation and applicability of this principle. The issue is tangible in case of candidate states, since the pre-accession process implies the identification of legal and legislative systems with that of the EU’s legal institutions and principles. As for non-candidate states, they do not have a guideline to be applied in the practice of the applicability of the rule of law. The political association is not a membership and it does not imply harmonization of legislation,

whereas the EU determines the implementation of these proposed preconditions as the necessary condition for the deepening cooperation and with regard to which the European Commission evaluates the accomplished work and composes and publishes its annual reports. At first sight, everything seems clear and simple, yet certain questions arise when issues are studied more profoundly, and to which neither EU nor a third state seem to have any answers. The EU definitely accepts that economic development is totally based on legal definition of intergovernmental economic transactions, as well as on the ability to carry out transactions, on the protection of intellectual property and on the ability to settle commercial disputes through fair court procedures. As a result, the principle of legality strengthens the potential of economic and political systems of any member-state in the actions of the governments.

The EU has conveyed this message by means of various and numerous documents, yet the prioritization of the principle of the rule of law is not unequivocally perceived by national legal systems of the member states. It may be stated that this requirement is quite understandable in the old EU member-states, which reduces their ability to encourage the rule of law without being accused of hypocrisy. Nevertheless, this issue is very apparent in newly accessed Eastern European states, which proves the fact that EU’s impact is the highest on the candidate states during the pre-accession period, when the conditionality of cooperation is applied. From the beginning of the accession, the process of domestic reforms is not so interrupted but is rather slowed down and leads to the weakening of the requirement of the rule of law and its promotion in the EU external powers.

The European Commission and other performers in their external activities interpret the rule of law in quite a narrow sense, i.e. the activity of judicial system, particularly, in the criminal sphere, and in certain cases within the framework of the fight against corruption. In this narrow sense, the definition of “the rule of law” overlooks important components, such as activities and decisions of all endowed with governmental functions both in public and in
private sectors as well as the presence of a permanent control over them through administrative and constitutional systems. Moreover, the definition given by the Commission denies the fact that the “rule of law” is only a law and not a right, and just the presence of good laws is not a sufficient precondition to consider the rule of law being established in the legal system of the given state. The reality and the extent to which the law enforcement bodies and institutions of the state are willing to use these regulations in practice is more important, and most importantly the extent of how the final beneficiaries, citizens of good laws are ready to accept these regulations and to meet their requirements, in its turn, acquires social significance. The requirement and precondition of the “rule of law” in the third states, including the promotion and implementation of the EU oriented actions in candidate states do not explain the main function of this concept, i.e. to solve political and social confrontations within the state, which creates obstacles for public and state institutions of the state to fulfill their main social mission and to keep the country in constant conditions of instability and tension. This is mainly typical of states of a non-democratic governing heritage, especially post-social Central, Eastern European and post-Soviet countries. The European integration (accession to the EU) is the most important and the most efficient mechanism to get rid of this heritage and a tool to create a legal state, whereas the EU — prioritizing the geographical and political interest and economic expectations and putting prevailing political interest over fundamental values on the basis of the cooperation with these states — hasn’t not managed to get rid of the application of the crucial double standards yet.

This criticism, in fact, is more relevant when we consider the process of the progress of the “rule of law” worldwide. In the EU Commission evaluation reports, few questions referring to the issue of the rule of law is applicable. Moreover, prevailing majority of such progress of “the rule of law” doesn’t follow the analytical limit at all, but describes the institutional characteristics in more details, which are necessary for the state to show its ability to adopt a
modern legal system. The reluctance of the EU to conceptualize “the rule of law”, the EU in fact preferred to accept restriction based on the description, based on one of the analytical restriction, which is equally applied by the Organization of Economic and Cooperation Development, the World Bank, the USA and other international units promoting the rule of law during the last twenty years. Summarizing the above mentioned, it becomes more obvious that this process is present:

- The focus of the attention on state institutions, whereas in practice, the EU evaluation reports are primarily concentrated on judicial systems;
- Agenda established by foreign experts, mostly lawyers, especially legal scholars, attorneys and high-level officials;
- Intention to discover issues of legal system and their legal solutions which refer to the courts, prosecutions, agreements and legislative reforms as well as other institutions and processes, where lawyers have an essential role.

As a result, the financing of a third country by the EU and the measurement of its influence is directed to the concrete sphere of the activity, in particular to the renovation and building of courts, the procurement of furniture, computers, materials and other equipment, the development of new laws and regulations, the training of judges, lawyers and other legal staff, the improvement of administrative and management skills of the judicial bodies, the assistance for educational institutions of judges and lawyers, associations of lawyers and other spheres of activities.

Eventually, a situation has been created when any lawyer, a scholar analyzing numerous EU strategic documents comes to a conclusion that the EU in general requires to create “[i]ndependent, highly qualified and well-trained staff, highly paid, respected and easily accessible judicial system for people. This is to have a high level of self-governing, including the process aimed at the training of judges through special schools and the training of judges from other spheres, at the activity of self-governing bodies, as well as the process of judges appointments, and guarantees for non-interference
in the court activities.”

