

METHODOLOGY FOR LAW APPROXIMATION IN THE REPUBLIC OF MOLDOVA

**Chisinau
May, 2010**

This Report has been prepared with the Financial support of the European Union. The views expressed in the Report remain those of the Project and the authors and are not to be understood as in any way reflecting an official opinion of EUROPEAID, the European Union or any of its constituent or connected organisations.

TABLE OF CONTENTS

FOREWORD	5
INTRODUCTION	7
CHAPTER I. INTRODUCTORY REMARKS ON THE PROCESS OF LAW APPROXIMATION	8
1.1. IS TRANSPOSING EU LAW AN OBLIGATION FOR MOLDOVA?	8
1.2. THE PROCESS OF LAW APPROXIMATION IN MOLDOVA: SOME ISSUES.....	9
1.3. TWO GENERAL QUESTIONS ON LAW APPROXIMATION	10
1.4. NOTIONS OF THE EUROPEAN COMMUNITY LAW AND EUROPEAN UNION LAW: COMMON FEATURES AND DIFFERENCES	11
1.5. HARMONISATION, APPROXIMATION, COORDINATION AND CONVERGENCE	13
CHAPTER II. LAW APPROXIMATION IN THE CONTEXT OF MOLDOVA – EU AGREEMENTS AND NATIONAL PRIORITIES	15
2.1. INTRODUCTION	15
2.2. MOLDOVA – EU - COMMITMENTS CONCERNING LAW APPROXIMATION AND NATIONAL PRIORITIES FOR LAW APPROXIMATION	17
2.2.1. The Partnership and Cooperation Agreement (PCA)	17
2.2.2. National Development Strategy 2008-2011.....	18
2.2.3. Annual National Plan for Legal Approximation in the Republic of Moldova	18
2.2.4. European Neighbourhood Partnership Action Plan (ENPAP).....	18
2.2.5. Association Agreement (AA)	19
CHAPTER III. SOME BASIC FACTS ON THE LAW OF THE EUROPEAN UNION	20
3.1. SOURCES OF EU LAW.....	20
3.2. PRIMARY SOURCES OF LAW	20
3.2.1. Founding Treaties and other important treaties.....	20
3.2.2. The Treaty of Lisbon and the main changes introduced.....	22
3.2.3. The general principles of European Union law	26
3.3. SECONDARY SOURCES OF EU LAW	29
3.3.1. The EU legal acts.....	29
3.3.2. International agreements	32
3.3.3. Case law of the Court of Justice of the European Union	32
3.4. EU “SOFT LAW”	34
CHAPTER IV. METHODS OF LAW APPROXIMATION	36
4.1. APPLICATION OF EU LAW IN MEMBER STATES.....	36
4.1.1. Law approximation.....	36
4.1.2. Types of legal approximation	37
4.1.3. Law harmonization – theoretical overview of some methods and techniques in EU Member States.....	37
4.2. SOME PRACTICAL ISSUES	40
CHAPTER V. PRACTICAL GUIDELINES FOR THE METHODS TO BE USED IN LAW APPROXIMATION IN MOLDOVA	44
5.1. THE APPLICATION OF THE MOLDOVAN LAW DRAFTING TECHNIQUES IN THE APPROXIMATION OF EU LAW	44
5.2. GENERAL PRINCIPLES.....	45

5.3. RECOMMENDATIONS FOR TRANSPOSING A REGULATION	48
5.4. RECOMMENDATIONS FOR TRANSPOSING A DIRECTIVE	48
ANALYSIS IS BASED ON THE KEY LEGAL ELEMENTS:	49
CHAPTER VI. SPECIFIC ISSUES IN LAW APPROXIMATION	54
6.1. HOW TO START WITH LAW APPROXIMATION WITH A PARTICULAR PIECE OF LEGISLATION?	54
6.2. HOW AND WHERE TO FIND INFORMATION ON RELEVANT AND UP TO DATE EU LEGISLATION?	59
CHAPTER VII. THE ROLE OF THE PARLIAMENT IN THE PROCESS OF LAW APPROXIMATION.....	61
7.1. GENERAL ISSUES.....	61
7.2. HARMONISATION OF THE NATIONAL LEGISLATION.....	61
7.3. COMMITTEES FOR EU AFFAIRS IN NATIONAL PARLIAMENTS	62
7.4. JOINT PARLIAMENTARY COMMITTEES	62
7.5. PARLIAMENTARY ASSEMBLY OF THE EUROPEAN PARLIAMENT'S EUROPEAN UNION EASTERN NEIGHBOURS (EURONEST).....	62
SOURCES	63
ANNEX I	65
ANNEX II	74

FOREWORD

Approximation of the Moldovan legislation with the requirements of the EU law is often perceived by many people as a very technical exercise. However it shall always be remembered that this is one of the cornerstones for the successful integration of the Republic of Moldova into the European Union. The statistics indicates a total of 10,785 different directives and regulations in force, as well as 10,014 legal acts modifying existing EU legal acts, bringing the total number of acts to 20,799. This list does not include several thousands of other types of EU legal acts that must also be implemented by candidate/associated countries. These figures are not constant because they are changing every day following the adoption of new EU legal acts and the process of repealing old ones. But in any case, based on various studies and the practical examples of EU Member States and accession countries, it can be concluded that the overall of number of national legal/normative acts needed for EU accession can fluctuate within 10-40 per cent of the overall legislative workload of the country.

The same estimation could be true in relation to the Republic of Moldova, especially after the signature of the new Association Agreement, which is currently in the negotiations process. The conclusion of an Association Agreement will have consequences for the legal approximation system of the Republic of Moldova. Fulfilment of its requirements will significantly intensify both the speed of law-making and the workload of the Government and of the Parliament in the forthcoming years.

The current legal approximation mechanism of the Republic of Moldova functions for 3 years. Therefore now it was the right time to assess the law harmonisation practice in Moldova and to make elaborate the guidelines for the future work in this area. Whereas it is impossible to foresee all the problems arising in relation to the legal approximation process, these guidelines will be further improved in the light of the future developments of the EU law and the additional legal approximation experience.

The Methodology for Legal Approximation was developed jointly by the Centre for Legal Approximation and the TACIS Project "Support for the Implementation of the agreements between the Republic of Moldova and the European Union". With pleasure, we present our sincere thanks to the TACIS Project and its experts for the support in drafting and publishing the present Methodology. Much effort has been made in order to ensure the accuracy and consistency of the information provided in this document, especially, in the light of the new developments of the EU law, introduced by the Lisbon Treaty. The Methodology is designed in order to assist the legal drafters in the process of implementation of EU law in the Moldovan legal system. It guides every legal drafter on the step-by-step basis on the various aspects of correct methods of drafting the legal act, which will be harmonised with the requirements of EU law. It is based on the best practices of numerous EU Member States, as well as on the requirements of the Moldovan legislation in the area of legal approximation.

The process of legal approximation is often described as making the legal system of a state more "European". Undoubtedly, this is one of the main objectives of the Republic of Moldova and the near future will demonstrate our state's abilities as a future Associated country to the European Union. The long and complex process of legal approximation of the Moldovan national legislation to the EU *acquis* is expected to become even more important and more challenging, when signing the Association Agreement with EU. This is why, we

sincerely hope that this Methodology will contribute in understanding the challenges better and in defining the best ways of meeting them.

We wish you success in your work!

Natalia Suceveanu

**Director,
Center for Legal Approximation
Ministry of Justice**

Stela Buiuc

**Vicedirector,
Center for Legal Approximation
Ministry of Justice**

INTRODUCTION

This Methodology is intended as a set of clear and practical instructions for legal drafters and policy makers and as a practical supplement to Moldovan legislation, which already in detail and in form of statutory provisions defines drafting procedures and rules on law approximation. The key relevant Moldovan acts are:

- Law on Legislative Acts No. 780-XV as of December 27, 2001 (with the subsequent amendments),
- Law on Normative Acts of the Government and Other Central and Local Public Administration Authorities No. 317-XV of July 18, 2003 (with the subsequent amendments) and
- Government Decision No. 1345 of November 24, 2006 regulating the Approximation Mechanism for National legislation with the Community Acquis Communautaire.

The Methodology reflects the legal provisions of these key pieces of Moldovan legislation for law approximation.

This methodology has law approximation in the title, but deals also with law harmonization. Although harmonisation and approximation are mostly used as synonyms when discussing the process of transposition the EU legal acts into national legal system. It should be mentioned that law approximation is wider and in the authors' view means also policy making before harmonisation as well as credible enforcement after pure (legal) harmonisation is done. Due to this, the subject of this methodology is wider and not solely¹ focused on legal transposition techniques.

After introductory remarks on the law approximation process, the methodology provides for a brief overview of law approximation in Moldova and presents methods of law approximation in the EU framework.

The Methodology ends with description of specific aspects of law approximation and some links on EU legislation, which are useful for the legal drafters.

Primož Vehar

Juris Gromovs

Project "Support for the Implementation of the agreements between the Republic of Moldova and the European Union"

¹ According to the Romanian terminology the approximation and harmonisation have the same meaning – by GD 1345 harmonisation involves also policy making and enforcement of the adopted acts. On the other side GD 1345 in drafting national legislation also requests using the same legal language used by Community legislation. Therefore, the difference between harmonisation and approximation is stressed in the text – Chapter I point 1.5

CHAPTER I. INTRODUCTORY REMARKS ON THE PROCESS OF LAW APPROXIMATION

The experience from new EU Member States undoubtedly is that to be ready for membership of the European Union is not only a political and economic question but also, a legal one. EU law and law approximation of national laws should therefore not be underestimated.

Following experience from the new Member States the relationship of Moldovan legislation, its drafters and later those who implement towards EU law, can be divided into three stages:

1. Adaptation to - and getting familiar with EU law, where deeper knowledge is gained,
2. The next logical step from gaining abstract knowledge will be taken in a far more practical direction, making EU law a part of the everyday work of those involved in law-making and,
3. EU law will begin to influence the work also of those who implement and enforce law.

1.1. IS TRANSPOSING EU LAW AN OBLIGATION FOR MOLDOVA?

Proof that adaptation to EU law is becoming a serious task in the fulfilment of foreign obligations assumed by the Republic of Moldova is provided by the Partnership and Cooperation Agreement (PCA), concluded between Moldova and the European Communities and their Member States, future negotiations for a further step in bilateral relations in a form of Association Agreement (AA) between Moldova and the European Union, and by the legal acts adopted by Moldova as the organisational procedures and legislative techniques set by the Law no.780-XV from December 27, 2001 on legislative acts, Law no.317-XV from July 18, 2003 on the normative acts of the Government and other central and local public administration authorities and Government Decision 1345 of November 24, 2006 regulating the Approximation Mechanism for National legislation with the Community *Acquis Communautaire*.

The Partnership and Cooperation Agreement (PCA) concluded between Moldova and the European Communities and their Member States, already provides for Moldova's obligations with regard to legislative approximation. Namely, under Article 50 of the PCA, Moldova committed to ensuring that its legislation will be gradually made compatible with that of the Community.

More and deeper obligations to approximate or transpose legislation will arise from the conclusion of the future Association Agreement. Eventually, this may be followed by an expressed intention to join the European Union which then results in the requirement for full transposition. In this context, considerations of EU law will become a larger part of the day-to-day work of Moldovan state officials involved in law-making. This will apply both to the preparation of new draft laws and the amendment of existing ones. In practice, if we use a purely legalistic

approach concerning the PCA, we could face the interesting paradox that there is no EU legal act with which Moldova must harmonize. Namely, all PCA provisions that address the issue of legislative harmonisation are general in nature and politically binding but have no direct effect in relation to the direct establishment of rights and obligations in the internal legal order. On the other side, there will be no further progress towards EU integration without progress on law approximation. Thus, we can conclude that already now there are obligations (as for example consequences of the membership of the South-East Europe Energy Community, and efforts in negotiations to conclude Association Agreement) which require great efforts in law approximation. The future Association Agreement will include clear tasks not only on establishing a free trade area but also on legal reform in other specific sectors. A jointly established monitoring system, followed by annual reports from the EU on implementation of the agreements.

1.2. THE PROCESS OF LAW APPROXIMATION IN MOLDOVA: SOME ISSUES

The Moldovan "Government Decision 1345 of November 24, 2006 regulating the Approximation Mechanism for National legislation with the Community *Acquis Communautaire*" (GD 1345) ensures that there is a sound legal foundation for integration of Moldova with the EU, including the beginning of the process of approximation Moldovan law with that of the EU. Through the same legislation, the CLA was established as part of the Ministry of Justice as a specific institution in the legislative process with responsibility for checking the compatibility of national draft legislation with EU law when implementing the National Plan for Legal Approximation.

This methodology for law approximation contains primarily more general guidelines as well as specific examples and is intended to provide state officials with an overview of EU law and methods of transposition. However, all problems arising out of the application of EU law cannot not be foreseen in advance and a lot of questions will still emerge in the future.

Moldova has the opportunity to learn from other countries experience when it endeavours on the path of deeper integration. It can take into account the latest developments in EU legislation in the particular field and incorporate it in its own. However, there are risks ahead that could turn a potential improvement into a disaster for the country. For example, it should be avoided that legislation becomes unnecessarily complex and when legislation is transposed, it should be clear from start what should be achieved and how it should be done.

For example, one national law is often sufficient for transposing two or more different Directives related to the same field, instead of burdening the legal system with two separate laws, each relating to one Directive it should be addressed in one piece of legislation. An example could be EU Consumer protection legislation with its current 18 Directives, 1 Regulation and 2 Recommendations. Obviously, the solution is not 20 different Moldovan acts, nor transposition of all EU Consumer protection legislation immediately in one law, but assessment of the current situation, followed by a decision how to approach the issue. Most likely one consumer protection law for Directives on consumer rights and consumer contracts will be needed, but also separate laws regulating

consumer interests in financial services and acts regulating out-of-court dispute settlement.

Finally, “goldplating²” should be avoided to ensure that legal approximation has adverse consequences.

In addition to the risks identified above, there is also the issue of familiarity with underlying policies. State officials from EU Member States actively participate in the legislative process within the EU and therefore they are familiar with a particular Directive, the reasons for its adoption as well as with reasons for certain solutions. Moldovan state officials in case of a Directive are somewhat disadvantaged as they do not have the opportunity to be part of the drafting process. To some extent, this can be compensated for by carefully analysing the preamble as well as by research on the relevant page of the EU website where there are often summaries available that describe what the Directive or Regulation is intending to address and achieve. Furthermore, the process of approximation is made more difficult by the absence of a hierarchy of provisions in the European Union itself. The division between primary and secondary legislation in European Union is distinct, but no definitions exist in more detail with regard to the hierarchical relationship between different categories of EU legislation.

Another stumbling block can be the terminology and language, used in EU legislation. The EU has developed a specific kind of legal language, owing to differences between the legal systems and languages of different Member States. Concepts provided for in Directives are sometimes difficult to comprehend in terms of both language and meaning.

1.3. TWO GENERAL QUESTIONS ON LAW APPROXIMATION

Two general questions have produced many theoretical as well as practical problems in new Member States during the accession process. One was concerning references to the Directives transposed as obligatory for Member States, and the other related to transposing Regulations into national legislation. EU Member States are prohibited from transposing the Regulations into their national law unless it is directly required by the provisions of a Regulation³ in question or the relevant case law of the Court of Justice of the European Union.

For EU Member States, references to Directives are obligatory. When one Directive is transposed into several national legislative acts, all of those must contain a reference to the Directive. The reference requirement is based on the reason that in the event of problems with interpreting the national law harmonised with the Directive, the national courts of the Member State will know the underlying Directive and may, if necessary, request from the Court of Justice of the European Union a preliminary ruling on interpretation of the Directive.

² Goldplating is the term used to describe the policy of exceeding the minimum requirements that are set by directives and regulations. Examples of this would be adopting stricter environmental standards than prescribed.

³ Regulations are automatically applicable in EU member states and supersede national legislation that would contradict the provisions of a regulation.

Furthermore, such references provide individuals as well as the European Commission with information that the Member State has transposed the Directive in question.

The Regulation on the Mechanism of Approximation of Legislation of the Republic of Moldova with Community Legislation approved by GD 1345 provides for the following:

a) Moldovan authorities shall include in its normative acts references to the transposed EU legal acts⁴. Such reference shall be included in the beginning of the draft normative act⁵ at the stage of its drafting.

b) They shall transpose regulations into national legal order⁶. Definitions of concepts and other provisions contained in the Regulations should be transposed into Moldovan laws with special caution that after accession such acts will be amended into implementing acts of regulations.

