Republika e Kosovës
Republika Kosova - Republic of Kosovo
Qeveria - Vlada - Government

PRACTICAL GUIDELINES FOR LEGAL APROXIMATION OF THE LEGISLATION OF THE REPUBLIC OF KOSOVO WITH THE LEGISLATION OF THE EUROPEAN UNION

April 2014

Republika e Kosovës
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giz Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH

FOREWORDS

The Republic of Kosovo is fully aware that our willingness and intention to join the European Union (EU) is not only a political and economic, but above all, a legal issue. Indeed the legal approximation process is the largest and most comprehensive task in the accession process. It represents one of the Copenhagen accession criteria to the European Union: before accession, Kosovo, as any other country willing to join the EU, will have to have aligned its entire legislation with the one of the EU. In this respect, limited progress in legal approximation would lead to limited progress towards EU integration. Therefore, the progress in the EU integration process heavily depends on progress in the process of legal approximation.

Therefore, the Government of the Republic of Kosovo, aware of this very complex and challenging process, has been taking necessary measures and is committed to gradually align its legislation to become consistent with the one of the EU.

Also the process of legal approximation requires human resources professional with sufficient expertise and well established structures. With the adoption and entry into force of the Rules of Procedure of the Government of the Republic of Kosovo no. 09/2011, the Regulation no. 13/2013 for the Government Legal Service (17/06/2013) and the Administrative Instructions 03/2013 on Standards for the Drafting of Normative Acts (17/06/2013), the structures and processes for legal approximation have been put in place.

The application of this process is not only to build Kosovo's legal framework in accordance with its requirements, but also to provide the administrative and other conditions necessary for its effective implementation.

These Practical Guidelines have been prepared so that Kosovo legislation drafters, who are familiar with the domestic legal system, gain some basic knowledge about the functioning of the EU and its legal system and familiarize themselves with some basic techniques of legal approximation.

In general, the responsibility for policy development and legal approximation fall under the line institutions responsible for drafting legislation. The institution proposing a draft normative act needs to assess its compliance with the EU Acquis. To this purpose, several legal approximation instruments have been introduced to support the approximation efforts of the line institution: the Statement of Compliance (SoC) and the Tables of Compliance (ToC) with the EU acquis. On this basis, the Ministry for European Integration shall issue the Opinion on Compliance with the EU Acquis (OoC). The normative act accompanied with the Tables, the Statement and the Opinion shall then be sent to the Legal Office Prime Minister's Office which examines the consistency of the act with the constitutional and legal order, the procedural progress of the act and the legislative drafting standards.

Comments and suggestions for improving these Practical Guidelines are welcome. They

may be addressed in written to the Legal Office of the Prime Minister's Office and the Department of EU Law of the Ministry for European Integration.

A proverb says: "if you want to go far, walk with others; and if you want to go fast, go alone". Therefore we decided to walk with others towards the European Union. These Practical Guidelines have been prepared jointly by all line ministries and reviewed by several EU-funded projects in Kosovo. The drafting of the Guidelines has been continuously supported by the GIZ project "Support to the European Integration Process in Kosovo" under the frame of the long-term bilateral assistance of the Federal Republic of Germany to Kosovo, whom we thank for their support.

Sincerely,

Besim M. Kajtazi
Director of the Legal Office, Office of the Prime Minister

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QEVERIA E KOSOVËS - VLADA KOSOVA - GOVERNMENT OF KOSOVA
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Zyra e Kryeministrit-Ured Premijera-Office of the Prime Minister
Sekretari i Përgjithshëm – Generalni Sekretar – Secretary General

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Datë: 17.04.2014
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Sekretari i Përgjithshëm i Zyrës së Kryeministrit,
Në mbështetje të nenit 33 të Udhëzimit Administrativ nr. 03/2013 për Standardet e Hartimit të Akteve Normative dhe duke marrë parasysh propozimin e Drejtorit të Zyrës Ligjore të Zyrës së Kryeministrit dhe Drejtorit të Departamentit për të Drejtën e BE-së të Ministrisë së Integrimit Evropian, pas një procesi të bashkëpunimit dhe koordinimit me ministritë e linjës dhe me përkrahjen e **GIZ** (Deutsche Gesellschaft für Internationale Zusammenarbeit); Projekti "Support to the European Integration Process in Kosovo"
Miraton:

UDHËZIME PRAKTIKE PËR PËRAFRIMIN E LEGJISLACIONIT TË REPUBLIKËS SË KOSOVËS ME LEGJISLACIONIN E BASHKIMIT EVROPIAN (Acquis të BE-së)

Qëllimi i këtyre Udhëzimeve Praktike është që hartuesit e akteve normative (projektligjeve dhe akteve nënligjore) në Republikën e Kosovës, që e kanë të njohur sistemin e brendshëm juridik, të marrin disa njohuri themelore për funksionimin e BE-së dhe sistemit të tij juridik dhe të njoftohen me disa teknika themelore të përputhshmërisë së legjislacionit me Acquis të BE-së.

Këto Udhëzime Praktike nuk do të zgjidhin të gjitha sfidat e Kosovës në lidhje me procesin e përafrimit ligjor dhe as nuk do të shpjegojnë çdo gjë në lidhje me funksionimin e BE-së, por do të mbështesin hartuesit e legjislacionit në Republikën e Kosovës në procesin e harmonizimit të legjislacionit të Republikës së Kosovës me legjislacionin e BE-së (Acquis të BE-së).

Zyra Ligjore në kuadër të Zyrës së Kryeministrit, në bashkëpunim me Departamentin për të Drejtën e BE-së së Ministrisë së Integrimit Evropian informon, promovon dhe mban trajnime për zbatimin e këtyre udhëzimeve.

Fitim Krasniqi
Sekretar i Përgjithshëm

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Table of abbreviations

CFSP	Common Foreign and Security Policy
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
Euratom	European Atomic Energy Community
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
IPA	Instrument for Pre-Accession Assistance
JHA	Justice and Home Affairs
MEI	Ministry of European Integration
NPAA	National Plan of Adoption of the Acquis
NPI	National Plan of Integration
OJ	Official Journal
OoC	Opinion on Compliance
OPM	Office of the Prime Minister
PJCC	Police and Judicial Co-operation in Criminal Matters
SAA	Stabilisation and Association Agreement
SoC	Statement of Compliance
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
ToC	Table of Compliance

INTRODUCTION

These Practical Guidelines show that the process of approximation of legislation of the Republic of Kosovo with the EU legislation is only a part of the process of drafting legislation. These Practical Guidelines serve for drafters of the Republic of Kosovo, who are familiar with the domestic legal system in order to gain some additional basic knowledge about the functioning of the EU and its legal system and familiarize themselves with some basic techniques of legal approximation.

