

HARMONISATION AND TRANSPOSITION OF COMMUNITY ACQUIS INTO NATIONAL LEGISLATION

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Abstract: *There is no common understanding of the nature of community acquis in the literature. Nevertheless, one thing is certain - the subject of community acquis i.e. EU law is a set of mutual rights and obligations of the Union and its subjects (Member States, individuals and legal entities). Besides, the process of harmonization of national law of the economy, both member state and any other state, is a specific legal phenomenon often viewed through the prism of paragraph (Kostadinović - Račić) that EU, in fact, is an international organization with its legal system that combines the work of communities and segments of international cooperation. This unique international organization has a supranational personal character and as such, it represents a particular constitutional structure with common goals, institutions common of constitutional changes. Elaborating on the process of harmonization of the process it is important to consider it in its entirety, but also based on specific – transposition places.*

Keywords: *harmonization of the law, transposition, community acquis, national legislation*

1. INTRODUCTION

The process of institutional connection of a country with the European Union and EU membership implies the adoption of the legal inheritance of the EU, so-called *acquis communautaire*. The process of adjustment - an approximation is the harmonization of laws and regulations of the Member States with EU law. The objective of harmonizing is the regulation of social relations in a uniform way, or as close as possible at the EU level. Given the degree of harmonization of legal solutions, it is possible to speak of communitarian regulation, aimed at the achievement of single legal solutions and the establishment of a single legal regime and communitarian regulation, which harmonize legal regimes within the EU, i.e. harmonizes the national legislations by taking over EU provisions into national law. Harmonization process includes methods and techniques of transferring solutions from the legal inheritance in the domestic legal system, the process of their incorporation in the domestic legal system and the application process that manifests itself through the exercise of rights and acceptance of specific commitments. The EU is a consistent, unique

system, an autonomous legal order with structured organizational and legal norms, legal sources and their own institutions and procedures of adoption, interpretation and application. In case of conflict with national law, EU law has primacy by the so-called principle of supremacy. This principle from national courts and national government as a whole requires to refrain from applying provisions of national law which is contrary to EU law, and instead the application of EU law. *Acquis communautaire* stemmed from fifty years of progressively complex process of European integration, which was the basis for the Treaty of Paris regarding the establishing the European Community of Coal and Steel from 1951. It represents the content, principles and political objectives of the treaties, legislation adopted by applying the treaties and the judgment of the Court of Justice of the European Communities, declarations and resolutions adopted by the European Union, measures relating to the common foreign and security policy, measures relating to justice and home affairs, international agreements concluded by the EU, as well as agreements between member states in the EU activities. It consists of the basic agreements, association agreements signed by member states, and all agreements between the EU and third countries, binding regulations, directives and non-binding recommendations and opinions and judgments of the European Court of Justice.

2. HARMONIZATION OF THE LAW

The process of alignment with the community inheritance is not only to identify the relevant EU regulations with which the national legislation must be harmonized, but also the analysis of the national legislation. In addition, the process of adaptation and harmonization of national legislation with the legal inheritance implies that all legal documents must be taken into account and their compliance must be assessed. West-European system of civil law emphasizes the judicial decisions and law practice, and has a more pragmatic approach to the law. Therefore, judges base their decisions on the laws and regulations, while unwritten principles and various instruments of so-called “soft law” play an important role in the understanding and application of the law. EU legislation has not only written rules but also certain unwritten general principles of which many are constitutional in nature. Judicial practice has an important role in the creation of the EU legal system, and some areas are not regulated using traditional binding legal instrument, but an instrument called “soft law”. Thus, the notion of rights or of what may be called the legal culture in the early stages of association, generally, is not the same in the EU and candidate countries. Therefore, it is necessary to combine two different approaches in order to do a complete and detailed assessment of the degree of correspondence between the two legal systems. Conformity assessment should be done in terms of legislation i.e. the EU point of view and from the standpoint of national legislation. Legislation is, therefore, the EU policy that serves the achievement of the goal of unification of law in the member states, to the extent that should enable the establishment and functioning of the common market. Alignment is not just a simple formal procedure, nor is it an end. It is an instrument for achieving a wide range of legal, technical, economic and political goals. In addition, harmonization is not a simple transposition of community legal norms into national legislation. Quality of the harmonization process is measured by the application of these processes in the domestic legal order. Therefore, the process of harmonization, in addition