In the beginning of this introduction, participation in the preparation of EU law was referred to as the third and final stage in the relationship between Moldova and the European Union. At that time, Moldova as EU Member State will actively participate in drafting EU legislation and as part of the process, the legal drafters will have a much easier job with the transposition of Directives in which preparation they took part. Regulations will be directly applicable and only legislation for its implementation will have to be adopted. But before participating in EU law making is possible, there is a long process. The first legal task will be to amend the Constitution to allow the transfer of some sovereign rights in order to enable accession, by regulating the constitutional relations between the Government and the national Parliament in order to ensure that the Government takes into consideration the national Parliament when functioning within the EU.

1.4. NOTIONS OF THE EUROPEAN COMMUNITY LAW AND EUROPEAN UNION LAW: COMMON FEATURES AND DIFFERENCES

Legislation created within the framework of the European Union and the European Communities (formerly European Economic Community, European Coal and Steel Community and the European Atomic Energy Community) has long been called "the European Communities Law". However when we talk about law approximation we primarily speak about the approximation with legislation which was adopted under the framework of the Treaty establishing the European Community.

Lately, especially after the entry into force of the Treaty of Maastricht in 1993 which established the European Union, this legislation has been called "European Union Law" or at the more informal bureaucratic jargon "acquis of the European Union".

⁴ GD 1345, Art 16 and 17.

⁵ Here and further any reference to the "normative act" of the Republic of Moldova shall be understood as covering both the laws and the normative acts of the Government and other central and local public administration authorities of Moldova.

⁶ GD 1345, Art 9.c) does not exclude the regulations.

The issue is not only a linguistic nature because in the theoretical legal sense the difference was not consistently made between the European Community and the European Union in “pre-Treaty of Lisbon” time. Namely, the Treaty on European Union (TEU) stipulated the existence of the European Union as an "umbrella structure" that rested on three pillars: The first pillar was composed of the Treaty establishing the European Community, known, before the Maastricht Treaty, as the Treaty establishing the European Economic Community, the Treaty establishing the European Coal and Steel Community (this Treaty expired in 2002) and the Treaty establishing the European Atomic Energy Community ("EURATOM"). The second pillar of the Union was composed of the issues of the Common Foreign and Security Policy and the third pillar of Police and Judicial Co-operation in Criminal Matters, which before the Amsterdam Treaty, was known as Justice and Home Affairs. The legal acts, which were adopted within the framework of the second and third pillars, are based on the provisions of the Treaty establishing the European Union.

The Treaty of Lisbon, which amended but did not replace the two remaining founding treaties and changes the title of the EC Treaty to the “Treaty on the Functioning of the European Union” (TFEU), finally abolished the classical three pillar structure as well as the distinction between EC law and EU law. Furthermore it established a legal personality for the European Union..

The current relationship between the European Community and European Union is outlined in the Article 1 paragraph 3. of the TEU and is defined as follows: "*The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as "the Treaties"). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community".*

Therefore the current EU legal system consists of a number of elements:

1. the law previously called the “law of the European Community” (based on the Treaty establishing the European Economic Community", EEC, later amended and re-titled as the Treaty establishing the European Community),
2. law of the European Atomic Energy Community, which is based on the Treaty establishing the European Atomic Energy Community,
3. the European Union law, which is based on the Treaty establishing the European Union (TEU).

After the Treaty of Lisbon entered into force, the term “law of the European Community” ceased to exist and the common term “EU law” is used. The EURATOM law still exists and is not included into the meaning of “EU law”. It is not a subject of this methodology.

1.5. HARMONISATION, APPROXIMATION, COORDINATION AND CONVERGENCE

In the European Union the concept of harmonisation of law means the process of harmonisation of the national legislation of the Member States with the EU law.

The founding treaties use different terms such as: harmonisation, approximation and coordination. These three variants of terms should express different levels of integration processes that are achieved between the member states.

Article 115 of the TFEU provides for *approximation* of laws, regulations and administrative provisions of the Member States to the extent that such approximation is necessary to ensure the establishment and functioning of the internal market.

Harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market is provided for in Article 113 of the TFEU.

In some cases EU law provides for harmonisation and approximation, such as, for example, legislation on social policy (Article 151 of the TFEU). In other cases EU law requires the coordination of laws, bylaws and administrative legislation (Article 50(g) and 52 (2) of the TFEU)

The term “*convergence*” is being used by the EU when referring to the harmonization processes in countries within the scope of the European Neighbourhood Policy. The meaning is thus formally different from the term “approximation”, which is applied to the processes, which are undertaken by the Member States and the current EU candidate countries, accession countries and associated countries⁷.

Finally it shall be noted that in practice the term most commonly used in relation to countries which are not EU Member States is “harmonization” (however in the texts of the association agreements or the cooperation agreements concluded by the European Community and its Member States with the third countries “approximation” is used).

The meaning in which the term is being used by EU institutions and officials of the third countries (EU Association Countries, Candidate Countries, Accession Countries or other countries, which establish closer cooperation with the European Union) is not always very consistent and generally shall be understood as follows:

- a) Either in the narrow sense “harmonisation” is the same as “legal approximation”, or
- b) In the broadest sense “harmonisation” means the transposition of provisions of EU law into the national legislation, implementation (application)

⁷ Moldova – EU Convergence planning, Environmental collaboration for the Black Sea, Georgia, Moldova, Russia and Ukraine, Presentation at the Public Outreach Event, March 20, 2009.

of the provisions of such national legislation by the national competent public authorities and its enforcement by the courts and law enforcement in cases of their infringements.

However irrespectively of the difference in the above-mentioned terminology (approximation, harmonization, convergence or any other term to be used) in practice one of the clearest indicators of the progress of the country on its path to the EU integration is the quantity national legal acts, which have transposed the provisions of EU law, and the evidence of their effective implementation.

It should be noted that the only the broadest interpretation (version (b)) described above provides for a satisfactory assessment of the progress of any country, including Moldova, in its integration into the European Union.

CHAPTER II. LAW APPROXIMATION IN THE CONTEXT OF MOLDOVA – EU AGREEMENTS AND NATIONAL PRIORITIES

2.1. INTRODUCTION

The process of association with the EU is at the same time a transition and modernisation process considering that it implies:

- Speeding up the transition with improvement of the order and stability in the economy and society,
- Assistance in overcoming the obstacles such as economic monopolies and political interests,
- Improvement of the competitiveness of the economy.

These goals cannot be achieved without new and amended legislation and, before that, the clear political commitment. A first serious step closer to the EU was the Partnership & Cooperation Agreement (PCA), with common institutions, and its implementation in the years that followed. The next phase related to law harmonization will be negotiations for and signing of the Association Agreement and its implementation in the future years. Implementation will require establishing joint Moldovan - EU bodies to follow implementation especially in legal approximation activities of priority areas.

Following the experience of the new EU Member States as well as the current candidate countries, if and when Moldova will officially apply for EU membership the EU Council will request the European Commission to prepare a opinion on the Moldova application. When this happens, Moldova will receive from the European Commission a “Questionnaire” with thousands of questions related to different areas and the Moldovan administration will have to provide clear and concise answers which shall be the basis for a decision on possible candidate country status. Every year an annual report of EU Commission shall present the progress on legal approximation. After a decision on beginning of the negotiations is adopted, “screening” of legislation on all 35 negotiating chapters will be carried out, followed by negotiations on all 35 chapters. After the completion of the negotiations (closing the chapters in EU jargon) follows a “post-negotiation” phase which is used for signing and ratifying the accession treaty as well as carrying out the last approximation activities before membership. While establishing a functioning system of EU Integration coordination, it is most likely that on commencing accession negotiations Moldova would develop a comprehensive document called “National plan for adoption of the Acquis” (NPAA) or “National plan of Integration” (NPI) as a follow up of the National Plan for Legal Approximation, defining:

- National priorities through developmental and strategic objectives,
- Adequate policies, reforms and measures needed for the implementation of these objectives,
- a detailed plan of law approximation,

- Institutional capacity building needs,
- Defined human and budget resources as well as,
- Other funds needed for the implementation of the planned tasks.

Law approximation priorities should be defined through proper planning and clear coordination and allocation among ministries, departments and experts. After all, for each EU legal act it must be clear who is responsible for transposition (ministry, department, and person). Law approximation in its broader meaning (including the effective implementation and enforcement of the harmonised national legislation) is without doubt the most important condition for closer economic and political relations with EU and the most demanding task in the whole process of cooperation.

To draft a law is a real challenge, to incorporate an EU legal act in national legislation an even greater challenge. Before drafting a law, proper policy planning is needed, and after drafting a law, implementation and credible enforcement are necessary.

Drafting a law is namely only one part of the process of law approximation.

There are at least the following main stages in a law approximation process:

- 1) **The preparatory stage** – establishment of the necessary institutions for the law approximation process and a series of technical activities including distribution and presentation of the EU legal acts in particular areas and presentation of the law approximation principles in general.

This stage can be recognized in GD 1345 in Article 1, which defines the objective of this Decision and regulates the meaning of norms related to EU legislation. It sets the normative acts related to the EU legislation to which the national legislation of the Republic of Moldova should be approximated, the method of legislative approximation and the institutional mechanism for legal approximation of the national legislation with EU legislation. Article 10 defines the obligation establishment of the necessary institutions for the law approximation - central public administration authorities – ministries and other central bodies – agencies, services, bureaus, that have the power of legislative initiative according to EU legislation.

- 2) **The analytical stage** – definition of priorities based on state priorities as well as international agreements (like PCA or AA) or political documents like EU-Moldova Action Plan mutually agreed, translation of the necessary EU legal acts into the Moldovan state language and their incorporation into the National Plan for Legal Approximation in line with the previously defined priorities.

The analytical stage could be found in Article 5 of the GD 1345 (this Article defines the importance and obligation of determining priorities in the approximation process, especially in the areas set as priority by bilateral agreements in force regulating the relations of the EU and the Republic of Moldova) and the Article 9 (this Article defines the stages of the implementation the legal approximation process - identification of areas,

establishing the procedure, identification of the legal EU legislation basis, establishing the provisions of national legislation in the corresponding area).

- 3) **Transposition** – operational elaboration of the new legislation in line with the previously defined plan. At this stage the actual approximation of the Moldovan legislation with the EU law is achieved and national experts, when possible with the EU expert's assistance, have to prepare new draft laws or propose amendments to the existing laws and by-laws, in order to attain compatibility with EU law.

The third stage – transposition is provided by the GD 1345, Article 6 which defines the development of the process of approximation through the development of a comparative analysis and the elimination of contradictory provisions, elaboration of new norms or supplementing the existing ones maintaining the structure and language of editing, as well as specific and characteristic features of the national system of law. GD 1345 defines ways of transposition also in the other articles that follow explaining principles on which legal approximation process should rely on and on which conditions should be focused.

- 4) **Implementation** – not only adoption of the new laws or amendments of the existing laws in the Parliament, but also their adequate implementation in practice and management of their effectiveness through the existing institutional infrastructure.
- 5) **Credible Enforcement** – after adoption of legal acts the necessary measures of the competent authorities are needed (like: monitoring, inspection controls, penalties, corrective measures and other measures) to ensure that the law is being complied with fully and properly and that performance of sectoral policy is improved.

All these stages are incorporated also into the organisational procedures and legislative techniques set by Law no.780-XV on legislative acts and Law no.317-XV on the normative acts of the Government and other central and local public administration authorities.

2.2. MOLDOVA – EU - COMMITMENTS CONCERNING LAW APPROXIMATION AND NATIONAL PRIORITIES FOR LAW APPROXIMATION

2.2.1. The Partnership and Cooperation Agreement (PCA)

The *Partnership and Cooperation Agreement (PCA)* came into force in July 1998 for an initial period of ten years, after which it is automatically renewed by consent of the parties. The PCA establishes the legal and institutional framework for bilateral relations between the EU and Moldova, sets the principal common objectives, and calls for activities and dialogue in a number of policy areas.

The Agreement also provided for cooperation in a range of areas including in most of those an element of legal approximation.

Article 50 refers to “endeavouring to ensure”, that its legislation will be “gradually”

made “compatible”. And this, of course, is not the same as a commitment to achieve full compliance with EU law. Obligation to transpose EU law is based on very general formulations without direct effect. If we compare PCA and so-called Stabilisation and Association Agreements (SAAs) EU concluded with Western Balkan countries recently – the latest ones are more linked towards economic integration into EU than just establishing economic links with the EU than the PCA.

SAAs are the latest versions of the agreements EU concluded with potential candidate countries in this decade established a political dialogue between EU, its Member States and Associated Countries and have rules on the abolition of customs duties, the establishment of a free trade area for industrial goods and special arrangements applied for EU sensitive sectors such as agriculture, textiles fisheries, etc.

There were also some specific requirements concerning approximation of law in the fields of competition, intellectual property rights and public procurement, which were additional to the general requirement for the alignment of legislation. The SAA, although nowhere directly mentioning EU membership, goes much further than the PCA.

2.2.2. National Development Strategy 2008-2011

National Development Strategy 2008-2011 adopted in a form of a law in 2007 as the main internal national strategic planning paper together with above mentioned Moldova-EU commitments should be the basis for policy making concerning EU law approximation priorities. Result of this policy making activities through analytical and preparatory part shall be clearly defined national priorities on law approximation – defined sector by sector.

2.2.3. Annual National Plan for Legal Approximation in the Republic of Moldova

This is a document where law approximation priorities are defined by the Government through the policy making and they are reflected sector by sector with clear deadlines.

This should be the only strategic document for legislative planning where line ministries have to include priorities deriving from above mentioned documents. Planning in line ministries should take into account the trade, economic and social development requirements and on that basis a) list and assessment of EU legislation from certain area, b) assessment of current state of play and level of current compatibility in Moldova on a specific sector, c) legal approximation priorities for the National Plan for Legal Approximation.

2.2.4. European Neighbourhood Partnership Action Plan (ENPAP)

The EU - Moldova Action Plan adopted in February 2005 is a political document laying out the strategic objectives of the cooperation between Moldova and the

EU. It covers a timeframe of three years. Its implementation should help to fulfil the provisions in the PCA and should encourage and support Moldova's objective of further integration into European economic and social structures. Implementation of the Action Plan should contribute to significantly advancing the approximation of Moldovan legislation, norms and standards to those of the European Union.

2.2.5. Association Agreement (AA)

This future agreement, the content of which is the subject of negotiations, will be concluded between Moldova on one side and EU and its Member States on the other side. The negotiations of this important treaty are already ongoing

Following the experience of new EU member states and their Association Agreements in 1990' and Western Balkan countries and their SAA in 2000' we can conclude that such an agreement means an important step forward in relations with the EU.

Such an agreement, which will enter into force in 2 to 3 years after signature due to ratifications needed by the national parliaments of all EU member states, will most likely include political, economic, trade and development relations and provisions on political dialogue, cooperation, establishment of free trade, legal approximation, EU assistance and common institutions for the implementation.

Following experience of new EU member States and Western Balkan countries, such an agreement could contain a general law harmonisation clause that will concern gradual legal harmonisation of existing and future legislation of Moldova. Most probably key internal market areas will be listed as priorities and emphasis will not be only in adoption on legislation, but also on its effective implementation. Such an Agreement will also have the provisions that address the issue of monitoring the implementation of adopted legislation and its enforcement, as well as the functioning of the judiciary.

A product of negotiations could be a general time framework for the harmonisation in key Internal market sectors, such as in competition, state aids, intellectual and industrial property rights, public procurement, standards and technical rules, financial services, transport, company law, accountancy, consumer protection, data protection, health and safety at work. Other sectors will most probably have the opportunity to be harmonised throughout the longer period.

Based on experience of new EU member states and Western Balkan countries the agreement shall be read also through the relevant Annexes and Protocols which can determine specific arrangements for textile and clothing, steel, coal, rules governing origin, agriculture, fisheries and other areas of strategic importance for the EU.

The final part of the Agreement will most likely lay down institutional provisions which shall be used in its implementation and are of great importance since not only law harmonisation, but also the overall integration process, will be monitored through common Institutions of Association Agreement.

CHAPTER III. SOME BASIC FACTS ON THE LAW OF THE EUROPEAN UNION

3.1. SOURCES OF EU LAW

The **Law of the European Union** is the unique legal system which operates alongside the laws of Member States of the European Union (EU). EU law has direct effect within the legal systems of its Member States, and overrides national law in many areas, especially in areas covered by the Single Market.