These Practical Guidelines are divided into three basic chapters: first, basic issues of EU law, second, key issues on legal approximation process, and third, practical step by step approach on legal approximation.

The first chapter provides basic information on the functioning of the EU, based on Lisbon Treaty, and its legal order. A special attention is dedicated to the different types of legal acts used in the EU as well as to the case law of Court of Justice which set up key principles of the EU law. Within this chapter the EU institutions and their role are presented.

In the second chapter, the main attention is on the process of legal approximation. Here we try to explain not only what legal approximation is, but above all main challenges: the levels, the methods used as well as "do's and don'ts" for Kosovo drafters. Another part is dedicated also to explain where and how to search for EU law.

The last, third, chapter is practically oriented and tries to lead the drafter step by step in the approximation process, from planning and searching for EU legal act till its submission of the harmonised legal act to the National Assembly.

CHAPTER 1: THE LAW OF THE EUROPEAN UNION - WHAT A LEGAL DRAFTER NEEDS TO KNOW?

This chapter covers only the basic issues of EU law that legal drafters should be aware of when drafting national legislation. For the requirements of EU law in individual sectors, legal drafters need to consult the related EU legislation, the case law of the Court of Justice of the European Union and the necessary academic or technical literature.

The law of the European Union has created a new legal order different from both international law and the internal legal order of the Member States. Unlike the international law, which primarily regulates inter-state relations, with the states being the legal subjects, EU law comprises a full set of rights and obligations applying to the Member States, and natural and legal persons within those States.

Prior to entry in to force of the Lisbon Treaty (2009), it was customary to make a distinction between European Union Law and European Community Law. The distinction stemmed from the system of three pillars, which was abolished by the Lisbon Treaty. It should be noted that before 2009, the legal order changed from one pillar to the other, with significant differences between the Community first pillar and the inter-governmental second and third pillar. All three pillars together made up the body of EU law.

With the entry into force of the Lisbon Treaty, **we only refer to the law of the European Union**. However, the **old legal acts are in force until they are repealed, annulled or amended**.

1. Law of the European Community Law and Law of the European Union

Depending on the year of adoption, the EU legal acts or other documents may contain references to the "law of European Communities", the "European Community law" or the "European Union law". In order to avoid confusion while using this terminology, it is vital to be precise.

The legislation which was created within the framework of the European Communities (European Coal and Steel Community, European Atomic Energy Community and European Economic Community) has long been called "**the law of the European Communities**" (referred to hereafter as **EC law**).

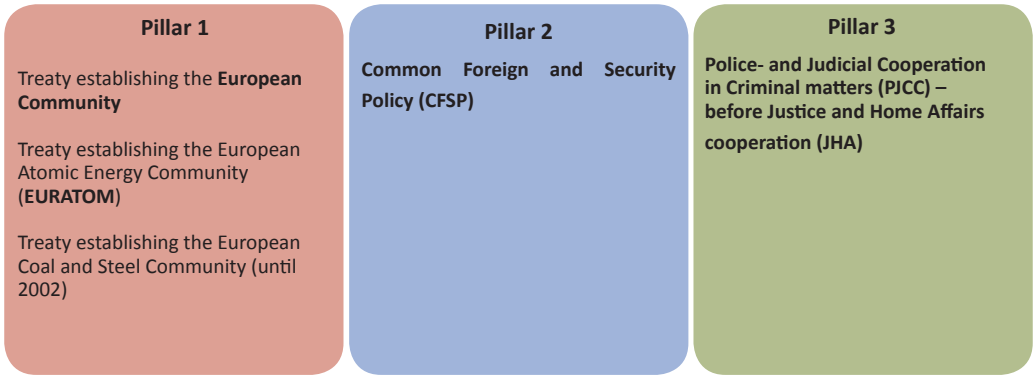
The largest of the three pillars was renamed to "European Community" and the legislation adopted by EC Institutions under this pillar was referred to as "**the law of the European Community"**.

The entry into force of the Treaty of Maastricht in 1993 established the European Union and the notion of **"law of the European Union"** which consisted of the legislation adopted by EC institutions in the first pillar and of inter-governmental cooperation within the second and third pillar.

Altogether, this accumulated legislation constituted the core[1] of the **Acquis Communautaire** or, since 2009, the **EU Acquis**. It consists of norms and legal practice, including primary and secondary legislation, as well as other legal acts, principles, agreements, declarations, resolutions, opinions, objectives and institutional and operating practices (including the case law of the European Court of Justice) applying to the Union, whether legally binding or not.[2]

The issue between the law of the "European Communities", "European Community" and "European Union" is not only of a linguistic nature. Indeed, in the theoretical legal sense, the difference was not consistently made between notions of "the European Community" and "the European Union" before the Treaty of Lisbon.

Namely, the Treaty on European Union from 1992 stipulated the existence of the European Union as an "umbrella structure" that rested on three pillars where only the Communities pillar had legal personality and pillar 2 and 3 were ruled by forms of intergovernmental cooperation:



The **Treaty of Lisbon** is an international agreement which amends the two treaties forming the constitutional basis of the European Union. The Lisbon Treaty was signed by the EU member states on 13 December 2007, and entered into force on 1 December 2009. It amends the Maastricht Treaty (also known as the Treaty on European Union) and the Treaty establishing the European Community (TEC; also known as the Treaty of Rome). In this process, the Rome Treaty was renamed to the Treaty on the Functioning of the European Union (TFEU).

The Treaty of Lisbon therefore amended, but did not replace the two remaining founding treaties and changed the title of the EC Treaty to the "Treaty on the Functioning of the European Union" (referred to hereafter as the TFEU). It finally abolished the classical three-pillar structure as well as the distinction between EC law and EU law and gave the European Union a legal personality.

1 See: http://europa.eu/legislation_summaries/glossary/community_acquis_en.htm.
2 Definition of Acquis by: Zoltan Horvath, Handbook on the European Union, Budapest 2011, p. 226.