to the activities of the legislative bodies, includes a development of the necessary supporting infrastructure consisting of professional and effective public administration and an independent and impartial judiciary. When evaluating the compatibility of national legislation with the EU inheritance, in addition to law, all by-laws before the final grade of the specific level of regulation compliance should be taken into account. Convergence of national law, the requirements of the *acquis* implies significant changes regarding the rules and procedures of the regulations or the construction of a modern legal system that must meet the requirements of membership.

Harmonization process includes methods and techniques of transferring solutions from the *acquis* in the domestic legal system, the process of their incorporation in the domestic legal system and the application process that manifests itself through the exercise of rights and acceptance of specific commitments. In terms of scale i.e. the scope of adjustments in third countries, the EU has offered an approaching model i.e. the so-called transition in its White Paper II, "Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union". The White Paper recommended the 23 areas to states that wish to participate in the European integration process in order to harmonize their legislation with EU law. Later it was extended to 31 and 35 areas, namely: the free movement of goods, free movement of persons, free movement of services, free movement of capital, public procurement, commercial law, industrial property, competition policy, financial services, information society and media, agriculture and rural development, food safety, veterinary and phytosanitary policy, fisheries, economic and monetary policy, energy, taxation, water management, statistics, social policy and employment, enterprise and industrial policy, trans-European networks, regional policy and coordination of structural instruments, judicial and fundamental rights, justice, freedom and security, science and research, education and culture, the environment, health and consumer protection, customs policy, external relations, foreign, security and defense policy, financial control, financial issues and budget issues, institutions and other.

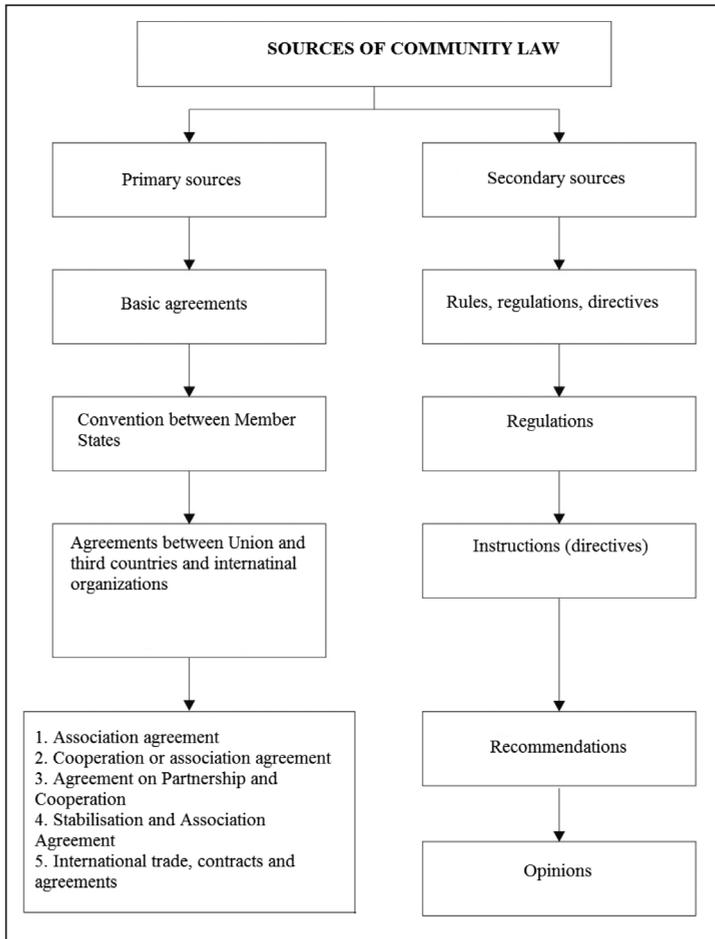
We can conclude that the adjustment process is fully committed to regulations and economic fields to the four freedoms: free movement of goods, free movement of people, services and the free exercise of the free movement of capital, followed by common policies - in fact, on the establishment and functioning of the internal market. Certain areas of domestic legislation are harmonized with the bypassing method, for example, when joining the World Trade Organization or the Council of Europe. Alignment as a long-term process takes place in several stages, and its duration depends on the current legal, economic and social infrastructure and the overall limits lay down by the Stabilization and Association Agreement. Clearly, the above can have an impact on the original sources of the community *acquis* model presented in Fig. [1]