The Law of the EU is usually divided into primary and secondary law.

3.2. PRIMARY SOURCES OF LAW

The primary law in the legal system of the EU has the highest rank, and all other legal norms are based on and subordinated to the norms of the primary rights.

The primary sources of EU law or the primary legislation consists of:

- The Treaties and
- The general principles of EU law.

3.2.1. Founding Treaties and other important treaties

The primary legislation or the treaties are deemed to be the constitutional law of the European Union. They were concluded between and by the governments of all EU Member States acting by consensus. They are much more than an agreement that establishes mutual rights and obligations of states, since they create their own legal order in which Member States limited their sovereign rights, and whose subjects are not only member states but also their citizens.

The Treaties are the most important sources of EU law for three main reasons:

1. They provide for the organisation, status and mutual relations of the main subjects of EU law. It is true that some authorities, they jurisdiction, what is their relationship, what position they have. At the same time, the relationship between the subjects of EU law and they are the Member States, organs of the EU and the natural and legal persons from Member States.
2. They define the areas of policy making, which belong solely to the EU, its Member States and as well the areas of their shared competence.

The Treaties essentially perform the function of the highest acts of the Union system, similar to a place that takes the Constitution of a state on a hierarchical scale of legal sources.

The Treaties that make up the primary legislation include:

- the ECSC Treaty (Treaty of Paris)⁸;
- the EEC Treaty (Treaty of Rome)⁹;
- the EURATOM Treaty (Treaty of Rome)¹⁰;
- the Merger Treaty¹¹;
- the Acts of Accession of the United Kingdom, Ireland and Denmark (1972);
- the Budgetary Treaty (1970);
- the Budgetary Treaty (1975);
- the Act of Accession of Greece (1979);
- the Acts of Accession of Spain and Portugal (1985);
- the Single European Act (SEA)¹²;
- the Treaty of Maastricht (Treaty on European Union)¹³;
- the Acts of Accession of Austria, Sweden and Finland (1994);
- the Treaty of Amsterdam¹⁴;
- the Treaty of Nice¹⁵;
- the Treaty of Accession (10 new member States) (2003);
- the Treaty of Accession (Romania and Bulgaria) (2005);
- the Treaty of Lisbon¹⁶.

The various annexes and protocols attached to these Treaties are also considered a source of primary legislation.

⁸ The Treaty establishing the European Coal and Steel Community (ECSC), signed on 18 April 1951 in Paris, entered into force on 23 July 1952 and expired on 23 July 2002.

⁹ The Treaty establishing the European Economic Community (EEC), signed in Rome on 25 March 1957, and entered into force on 1 January 1958.

¹⁰ The Treaty establishing the European Atomic Energy Community (EURATOM) was signed at the same time when and the EEC Treaty and the two are therefore jointly known as the Treaties of Rome.

¹¹ The Treaty was signed in Brussels on 8 April 1965 and in force since 1 July 1967, which provided for a Single Commission and a Single Council of the then three European Communities.

¹² The Single European Act (SEA) was signed in Luxembourg and the Hague, and entered into force on 1 July 1987, provided for the adaptations required for the achievement of the Internal Market.

¹³ The Treaty was signed in Maastricht on 7 February 1992, entered into force on 1 November 1993. The Maastricht Treaty changed the name of the European Economic Community to simply "the European Community". It also introduced new forms of co-operation between the Member State governments - for example on defence, and in the area of "justice and home affairs". By adding this inter-governmental co-operation to the existing "Community" system, the Maastricht Treaty created a new structure with three "pillars" which is political as well economic.

¹⁴ The Treaty was signed on 2 October 1997, entered into force on 1 May 1999. It amended and renumbered the EU and EC Treaties. Consolidated versions of the EU and EC Treaties are attached to it. The Treaty of Amsterdam changed the articles of the Treaty on European Union, identified by letters A to S, into numerical form.

¹⁵ The Treaty was signed on 26 February 2001, entered into force on 1 February 2003. It dealt mostly with reforming the institutions so that the Union could function efficiently after its enlargement to 25 Member States.

¹⁶ The Treaty was signed on 26 February 2001, entered into force on 1 February 2003. It dealt mostly with reforming the institutions so that the Union could function efficiently after its enlargement to 25 Member States.

3.2.2. The Treaty of Lisbon and the main changes introduced

Last reform of the EU institutions was made with the [Treaty of Lisbon](#), which has now been ratified by all 27 EU member states and entered into force on December 1, 2009. It represents the legislative and political framework within which the EU will function for the foreseeable future.

A brief summary of the main changes:

a) A single legal personality

On 1 December 2009 the European Community was replaced by the European Union which succeeds it and takes over all its rights and obligations. The Treaty on European Union keeps the same title and the Treaty establishing the European Community becomes the Treaty on the Functioning of the European Union: "*The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as "the Treaties"). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community*".¹⁷

It finally abolishes the classical three pillar structure as well as distinction on EC law and EU law and gave to European Union legal personality: "*This Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded. These two Treaties, which have the same legal value, shall be referred to as "the Treaties"*".¹⁸ Legal personality will practically allow the EU to act with one voice under international law and to conclude the treaties as well to have a seat in international organisations.

b) Division of the competences between EU and the Member States

Art. 2 of the TFEU provides for three types of competences of the EU:

- exclusive competences (defined by Art. 3 of the TFEU);
- competences, which EU shares with the Member States. The Member States may take measures as long and insofar as the EU has not yet taken its measures. (Art. 4 of the TFEU provides for large list of competences, such as areas of environment, internal market and others, which is not an exhaustive one);
- EU may carry out actions to support, coordinate or supplement the actions of the Member States (article 6 of the TFEU, including such areas as the tourism, culture, and others).

Therefore the EU and Member States as defined after changes brought by the Treaty of Lisbon, have the following competences:

¹⁷ The Lisbon Treaty (Treaty on European Union - consolidated versions) - Title I – Common provisions, Para. 3. Article 1.

¹⁸ The Lisbon Treaty (Treaty on the Functioning of the European Union - consolidated versions) - Part I – Principles, Para.3, Article 1.

Exclusive competence

There are five areas in which EU Member States have agreed that the EU alone may pass new legislation:

- the customs union;
- the establishing of the competition rules;
- monetary policy for those countries which have the Euro;
- the conservation of marine biological resources under the common fisheries policy and
- common commercial policy.

Also, the EU has exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the EU or is necessary to enable the EU to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Shared competence

There are 11 areas where the EU and the Member States will share responsibility to pass new legislation, with the EU focusing on the cross border effects and the importance of minimum standards (such as on the environment) within a single market, if trade barriers are to be removed.

Shared competence between the EU and the Member States applies in the following principal areas:

- internal market;
- social policy;
- economic, social and territorial cohesion;
- agriculture and fisheries excluding the conservation of marine biological resources;
- environment;
- consumer protection;
- transport;
- trans-European networks;
- energy;
- common safety in relation to public health and
- area of freedom, security and justice.

In the areas of research, technological development and space, the EU shall have competence to carry out activities, in particular to define and implement programmes. Also in the areas of development cooperation and humanitarian aid, the EU shall have competence to carry out activities and conduct a common policy. However, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Co-ordination competence

The Member States will coordinate their economic and employment policies with one another to minimize distortions or disruptions in the single market. This applies even to those countries outside the euro - zone. The Union may take initiatives to ensure coordination of Member States' social policies.

Support competence

The EU will support, coordinate and supplement EU countries' activities in the following areas, including:

- protection and improvement in human health;
- tourism;
- industry;
- culture;
- education, vocational training, youth and sport;
- civil protection and
- administrative cooperation.

c) Protection of the Fundamental Rights and Freedoms and the Charter of Fundamental Rights of the European Union

The obligation of the protection of fundamental rights by the EU (then –EC law) was raised by the European Court of Justice more than 30 years ago. Originally established as the principle of EU law by the case law of the Court, it later was further mentioned in the TEU. Finally during the negotiations of the Treaty of Nice EU adopted the Charter of Fundamental Rights of the European Union.

The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of December 7, 2000 (as adapted to the changes made by the Treaty of Lisbon at Strasbourg, on December 12, 2007), has the same legal value as the Treaties. Article 6 of the TEU provides for the detailed explanation on the way, in which the Charter shall apply:

- The Charter shall have the same legal value as the EU Founding Treaties.
- The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
- The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
- The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Founding Treaties.
- Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result

from the constitutional traditions common to the Member States, shall constitute general principles of the EU law.

d) Abolition of the second and third pillar of EU and EC law

The EU legal system still contains 2 types of EU legal acts related to the issues of the so-called second pillar (acts adopted within the framework of TEU provisions on Common Foreign and Security Policy) and the third pillar (TEU provisions on Police and judicial cooperation in criminal matters).

Until the Treaty of Lisbon the special EU legal acts were adopted within these two frameworks. In order to achieve goals of the Common Foreign and Security Policy, EU institutions could use the acts defined in the Article 25 of the Treaty on European Union. The Article defined the general guidelines, adopting decisions and making the strategies which provide the objectives, duration and resources an important common interest of Common Foreign and Security Policy.

In the area of Police and judicial cooperation in criminal matters Member States could conclude special conventions, adopt joint positions, joint actions, resolutions, recommendations, decisions and later on-framework decisions. The framework decisions is a special type of EU legal acts, which is very similar to Directives but used only for legal harmonisation in the area of criminal law and do not have direct effect.

e) The introduction of legislative and non-legislative procedures

Article 288 of the TFEU, provides for that the same three types of binding legal instruments (regulations, Directives and decisions) in the future, will be available at three different levels of law-making: for 'true' legislation, for the adoption of delegated acts and for the adoption of implementing acts. Their position at one of these three levels will be indicated in the formal denomination of the EU legal act¹⁹.

Since the entry into force of the Treaty of Lisbon the TFEU provides such terms as the legislative acts and non-legislative acts:

a) Article 289 TFEU provides for the 'ordinary legislative procedure' and definition of a 'legislative' act. The ordinary legislative procedure (previously known as the co-decision procedure), shall consist in the joint adoption by the European Parliament and the Council of a regulation, Directive or decision on a proposal from the European Commission. Adoption of a regulation, Directive or decision by the European Parliament with the participation of the Council or by the Council with the participation of the Parliament shall constitute a special legislative procedure, which may only be employed in the specific cases provided for by the Treaties. In specific cases provided for by the Treaties, notably in the area of Common Foreign and Security Policy, the initiative for the adoption of legislative

¹⁹ B.de Witte, „Legal Instruments and Law-Making in the Lisbon Treaty”, S. Griller, J. Ziller (eds.), „The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?”, 2008 Springer-Verlag Wien, p.92.

acts may come from a source other than the European Commission²⁰.

b) Article 290 of the TFEU provides for that EU legislative act may provide for the delegation of the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act to the European Commission. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power. Such acts shall contain in their titles the adjective 'delegated'.

Article 291 TFEU provides for the conditions of adoption of the so-called 'implementing' EU acts. It stipulates that Member States shall adopt all measures of national law necessary to implement legally binding EU acts. Where uniform conditions for implementing legally binding EU acts are needed, those acts shall confer implementing powers on the European Commission or, in duly justified specific cases and in accordance with the cases provided for in the Treaty on European Union - on the Council. These acts shall contain the word „implementing” in their titles. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by EU Member States of the Commission's exercise of implementing powers.

3.2.3. The general principles of European Union law

The general principles of EU law can be established either by case law of the European Court of Justice or by the Founding Treaties. General principles are an important part of any legal order, and their practical function is to allow the resolution of disputes for which there is no specific written legal rules.

In the EU law the Court of Justice and Founding Treaties have so far identified a number of general principles, among which are important: protection of fundamental rights of EU citizens (as discussed above), legal certainty and protection of legitimate expectations, which, for example, include the prohibition of retroactivity, prohibition of discrimination, the principle of proportionality and others. There is no exhaustive list of such principles in the case law of the Court of Justice or Founding Treaties.

Four examples of well known principles can be given.

3.2.3.1. Supremacy (primacy) of EU law

The principle of supremacy or primacy of EU law means that EU law takes precedence over any national law of any EU Member State which provisions are contrary to it. In 1964, the Costa judgment established the primacy of Community

²⁰ R.Crowe, „The Treaty of Lisbon: A Revised Legal Framework for the Organisation and Functioning of the European Union”, ERA Forum (2008) 9:163–208, pp.187-188.

law over domestic law. In that case, an Italian court had asked the Court of Justice whether the Italian law on nationalisation of the production and distribution of electrical energy was compatible with certain rules in the EEC Treaty. The Court introduced the doctrine of the primacy of Community law, basing it on the specific nature of the Community legal order, which is to be uniformly applied in all the Member States.

According to this principle in cases where divergence occurs between national and EU law, the latter applies.

The basic rule is that the EU primary and secondary legislation shall be deemed as the part of the legal systems of the Member States (depending on the state legal systems which could be different due to the various aspects of the monist and dualist approach) and must be applied also by their courts and competent authorities.

EU law takes precedence, if the following conditions altogether are fulfilled:

- There is controversy between EU law and the law of a Member State in question;
- The EU legislation has been adopted legitimately and is applicable;
- The Member States have not made reservations to the particular provisions of EU law at issue.

In the event that the Court of Justice declared domestic law incompatible with EU law (Case 106/77 Simmenthal) does not follow the nullification of such laws, but the state has an obligation to change the problematic provisions of the law (case 10 (22/97) Minister della Finanza v In. Co.Ge.). In the meantime, the domestic courts should apply the law in question, i.e. they have a duty of interpretation of domestic law in accordance with the meaning and spirit of the provisions of EU law (Case 14/83 Von Colson).

In addition to the case law of the European Court of Justice, which established and re-affirmed this principle in a number of judgments, the Treaty of Lisbon has Declaration concerning primacy (Declaration nr. 17) attached to it, which refers to the abovementioned case law, thus reaffirming the importance of this principle.

3.2.3.2. Principle of Proportionality

EU legal measures shall comply with this principle in order to ensure that their restrictive effect is proportional and justified by their contents by corresponding to three main criteria:

The legal measure should be:

- (a) appropriate in order to achieve the intended goal;
- (b) necessary to achieve the intended goal;
- (c) the least restrictive measure with which to achieve the goal.

3.2.3.3. Direct effect of the EU law

In its case-law (starting with Van Gend & Loos in 1963), the Court introduced the principle of the direct effect of Community law in the Member States, which now enables European citizens to rely directly on rules of European Union law before their national courts. The transport company Van Gend & Loos had imported goods from Germany to the Netherlands and had to pay customs duties which it considered to be incompatible with the rule in the EEC Treaty prohibiting increases in customs duties in trade between Member States. The action raised the question of the conflict between national legislation and the provisions of the EEC Treaty. The Court decided the question referred by a Netherlands court by stating the doctrine of direct effect, thus conferring on the transport company a direct guarantee of its rights under Community law before the national court.

3.2.3.4. Liability of EU Member States

In 1991, in Francovich and Others, the Court developed the principle of liability of a Member State to individuals for damage caused to them by a breach of Community law by that State. Since 1991, European citizens have therefore been able to bring an action for damages against a State which infringes a Community rule. Two Italian citizens who were owed pay by their insolvent employers had brought actions for a declaration that the Italian State had failed to transpose Community provisions protecting employees in the event of their employers' insolvency. On a reference from an Italian court, the Court stated that the Directive in question was designed to confer on individuals rights which they had been denied as a result of the failure to act of the State which had not implemented the Directive. The Court thus opened up the possibility of an action for damages against the State itself.

3.2.3.5. Direct applicability of EU law

EU Primary legislation is directly applicable in the EU Members States and is superior to national legislation. The directly applicable provisions may be also found in the EU secondary legislation (usually identified by the case of the Court of Justice). Direct applicability means that the applicable provisions may be invoked before a national court and such a provision is enforceable without reservations.

The following principles have to be observed with regard to direct applicability:

- 1) In the interpretation of national law one should focus rather on its compatibility than incompatibility with EU law, meaning that national law must be construed in compliance with EU law. This avoids many controversies, also between secondary legislation (the principle of interpreting national law according to EU law);
- 2) In the case of divergence between national and EU law the national authorities have the obligation to set national legislation aside and apply EU law. This could mean that the national courts must impose prohibitions and

give orders pertaining to activities in breach of EU law and approve amendments where EU law is defaulted (the principle of supremacy of EU law);

- 3) Where a person acts in accordance with directly applicable provisions, he shall not be subject to administrative or criminal liability, even if prescribed by national law;
- 4) The Member States must abolish such national provisions, which are in contravention of directly applicable legislation;
- 5) In some cases direct applicability has resulted in a situation where the Member States are unable to further their legislation in a certain field. This is known as "impeding effect".