The current relation between the European Community and European Union is settled in Article 1 paragraph 3 of the TEU[3] and is established as the following:

> “The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereafter referred to as “the Treaties”). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.”

Starting with the Lisbon Treaty, the European Union and the European Community live on as a single organization: the European Union. The EU legal personality replaced that of the European Community and the Union became the legal successor of the Community.

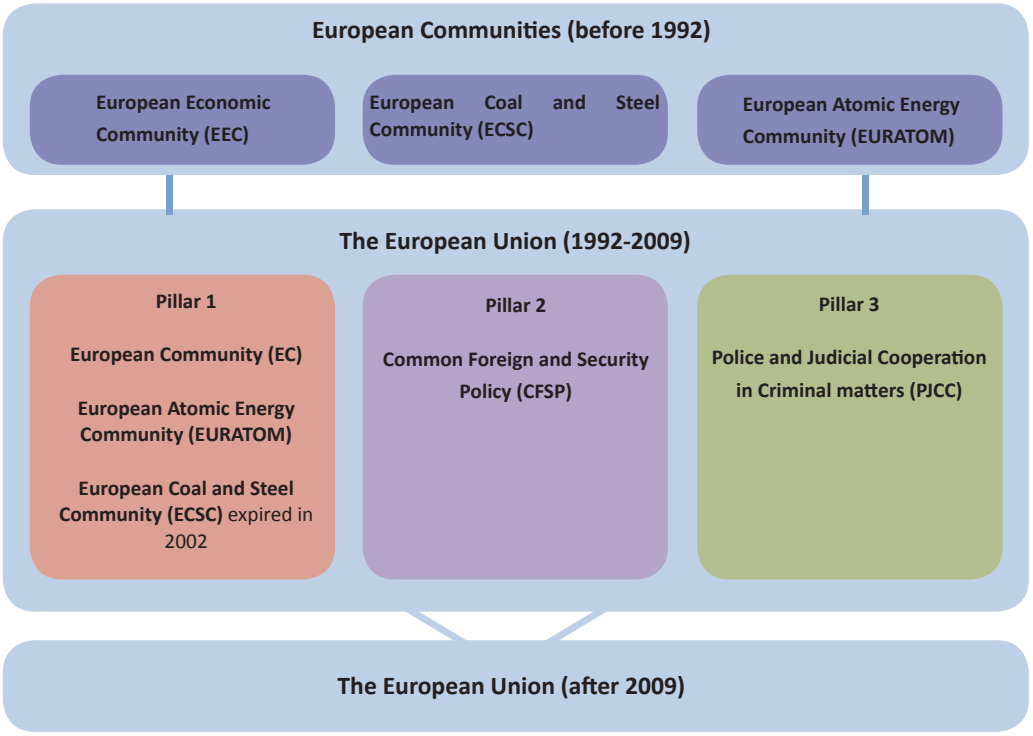
With the legal personality of the Union, the Lisbon Treaty ended the division between external trade and economic activities of the former first pillar, the second pillar with cooperation on foreign and security policy and the third pillar with police and judiciary cooperation in criminal matters. It also allowed the Union to act on international scene (conclusion of international treaties, membership in an international organization, etc).

After the entry into force of the Treaty of Lisbon, the terms “Law of the European Community” and “Acquis Communautaire” ceased to exist and the common term “EU law” or “Law of the European Union” or “EU Acquis” or just “Acquis” should be used.

The law of the EURATOM still exists, however it is not included within the meaning of “EU law” therefore it is not a subject of these practical guidelines.

[3] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union C 83, 30.03.2010.

- *Overview*



2. Sources of EU Law

The European Union is a unique legal system, which operates alongside the laws of the Member States of the European Union. The EU law has direct effect on the legal systems of its Member States, and overrides national law in many areas, especially in areas covered by the Single Market. The EU Law is usually divided into EU primary and secondary law.

2.1. Primary Sources of EU law

The primary law in the legal system of the EU has the highest rank, and all other legal norms are based on it. It consists of the EU founding treaties and other main treaties as well as the general principles of EU law.

2.1.1. The EU Founding Treaties and other main treaties

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 created a specific legal order in which Member States limited their sovereign rights, and whose subjects are not only Member States but also their citizens.

The founding treaties of the European Union are:

- The Treaty on the European Union and
- The Treaty on the Functioning of the European Union

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

- They provide for the **organisation, status and mutual relations** of the main subjects of the EU law such as the EU Member States, the EU institutions and bodies, the natural and legal persons from Member States;
- They divide the **areas of policy making**, which belong solely to the EU, its Member States and as well the areas of their shared competence.

Therefore, the Treaties are similar to the constitution of a state on a hierarchical scale of legal sources.

The following Treaties form the significant part of the EU primary legislation:

- The Treaty of Paris[4], establishing the European Coal and Steel Community (ECSC) (1951-2002);
- The Treaty of Rome[5], establishing the European Economic Community (EEC, 1957);
- The Treaty establishing the European Atomic Energy Community6 (EURATOM, 1957);
- The Merger Treaty[7] (1965);
- The Acts of Accession of the United Kingdom, Ireland and Denmark (1972);
- The Budgetary Treaty (1970);
- The Act of Accession of Greece (1979), Spain and Portugal (1985);
- The Single European Act[8] (SEA, 1986);
- The Treaty of Maastricht[9], establishing the European Union (EU, 1992);
- The acts of Accession of Austria, Sweden and Finland (1994);
- The Treaty of Amsterdam[10] (1997);
- The Treaty of Nice[11] (2001);

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4 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.

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

6 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.

7 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.

8 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.

9 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 Treaty of Maastricht created a new structure with three "pillars" which is political as well economic.

10 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.

11 The Treaty was signed on 26 February 2001, entered into force on 1 February 2003. It dealt mostly with

- The Treaty of Accession of 10 new Member States (2003);
- The Treaty of Accession of Bulgaria and Romania (2005);
- The Treaty of Lisbon[12] (2009);
- The Treaty of Accession of Croatia[13] (2011).