If we try to localize all the mentioned requirements on the activity of judicial bodies of the Western Europe states and on the USA, we will see that in certain cases the appointment of judges takes place by means of political orientation, and whose decisions in future may have shades of political ideologies, they do not get systematic education, the salary is lower than those of lawyers working in private law offices, the process of establishing justice is slower in comparison to other courts. Nonetheless, if the activity of this court happen to be evaluated by the EU, then it will pass the required minimum, as the court in the end establishes justice without getting into the technical and procedural drawbacks and defects.

In the anatomical approach of the principle of the “rule of law”, to make inner challenges and traps more visible, we try to place them in three main spheres: 1) The focus of the unnecessary attention by the EU on the legal and institutional system of the state; 2) state centralization; and 3) complete attention on means rather than on aims.

1. Anatomical approach has narrowed the boundaries of the evaluation of the “rule of law” and the construction of reforms focusing it exclusively on law implementation state bodies, particularly courts, police, the prosecution and penitentiary institutions. Most of the rule of law issues are beyond the jurisdiction of the law enforcement bodies and are in the wide sphere of the relations between authoritative centers. The European Commission, in its evaluation reports, realizes and confirms this fact, yet it does not pay a proper attention to this and it has its own reasons. The most essential reason for EU’s focused attention on these institutions is that EU possesses a comparative advantage and sufficient levers of impact to reach tangible results. Nevertheless, it is not clear which institutions having formal nature should not be a cornerstone for the evaluation and reforms of the rule of law. One of the main consequences of the current modern approach is the ambiguity of legal and institutional, which, on the one hand, the state should ensure the reforms of its institutional system to reach the rule of law
and on the other hand, to guarantee a complete compliance with EU law\textsuperscript{17}. As a result, in parallel with the EU developments, the process of spreading sustainable and appropriate laws commences, which entails the change of the national legislation at impermissible frequency and great risks for legal stability and certainty, which are essential and important guarantees for the rule of law. Frequently amended and altered laws as a rule have low quality and do not fully regulate public relations of a concrete sphere. National authorities in this case face the dilemma which is either to safeguard the rule of law or to change the national legislation in compliance with the EU law. These two are considered the most important precondition for the EU membership, and the European Commission is the body responsible for the evaluation and implementation of the control aimed at their execution, and which preferably applies the mathematic and formal legal and institutional evaluation to avoid the inner contradiction.

2. The unnecessarily great attention paid by the EU on the reforms of the national institutional system has its impact on the evaluation process by the EU of the work carried out by the candidate state. This is particularly noticeable when the opinions and conclusions of international experts who derived from the industrialized societies are to be taken into account. The hired experts from Brussels are frequently considered “right way guards” which are to develop strategy for socialization and to try to find more or less answers with this respect in the candidate states. To promote reforms and to make them more efficient, the Commission mainly relies on the body of public administration. The EU experts and officials alongside with NGOs organize discussions on the reforms of previously unjustified and compressed legal system and finance only to praise the implemented work. The more pro-active representatives of the society are rarely included, even if they can

\textsuperscript{17} In the process of identification of the national legislation with the EU law can be replaced with other law only due to the fact that the latter is in compliance with EU law requirements and these two were sufficient for the prior precondition of the rule of law.
lead wide layers of the society.

3. More attention on means than on aims. The above mentioned two tendencies derive from the approaches based on anatomical institutions of the rule of law, especially the focus of the attention more on means than on aims. The evaluation focused mainly on institutions, as a rule, does not answer the question of what is the reason for vulnerability of judicial, criminal and administrative and law enforcement systems despite the financial and technical assistance to the candidate states and what should be done to improve the situation. Since some rule of law issues arise from the resources, yet others also from the lack of training.

As a result, in terms of evaluation the institutional modeling fails the main testing of the strategy, i.e. if it is indeed possible to bring the resources of the problematic state in compliance with the aims and what should do the EU to assist that very state. The progress for the evaluation of this method simply observes any legal institution and law and compares them with identical institutions and laws of the Western states and then tries to create “facilities “ to harmonize them with each other, and does not take into account the weak and strong sides of the national reformers. This restricts the limits for the possible interference and applies tools such as the development assistance and technical aid, underestimating other encouraging methods of changes. Another shortcoming of this approach is the fact that it ignores available inner resources and significance of their opinions of the present issues as well as the origin of factors hindering the process of reforms and well-known methods to neutralize them. This approach views the process of reforms as apolitical without implying the methods by which the reforms of certain spheres may be hindered as a result of the discretionary application of powers reserved by law. Among the mentioned flaws this approach lacks the ability to catch the moment of timely intervention equally in all spheres, whereas it was possible to make use of opportunities for timely political and social changes which would make the process of reforms more efficient.

The EU approach and applicable policy aimed at the promotion
and implementation of the rule of law in the third countries leaves essential participants, i.e. citizens, out of the game. Focusing the attention and resources on state bodies and institutions of public administration and on the other hand, overlooking main barriers for the implementation of the rule of law in involved states, the EU reduces the public credibility and trust of the Progress reports drawn up by itself by distracting the attention, resources and financial means from the issues which the EU tries to solve.