EU Member States do not need and with some exceptions are prohibited from the transposition of the provisions of Regulations in their legal system, because of their direct applicability ensures automatic compliance domestic law with the EU law. But as it was mentioned in sub-chapter 3.3.1.1., "Regulations" of this Methodology, countries aspiring to EU membership, including Moldova, need to transpose the regulations in its legal system by passing legislation with similar or the same content. This stems from the fact that these countries are not part of the legal system of the EU.

3.3. SECONDARY SOURCES OF EU LAW

The secondary sources of EU law are the legal acts of the EU and international agreements that regulate the mutual relations of EU and other international organizations or third countries. The jurisprudence of the Court of Justice of the European Union is also a significant part of the EU law sources.

3.3.1. The EU legal acts

The largest group of EU legal rules is contained in the acts adopted by the institutions of the EU on the basis of powers which they are awarded by the Treaties. Article 288 of the TFEU provides for the EU institutions adopt regulations, Directives, decisions, recommendations and opinions, in order to exercise the Union's competences.

3.3.1.1. Regulations ("Verordnung" in German, "Réglement" in French)²¹

A **Regulation** has general application and is binding in its entirety and directly applicable in all Member State. Regulations are addressed to all Member States. The Member States are not entitled to apply the regulation only partially or choose only part of the provisions for application in order to prevent the enactment of adverse legislation. Neither are they entitled to introduce provisions and practices in national law, which would make it possible not to apply the

²¹ Article 288(2) of the TFEU.

regulation.

As mentioned above, the Court of Justice's case law explicitly prohibits the transposition of provisions of Regulations unless the authorization to transpose is explicitly provided in the mentioned Regulation or Court of Justice's case law.

Regulations (with few exceptions, which are described below), cannot be transposed in the legal systems of EC Member States, but are to be transposed in the legal system of the Moldova (as country having contractual obligations in the form of Partnership, and, in the future - as the Associated or EU Candidate country) in order to ensure that the requirements of EU law are properly implemented in Moldova. Such Moldovan legal acts, which transpose the regulations, would need to be abolished upon the accession of the country to the European Union.

3.3.1.2. Directives (“Richtlinie” in German, “Directive” in French)²²

A **Directive** is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods of approximation.

A Directive is (together with the regulation), the most important legal instrument of the EU. It represents a compromise between the need for uniform legislation within the Union and the need to retain the greater diversity of possible legal systems of member states. The aim of the Directives is approximation of laws, not equal laws, as is the case with the regulations.

From the point of legal harmonisation process, the Directives are the most important instrument of EU law. The first reason is the very nature of the Directives and the other is the fact that the largest number of secondary sources of EU law was passed in the form of Directives. Hence it can be assumed that most of the domestic legal-acts shall be harmonize exactly with the solutions from the Directives.

Direct applicability of the provisions of Directives

As a general rule, Directives are not directly applicable. Unlike the directly applicable regulations the Directive has to be “incorporated” into national legislation even if it's directly applicable.

The Court of Justice has also introduced partial direct applicability. This means that with regard to the government and other public institutions individuals can rely on the rights stemming from the provisions of the Directive even if the Directive has not been incorporated into national legislation or it has been incorporated inaccurately. Direct applicability terminates, when the Directive is incorporated into national law.

A Directive is directly applicable, if:

- The Member State has not incorporated the Directive into the national legal

²² Article 288(3) of the TFEU.

system in time;

- As to its substance, the Directive is sufficiently clear, unconditional and precise;
- The Directive confers rights upon the nationals of the Member States.

Direct applicability is only vertical, i.e. between the state and the individual and legal persons. Natural and legal persons can call to the rights given them by the Directive and sue the state (Case 6/90 Francovich and Bonifaci v Italy, 1991) or against the public companies, i.e. companies owned by the state, or who have powers of public importance. The state risks running lawsuit for damages due to the failure of its administration to implement the Directive. Horizontal effects, among other legal and natural persons, on this basis, are not possible.

3.3.1.3. Decisions²³

A **Decision** is one of the three binding instruments provided by secondary EU legislation. A decision is binding on the person or entity to which it is addressed. Decisions may be addressed to member states or individuals. The Council of the European Union can delegate power to make decisions to the European Commission. Common uses of decisions involve the Commission ruling on proposed mergers, and day-to-day agricultural matters (e.g. setting standard prices for vegetables).

On the basis of the Court of Justice's case law, decisions may have direct effect, that is to say they may be invoked by individuals before national courts.

Finally it shall be stressed that although the title "decision" may seem indicating one type of EU legal acts, there is a difference in their contents and legal basis. Before the Treaty of Lisbon there were different types of the decisions, which were issued under provisions of the Founding Treaties. Now the pillar system is abolished by the Treaty of Lisbon, but there is still a specific difference in the procedure of the adoption of decisions in the issues of Common Foreign and Security Policy and in the rest of the areas of EU law.

3.3.1.4. Recommendations and opinions²⁴

Recommendations have no binding force. They differ from regulations, Directives and decisions, in that they are not binding for Member States. Though without legal force, they do have a political weight. The Recommendation is an instrument of indirect action aiming at preparation of legislation in Member States, differing from the Directive only by the absence of obligatory power.

The Council adopts recommendations. It shall act on a proposal from the Commission in all cases where the Treaties provide that it shall adopt acts on a proposal from the Commission. It will act unanimously in those areas in which unanimity is required for the adoption of a Union act. The Commission, and the

²³ Article 288(4) of the TFEU

²⁴ Article 288(5) of the TFEU

European Central Bank in the specific cases provided for in the Treaties, can also adopt recommendations.

The founding Treaties provide possibilities for EU institutions to issue **the opinions** in the area of their competence (e.g. the European Central Bank or for the European Commission). Unless explicitly stated in the Founding Treaties or the Court of Justice's case law, these opinions, similarly to the recommendations, are not legally binding.

3.3.2. *International agreements*

In accordance with the Article 216 of the TFEU, the EU may conclude agreements with one or more third countries or international organisations where the Treaty so provides or where the conclusion of such agreements is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaty, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. The agreements concluded by the EU are binding upon the institutions of the EU and on its Member States.

The EU 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. Partnership and Cooperation Agreement concluded with Moldova, as well as future Association Agreement, is an example.

In accordance with the Article 218 (2) of the TFEU the Council will authorise the opening of negotiations, adopt negotiating Directives, authorise the signing of agreements and conclude them.

A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

3.3.3. *Case law of the Court of Justice of the European Union*

3.3.4.1. *Rulings of the Court of Justice of the European Union as a source of law and their relationship with national legislation and case law of the national courts.*

Since the establishment of the Court of Justice of the European Communities (since the entry into force of the Treaty of Lisbon its name has been changed to "the Court of Justice of the European Union, referred further as the Court of Justice) in 1952. Its mission is to ensure that "the law is observed" "in the interpretation and application" of the Treaties.

As part of that mission, the Court of Justice:

- Reviews the legality of the acts of the institutions of the European Union;

- Ensures that the Member States comply with obligations under the Treaties and
- Interprets European Union law at the request of the national courts and tribunals.

The Court thus constitutes the judicial authority of the European Union and, in cooperation with the courts and tribunals of the Member States, it ensures the uniform application and interpretation of European Union law.

The Court of Justice consists of three courts: the Court of Justice, the General Court (created in 1988) and the Civil Service Tribunal (created in 2004). Since their establishment, approximately 15 000 judgments have been delivered by the three courts.

3.3.4.2. Preliminary rulings of the Court of Justice of the European Union

The courts of EU Member States must apply a uniform approach to interpreting EU law and especially in the process of application of the national legislation, which provisions was harmonised with the EU law requirements. They also need ensure that such EU secondary law sources as the regulations are applied directly, similarly to the way the national legal acts of the Member States apply.

In this regard it shall be mentioned that in accordance with Article 267 of the TFEU the Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court²⁵.

While elaborating the Moldovan draft normative acts, which transpose the provisions of EU law, legal drafters should pay proper attention to the jurisprudence of the Court of Justice on the validity and interpretation of the transposed EU legal acts. For example the Court of Justice may decide that article of Directive at issue is invalid and therefore the legal drafters shall not transpose it into the national legislation. The compliance of the provisions of Moldovan draft normative act with the case law of the Court of Justice.

²⁵ The TFEU has a number of detailed provisions on the activity of the Court of Justice, which are not relevant for Moldovan legal drafters and therefore are excluded from the scope of this Methodology.

3.4. EU “SOFT LAW”

Besides presented primary and secondary sources of EU law we have to mention also the “soft law”.

The definition of the EU soft law is not provided in the Treaties. A number of definitions were proposed by the legal scientists and one may recommend to refer to the EU soft law on the basis of the following definition:

„Rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects”²⁶.

For example until entry into force of the Treaty of Lisbon the European Commission exercised the powers conferred on it by the Council for the implementation of rules laid down by the latter” (as it was provided by Article 211 (4) of the TEC). In particular areas of law it has used soft law instruments (mainly notices and guidelines) in order to communicate its approach on a particular issue of policy, that has not been regulated by EU “hard law” instruments as Directives, regulations or decisions until now. Such types of instruments as “notices” or “guidelines” were not mentioned in the TEC at all.

There is no official classification of the „soft law instruments” in the Treaties. Therefore the classification proposed below is developed by the legal scientists in the area of EU law based on the practice of EU institutions and the case law of the Court of Justice²⁷:

1) Preparatory Instruments:

- the Green Papers;
- the White Papers;
- Action Programmes.

2) Informative instruments (communications).

3) Interpretative and decisional instruments (mostly communications, which provide for the administrative rules in the issues of EU Law, interpretative communications and notices of the Commission, decisional guidelines, codes and frameworks).

4) Formal and non-formal steering instruments (recommendations, opinions, resolutions, codes of conduct, conclusions, declarations, and other documents).

5) Commission recommendations, Council recommendations, Commission opinions, Council conclusions, Council declarations and EU Member States’ declarations, Joint Declarations and Inter-Institutional Agreements, Council

²⁶ L.Senden, Modern Studies in European Law, Volume 1: Soft Law in European Community Law, Hart Publishing, 2004., p.112

²⁷ L.Senden, Modern Studies in European Law, Volume 1: Soft Law in European Community Law, Hart Publishing, 2004., p.126-216.

resolutions, Council and Commission Codes of conduct or practice and mixed conclusions, declarations and resolutions.

Although the majority of “soft law acts” are not explicitly mentioned in the Article 288 of the TFEU, the same article does not preclude their adoption in the future and it can be assumed that their use of such EU institutions as European Commission and the Council will be continued. A significant amount of these acts, which were adopted in the “pre-Lisbon” period is deemed to be in force and shall be taken into account by the Moldovan legal drafters during the elaboration of the draft normative acts.

CHAPTER IV. METHODS OF LAW APPROXIMATION

4.1. APPLICATION OF EU LAW IN MEMBER STATES

The process of approximation includes methods and techniques for transposing the solutions of EU legislation into national law, their incorporation or embedding into national legal systems and the process of implementation, which is individually manifested through realisation of individual rights or assumption of concrete obligations.

In accordance with Article 4(3) of the Treaty on European Union as revised by the Treaty of Lisbon, the EU Member States take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the EU institutions of the Union. They also facilitate the achievement of the EU tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

4.1.1. Law approximation

Law Approximation is the alignment of laws, regulations or administrative provisions of the Member States with EU law. The aim of approximation is to regulate social relations in a uniform way, or as far as possible in a similar way, at the EU level.

In simpler words, they harmonise national provisions by transposing EU provisions into national law.

Member States of the European Union (as well as countries in the accession process) have in most cases free choice in terms of methods and techniques of approximation of law because from their constitutional and legal system depends on whether the harmonisation is done by law or bylaws or combination. This rule was confirmed by the judgment of the Court of Justice of the EU in the case 96/81 Commission v. Netherlands: "It is true that each Member State is free to delegate powers to its domestic authorities as it considers fit and to implement the directive by means of measures adopted by regional and local authorities." That does not release the state from the obligation to implement the respective Directive by means of the legally binding national normative acts.

The differences between the laws of the Member States can be overcome by:

- Replacing national legislation by EU legislation where the uniform arrangements in a specific area must apply throughout EU (e.g. the common agriculture policy), or
- Harmonising national legislation by transposing EU provisions into national law in order to make the same essential conditions in all the Member States for the achievement the Community objectives (e.g. with the aim of improving the functioning of the common market).

The Member States are not only obliged to harmonise laws, but also to ensure their proper implementation by creating and developing an adequate and appropriate administrative and judicial structure.

4.1.2. Types of legal approximation

There are three types of legal approximation in the EU:

- Unification - national legislation has been replaced by EU legislation in a certain field where the EU has full competence. Regulations are the main instruments used for unification;
- Harmonisation - national legislation complies with objectives provided for in EU acts. Directives are the main instruments for harmonisation;
- Co-ordination - some pieces of EU legislation provide for the coordination of activities and the exchange of information, as well as for the conclusion of agreements between Member States on particular topics.

As already stated, in EU 'approximation' means the whole process and is a wider term than 'harmonisation' which represents only transposition of EU acts into domestic legal order.

4.1.3. Law harmonization – theoretical overview of some methods and techniques in EU Member States

4.1.3.1. Maximum and minimum harmonization

If a piece of law (usually a Directive, but also a regulation on occasion), is described as maximum harmonisation, that means that national law may not exceed the terms of the legislation. In practice, this prohibits gold-plating of EU legislation when it is transposed into national law. Traditionally it was fairly uncommon for EU legislation to be drafted on this basis.

On the other hand, if a piece of law (usually a Directive, but also a regulation on occasion), is described as minimum harmonisation, that means that it sets a threshold which national legislation must meet. However, national law may exceed the terms of the legislation if desired. It is usually easier to reach agreement on legislation drafted on this basis, as it allows existing national legislation on issues such as consumer protection or the environment to remain in place. Therefore, most European legislation has been implemented on this basis.

In more recent years, however, the burden of EU law has led to calls for deregulation, and accusations that some member states still indulge in protectionism when implementing Directives into national law through gold-plating. Therefore, a growing minority of EU law contains maximum harmonisation provisions. It is quite common for a Directive or recommendation to consist of a mixture of maximum harmonisation and minimum harmonisation clauses.

Member States are obliged to incorporate requirements of EU legal acts into their domestic legislation within a certain time period. When the legislation in question

is a Directive, this is called transposition. Regulations and Decisions enter into force directly without need for transposition and without any national policy freedom, but often will need changes to national legislation to give effect to them. Most of this section applies to transposition of Directives – where wider matters are concerned; the term “incorporation” is used.

There are several preconditions for transposing the provisions of EU law into the national legislation. In its case law the Court of Justice has developed a number of requirements concerning this, aimed in particular at ensuring the effectiveness of the Directives and guaranteeing legal certainty. These requirements can be seen as conditions when transposing European legislation. The Court of Justice has set out specifications about the character of the transposing regulations.

National authorities must:

- (1) Choose the most effective form of measures,
- (2) Use legally binding measures and
- (3) Ensure publicity for implementing measures;

Stated that transposition measures must ensure the actual and full application of EC legislation in a specific and clear way;

Determined that where a Directive is aimed at creating rights for individuals these should be able to ascertain the full extent of these rights from the national provisions and be able to invoke them before the national courts;

Required that transposing measures use the same form of instrument for transposing Directives as used for the same issue in that Member State.

In spite of these preconditions, Member States still face problems during their transposition process especially relating to correct transposition, timely transposition and gold plating (that is going beyond the EU requirements). The problems are primarily a result of the content and quality of the EU legislation and of the incorporation into national administrative structures and legal systems that have developed over time.

4.1.3.2. Gold-plating

Gold-plating refers to the practice of national bodies exceeding the terms of Directives when implementing them into national law. Option is to extend the scope, adding in some way to Directive requirements or using domestic wider terms instead of those used in EU act.

Such stricter national measures might lead to new barriers to trade and the freedom to provide services.

As a consequence in recent years the European Commission has supported more measures of EU law, which applied the maximum harmonisation approach thus effectively precluding EU Member States from the possibilities to use the gold-plating.

4.1.3.3. Method of selective (optional) harmonisation

This method is used in cases where the Directive leaves the freedom of entrepreneurs, such as manufacturers, to produce and put into circulation goods on the harmonised rules, which are defined in the Directives, or under domestic legislations. The method of selection is used in Directive of "the old approach", which often leaves the manufacturers the right to follow the agreed rules of EU production standards, which ensure the free circulation of their products, but also the ability to follow domestic legislations. However, in the later case, these products are not guaranteed free circulation.