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

2.1.2. Changes introduced by the Treaty of Lisbon and impact on Kosovo

The last reform of the EU legal and institutional system was agreed upon with the Treaty of Lisbon, which entered into force on 1 December 2009. This Treaty represents the legislative and political framework within which the EU will function for the foreseeable future. The Treaty of Lisbon has introduced some key changes:

- ***Single legal personality***

On 1 December 2009, the Treaty of Lisbon merged the two legal personalities of the European Community and of the European Union into a new single EU legal personality. It finally abolished the classical three pillar structure as well as the distinction between "EC law" and "EU law" and gave the European Union a legal personality[14]. The title of the Treaty on European Union remained unchanged, but the Treaty establishing the European Community was renamed to Treaty on the Functioning of the European Union (TFEU):

> "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.[15]"

A legal personality will allow the EU to act with one voice under international law and to conclude treaties as well as to have a seat in international organisations.

- ***Division of the competences between the EU and the Member States***

The term "competence" refers to the responsibility for decision making in a particular policy area. The Treaty of Lisbon codifies and describes the division of competences between the Union and the Member States (Article 2-6 TFEU). It clearly identifies policy areas in which the EU exercises exclusive, shared and supportive competences[16]. The Treaty of Lisbon codified categories of EU competences, which already had been

reforming the institutions so that the Union could function efficiently after its enlargement to 25 Member States.

12 The Treaty was signed on 13 December 2007, entered into force on 1 December 2009.

13 The Treaty signed in 2011 entered into force on 1 July 2013 and Croatia became 28th EU Member State.

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

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

16 A. Kaczorowska, "European Union Law", 2nd ed, Routledge-Cavendish, 2011, p. 81.

identified by the European Court of Justice or mentioned in the previous founding treaties. It puts them into a more coherent order[17].

Art. 2 of the TFEU provides for three types of competences of the EU[18]:

- **Exclusive competences** of the European Union (defined by Art. 3 of the TFEU). In these policies defined by the TFEU, the EU has the exclusive legislative and decision-taking power to regulate certain subject matters. EU Member States should not interfere with their own regulation into these areas as they delegated the relevant functions to the EU and its institutions.
    - Areas: Customs union, Competition rules for the internal Market, Monetary policy for the Eurozone, Commercial policy and Conservation of marine biological resources. The principle of subsidiary does not apply to areas in which the EU enjoys exclusive competences but the principle of proportionality does.

- **Competences that the EU shares with the Member States**. Most competences are shared between the EU and the Member States. The Member States may take measures as long and insofar as the EU has not yet taken its measures (defined by Art. 4 of the TFEU). Under the principle of subsidiarity, in the areas of shared competences the EU can only intervene if certain objectives set out by the Treaties cannot be attained by the Member States and only if the EU can attain them with greater efficiency than the Member States. Further, the EU is bound by the principle of proportionality; hence any act shall not exceed what is necessary to achieve the objectives of the Treaties" (Article 25 TFEU)[19].
    - Areas: Internal market, Social policy, Economic, social and territorial cohesion, Agriculture and Fisheries, Environment, Consumer protection, Transport, Trans-European networks, Energy, Freedom, Justice and Security, Public health.

- **Supportive competences of the EU:** The EU may carry out actions to support, coordinate or supplement the actions of the Member States (defined by Art. 6 of the TFEU). In these areas the EU supports, co-ordinates, encourages or complements measures taken at national level (Art. 6 TFEU) and Member States have not conferred competences to the EU but have decided to act through it.
    - Areas: protection and improvement of human health, Industry, Culture, Tourism, Education, Vocational training, Youth and sport, Civil protection, Administrative cooperation.

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17 J.-C. Piri, The Lisbon Treaty: A Legal and Political Analysis (Cambridge Studies in European Law and Policy), Cambridge University Press, 2010.

18 As classified by J.-C. Piri in „The Lisbon Treaty: A Legal and Political Analysis (Cambridge Studies in European Law and Policy)", Cambridge University Press, 2010.

19 Protocol 2 on the Application of the Principles of Subsidiarity and Proportionality attached to the Treaties establishes not only the conditions for the application of these principles but also a system for monitoring their application.

It should be noted that the EU competences in the area of coordination of economic and employment policies, Common Foreign and Security Policy, Research, technological development and space, Development cooperation and humanitarian aid do not fall under any of these three categories and do not belong to this set of competencies.

However, a declaration is made stating that EU common foreign and security policy will not affect the Member States' competence for their individual foreign policy and national standing in the world.

In any case, in the exercise of these powers, the EU is governed by the **subsidiarity principle.**

The present formulation is contained in Article 5(3) of the Treaty on European Union (consolidated version following the Treaty of Lisbon, which entered into force on 1 December 2009):

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

A more descriptive analysis of the principle can be found in Protocol 2 to the European Treaties

The subsidiarity principle has two sides:

- Affirmative: the EU must act where the objectives to be pursued can be better attained at the EU level;
- Negative: the EU should not act where objectives can be satisfactorily attained by the Member States acting individually.

- ***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 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 was later included in the TEU. Finally, during the negotiations of the Treaty of Nice (2001), the EU adopted the Charter of Fundamental Rights of the European Union. The Treaty of Lisbon (2009) expressly affirmed the binding nature of the Charter, despite the non-inclusion of the Charter in the Founding Treaties.

The Art. 6 of the TEU provides for the detailed explanation on the way in which the Charter shall apply. In addition, Art. 51 of the Charter points out that the EU institutions and the Member States will have to respect the rights and principles enshrined therein when implementing EU law.

Moreover, they will have to promote the observance of the Charter in accordance with their respective powers[20].

The protection of fundamental rights and freedoms and the binding nature of the Charter of Fundamental Rights have already now a great influence on Kosovo as potential candidate for EU.

Namely, Article 49 of the EU Treaty stipulates that any European state may apply for membership if it respects the fundamental values of the Union as defined in Article 2 which says:

> "The Union is founded on the values of respect for human dignity freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

- ***Abolition of the second and third pillars of the EU and EC law***

The EU legal system still contains two types of EU legal acts related to the issues of the second pillar: the acts adopted within the framework of the TEU provisions on Common Foreign and Security Policy; and of the third pillar: those adopted in the framework of the TEU provisions on Police and judicial cooperation in criminal matters.

As mentioned above, until the Treaty of Lisbon entered into force, special EU legal acts were adopted within these two frameworks and many of these legal acts are still in force. In order to achieve the goals of the Common Foreign and Security Policy, the EU institutions could use the acts, which were defined in the former Art. 25 of the Treaty on European Union. The Article provided for 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 the Member States could conclude special conventions, adopt joint positions, joint actions, resolutions, recommendations, decisions and, later on, framework decisions. The entry into force of the Treaty of Lisbon finally abolished the pillar system. However, the remaining old EU legal instruments will, in accordance with the provisions of the Protocol nr. 36 on transitional provisions to the TEU remain in force until "those acts are repealed, annulled or amended in implementation of the Treaties"[21].