3. TYPES OF HARMONIZATION

Different terms of terms harmonization approximation and coordination were used in the founding treaties. They express different degrees of the integration processes that generate between Member States, and the provisions of Article 3 and 94 of the Treaty on establishing the provided harmonization of laws, regulations and administrative measures to the extent necessary for the establishment or operation of the common market. Approxima-

tion of customs regulations was provided under the provisions of former Article 27 of the EC Treaty, and harmonization of the sales tax and state aid by provisions of Article 93 and 131 of EC Treaty. For some legislation, harmonization and convergence are provided, such as, for example, regulations on social systems, and the coordination of laws, regulations and administrative provisions foreseen in the area of residence, the recognition of professional qualifications, etc. Bearing in mind the fact that in practice it is not possible to consistently implement these theoretical models, for them, regardless of the terms of the treaties, the most commonly used term is harmonization, which can be translated as an adjustment. The theory states the following methods of adjustment: adjustment by identifying common norms in the European Union, a full synchronization, optional compliance, in part harmonization, minimum harmonization, alternative adjustment, adjustment via the mutual recognition of national legislation and the reconciliation through the recognition the rights of other Member States and adjustment by reference to the standards. [2]

Figure 1: Model of the community acquis source



Full adjustment is the harmonization of legislation of Member States with solutions that are defined in the directive, to which Member States, except so-called procedural discretion, does not leave any discretion or material deviation (used in the “new approach” directive). The method of election adjustment is used in cases where directives have the freedom and opportunity to pursue harmonized EU rules or the ability to follow local regulations.

Unification - national regulations are replaced by the EU regulations in certain areas with full authority. Ordinances or regulations are the main instruments used for unification.

Harmonization - national regulations are adjusted with the objectives laid down in EU legislation. The main instrument for harmonization is directive. It can be positive, negative, complete and minimal.

Coordination - appropriate legal acts determine the coordination of activities, sharing information, and the conclusion of agreements on specific issues between the member states.

Positive harmonization of national law equalizes the adoption and implementation of secondary legislation i.e. harmonization measures. Negative harmonization (the terms “negative integration” and “negative control” are used in the literature) adjustment of the legal regime is achieved by strict restriction or prohibition contained in the treaties, which were sent to the states - members and by prescribing standards that limit i.e. refrain a communitarian legislator to adopt new regulations. Measures of the negative harmonization are directly applicable (e.g. prohibition of customs duties on imports and exports, import prohibition of tax discrimination, the elimination of all tariff and quantitative restrictions on internal trade, etc.). A detailed and comprehensive regulation of certain areas does not leave much room for additional regulation to member states. These regulations set the maximum standard or prescribe a uniform standard in this area. Minimum harmonization establishes a minimum of legal regulation in a specific area, which allows member states additional regulation i.e. prescribing stricter standards than the community standards, if they are compatible with the EC Treaty. Mainly used in the regulations on the protection of consumers and the environment.

4. METHODS OF HARMONIZATION AND SELECTION OF AN APPROPRIATE INSTRUMENT

Transposition is so-called copying or transmission of verbatim texts of Community law into national law. It is used in cases where the directive is very detailed and contains certain technical matters. It may be achieved by full and proper compliance with legal obligations, and can produce terminology that is not common and does not match the terminology of national legal systems.

Reformulation is a method to harmonize regulations taking the essence of obligations arising from the directive. Using this method the national legal system and legal language are preserved.