4.1.3.4. Partial harmonisation

This method is used for approximation of domestic legislations that apply only to cross-border trade relations.

As in the case of the selective harmonisation, the Member States was left free to adopt the legislation that is applied in internal trade within the EU, or other applicable in domestic traffic. An example of this type of the approximation is Directive of the Council 64/433 on conditions that must satisfy the fresh meat in the trade within the EU and cross-border trade.

4.1.3.5. The method of alternative harmonisation

This method is used in cases where the Directive left to EU Member States the freedom to choose different offered solutions for its implementation.

For example: in the Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community a choice for a Member State was left between achieving quality objectives or emission standards compliance.

4.1.3.6. Harmonisation through mutual recognition of domestic legislations

This method of harmonisation was defined by the Court of Justice in its judgments in cases of Dassonville and Cassis de Dijon. The concept of healthy and safe products should not be much different between the EU Member States. Product that is legally in the market in one Member State could be also in the markets of other Member States except in specifically stated exceptions. Strictly speaking, this is not a method of harmonisation of law, but a means of removing obstacles to free trade. However, it may speed up the harmonisation of domestic regulations in order to achieve greater product safety.

4.1.3.7. Method of mutual recognition of rights of control

This method of harmonisation is limited to recognizing the rights of each Member State to another Member State to check the fulfilment of certain conditions. An example of "mutual recognition of the right to control" can be provided by means

of Council Directive 88/320/EEC of 9 June 1988 on the inspection and verification of Good Laboratory Practice (GLP). Directive provides for that the results of laboratory inspections and study audits on GLP compliance carried out by a Member State shall be binding on the other Member States.

The principle of mutual recognition means that not all sectors need to be fully harmonised and that, in these sectors, harmonisation may be restricted to the 'essential requirements'.

4.1.3.8. Harmonisation of the method of referral

This legal technique refers to the implementation of and compliance with the rules contained in the appropriate Directive, while other matters are in accordance with the norms of relevant institutions, such as Standards Institute. This technique is recommended as part of measures of "new approach Directives", because the Directives of the new approach establish basic technical security features, while other details refer to technical standards.

4.2. SOME PRACTICAL ISSUES

Drafting of a certain normative act in order to transpose the EU law requirements requires team work of lawyers, translators and sectoral experts in the specific policy area.

A number of principles shall be remembered before and during the legal drafting for legal harmonization purposes:

- 1) State has a choice whether to include the provisions of a Directive into the existing legislation or to adopt a new legal act
- 2) The choice of type of the national normative act, by which a Directive shall be transposed, is dependant on the constitutional order and hierarchy of legal acts of the state in question,
- 3) If a Directive intends to grant the certain rights to the individuals, the provisions of the national legal act shall grant these rights in very clear manner, and these individuals shall be able to rely on these rights, including the protection by the domestic courts.

The same rules apply to obligations of a state or individual.

- 4) In principle the state always has the free choice between different legal approximation techniques due to the following reasons:

- the content of the Directives is diverse,
- they regulate too many areas and lay down provisions of different degree of details and clarity, which makes the choice by a state of the uniform approach to legal technique almost impossible.

5) While transposing the Directive its objective shall be achieved fully, with clarity and legal certainty. However except in some cases usually directly indicated in EU legal act:

- no obligation exists to always ensure the literal transposition of its provisions,
- no requirement exists that the transposing national legal act shall follow the structure of EU legal act,
- no exists requirement as to the number of transposing national legal acts per one EU legal act.

The table of concordance should indicate clearly the level of compliance for with EU legal act as well as future plans for full approximation where it is possible (please see the Annex I to this Methodology for the full set of guidelines on drafting the Tables of Concordance).

Beside the important principles of the legislative drafting techniques which state that the acts shall be drafted clearly, simply and precisely, important aspect of these techniques is related to the terminology which has to be used when approximating the national legislation to EU law.

Article 19 c) and e) of the Law on Legislative acts emphasizes that the terminology shall be compatible with the one used by the EU law, constant and uniform with the legislation in force and EU law. Point 7 of the GD 1345 also states that when drafting a national act the EU law terminology should be respected.

The terminology in the Moldovan legislation should, as far as possible, be based on the language use of EU legislation. It might happen that certain terms are already defined by the national legislation. If this is the case, the authority should check first if the terms have the same meaning; if yes, than it has to reflect the article from the national act in the table of concordance and the degree of compatibility; if it is partially in compliance, to indicate in the Table of concordance the degree of compliance and in the last column to indicate the future steps for full approximation of the respective article; if the same term is used, but different meaning, the authority should not avoid introducing in the draft the definition in the meaning of the draft in question. The table of concordance must reflect all the similar existing terms or definitions contained in the national legislation by which a certain term is considered transposed, in order to avoid overlapping in regulation of the same issues. Also, approximation of the national legislation to the EU law, normally, supposes introducing into legislation new terms and definitions contained in the EU acts. At the same time, the author of the Moldovan normative act should pursue the consistency of the definitions in the national legislation.

Specific attention must be put on the following terminology (Member State, Third country, Commission, Council, Standing Committee, etc) which cannot be copy-paste but replaced with proper Moldovan terms. Although the Law on Legislative acts emphasizes that the terminology should be compatible with the one used in EU law and Article 7 of the GD No 1345 request that EU terminology is respected, this cannot be always the case. In Tables of Concordance these differences in terminology must be explained.

In EU law there are provisions on communications with EU Commission or other member states and harmonisation in those cases varies from case to case.

As example: If EU act request that EU Commission or Member States must be informed about certain actions deriving from a Directive, it is decision of the state if such an article will be transposed into national legislation or an administrative decision is enough.

It would be recommended that such requests are transposed in the national law with the special transitional article on entering into force with the date of accession.

Special attention shall be taken that drafting should be appropriate to the type of act concerned.

Since laws are binding in the whole territory of Moldova and are directly applicable it should be drafted in such a way that the addressees have no doubts as to the rights and obligations resulting from them. Bylaws should be used only when legal background exists in the higher act and they cannot introduce new rights and obligations as well as penalties and sanctions. Bylaws can only define in details what is already provided for in laws. National legislation, including all bylaws, shall be also published in Official Monitor.

If implementation of one EU legal act falls within the scope of competences of several ministries and central public authorities, their proper cooperation in legal drafting process shall be ensured, including the cooperation in the preparation of the table of concordance for the draft normative act.

When harmonising with the provisions of EU law, it is not enough to transpose the provisions of EU legal act into the national legislation. The new national normative act shall be coherent with the domestic legal system. If necessary other laws, which are in force, shall be amended in order to ensure the absence of conflict of norms of the older and new legislation. Transitional periods²⁸ are important during drafting because what is stipulated for EU Member States is not always possible to immediately implement in Moldova. Time is needed also to establish necessary institutions to be operational. Some environmental requests could namely have as a consequence the closing of a factory (and having many workers unemployed) or invest great amount in cleaning systems to be fully compatible with EU. The transitional periods of the Moldovan normative acts shall also take into account the obligations arising from the bilateral agreements concluded between Moldova and European Union.

Therefore transitional periods could be used for giving later effect to certain articles of the legal act. Transitional article could look like: *“Article 12 of this law is entering into force on January 1, 2015 until then the current system will be valid”*.

Transitional solutions like: *“Article 12 of this law is entering into force with the date of Accession of the Republic of Moldova to the European Union”*, should be avoided at least till then when Moldova will enter accession negotiations because they could be recognised as being contrary to the Constitution and rules of legal

²⁸ Article 14 b) in Regulation approved by GD No.1345

certainty as providing some future and uncertain legal regulations. When negotiations of Moldova and EU for EU membership will be in progress such solutions could be more suitable for implementation in Moldovan legislation.

The main rule for drafting national legislation (laws or bylaws), must be compatibility with EU legislation, having the character of a normative act, being efficient and therefore possible to be implemented in practice.²⁹

²⁹ Article 7 c) in Regulation approved by GD No.1345

CHAPTER V. PRACTICAL GUIDELINES FOR THE METHODS TO BE USED IN LAW APPROXIMATION IN MOLDOVA

After completing an overview of law approximation in EU Member States, this part is dealing with possible approximation methods for Moldova taking into account that Moldova is not an EU Member State and there is no direct applicability of regulations which therefore as with Directives have to be transposed into domestic legislation.

5.1. THE APPLICATION OF THE MOLDOVAN LAW DRAFTING TECHNIQUES IN THE APPROXIMATION OF EU LAW

Although Moldovan Law drafting techniques do not exist in the form of written guidelines, there are some basic principles in the following legal acts regulating law drafting which are useful tools during the process of law approximation: Law on Legislative Acts No. 780-XV as of December 27, 2001 (with the subsequent amendments in 2006), Law on Normative Acts of the Government and Other Central and Local Public Administration Authorities No. 317-XV of July 18, 2003 (with the subsequent amendments) and Government Decision No. 1345 of November 24, 2006 regulating the Approximation Mechanism for National legislation with the Community Acquis Communautaire.

Good legislative drafting namely means the ability to identify the legal objectives and meet them fully by expressing the necessary legal rights and obligations in an accurate clear manner, while also ensuring that the draft complies with superior norms and that is effectively and consistently relates to existing legal norms.

If legal drafts are written just to satisfy authorities or to fulfil legislative plan then bad drafting could have long term consequences for the state due to chaotic legal system and problems for the end users.

As defined in paragraph 2. of the Regulation approved by GD 1345 Law approximation is a continuous process with the aim to ensure compatibility of Moldovan legal acts with EU legislation in a way that EU legislation through harmonisation process becomes part of the national legal system. It is clear that solutions and definitions from EU legal acts through harmonisation becomes part of national legislation and published in Official Monitor represent the mirror of Moldovan legal system. Therefore, Government Decision No. 1345 requests that in the process of law approximation normative acts should be written in accordance with the national legislative techniques³⁰.

Despite this clear provision of the article 7.a) in Regulation approved by GD No.1345 that draft must be in line with national legislative techniques as provided in the Law No. 780-XV and Law No 317-XV there must exist certain flexibility of a legal drafter who should have in mind the possibility of proper law implementation. During drafting there will be problems with new definitions and solutions which are new for Moldova and there is only way that Moldovan drafting adapt to EU requirements because EU will not adapt its legislation to Moldovan traditions and

³⁰ Article 7 a) in Regulation approved by GD No.1345

principles. Ways of adapting the current Moldovan law making processes to facilitate the process of approximation should be considered

Law on Legislative Acts is setting main principles of law drafting³¹ stating that:

- (1) The legislative act has to comply with the provisions of international treaties which the Republic of Moldova is part to, to international law principles and norms which are unanimously recognized, inclusively with the community legislation.
- (2) The legislative act has to comply with the constitutional provisions and be in conformity with the existent legal framework, with the legislation codification and unification system.
- (3) During legislative act development, adoption and enforcement the following principles need to be observed:
 - a) opportunity, coherence, consistency and equability between the concurrent norms;
 - b) consistency, stability and predictability of legal norms;
 - c) transparency, publicity and accessibility.

The Constitution is hierarchically the highest legal act and all laws and bylaws have to be in line with the Constitution. Sooner or later also Moldova could be faced with problems when some approximated legislation could contravene the Constitution. An example of such was the prohibition by the Constitution of purchasing real estate for foreigners in one new EU member state before accession and this resulted in Constitutional change. When there is a conflict of EU legal act with Moldova Constitution there are only two possibilities for Moldova – to change a Constitution or not harmonise with the EU legal act.

Before accession to EU, Moldova will most likely, as all new member States, amend its Constitution allowing transfer of some sovereign rights to the EU.

5.2. GENERAL PRINCIPLES

To draft a law harmonised with the EU, it is namely not enough to be familiar with EU law, but as well with the domestic legal system which must be respected. This is clearly stated in Moldovan legislation:

1. *The legislative act has to comply with the constitutional provisions and be in conformity with the existent legal framework, with the legislation codification and unification system*³².
2. *The draft should correspond to the following requirements*³³:
 - *be drafted in accordance with the national legislative technique;*
 - *stipulate the date of entry into force and the eventual period of transition*

³¹ Article 4, Law on Legislative Acts

³² Article 4 (2), Law on Legislative Acts

³³ Article 14) in Regulation approved by GD No.1345

necessary for the implementation of provisions of the normative act;

- *indicate the period necessary for bringing the national legislation into conformity with the adjusted normative act.*

Below some basic rules are presented which should be followed by respective line ministries when dealing with law approximation:

Before starting the harmonisation with a certain EU legal act is recommended to get familiar with the history of the EU legal act adoption. Of special importance are here proposals of the EU Commission, opinions of the European Parliament and Council during EU legislative procedure as well as different Green or White papers as preparatory documents before legislation is adopted within EU.

A drafter should further study the regulatory framework of EU legal act and development tendencies on the field regulated by that act and shall understand which Moldova legislation should be adopted or amended.

During drafting besides EU secondary legislation also EU primary law and the judgments of the Court of Justice should be taken into account as well.

After political and professional decision to have certain EU legal act(s) planned in National Plan for Approximation to be harmonised with, the drafter will be maybe included in translation activities or in activities of legal revision of translated text to become familiar with terminology.

Then the history of EU legal act shall be studied to understand what are the reasons for adoption, problems during EU legislative procedure, and papers as White and Green books as well as opinions of the Council and European Parliament are useful.

The decision which domestic act will be used for harmonisation should be adopted.

Basically, the legal instrument intended for the implementation of the EU legislation into the national law needs to be binding and effective, although the choice of appropriate instrument is left to Moldova and depends on the nature and scope of the EU policy included in the provisions that are the subject of the harmonisation.

Most likely law should be used for the harmonisation with regulations, (which in EU member states are directly applicable without transposition) and also with Directives which include general principles of the specific area or horizontal Directives. Also laws will be used for Directives which confer the rights and obligations to the natural and legal persons and for all legal acts whose transposition is intended for amending the existing laws or has political implications.

The bylaws should be used for the harmonisation with technical legislation.

There are three professionally and legally the most correct methods of harmonisation proposed which in most cases are combined or supplemented.

In accordance with GD No 1345 *“In the process of approximation, the proper translation of Community legislation in the national legislation shall be performed through:*

- a) *direct translation – the draft national normative act that translates acts from the Community legislation must obtain the same legal effect as the translated legal act, using the same (or mostly the same) legal language used by the respective Community legislation act.*
- b) *national piece of legislation – the draft national normative act uses individual means, upon the discretion of the state, thus creating the necessary framework for applying the Community legislation act with strict observance of its objective³⁴.*

The basic method when transposing Directive as key EU legal act is method of correct and detail transposition with partially rewriting, where EU act is **rewritten or reformulated** in accordance with domestic technical rules. The EU act is transposed and all objectives of EU legal act are included. By using this method, the national legal system and legal terminology language is preserved. Reformulation also provides the possibility to exclude irrelevant parts of the text and gives the drafter freedom to act in accordance with the national legal system.

The second method of transposition is **literally transposition or copy – paste** method. Certain parts of EU act are literally copied into domestic legal act. This method is useful where we have technically detailed parts of the EU act as charts, formulas, accounts and, ensures full and correct fulfilment of the imposed obligations; however, it may result in the use of terminology which is strange and unknown in domestic legal terminology which is unknown and inappropriate in the national legal system.

Exceptionally in rare cases is transposition theoretically possible only with **reference** to the certain parts of a particular type of EU legal act (a Directive) from the same above reasons as where the method is copying. In most cases there are technical annexes to the Directives. Such approach is used by some of EU Member States. However even in a Member State it would be better to be avoided especially in cases when Directive at issue directly provides for the rights and obligations to the natural or legal persons. In any case it shall be underlined that Moldovan line ministries or any other central public institutions which elaborate the draft normative acts, should avoid making such references as according to the current legal regulation of Moldova such reference would be contrary to the Constitution.

From the new Member States experience there could be a conclusion that a combination of the first two methods were prevailing concerning transposition methods and as general rule the text of a Directive should not be copied word for word into national acts, neither should the act follow the structure of the Directive. It should be also mentioned that in cases when a Directive is amended, a national provision should be amended subsequently.

During transposition tables of concordance should be completed by drafters in

³⁴ Article 15, Decision 1345

accordance with the guidelines. These tables are direct assistance in checking ones own transposition efforts.