Therefore, Kosovo will still need to harmonise its legislation with the requirements of EU legal acts adopted within the former pillar system until the moment when they are repealed and replaced by new legal instruments.

[20] „The EU Charter of Fundamental Rights: From Declaration to Binding Instrument (Ius Gentium: Comparative Perspectives on Law and Justice), ed. By G. Di Federico, Springer; 1st Edition, 2010, pp. 166-167.

[21] J. Gromovs, "Future Development of the Area of Freedom, Security and Justice: Major Issues", "Lisbon Treaty: a Look Forward", Riga, 2011.g.

- *Decrease in number of types of the EU legal acts*

Upon entry into force of the Treaty of Lisbon the number of EU secondary legal acts was reduced from 15 to 5 types: Regulations, Directives, Decisions, Recommendations and Opinions. The names of the remaining types of EU legal acts were left unchanged.

- *Introduction of legislative and non-legislative procedures in the EU law*

Art. 288 of the TFEU provides for that in the future the same three types of binding legal instruments (Regulations, Directives and Decisions) will be available at three different levels of law-making: for legislation as such, 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 act[22].

- *Increased role of National Parliaments of EU Member States*

The Treaty of Lisbon provides for an increased right of the National Parliaments of EU Member States to express their views on whether draft EU legislative proposals comply with the principle of subsidiarity. If they consider that the proposal does not comply, they have the right to send an opinion to the initiator of the legislation ("early warning system").

National parliaments can issue a reasoned position within 8 weeks following the legislative proposal, setting out why the legislative proposal in question does not meet the subsidiarity and proportionality requirements. If this reasoned opinion is supported by at least a third votes allocated to the National Parliaments (each national parliament has two votes, or in case of chamber system, one vote per chamber), the legislative proposal must be reviewed again by the institution that issued it (usually the Commission). Following this review, the proposal can be retained, amended or withdrawn.

If the European Commission decides to retain the draft, it must issue a reasoned opinion, stating why it considers the draft to follow the subsidiarity principle. This reasoned opinion is sent to the EU legislator together with the reasoned opinion of the national parliaments so they can be taken into account in the legislative procedure. If, by a 55% majority of the Members of the Council of the EU or by the majority of the votes cast in European Parliament, the EU legislator is of the opinion that the proposal does not comply with the subsidiarity principle, the legislative proposal is not examined any further.

This early warning system has no consequences for the Kosovo Assembly until Kosovo is not in the EU. But, in any case, the Committee for European Integration of the Kosovo Assembly will monitor, not only the Kosovo's European Integration process by reviewing Government's work, but the legjislative procedures in the EU and will cooperate with the EU Member States Parliaments.

[22] 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.

2.2. Secondary sources of EU law

The secondary sources of EU law are the unilateral legal acts issued by EU institutions according to set rules as well as conventions and agreements between the EU and a third country or a third-party organization[23].

Under the Treaty of Lisbon, Member States have conferred important legislative powers on the European institutions enabling them to implement the provisions of the Treaties and thus giving full effect to EU law and policies. The Treaty of Lisbon is the first Treaty which makes reference to legislative acts adopted by EU institutions in order to implement the Treaties.

It rationalizes, simplifies and provides for the hierarchy of secondary sources. Article 288 TFEU states that the EU institutions "shall adopt regulations, directives, decisions, recommendations and opinions." The Article 289(3) TFEU states that "legal acts adopted by legislative procedure shall constitute legislative acts."

The largest amount of EU legal provisions, which require legal approximation activities, is contained in the secondary EU legal acts. The choice of the EU secondary legal instrument, which would be legally binding (regulation, directive or decision) – for the regulation of specific issue is determined by reference to a provision of the Founding Treaties which constitutes its legal basis.

If there is no indication as to what kind of EU legal act should be adopted, or a particular provision of the Treaty leaves the choice open, the competent EU institution chooses the most appropriate legal instrument in order to achieve the objective prescribed by the provision in question (subject to the judicial review of the European Court of Justice)[24]. Art. 288 of the TFEU provides that EU institutions adopt regulations, directives, decisions, recommendations and opinions, in order to exercise their competences.

Before the changes through the Lisbon Treaty, there are 15 types of EU legal acts which were adopted in the framework of the founding Treaties before the Lisbon Treaty under the different pillars (European Community law, CFSP and JHA):

- Regulations;
- Directives;
- Four types of Decisions (adopted under the frameworks of EC, CFSP, JHA and sui generis, which are all legally binding);
- Recommendations and Opinions;
- Framework decisions adopted only under the frameworks of JHA (in their nature they are similar to directives, although they cannot entail direct effect);
- Conventions between Member States (adopted under the frameworks of the EC and JHA. In principle they were classic international agreements, existing under international law, but seldom used);
- Principles and general guidelines (listed among CFSP instruments, although

[23] Art. 216 TFEU confers the right to conclude such agreements, which are binding on the Institutions of the Union and its Member States.

[24] A. Kaczorowska, „European Union Law", Routledge-Cavendish, 2008, p. 214.

they were not legal acts);
- The Common strategy (adopted under the framework of CFSP);
- Two types of Common Positions (adopted under the frameworks of CFSP and JHA, which both have binding force); and
- The joint action (adopted under the framework of CFSP, which also has binding force)[25].

The reason for such a complicated legal system of EU secondary legal acts, which do not have a formal hierarchy between each other, is the development of EU law following the changes brought by the Founding and other Treaties.

The Treaty of Lisbon changed the classification for secondary sources of EU law from 15 types to only 5 types: **Regulations, Directives, Decisions, Recommendations and Opinions.**

2.2.1. Regulations[26]

Regulations are the most important EU acts as they ensure uniformity of solutions on a specific point of law throughout the EU. They apply *erga omnes* (in relation to everyone) and simultaneously in all Member States.

Art. 288 TFEU defines regulations in the following terms:

> "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."

A regulation has as a general application, is binding in its entirety and directly applicable in all Member States. Regulations are addressed to all Member States. The Member States are not entitled to apply the regulation only partially or choose only part of their provisions for application in order to prevent the enactment of adverse national legislation. Neither are they entitled to introduce provisions and practices in the national law, which would make it possible not to apply the regulation. Unlike the directive (see below), the regulation is an instrument to unify some legal provisions EU-wide.