Reporting is so-called referencing to regulations, it is used very rarely and only in cases when it comes to the directive that includes detailed and precise technical terms. The provisions of the directive are listed in the annex of the national legal acts. Reference to the decree is recommended only after the accession to the EU, given the fact that the

regulations are directly applicable. The general rule is that the text of the directive cannot be transcribed verbatim into national legislation. In addition, we should not follow the structure of the text of the directive. In cases where the directive is changing, the national regulation should be changed in the same way.

The basic rule is that the normative instrument used for taking over EU legislation into national law must be legally binding and have an effective impact, and the question of choice is left to the Member States. Generally, acts of Parliament, government regulations, and relevant ministries and other administrative bodies have the necessary binding power and efficiency that makes them eligible for the takeover of the EU legislation. Collective bargaining agreements have also such eligibility, as well as other general legal acts, which excludes administrative acts as an individual. The collective agreements are considered to be sufficient to regulate relations between employers and employees, if their application and the possibility of a dispute in the event of non-compliance with the provisions of the relevant directives are provided.

Selection and choice of an appropriate normative act requires a flexible and systematic approach, so we should try to avoid simple borrowing by law, which may result in often unnecessarily long delays in the adoption procedure and procedure changes as well, and the particularly important is to provide taking over more EU regulations governing the same subject to one or more regulations in order to avoid unnecessary taking over of the same EU rules in two or more national regulations. Character and coverage of EU policies, as the form of regulation that is already regulate this area, and the factors which, apart the form of the existing law in a given area and its significance, also influence the selection of an appropriate legal instrument.

Following will be taken over by the law:

- a) Legal acts whose implementation involves supplementing existing,
- b) Directives, which include general principles for specific areas and horizontal directive, and
- c) Directives that constitute the rights and obligations of legal entities and individuals

5. RESUME

In practice, different terms that mean “adjustment” are used - harmonization, adjustment, approximation, etc. Moreover, in specific case is used the term implementation, which includes all three phases of adjustment (transfer, implementation, application). Sometimes “implementation” is just another phase of the adjustment that in this paper we have called “implementation”. Nevertheless, in the context of future negotiations for membership of the candidate is required to show that has developed national regulations to properly transfer to EU law into domestic legal system (transposition); to effectively implement it (implementation), and applies (enforcement). Therefore, the terms used herein shall be understood only in relation to the meaning attributed to the English expression in parentheses, and no significance in the context of the national law. Based on this, the rules and procedures of the regulations and their harmonization with EU legislation should include development and implementation of the legislative framework for the adoption of legislation based on the principle of legislative planning activities in the institutional and temporal terms; coordination of the standardization process by the line ministry in order

to promote appropriate standardization policies, coordination between the legislative and executive authorities; choice of appropriate policy of action before drafting using instruments such as the analysis of the normative performance, assessment of compliance with EU legislation and respect for the introduction of uniform standards and practices in the preparation and drafting of regulations in terms of the structure around the laws, some provisions, and in terms of its components and text justification, development of inter-institutional cooperation and involvement of civil society and the economy. Therefore, in this context, harmonization of law is neither an easy nor a finished process. The EU in this area is also on unknown territory while the common feature is the question, how and at what pace to implement into the European legal space the legal institutions of Anglo-Saxon law that have emerged in different circumstances and under different circumstances. On the other hand, the fact is that the capital markets and securities becomes more unique and, among other things, corporate law, stock exchange law, securities law, competition law and bankruptcy law have increasingly harmonized, in order to serve its development. EU, aware of its limitations and risk environments, is determined to incorporate many institutes of Anglo-Saxon law into its legal space and design changes over the course of three speeds: the short, medium and long term. Legal profile of company law, largely, will be determined by the technical profile, and hence are not possible ultimate laws governing business organizations, especially corporations. Obviously, this complex issue cannot be closed with the presentation of the optimistic figures. If that were so, the EU would be made universal "recipe" for all law projects in all states, and that would be the most expensive recipe in the world. Nevertheless, this is impossible, and therefore this work cannot be considered completed ever, always current, disputed or favored.

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