5.3. RECOMMENDATIONS FOR TRANSPOSING A REGULATION

As regards EU regulations – as acts directly applicable within the EU it is recommended not to change the texts in the current harmonization process. At the same time they have no direct effect on Moldova, since it is not a Member State of the EU. Only after EU accession regulations become directly applicable in Moldova.

It is practically impossible to avoid rewriting regulations in national legislation because Moldova cannot develop certain areas and meet the EU requirements without creating the structure contained in the relevant regulation. Therefore the definitions and the other provisions included in the regulations must be incorporated into Moldovan legislation. The wording should be as close to the EU regulation as possible. Otherwise divergence may occur during application, if, after EU accession, a Moldovan act and a directly applicable EU regulation are applied concurrently. There could be a problem with choosing the provision to be applied in each individual case, especially where provisions could be interpreted differently or when regulations are amended and the Moldovan legislation introduced for the purpose of harmonizing with EU regulations disregards those amendments.

Since the regulations don't always prescribe all the rules, supplementary national measures are needed in many cases. Sometimes national legislation must provide the implementation of the regulation or impose penalties for non-compliance and to define national body for surveillance, etc. Also the regulation itself could delegate this authority as for example: "Enforcement procedure shall be governed by the Member State". Because Member States themselves decide the issues related to criminal and civil enforcement procedures, the provision in this field will be specified nationally. In principle, the provisions of such regulations are as Directives and the Member States are required to adopt national legislation governing the relevant area or adapt the existing legislation.

5.4. RECOMMENDATIONS FOR TRANSPOSING A DIRECTIVE³⁵

The form and methods of harmonization as well as choosing national legislation which is most appropriate for its implementation is the choice of the state. The national implementing legislation does not have to repeat it word for word or completely follow its structure. The national legislation must give the individuals concerned a clear and accurate indication of their right and obligations and allow the state to ensure compliance with these rights and obligations. Some Directives are more general, the others more detailed. Detailed examination of the text of the Directive is essential when harmonizing national legislation with the Directive, since it contains different provisions, some of which are obligatory and some are

³⁵ Article 288 (3) of the TFEU : "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

not. Operational provisions laying down the scope and purpose of the legislation and determining the implementation and the situation to be achieved by way of implementation are obligatory for national incorporation. These provisions must be examined to determine whether maximum or minimum harmonization³⁶ is required by the Directive.

Transposition of a Directive will be further explained below by providing a practical example of transposition of a Directive as the most common instrument of law harmonization.

Analysis of the Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers.

After decision of transposing this Directive into domestic legislation (in a bylaw or as a part of a law) has been adopted analysis has been done of consequences and methods of its credible enforcement (inspection surveillance, information, penalties,...), the drafter should carefully analyse a Directive sentence by sentence and see which parts could be transposed. It is recommended to check also the history of the Directive.

The original text of this Directive is presented in Annex II of this Methodology.

Analysis is based on the key legal elements:

Title

- a) The title describes the type of legal act (Directive), as well as the topic (price indication of products offered to consumers),
- b) The institution which has passed it (Parliament and Council),
- c) The date of passing (*16 February 1998*),
- d) The subject (*on consumer protection in the indication of the prices*) and
- e) The number of the legal act (*98/6/EC*).

Preamble

In addition to information on decision making procedure and legal basis, preamble contains very useful information for understanding motives and objectives of the regulatory intervention as well;

Legal basis

Having regard to the Treaty establishing the European Community, and in particular Article 129a(2) thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the Economic and Social Committee (2),

³⁶ Maximum and minimum harmonisation is explained in previous chapter.

Procedure

Acting in accordance with the procedure laid down in Article 189b of the Treaty (3), in the light of the joint text approved by the Conciliation Committee on 9 December 1997,

Reasoning

(1) Whereas transparent operation of the market and correct information is of benefit to consumer protection and healthy competition between enterprises and products;

(2) Whereas consumers must be guaranteed a high level of protection; whereas the Community should contribute thereto by specific action which supports and supplements the policy pursued by the Member States regarding precise, transparent and unambiguous information for consumers on the prices of products offered to them;

(3) Whereas the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy (4) and the Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy (5) provide for the establishment of common principles for indicating prices;...

Text

Scope and objective

“The purpose of this Directive is to stipulate indication of the selling price and the price per unit of measurement of products offered by traders to consumers in order to improve consumer information and to facilitate comparison of prices”

This part has to be transposed.

Definitions

Art 2

For the purposes of this Directive:

(a) selling price shall mean the final price for a unit of the product, or a given quantity of the product, including VAT and all other taxes;

(b) unit price shall mean the final price, including VAT and all other taxes, for one kilogramme, one litre, one metre, one square metre or one cubic metre of the product or a different single unit of quantity which is widely and customarily used in the Member State concerned in the marketing of specific products;

(c) products sold in bulk shall mean products which are not pre-packaged and are measured in the presence of the consumer;

(d) trader shall mean any natural or legal person who sells or offers for sale products which fall within his commercial or professional activity;

(e) consumer shall mean any natural person who buys a product for purposes that do not fall within the sphere of his commercial or professional activity.

In Article 2 commonly used terms are determined (selling price, unit price, trader, consumer etc.).

This is one of the operative parts of the Directive which has to be transposed into national law.

Measures to be implemented into national law

Art 3/1: The selling price and the unit price shall be indicated for all products...

Art 3/3: For products sold in bulk, only the unit price must be indicated.

Art 3/4: Any advertisement which mentions the selling price of products referred to in Article 1 shall also indicate the unit price.....

Art 4: The selling price and the unit price must be unambiguous, easily identifiable and clearly legible

These are examples of operative parts of the Directive which has to be transposed into national law.

Possible exclusion

Art 3/2: Member States may decide not to apply paragraph 1 to:

- products supplied in the course of the provision of a service,*
- sales by auction and sales of works of art and antiques.*

Art 5: Member States may waive the obligation to indicate the unit price of products for which such indication would not be useful because of the products' nature or purpose or would be liable to create confusion.

Art 6: If the obligation to indicate the unit price were to constitute an excessive burden for certain small retail businesses because of the number of products on sale, the sales area, the nature of the place of sale, specific conditions of sale where the product is not directly accessible for the consumer or certain forms of business, such as certain types of itinerant trade, Member States may, for a transitional period following the date referred to in Article 11 (1), provide that the obligation to indicate the unit price of products other than those sold in bulk, which are sold in the said businesses, shall not apply, subject to Article 12.

Application of national provisions

Art 7: Member States shall provide appropriate measures to inform all persons concerned of the national law transposing this Directive.

Art 8: Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive, and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.

Here is an example of a Directive where the method of copy-paste or literally transposition cannot be used. The only possible way of transposition is the rewriting of this article due to the penalty provisions which have to be included the only way of transposition is in domestic law or penalty provisions will be in another law, as penalties should not be included in bylaws.

Amend and make reference to other legal acts

Art 9: The transition period of nine years referred to in Article 1 of Directive 95/58/EC of the European Parliament and of the Council of 29 November 1995 amending Directive 79/581/EEC on consumer protection in the indication of the prices of foodstuffs and Directive 88/314/EEC on consumer protection in the indication of the prices of non-food products (8) shall be extended until the date referred to in Article 11(1) of this Directive.

Minimum harmonisation clause

Art 10: This Directive shall not prevent Member States from adopting or maintaining provisions which are more favourable as regards consumer information and comparison of prices, without prejudice to their obligations under the Treaty.

This Directive sets a threshold which national legislation must meet. However, national law may exceed the terms of the legislation if desired.

Rules on implementation

Art 11 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 18 March 2000. They shall forthwith inform the Commission thereof. The provisions adopted shall be applicable as of that date.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such reference shall be laid down by Member States.

Possible further harmonisation

Art 12: The Commission shall, not later than three years after the date referred to in Article 11(1), submit to the European Parliament and the Council a comprehensive report on the application of this Directive, in particular on the application of Article 6, accompanied by a proposal.

The European Parliament and the Council shall, on this basis, re-examine the provisions of Article 6 and shall act, in accordance with the Treaty, within three years of the presentation by the Commission of the proposal referred to in the first paragraph.

Final provisions

Art 13: This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Art 14: This Directive is addressed to the Member States.

Conclusions

The conclusion from the above analysis can be summarized in the following points:

- The text contains obligatory and non-obligatory provisions;
- The obligatory provisions have to be transposed into national law to ensure that the legal situation created in EU law corresponds to the national legal situation. The obligatory articles are: Article 1, Article 2, Article 3 (subparagraphs 1, 3 and 4), Article 4.
- Some articles are the subject of minimum harmonization or others where exclusion is possible and is the decision of the state if these Articles will be included or not. Such articles are: Article 3 (subparagraphs 2), Article 5 and Article 6.
- The other parts of the Directive are non-obligatory parts and contain provisions which are not subject to harmonization and do not require transposition. They do not create any legal obligation.

Attention should be addressed to the minimum harmonisation requirements of the Directive which allows provisions in national legislation more favourable as regards consumer information and comparison of prices than Directive.

CHAPTER VI. SPECIFIC ISSUES IN LAW APPROXIMATION

6.1. HOW TO START WITH LAW APPROXIMATION WITH A PARTICULAR PIECE OF LEGISLATION?

Developing a draft legal act by GD 1345 shall have the following initial phase: *“An important stage of a draft law initiation is the procedure of assessment of consequences and costs, that represent a series of logical actions that structure the preparation of legislative solutions, such as: identification of problems (divergences between policies and relevant legislation of the European Union and Republic of Moldova), identification of specific objectives according to national strategies, development of main options, including on the basis of other countries best practices; analysis of their impact, comparison of options and identification of most appropriate ones, identification of indicators of the monitoring and evaluation process”³⁷.*

The approximation of legislation should be conducted in two stages:

- 1st stage: certain key decisions and priorities are needed in the framework of the policy making.
- 2nd stage: legal transposing, legal drafting to give effect to the policy adopted.

Law approximation is not a substitute for policy development but it is follow up of proper key decisions and defined priorities in key strategy documents such as the National Plan for Legal Approximation.

Law approximation is not only harmonising national law with the EU legal act but much wider including also policy making before harmonisation as well as credible enforcement after pure harmonisation is done. Due to that also other related questions shall be solved before pure harmonisation starts.

First possible check list shall be used by a legal drafter before starting the normative drafting process:

- 1) To what extent is the existing national legislation compatible with the EU Directive in the given field?
- 2) Which parts of the Directive do not need to be transposed into the national law?
- 3) How detailed does the national legislation incorporating the other parts of the Directive have to be?
- 4) How much reformulation is required to structure and present the substance in a manner compatible with national legal traditions?
- 5) Are there any reasons why the wording of the provision should deviate from the Directive’s terminology?
- 6) Is there anything unclear in the Directive, which should be explained in

³⁷ Article 12, Decision 1345

national legislation or by other means?

- 7) Should any parts of the Directive be incorporated into national legislation word for word?
- 8) Is full harmonisation possible or should it be only partial? When would full harmonisation be applicable, now or upon accession to the EU?

Example of consumer related legislation which shall be included in National Law Approximation Plan. The following questions should be in mind of any policy maker in the certain ministry or agency.

Example of a possible checklist:

- a) Which consumer related legislation shall Moldova include in Law Approximation plan out of current secondary legislation which comprises 18 Directives, 1 Regulation and 2 Recommendations? Which of them are priorities to be included in legal drafting planning for the next year?
- b) In which domestic act Directive(s) will be transposed? Due to penalty provisions needed, it would be most likely law.
- c) Will all consumer related EU legal acts be transposed in one consumer protection law or will be more of them and which? Also bylaws? Probably consumer credits legislation or out of court dispute settlements legislation requires separate codification. Where new rights and obligations are created or where there are penalty provisions, bylaws are not enough!
- d) Will a special working group be organized for legal drafting of legislation which is interdisciplinary? Consumer credits legislation would require while drafting in addition to the Ministry responsible for consumers, also the Ministry of Finance, National bank, Association of private banks and inspectorates would be included.
- e) The regulatory impact assessment process should inform the political decision-makers of the likely impacts of new legislation or policy proposals in economic and other fields during drafting. What certain Directive brings to consumers or costs to traders? Will that increase prices? Are any new public institutions needed to be created?
- f) Tables of concordance should be completed during drafting by line ministry or agency in line with issued guidelines.
- g) Statements of compatibility should be completed after drafting by CLA in line with issued guidelines.
- h) The Tables of Concordance should be checked and revised in accordance with the Statement of Compatibility.
- i) The draft should be revised in order to increase the compliance with the relevant EU acts, according to the Statement of Compatibility.
- j) After government adoption of the domestic draft law, the legislative process in the parliament should be closely followed through participation in the parliamentary working bodies as well as plenary sessions to prevent adoption of solutions against the law objectives.
- k) The information events if and where they are possible are the tools for the

communication of the requirements of the national normative acts to the stakeholders. Such events can be conducted before and after the adoption of the normative act introducing important new issues for the state institutions (judiciary, inspections etc.) as well as related stakeholders (business associations, companies, banks etc.). Such events may significantly improve enforcement of these normative acts in the future.

The situation in which:

- legislation enters into force without the necessary resources for its implementation,
- substantial parts of new legislation are not implemented, should be avoided and prevented already in decision making phase.

A step by step approach is needed not only for policy makers but also for legal drafters. After national priorities are carefully defined in a key state document (as National plan for Law Approximation) the legal drafter should work step by step. Here we use example of price indication Directive.

A legal drafter should use a minimum check list provided below

a) Is the approximation with the particular EU legal act planned in one of key documents?

Provisions of the bilateral agreements concluded by the EU and Moldova, references to their implementing documents (national strategies or plans, which were adopted by the Government).

b) EU legal act(s) to be transposed shall be defined and the type determined.

- Regulation, which provisions have general application and which provisions of the regulation are binding and directly applicable for member states;
- Directive as the most common act for harmonization which in most cases allows the right of Member State to choose measures for implementation (minimum harmonisation); Directive of maximum harmonization or very technical one, defining very strict requirements which the Member States have to observe through precise transposition.
- Other type of EU legal act (as framework decision or decision);
- a non-binding legal act such as a recommendation or opinion.

c) To analyse the EU act: legal basis for adoption, contents, definitions, terminology.

What is the connection with the TFEU or TEU, preamble and purpose? Study the text of the EU act. Are there any important judgments of the Court of Justice and are there any related EU acts? What is the history of EU act (as White, Green books, opinions during EU legislative procedure, resolutions, opinions of EU bodies), what are opinions of foreign and domestic experts if any, literature and any comments of legal scientists)?

d) To analyse and check national legislation

Was the legal approximation already conducted in that area, is current legislation in line with EU legislation? If not then to what extent is the existing national legislation compatible with the EU Directive in the given field,

- Does any national act already transpose this EU legal act or its part?
- Does any other ministry prepare to transpose the same EU act?
- What kind of legal drafting work is to be performed (elaboration of new law, by-law, amendments to the existing law).

e) To harmonise with a Directive

- Which parts of a Directive have to be transposed (analysis of binding, non-binding and non-transposable provisions of Directive)?
- Was this Directive amended? If yes, are you going to transpose also all the amendments? In any case if a Directive has been amended, it shall be properly indicated in the table of concordance. If you use the official publication of consolidated Directive, it shall be properly indicated in the table of concordance. If there is no consolidated version of the Directive, which would be published in the Official Journal of the European Union, but for example, there is a consolidated digital version of the consolidated Directive at the EU legislation website, you should refer only to the Directive and the amending Directives as to the separate EU legal acts.
- What legal approximation technique to be used for the legal drafting: direct translation (copy – paste) method or rewriting (national piece of legislation)?
- Is it possible to completely transpose the requirements of Directive at this moment?
- Any transitional periods needed for the full transposition of Directive?
- Does the Directive contain any provisions, which may be applicable only upon accession of Moldova to the European Union?
- Try to avoid gold plating as described earlier in this methodology. Contact enforcement institutions when needed (judiciary authorities or ministries and other central public authorities). A Directive may provide for certain options: obligation to establish new institution or opportunity to establish (for example Directive may stipulate either “Member States may establish a special body... or “Member States shall establish an independent body”).

f) Legal drafting

- What type of Moldovan legal act is to be used (law, Governmental decision or decree of the Minister). If you have chosen a governmental decision or decree of the Minister, make sure that the proper transposition of EU law provisions can be ensured by means of the by-law and such choice of the

national normative act for transposition will not create any obstacles for the effective implementation and enforcement of these EU law provisions in the future (e.g. the relevant legislation provides for proper delegation for the Government of the Minister in question to legislate on this issue, the format of the by-law ensures the sufficient clarity of the legal provisions etc.)