The European Court of Justice explicitly prohibits the transposition of provisions of regulations unless the authorisation to transpose is explicitly provided in the mentioned Regulation or the ECJ case law.

Regulations are usually not transposed into the legal systems of EU Member States, because they are directly applicable as they stand. Member states have to adopt only implementing measures or penalties which are not precised in the Regulation. In Kosovo, however, which is not a Member State, the authorities need to ensure that the

[25] J.-C. Piri, The Lisbon Treaty: A Legal and Political Analysis (Cambridge Studies in European Law and Policy), Cambridge University Press, 2010.
[26] Article 288(2) of the TFEU.

requirements of the EU law (including regulations) are properly implemented. Such Kosovo legal acts, which transpose the regulations, would need to be abolished upon the accession of Kosovo to the European Union, but parts referring to penalties, institutions and implementing measures will remain.

2.2.2. Directives[27]

A Directive binds every EU Members State as to the result to be achieved, but leaves the choice of form and method to regulate the topic in the respective legal order to the national authorities of the Member States.

Directives are defined in Article 288 TFEU in the following terms:

> "A directive shall be binding, as to the result to be achieved, upon each Member States to which it is addressed, but shall leave to the national authorities the choice of form and methods."

Therefore it represents a compromise between the need for uniform legislation within the EU and the need to retain the diversity of legal systems of the EU Member States. The aim of the directives is the approximation of the national laws of the EU Member States, not the unification of legal provisions, as is the case of the regulations.

From the point of the legal approximation process, the directive is the most important instrument of EU law, due to its variety of nature and the fact that the vast amount of EU Law has been and is still passed in the form of directives.

Finally it should be stressed that the directives in fact are very diverse legal instruments[27]:

- Their texts have a certain uniform template, but their contents, especially in terms of clarity and degree of detailed elaboration of provisions depend very much on the year of adoption, area of regulation, which is in EU competence, the willingness of Member States to agree on certain provisions of the text and other reasons.
- Not existing as official term, the so-called "framework directives" are directives, which only contain general and basic principles. The detailed regulation of the subject matter follows in the so-called "daughter" directives. A number of examples may be provided in this regard, for example, directive 2000/60/EC establishing the framework for Community action in the field of water policy or Directive 89/391/EC on health and safety at work are examples of framework directives.

[27] Based on observations of S. Prechal in "Directives in EC Law", Oxford University Press, USA; 2 edition, 2006.

Non-implementation of a directive by a Member State within a prescribed time limit produces the following results:

- It becomes directly applicable upon the expiry of the time limit;
- Its provisions are directly effective, an individual may rely on them in proceedings before national courts upon the expiry of the time limit;
- The Commission may bring an action under Article 258 TFEU against the Member State concerned for breach of EU law;
- An individual may upon the expiry of the time limit, sue a defaulting Member State for damages, provided certain conditions are satisfied.

It is important to note that all directives in their formal provisions impose on the Member State concerned an obligation to provide a list of measures which have been taken in order to implement them. This facilitates the task of the Commission regarding the determination of conformity of national law with EU law in the area covered by the relevant directive.

It should also be noted that more than one directive may be transposed into the national law by a single legislative instrument**;** for instance when the implementation of the said directives requires the modification of the same national law, when these directives regulate the same issue or fall in the same policy area.

The Court of Justice ruled :

> “ The transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may, depending on the content of the directive, be adequate for the purpose provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts[28]. ”

Already the signature under an upcoming Stabilisation and Association Agreement (SAA) will create an obligation to harmonise legislation in selected areas. Meanwhile, progress in the EU Integration process is very much dependent on progress in the legal approximation process. Hence the Government should put great emphasis on the preparation of a future National Plan for the Adoption of the Acquis, which clearly is setting national priorities and defines responsibilities for the approximation according to chapters.

[28] Commission v Germany, C-131/88 (Groundwater).

2.2.3. Decisions

The third category of EU legal acts is decisions. A decision is defined in Article 288 TFEU in the following terms:

> “A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.”

A Decision shall be binding in its entirety, but only on those addressed. Decisions may be addressed to the EU Member States, EU institutions, natural or legal persons, which reside or are registered in EU Member States. Decisions are a tool for EU institutions to implement treaties and regulations and this is possible only if they are in position to take measures binding on individuals, undertakings or Member States.

On the basis of the case law of the Court of Justice, decisions may have direct effect. They therefore may be invoked by individuals before national courts.

As mentioned above, before the Treaty of Lisbon, there were different types of the decisions, which were issued under provisions of the Founding Treaties and a large amount of them is still in force. Although the pillar system was abolished by the Treaty of Lisbon, 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.

Kosovo legal drafters have to be aware that decisions are binding legal instruments and in majority cases should be carefully checked whether transposition is needed especially in the area of EC law (former first pillar).

Exemptions surely apply if the respective decision is addressed to an individual Member State or a specific legal person (company). Transposition is needed in many cases where a decision is issued by Commission with the objective of better implementation of the Treaty provisions or regulation adopted by Council and EU Parliament.

We stress attention to different types of decisions adopted before the Treaty of Lisbon, especially those of Police and Judicial cooperation (Framework decisions) which are very similar to directives although without direct effect and different types of decisions also within Common Foreign and Security Policy.

2.2.4. Recommendations and Opinions

A final category of legal measures explicitly provided for in the Treaties are recommendations and opinions. Article 288 TFEU is very short regarding recommendations and opinions:

> “Recommendations and opinions shall have no binding force”

Recommendations and Opinions have no binding force. They differ from regulations, directives and decisions, in that they are not binding for Member States. Therefore they belong to the EU "Soft law". However these instruments are very important, as although without legal force, they do have a political and moral weight. The recommendation is an instrument of indirect action aimed at preparation of legislation in the EU Member States, differing from the directives only by the absence of obligatory power.

Recommendations and opinions at least on this initial stage of the EU Integration process will not be in the first lines for legal approximation in Kosovo. Again, they have to be checked alongside with the regulations and directives from specific field and transposed if this is in political and in strategic interest of Kosovo. We stress again that they are not binding and do not place any legal obligation to the addressee within EU.

2.3. International Agreements

In accordance with Art. 216 of the TFEU, the EU may conclude agreements with one or more third countries or international organisations establishing an association involving reciprocal rights and obligations, common action and special procedure. Such agreements, which were concluded by the EU, are binding upon the institutions of the EU and on its Member States.

In accordance with Art. 218 (2) of the TFEU the Council authorises the opening of negotiations, adopts negotiating directives, authorises the signing of agreements and concludes 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.

The EU is signing international agreements around the globe with many countries (e.g. free trade, partnership and cooperation or Stabilization and Association). They are not directly affecting Kosovo because Kosovo is not part of the EU.

When Kosovo will sign a Stabilisation and Association Agreement with the EU, Kosovo will become a contracting party with clear benefits but also duties and obligations. One of them will be the obligation to gradually harmonise Kosovo legislation with the acquis based on the legislative programme. Also new treaties of accession with other Western Balkan countries will have effect on Kosovo and its future SAA especially in the area of trade.

2.3.1. EU "Soft law"

The definition of the EU soft law is not provided in the Treaties. Several definitions were proposed by legal scientists and one may recommend referring 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 those are aimed at and may produce practical effects[29]."

For example, until the 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 EU law, it 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 such EU "hard law" instruments as the 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 Justice[30]:

- **Preparatory instruments**: Green Papers, White Papers, Action Programmes;
- **Informative instruments**: Communications;
- **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);
- **Formal and non-formal steering instruments**: European Commission recommendations, Council recommendations, European Commission opinions, Council conclusions, Council declarations and EU Member States' declarations, Joint Declarations and Inter-Institutional Agreements, Council resolutions, Council and Commission Codes of conduct or practice and mixed conclusions, declarations and resolutions.

Although the majority of EU "soft law" acts are not explicitly mentioned in the Art. 288 of the TFEU, the same article does not preclude their adoption. Hence it can be assumed that the practice of EU institutions to adopt EU soft law acts will continue in the future.

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

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

EU soft law, namely preparatory or informational documents (as Green or White papers, communications, etc.) often contains significant reasons and background for adoption of specific wording in EU legal acts. Although it is not needed to transpose EU soft law as such, the content of such acts is often vital in order to understand the legal act and should not be underestimated in providing guidance in the transposition of the respective EU legal act into the domestic legal order.

2.3.2. Case law of the Court of Justice of the European Union

In accordance with the Art. 19(1) of the TEU, the European Court of Justice shall ensure "that in the interpretation and application of the Treaties the law is observed". 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 ensures, in cooperation with the courts and tribunals of the Member States, 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). In total approximately 15.000 judgments have been delivered by these three courts.

The courts of EU Member States have an obligation to apply EU law uniformly, certainly also with regard to national legislation, which has been harmonised with EU requirements. In addition, EU secondary law sources (e.g. regulations) are directly applicable in EU member states and thus need to be applied similarly to the way national legal acts of the Member States are applied.

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:

- The interpretation of the Treaties;
- 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 provide a reasoned judgement, request a ruling by the Court of Justice on the question. In cases where such a questions comes up in proceeding towards a final decision (no judicial remedy under national law), that court or tribunal is obliged bring the matter before the Court[31].

[31] The TFEU has a number of detailed provisions on the activity of the Court of Justice, which are not relevant for legal drafters of Kosovo and therefore are excluded from the scope of these Practical Guidelines.

Although not written in the Treaties, we have to be aware that case law is also a source of EU law. The Court of Justice namely interprets EU law to make sure it is applied in the same way in all EU countries. When we search for certain EU legal act it is our advice to check also Court decisions connected with this legal act. Court interpretations will many times help us to understand the legal act and connect open issues and possible problems not only during transposition but above all, in implementation.

2.4. The general principles of European Union law

The scope of the general principles of the EU law was established either by the case law of the European Court of Justice of the European Union (ECJ) 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.

While there is no exhaustive list of such principles in the case law of the ECJ or in the Founding Treaties, the following principles are widely known and applied: the supremacy of EU law, the protection of the fundamental rights of EU citizens, the direct effect and direct applicability of EU law, legal certainty and protection of legitimate expectations, which, for example, include the prohibition of retroactivity of EU legal provisions, prohibition of discrimination, the principle of proportionality and others.

Four examples are of particular importance:

- ***Supremacy of EU law over national law***

According to the case law of the ECJ, the supremacy of the EU law is a cornerstone principle of the EU law. This principle is inherent to the specific nature of the European Union (European Community).

The principle of supremacy means that the **EU law takes precedence over any national law of any EU Member State** with provisions that contradict it. At the time of the first judgment regarding this principle (case 6/64 Flaminio Costa vs E.N.E.L.[32]) there was no mentioning of supremacy of EC law over the national legislation of a Member State in the Founding Treaties. This judgment established the supremacy of the European Community law over the national law of the Member States.

In that case, an Italian court had asked the ECJ 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 supremacy of Community law, basing it on the specific nature of the Community legal order, which had to be uniformly applied in all Member States.

[32] Order of the Court of 3 June 1964. - Flaminio Costa v E.N.E.L.. - Reference for a preliminary ruling: Giudice conciliatore di Milano - Italy. - Case 6/64, European Court reports, English special edition, p. 00614.

Due to this principle, in cases where divergence occurs between the national and EU law, the latter applies. The basic rule is that the EU primary and secondary legislation has to be seen as part of the legal systems of the Member States and must be applied also by their courts and competent authorities.

The EU law takes precedence if the following conditions are all 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.

A national court, which should apply the provisions of EU law, is obliged to give them full effect, including if necessary refusal to apply any conflicting provision of the national legislation of the EU Member State in question. This court does not need to request or await the amendment or repeal of these provisions by the parliament, the government or the constitutional court (Judgment in case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA[33]).

In the meantime, the national courts should apply the law in question. They have a duty of interpretation of national law in accordance with the meaning and spirit of the provisions of EU law (Case 14/83 Von Colson[34]).

The supremacy of the EU law obliges the national courts to apply EU law and "to refuse to apply conflicting provisions of national law, irrespective of the judgment of the national constitutional court which has deferred the date on which those provisions, held to be unconstitutional, are to lose their binding force"[35].