- Ensure that you formulate provisions of the draft national act in a clear and precise manner following the requirements of the Moldovan legal drafting techniques.³⁸
- Check whether the Directive does not require changes to the structure of the existing governmental institutions or the establishment of the new ones.
- Ensure that you have made a reference to the EU legal act in accordance with the Moldovan legislation, especially GD 1345 as described above in this Methodology.

h) To check the compliance of the draft normative act

Check compliance of the draft with the Constitution of the Republic of Moldova and national legislation, international agreements, with EU the Treaty, other secondary EU legislation, general principles of EU law, and any judgments of the Court of Justice.

i) To complete the Table of Concordance

A Table of Concordance is the document, elaborated by a legal drafter, which is required to provide information about the degree of compatibility of a draft normative act with the requirements of EU law. It is highly recommended to submit a Table of Concordance not only to CLA but also to other interested line ministries – such a table could be used as an argument why certain solutions are used in the draft law or bylaw.

j) To submit the harmonised draft act to the a) interested line ministries and to the b) Ministry of Foreign Affairs and European Integration after that to the c) Centre for Legal Approximation (CLA) where the Statement of Compatibility is prepared. Finally, the draft law goes to the d) Ministry of Justice.

- Do not forget to attach Table of Concordance when sending draft legal act to the CLA.
- Do note that only the final version of the draft shall be submitted to the CLA. It is recommended that also opinions of other ministries and the table of divergence are attached. Do submit to the CLA all the working materials, which may support your view of the draft normative act as being compliant with EU requirements (studies, researches, opinions of experts and any other information),
- A Statement of Compatibility is a document, prepared by the CLA staff, which shall indicate the Centre's opinion on the quality of transposition of

³⁸See on Application of Moldovan law drafting techniques of this Methodology

the provisions of the EU Law and the compatibility of a draft normative act with the requirements of EU Law. After CLA, Ministry of Justice will check compatibility with the Constitution and the legal system.

k) To submit the harmonised draft to the Government

Draft normative act should be accompanied by the Table of Concordance prepared by legal drafter as well as Statement of Compatibility prepared by CLA.

6.2. HOW AND WHERE TO FIND INFORMATION ON RELEVANT AND UP TO DATE EU LEGISLATION?

This question is crucial already in planning phase and the EUR-Lex data base could be one of the most useful tools in this phase.

<http://eur-lex.europa.eu/en/index.htm> - this is webpage address of EUR-LEX data base which provides direct free access to European Union law. The Official Journal of the European Union can be consulted here as well as the treaties, legislation, case-law and legislative proposals. Extensive search facilities available on EUR-Lex could be used.

EUR-Lex provides free access to European Union law and other documents considered to be public. The website is available in 23 official languages of the European Union; preferred language can be chosen from the language bar at the top of the homepage.

The contents of the site amount to some 3 600 000 documents with texts dating back to 1951. The database is updated daily and every year around 15.000 documents are added.

Eur-LEX offers:

- daily editions of the Official Journal of the European Union in digital copies available online,
- simple search, advanced search and browsing options,
- the possibility to display and/or download documents (PDF, HTML, DOC, TIFF),
- analytical metadata for each document.

There are two search interfaces in EUR-Lex; simple search and advanced search. While advanced search provides a fuller range of search and display features, simple search will accommodate most users' requirements.

There is a wide range of search options; search by search terms, search by date, search by author, search by natural number, etc.

Another option is to browse collections and directories; choose from treaties,

international agreements, legislation in force, preparatory acts, case-law and parliamentary questions. Each of the aforementioned sectors offers a browsing feature, such as the Directory of EU legislation in force.

CHAPTER VII. THE ROLE OF THE PARLIAMENT IN THE PROCESS OF LAW APPROXIMATION

7.1. GENERAL ISSUES

A process of pre-accession adaptation to the EU and its legal order falls within the competences of the governments, as a segment of foreign relations. Because of this, the balance of power is much in favour of the government as the executive branch.

Within the Europe Agreements for CEE countries and subsequent SAA for Western Balkan countries or Political and Cooperation Agreement for Moldova and other countries from so called European Neighbourhood, the political decision-making and supervisory functions belong to the Councils, which operate on the basis of these Agreements in which the key role is played by the government with its ministers.

The Committees and subcommittees, which are established in accordance with the Agreement, should handle all technical and executive matters. They consist of governmental officials. The process of law approximation, with the exception of its last phase – Deliberation in the parliament, takes place on the governmental side, the same as the process of negotiations with EU is professionally and technically implemented by the government. All this shows that the governments are key players in the pre-accession period.

The main role of the of national Parliament could be seen as the scrutiny of governmental work; namely, the parliament with its services could not replace the government and could not compete with it and all its ministries, governmental services and agencies with thousands of employees, especially not in the most demanding task – preparing and drafting of legal acts that are harmonised with the EU law.

Therefore, the crucial task for national Parliaments in the association period is to provide political control over the process of coming closer to the European Union.

This democratic involvement by national Parliaments could be effected through the process of approximation of legislation, through the special parliamentary EU Committees, through the Joint Parliamentary Committees with European Parliament, or later, with the parliamentary scrutiny over the eventually negotiating process.

Democratic involvement by national Parliaments is related to the following issues:

7.2. HARMONISATION OF THE NATIONAL LEGISLATION

All national Parliaments are involved in legal harmonisation through the usual parliamentary deliberation and adoption of laws, as well as through ratification of Europe Agreements/SAA/PCA or through the constitutional amendments needed for later EU membership.

Deliberation and adoption of legislation in the parliament often requires fast-track

procedures that allow only for a single reading and involve sectoral committees as well as the Committees for EU Affairs.

7.3. COMMITTEES FOR EU AFFAIRS IN NATIONAL PARLIAMENTS

Main EU deliberations in national Parliaments take place through the Committees for EU Affairs that consist of the representatives of all parliamentary parties. Their tasks include a wide range of activities, such as monitoring of legal harmonisation and accession strategies, elaboration and harmonisation of national legislation, debates on different EU issues, examination and comments upon the annual Reports of the European Commission, maintenance of contacts with the European Parliament and other national Parliaments and their EU Committees as well as with other EU institutions and COSAC (Conference of the Parliamentary EU Committees), taking care of the implementation of EA/SAA/PCA on a parliamentary level through Joint Committee, organisation of information campaigns, etc.

7.4. JOINT PARLIAMENTARY COMMITTEES

One of the products of Europe Agreements/SAA/PCAs is the establishment of the Joint Parliamentary Committee which is a forum for members of the national Parliaments of accession countries and the European Parliament where they can meet and exchange views. The Parliamentary Committee may request relevant information regarding the implementation of Europe Agreement/SAA/PCA from the Council, and the latter shall deliver the requested information to the Committee. The Committee shall be informed about all decisions of the Council and may make recommendations to the Council. In many countries members of the Committees for EU Affairs constitute a component of the country in the Joint Parliamentary Committees with European Parliament.

7.5. PARLIAMENTARY ASSEMBLY OF THE EUROPEAN PARLIAMENT'S EUROPEAN UNION EASTERN NEIGHBOURS (EURONEST)

Finally the establishment of the Parliamentary Assembly of the European Parliament's European Union Eastern Neighbours (EURONEST) in 2009 should be mentioned.

EURONEST brings together the members of the European Parliament and the members of the national parliaments from Moldova and other five countries, which participate in the Eastern Partnership initiative, in order to ensure closer cooperation between the EU and these countries at the parliamentary level.

SOURCES

Literature:

1. P.Craig, G.de Búrca (2007). EU Law, Text, Cases and Materials (4th ed. ed.). Oxford, New York: Oxford University Press
2. W. Voermans, Gold-plating and double banking: an overrated problem?, Published in: Henk Snijders, Stefan Vogenauer (eds.), Content and Meaning of National Law in the Context of Transnational Law. Sellier European Law Publishers; Munich 2009, p. 79-88.
3. Joint practical guidelines for persons involved in the drafting of legislation within Community institutions, available at <http://eur-lex.europa.eu/en/techleg/index.htm>
4. European Commission: Better Regulation, available at http://ec.europa.eu/governance/better_regulation/index_en.htm
5. Mandelkern Group on Better Regulation, Final Report, 2001, available at http://ec.europa.eu/governance/better_regulation/documents/mandelkern_report.pdf.
6. Treaty of Lisbon – taking Europe into 21st century, available at http://europa.eu/lisbon_treaty/index_en.htm
7. OSCE, ODIHR, Preliminary report on the legislative process in the Republic of Moldova, Warsaw, September, 2008.
8. Handbook for Harmonization of Bosnia and Herzegovina Legislation with European Union Legislation, Directorate for European Integration, Government of Bosnia and Herzegovina, Sarajevo, 2005.
9. Nomo-technical guidelines, Office for Legislation, Government of Slovenia, Ljubljana, 2008.
10. Methodology for harmonising Estonian legislation with European Union law, Ministry of Justice of the Republic of Estonia, European Union Law Service, 2000.
11. C.Tobler, J.Beglinger, “Essential EU Law in Text”, Budapest: HVG-Orac 2010.
12. L. Senden, Modern Studies in European Law, Volume 1: Soft Law in European Community Law, Hart Publishing, 2004.
13. S. Bruun-Nielsen, E.Stuart, International and European Union best practices for the preparation of legislation, EU funded project, Astana, 2005.

14. P.Vehar, The National Parliament of Republic of Slovenia and EU affairs before and after the accession, Published in: 'National Parliaments within the enlarged EU", page 241-254, Routledge, London, New York, 2007.
15. Moldova – EU Convergence planning, Environmental collaboration for the Black Sea, Georgia, Moldova, Russia and Ukraine, Presentation at the Public Outreach Event, March 20, 2009.
16. J. Gromovs, „Problems of the implementation of the European Union Law in Latvia – aspects of the application of regulations”, University of Latvia, 2003.

Access to European Union law:

1. <http://europa.eu/> - official webpage of the European Union.
2. <http://eur-lex.europa.eu/en/index.htm> - Access to the EU founding treaties, international agreements, secondary EU legislation and the case law of the Court of Justice.
3. <http://www.curia.eu.int> – webpage of the Court of Justice of the European Union and its case law.

ANNEX I

Guidelines for Preparation of Tables of Concordance

Section 1

Scope of the Guidelines

1. These Guidelines provide methodological requirements for ministries and any other bodies of the Government of the Republic of Moldova (referred further collectively as legal drafters) which are recommended to be used in the process of the preparation of Tables of Concordance for draft normative acts, which transpose the provisions of the Law of the European Union (referred further as EU law).

2. A Table of Concordance is the document, elaborated by a legal drafter, which is required to provide information about the degree of compatibility of a draft normative act with the requirements with EU law. It shall be filled in accordance with the provisions of the Annex to the Regulation on the Approximation of Legislation of the Republic of Moldova with Community Legislation, approved by the Government Decision nr. 1345 of 24.11.2006 and the requirements of the Guidelines below.

3. The Law of the European Union (referred further as EU law) for the purpose of these Guidelines shall be understood as the EU primary law and all types of EU secondary legal acts. Where an EU law provision arises from the case law of the Court of Justice of the European Union and the general principles of EU law, an article of the EU legal act/s, to which the Court of Justice referred in its judgment, the date, complete number of the case, the names of the parties and the CELEX number shall be indicated in the Table of Concordance.

Section 2

Contents of the Table of Concordance

4. A Table of Concordance, in the format set out in the Annex to the Regulation on the Approximation of Legislation of the Republic of Moldova with Community Legislation, shall include the following information:

4.1. The type, number and title of the EU legal act/s (both in the State language of the Republic of Moldova and the English language), including its type, the name of the EU institution which adopted the act, the date of its adoption, its number and the number and publication date of the Official Journal of the European Union in which it was published.

4.2. The main goals of the relevant EU legal act/s. This shall include a brief statement of the purpose of the EU legal act and its regulatory scope. The

preamble and first articles of the EU legal act shall be used by the legal drafters as the source of this information.

4.3. Where the draft normative act transposes the provisions of an international treaty, to which the European Community has adhered and which was ratified by the Republic of Moldova, the full title of the relevant treaty, in the State language of the Republic of Moldova and English language, including its type, organisation, which adopted the treaty, the date of its adoption, the date of its publication in *Monitorul Oficial* and date of its entry into force.

4.4. The full title of the draft normative act of the Republic of Moldova and its type (law, decision, act of department etc.).

4.5. The level of overall compliance of the draft normative act with EU law provisions as well as a comparative analysis of the compatibility of provisions of the draft normative act with the relevant provisions of the EU legal act/s. The full texts of the relevant articles of the transposed EU legal act and the draft normative act, broken down into the paragraphs and clauses, shall be used in such comparative analysis.

4.6. Comments on reasons why the draft normative act is partially compatible or incompatible with the requirements of the EU law. Such comments shall include an indication of deadline, by which the draft normative act shall become fully compatible with the EU law requirements.

4.7. Contact details of the representative of the legal drafter: name surname, position, phone number, e-mail.

Section 3

Other accompanying documents to the relevant drafts (Informative Note)

5. Draft laws /regulations with Community relevance will be obligatory accompanied by an Informative Note that in addition to the information set out in art. 20 of Law 780-XV of 27.12.2001 on legislative acts and art. 37 of Law 317-XV of 18.07.2003 Law on Normative Acts of the Government and Other Central and Local Public Administration Authorities, should reflect:

5.1. The fact that the respective draft transposes or creates the necessary legal frame for the application of the EU law;

5.2. The list of EU laws (a complete title) which the draft transposes or creates the necessary frame for the their application;

5.3. Reference to a specific provision of an agreement signed by Moldova and the European Communities / European Union, which entails a commitment to approximate the national legislation, including a brief description of the essence of this commitment;

5.4. Reasons explaining why the relevant legal act/s of the EU have to be introduced in the national legal system of Republic of Moldova in the proposed

manner by the draft national legislative act and the impact of transposition on the national legal system;

5.5. Applicable deadline for transposing the provisions of the relevant EU legislation into the national legal system of Republic of Moldova and for the adoption / approval of draft legislation in question, as well as explanations concerning those deadlines (with specific references to various policy documents (Strategies, Plans, Programs), including the National Plan for Law Approximation for that year).

Section 4

Analysis of the requirements of European Union Law before the legal drafting and preparation of the Table of Concordance

6. Before the development of a draft normative act, a legal drafter is obliged to assess whether the scope of application of this draft is covered by EU law. If a future draft normative act will cover an area regulated by EU law, a legal drafter shall transpose the relevant provisions of EU law into the draft normative act and prepare a Table of Concordance.

7. In order to prepare a Table of Concordance, the obligatory and non-obligatory provisions of the EU legal act/s which are to be transposed in the draft normative act shall be identified. The degree of the transposition of these requirements shall be indicated in the Table of Concordance.

8. Obligatory provisions must be implemented into the legislation of Moldova to ensure that the legal situation created in EU law correspond to the national legal situation. Examples of obligatory provisions are:

- the definitions,
- the scope of application of the EU legal act in question,
- basic requirements of the EU legal act, as well as any annex/s to it.

9. The following non-obligatory parts of the EU legal act contain provisions, which are not subject to law approximation and do not require transposition, because they do not create any legal obligation:

- a) the preamble;
- b) the objective;
- c) Where relevant, exemptions and derogations, which allow a State the choice as to whether to transpose the relevant provision of EU legal act into the draft normative act. (Such exemptions and derogations are usually characterised by the use of such wordings as “Member States may”, “Member States may chose not to apply” or similar. In this case the Table of Concordance shall indicate whether or not such exemptions or derogations have been used by the legal drafter of the draft normative act. If a derogation arises in an EU legal act only in relation to one or a few

Member States, whether expressly or implicitly, it is not applicable in the case of Moldova);

- d) provisions of the EU legal act which contains such obligations of an EU Member State, which cannot be implemented by Moldova before accession to the European Union. (Such provisions, for example, usually refer to the obligations of the Member States to communicate certain information to the European Commission, to cooperate with other EU Member States and to perform any other activities which are in the sole competence of EU Member States);
- e) provisions of the EU legal act which impose obligations on the EU institutions;
- f) Final and transitional provisions of the EU legal act.

10. The requirements of paragraphs 5 to 8 do not apply to all EU soft law acts (legally non-binding acts of EU law). Unless some specific guidance is provided for the specific areas of law in a binding EU legal act or in the interpretative case law of the European Court of Justice, the method of transposition of such acts in the legislation of Moldova is left to the discretion of the legal drafters.

Section 5

Obligation to Fill In the Table of Concordance

11. The Table of Concordance shall indicate the title of the legal drafter responsible for the draft normative act, including the contact information of the public servant who is responsible for the coordination of the draft. Where there are several legal drafters involved in the drafting of the draft normative act or a working group was established for that purpose, the title of the main responsible legal drafter shall be indicated in the first instance. The rest of legal drafters involved in the draft shall be indicated below the main responsible legal drafter and shall be deemed to be co-responsible legal drafters.

The following rules shall be exercised in case if several legal drafters are involved:

- a) Before the drafting starts, the responsibility of the main legal drafter and each co-drafter for the transposition of the parts of the EU legal act(s), in accordance with their competence assigned by the legislation of Moldova, shall be identified, agreed and fixed, preferably in written form as the decision or protocol.
- b) In the course of the legal drafting each drafter shall provide the input to the draft normative act in terms of the clear oral or written proposal in regards of the transposition of the part of EU legal act, it is responsible for. If such proposal is expressed in the oral form during the meeting of the drafters, it shall be then documented in written form.

- c) In case when the proposal of one or many legal drafters (co-drafters) is only partially compatible with EU law or incompatible with EU law, and the legal drafters cannot agree on the amendments to this proposal, the position of these legal drafters and clear reasons explaining the basis for such proposal shall be properly explained. Such position shall be not only be provided by the respective legal drafter in the written form, but also stated in the point 7 (Reasons explaining why the draft is partially compatible or incompatible, see Point 20 of these Guidelines below) and point 9 (Deadline for the national act to become fully compatible) of the Table of Concordance. In the absence of such proper and detailed explanations the Table of Concordance shall be regarded as incomplete.

12. A Table of Concordance shall be prepared by the legal drafter simultaneously with the elaboration of the draft normative act. The Table of Concordance shall be accordingly amended each time the legal drafter amends any version of the draft normative act.

13. Where several legal drafters are involved in the drafting of a normative act, the main responsible drafter shall complete the Table of Concordance. The co-responsible drafters shall provide the main responsible drafter with the necessary information on the compatibility of the parts of the draft normative act which are related to their competences.

14. The legal drafter shall update the Table of Concordance each time the text of the draft normative act is changed by the amendments of the interested authorities, Centre for Legal Approximation, Ministry of Justice, etc. The legal drafter will submit to the Government of Republic of Moldova the final version of the Table of Concordance.

Section 6

Degrees of compatibility and their treatment in the Table of Concordance

15. The drafters shall indicate in the part 3 of the Table of Concordance titled “The level of compatibility” the degree of compatibility of the draft normative act with EU law. The following classification criteria shall be applied: “complies”, “partially complies” and “incompatible”.

16. The draft normative act is **compatible** if:

1. it incorporates all the provisions of the EU legal act/s, which are to be transposed into the draft normative act, and
2. it is in full compliance with all of these provisions.

17. The draft normative act is in **partial compliance** if:

1. it transposes the main requirements of the EU legal act/s which are to be transposed into the draft normative act, and
2. it is in compliance with these provisions but it is not in compliance with a

few other provisions of this EU legal act which were not transposed,

3. it fully transposes the provisions of EU legal act, but the text of this EU legal act contains references to other EU legal act and the provisions of this latter EU legal act were not transposed into the draft normative act or the national legislation.

18. The draft normative act is ***incompatible*** if its provisions are contrary to the provisions of EU law governing the scope of application of this draft normative act.

19. If a particular article of the draft normative act *does not transpose* the EU law provisions, this case shall be reflected in point 6 “Differences” of the Table of Concordance as the “national legislative specific” when the scope of this article is not regulated by EU law.

20. The Table of Concordance shall provide a comparative assessment of the compatibility of the draft normative act with provisions of the relevant EU legal acts by using the following methods:

1. The text of the transposed EU legal act/s shall be divided into articles and paragraphs. (Point 4 of the Table of Concordance). If the articles of the respective EU legal act are more detailed, the further break down into clauses and points may be provided in the Table of Concordance if necessary.

2. The text of the relevant provisions of the draft normative act shall be set out opposite to the relevant provision of the EU legal act which has been transposed by these provisions. This text shall be similarly divided into articles and paragraphs, and if necessary - clauses and points.

21. Where certain provisions of the draft normative act are only partially in compliance or incompatible with the relevant provisions of the EU legal act, this shall be indicated in the following points of the Table of Concordance: point 6 “Differences” (explaining the substance of the differences between the requirement of provision of EU law in issue and the provision of the draft normative act), point 7 “Reasons explaining why the draft is partially compatible or incompatible” and point 9 “Deadline for the national act to become fully compatible” by specifying:

1. The reasons why the provision of the draft normative act is partially compatible or incompatible with the requirements of the relevant EU legal act/s. These reasons shall be clearly indicated regardless of whether they are based on problems of a legal, economic, financial or social nature.

2. The statement of reasons shall be prepared by the legal drafter of the draft normative act in a clear and precise manner:

(a). reference must be made to a specific impact assessment, feasibility studies, governmental strategic and policy planning documents or other documents, which were elaborated by the legal drafters or by the

international organisations, non-governmental organisations, academic institutions, bilateral or EU support projects at the request of the legal drafter or otherwise and which relate to the choices made by the legal drafter in regard to the provisions of the draft normative act. These references and their relevance shall be formulated and presented precisely.

(b). every indication that the related provision of the EU legal act cannot be fully implemented before the accession to the European Union, shall be fully justified and explained.

3. The Table of Concordance shall indicate the date (year and month) by which the draft normative act/s transposing the currently non-transposed provisions of the EU legal act will be adopted.

If such a future draft normative act/s is already included in an annual Plan for Law Approximation or any other policy planning and strategic document, the deadline provided in that document shall be indicated in the relevant column of the Table of Concordance as the deadline for the achievement of full compatibility. If the fulfilment of such a planned deadline is not possible, a new deadline shall be provided and the reasons for non-compliance with the previous deadline shall be stated.

Excerpt from the Table of Concordance for the Draft Law X

<p>1. Title of Community legislation act, area of regulation and purpose of the act Directiva Consiliului din 13 iunie 1990 privind pachetele de servicii pentru călătorii, vacanțe și circuite (JO L 158, 23.6.1990, p. 59-64) 31990L0314 Subiectul scopului regulator îl constituie pachetele de servicii pentru călătorii, vacanțe și circuite. Obiectivul Directivei este armonizarea legislației statelor membre în sectorul pachetelor ce sunt vândute sau oferite pentru vânzare pe teritoriul Comunității.</p> <p>Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59-64) The subject of regulatory scope is package travel, package holidays and package tours, the objective of the Directive is the approximation of the laws of member states in the area of packages that are sold or offered for sale in territory of the Community.</p> <p>B. Alte surse ale legislației UE Cauzele conexe C-178/94, C-179/94, C-188/94, C-189/94 și C-190/94, Erich Dillenkofer, Christian Erdmann, Hans-Jurgen Schulte, Anke Heuer, Werner, Ursula și Trosten Knor v. Republica Federativă Germană ([1996] Rapoartele Curții Europene, p. 4845) 61994J0178 Joint cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, Erich Dillenkofer, Christian Erdmann, Hans-Jurgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v. Federal Republic of Germany ([1996] European Court Reports, p. 4845)</p>					
<p>2. Title of the national normative act, subject of regulation and its purpose Legea X Subiectul proiectului îl constituie stabilirea drepturilor și obligațiilor consumatorilor, protecția lor la achiziționarea bunurilor și serviciilor, precum și în alte forme de comerț și stabilirea autorităților competente pentru protecția drepturilor și intereselor consumatorului Law X The subject of regulatory scope is the rights and obligations of consumers and their protection in the purchase of goods and services, as well as in other forms of commerce, and the establishment of competent authorities to protect consumer rights and interests.</p>					
<p>3. The level of compatibility Incompatible</p>					
<p>4. Requirements and the provisions of the Community (article, paragraph)</p>	<p>5. Provisions of the national normative act (chapter, article, paragraph, etc).</p>	<p>6. Differences</p>	<p>7.Reasons explaining why the draft is partially compatible or incompatible</p>	<p>8. Responsible institution</p>	<p>9. Deadline for the national act to become fully compatible</p>
<p>Para.2, Article 2 'organizer' means the person who, other than occasionally,</p>	<p>Para.1, Article 3 'organizer' means the person who permanently or occasionally</p>	<p>Incompatible</p>	<p>The Directive 90/314/CEE in para.2, art. 2, expressly excludes the occasional</p>	<p>Ministry of Economy</p>	<p>The draft law amending the Law X, to achieve</p>

<p>organizes packages and sells or offers them for sale, whether directly or through a retailer;</p>	<p>organizes packages for commercial reasons and who offers these services whether directly or through a retailer</p>		<p>organisation of packages while the Para 1, Art. 3 of the national draft offers to the organiser also this possibility. Other reasons which explain the incompatibility with the EU law are based on economical reasons, studies or other documents).</p>		<p>full compatibility will be developed and included in the NPLA 2012</p>
--	---	--	---	--	---

ANNEX II

Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers,

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 129a(2) thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the Economic and Social Committee (2),

Acting in accordance with the procedure laid down in Article 189b of the Treaty (3), in the light of the joint text approved by the Conciliation Committee on 9 December 1997,

(1) Whereas transparent operation of the market and correct information is of benefit to consumer protection and healthy competition between enterprises and products;

(2) Whereas consumers must be guaranteed a high level of protection; whereas the Community should contribute thereto by specific action which supports and supplements the policy pursued by the Member States regarding precise, transparent and unambiguous information for consumers on the prices of products offered to them;

(3) Whereas the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy (4) and the Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy (5) provide for the establishment of common principles for indicating prices;

(4) Whereas these principles have been established by Directive 79/581/EEC concerning the indication of prices of certain foodstuffs (6) and Directive 88/314/EEC concerning the indication of prices of non-food products (7);

(5) Whereas the link between indication of the unit price of products and their pre-packaging in pre-established quantities or capacities corresponding to the values of the ranges adopted at Community level has proved overly complex to apply; whereas it is thus necessary to abandon this link in favour of a new simplified mechanism and in the interest of the consumer, without prejudice to the rules governing packaging standardisation;

(6) Whereas the obligation to indicate the selling price and the unit price contributes substantially to improving consumer information, as this is the easiest way to enable consumers to evaluate and compare the price of products in an optimum manner and hence to make informed choices on the basis of simple comparisons;

(7) Whereas, therefore, there should be a general obligation to indicate both the selling price and the unit price for all products except for products sold in bulk, where the selling price cannot be determined until the consumer indicates how much of the product is required;

(8) Whereas it is necessary to take into account the fact that certain products are customarily sold in quantities different from one kilogramme, one litre, one metre, one square metre or one cubic metre; whereas it is thus appropriate to allow Member States to authorise that the unit price refer to a different single unit of quantity, taking into account the nature of the product and the quantities in which it is customarily sold in the Member State concerned;

(9) Whereas the obligation to indicate the unit price may entail an excessive burden for certain small retail businesses under certain circumstances; whereas Member States should therefore be allowed to refrain from applying this obligation during an appropriate transitional period;

(10) Whereas Member States should also remain free to waive the obligation to indicate the unit price in the case of products for which such price indication would not be useful or would be liable to cause confusion for instance when indication of the quantity is not relevant for price comparison purposes, or when different products are marketed in the same packaging;

(11) Whereas in the case of non-food products, Member States, with a view to facilitating application of the mechanism implemented, are free to draw up a list of products or categories of products for which the obligation to indicate the unit price remains applicable;

(12) Whereas Community-level rules can ensure homogenous and transparent information that will benefit all consumers in the context of the internal market; whereas the new, simplified approach is both necessary and sufficient to achieve this objective;

(13) Whereas Member States must make sure that the system is effective; whereas the transparency of the system should also be maintained when the euro is introduced; whereas, to that end, the maximum number of prices to be indicated should be limited;

(14) Whereas particular attention should be paid to small retail businesses; whereas, to this end, the Commission should, in its report on the application of this Directive to be presented no later than three years after the date referred to in Article 11(1), take particular account of the experience gleaned in the application of the Directive by small retail businesses, inter alia, regarding technological developments and the introduction of the single currency; whereas this report, having regard to the transitional period referred to in Article 6, should be accompanied by a proposal,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

The purpose of this Directive is to stipulate indication of the selling price and the price per unit of measurement of products offered by traders to consumers in order to improve consumer information and to facilitate comparison of prices.

Article 2

For the purposes of this Directive:

(a) selling price shall mean the final price for a unit of the product, or a given quantity of the product, including VAT and all other taxes;

(b) unit price shall mean the final price, including VAT and all other taxes, for one kilogramme, one litre, one metre, one square metre or one cubic metre of the product or a different single unit of quantity which is widely and customarily used in the Member State concerned in the marketing of specific products;

(c) products sold in bulk shall mean products which are not pre-packaged and are measured in the presence of the consumer;

(d) trader shall mean any natural or legal person who sells or offers for sale products which fall within his commercial or professional activity;

(e) consumer shall mean any natural person who buys a product for purposes that do not fall within the sphere of his commercial or professional activity.

Article 3

1. The selling price and the unit price shall be indicated for all products referred to in Article 1, the indication of the unit price being subject to the provisions of Article 5. The unit price need not be indicated if it is identical to the sales price.

2. Member States may decide not to apply paragraph 1 to:

- products supplied in the course of the provision of a service,
- sales by auction and sales of works of art and antiques.

3. For products sold in bulk, only the unit price must be indicated.

4. Any advertisement which mentions the selling price of products referred to in Article 1 shall also indicate the unit price subject to Article 5.

Article 4

1. The selling price and the unit price must be unambiguous, easily identifiable and clearly legible. Member States may provide that the maximum number of prices to be indicated be limited.

2. The unit price shall refer to a quantity declared in accordance with national and Community provisions.

Where national or Community provisions require the indication of the net weight and the net drained weight for certain pre-packed products, it shall be sufficient to indicate the unit price of the net drained weight.

Article 5

1. Member States may waive the obligation to indicate the unit price of products for which such indication would not be useful because of the products' nature or purpose or would be liable to create confusion.

2. With a view to implementing paragraph 1, Member States may, in the case of non-food products, establish a list of the products or product categories to which the obligation to indicate the unit price shall remain applicable.

Article 6

If the obligation to indicate the unit price were to constitute an excessive burden for certain small retail businesses because of the number of products on sale, the sales area, the nature of the place of sale, specific conditions of sale where the product is not directly accessible for the consumer or certain forms of business, such as certain types of itinerant trade, Member States may, for a transitional period following the date referred to in Article 11 (1), provide that the obligation to

indicate the unit price of products other than those sold in bulk, which are sold in the said businesses, shall not apply, subject to Article 12.

Article 7

Member States shall provide appropriate measures to inform all persons concerned of the national law transposing this Directive.

Article 8

Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive, and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.

Article 9

1. The transition period of nine years referred to in Article 1 of Directive 95/58/EC of the European Parliament and of the Council of 29 November 1995 amending Directive 79/581/EEC on consumer protection in the indication of the prices of foodstuffs and Directive 88/314/EEC on consumer protection in the indication of the prices of non-food products (8) shall be extended until the date referred to in Article 11(1) of this Directive.

2. Directives 79/581/EEC and 88/314/EEC shall be repealed with effect from the date referred to in Article 11 (1) of this Directive.

Article 10

This Directive shall not prevent Member States from adopting or maintaining provisions which are more favourable as regards consumer information and comparison of prices, without prejudice to their obligations under the Treaty.

Article 11

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 18 March 2000. They shall forthwith inform the Commission thereof. The provisions adopted shall be applicable as of that date.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field governed by this Directive.

3. Member States shall communicate the provisions governing the penalties provided for in Article 8, and any later amendments thereto.

Article 12

The Commission shall, not later than three years after the date referred to in Article 11(1), submit to the European Parliament and the Council a comprehensive report on the application of this Directive, in particular on the application of Article 6, accompanied by a proposal.

The European Parliament and the Council shall, on this basis, re-examine the provisions of Article 6 and shall act, in accordance with the Treaty, within three

years of the presentation by the Commission of the proposal referred to in the first paragraph.

Article 13

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 14

This Directive is addressed to the Member States.

Done at Brussels, 16 February 1998.

For the European Parliament

The President

J. M. GIL-ROBLES

For the Council

The President

J. CUNNINGHAM