However a national court does not have to review and set aside a judgment which has become final and, thus, has acquired the status of res judicata ("a matter already judged"), but was contrary to a subsequent judgment of the European Court of Justice. The Court held that a national court is not required to discard its internal rules of procedure in order to review and set aside a final judicial decision, even if that decision is contrary to EU law. Therefore the principle of *res judicata* prevails over the principle of supremacy of EU law.[36]

A national court that finds that national legislation infringes directly on provisions of European Union law (for example the right of establishment in accordance with Art. 49

[33] Case 106/77, Judgment of the Court of 9 March 1978, Amministrazione delle Finanze dello Stato v Simmenthal SpA., European Court reports 1978, p. 00629.

[34] Case 14/83, Judgment of the Court of 10 April 1984, Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, European Court reports 1984, p.01891.

[35] Case C-314/08: Judgment of the Court (Third Chamber) of 19 November 2009 (Reference for a preliminary ruling from the Wojewódzki Sąd Administracyjny w Poznaniu — Poland) — Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu, Official Journal of the European Union C 024, 30/01/2010, pp. 0009 – 0010.

[36] Case C-234/04, Judgment of the Court (First Chamber) of 16 March 2006 (reference for a preliminary ruling of Landesgericht Innsbruck (Austria)) — Rosmarie Kapferer v Schlank & Schick GmbH, Official Journal of the European Union C 131, 3.6.2006, p. 14–15.

(former Art. 43 TEC) and/or freedom to provide services – in Art. 56 (ex Art. 49 TEC) of the TFEU) may even be in a position to decide not to apply the national legislation of its country. The Court of Justice clearly indicated, that "by reason of the supremacy of directly-applicable Union law, national legislation... which, according to the findings of a national court, comprises restrictions that are incompatible with the freedom of establishment and the freedom to provide services... cannot continue to apply"[37].

Finally, the Declaration concerning supremacy (Declaration nr. 17) attached to the Treaty of Lisbon refers to the existence of the above-mentioned supremacy concept in the case law of the European Court of Justice and is thus reaffirming the importance of this principle.

Kosovo is not an EU Member State therefore the principle of supremacy of EU law is formally seen not applicable until Kosovo has become part of the EU. Then a change of the Kosovo Constitution is likely to implement the principle of supremacy of EU law. Nevertheless, Kosovo legal drafters should be familiar with this principle in order to understand the language of regulations and directives as well as the case law of the Court of Justice enforcing supremacy of EU law.

- *Direct applicability of the EU law*

The principle of direct applicability means that directly applicable provisions of EU law must be fully and uniformly applied in all Member States from the date of their entry into force. **There is no need for their implementation by means of transposition into the national legislation of EU Member States.**

The following instruments of EU law are directly applicable:

- **Founding Treaties** (as follows from the judgment of the Court in joined Cases 9/65 and 58/65 San Michele SpA[38]);
- **Regulations** (in accordance with the above-mentioned provisions of Para.2. Article 288 (ex Art. 249 TEC) of the TFEU);
- **Decisions** are directly applicable to their addressees and, in the event that they do not dispose of addressees, on EU Member States (in accordance with the aforementioned provisions of Para. 4 Art. 288 (former Art. 249 TEC) of the TFEU); and
- **International agreements** concluded between the European Union and third countries, and between the European Union and international organisations, that do not require the adoption of implementing legislative measures at the European Union or national level.

[37] Case C-409/06, Judgment of the Court (Grand Chamber) of 8 September 2010 (reference for a preliminary ruling from the Verwaltungsgericht Köln (Germany)) — Winner Wetten GmbH v Mayor of Bergheim, Official Journal of the European Union C 288 , 23/10/2010, pp. 0006 – 0006.

[38] Joined cases 9 and 58-65, Judgment of the Court of 2 March 1967 Acciaierie San Michele SpA (in liquidation) v High Authority of the ECSC, European Court reports, p. 00001.

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

- In the interpretation of national law of an EU Member State, one should focus rather on its compatibility than incompatibility with the EU law, meaning that national law must be construed in compliance with EU law;
- 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 (the principle of supremacy of EU law as mentioned above);
- Where a person acts in accordance with directly applicable provisions, he/she shall not be subject to administrative or criminal liability, even if prescribed by national law;
- The EU Member States must abolish such national provisions, which are in contravention of directly applicable EU legislation;
- In some cases direct applicability has resulted in a situation where the EU Member States are unable to further their legislation in a certain field. This is known as "impeding effect".

Kosovo is not an EU Member State therefore the principle of direct applicability of EU law is not applicable until Kosovo will become part of the EU. Nevertheless, Kosovo legal drafters should be familiar with this principle in order to understand the language of regulations and directives as well as the case law of the Court of Justice enforcing direct applicability of EU law.

- ***Direct effect of the EU law***

According to the case law of the European Court of Justice, if the provisions of a directive are unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly[39].

The direct effect of European law has been enshrined by the Court of Justice in the judgment of Van Gend en Loos of 5 February 1963. In this judgment, the Court states that European law not only engenders obligations for Member States, but also rights for individuals. Individuals may therefore take advantage of these rights and directly invoke European acts before national and European courts. However, it is not necessary for the Member State to adopt the European act concerned into its internal legal system.

The EU law makes a distinction between horizontal and vertical direct effect:

- Vertical direct effect refers to a situation where an individual is allowed to rely

[39] Case C-138/07, Judgment of the Court (First Chamber) of 12 February 2009. Belgische Staat v Cobelfret NV (Reference for a preliminary ruling: Hof van Beroep te Antwerpen – Belgium) European Court reports 2009 Page I-00731).

on a provision of EU law in national proceedings against a Member State or its emanations;
- Horizontal direct effect concerns a situation where an individual is allowed to invoke a provision of EU law in national proceedings against another individual (that is, a natural or legal person).

Provisions of the TFEU Treaty and of regulations may be both horizontally and vertically directly effective[40]. In the case of other EU legal acts the situation is more complicated[41]:

- Directives may only produce vertical direct effect;
- Direct effect of Decisions depends on their addressees. They may produce vertical direct effect if the addressees are only EU Member States. A Decision addressed to a natural or a legal person can produce both vertical and horizontal direct effects;
- Provisions of international agreements concluded between the European Union (European Community) and third countries or international organisations, subject to the test for direct effect, may produce vertical direct.

Kosovo is not an EU Member State therefore the principle of direct effect of EU law is not applicable until Kosovo has become part of the EU. Nevertheless, Kosovo legal drafters should be familiar with this principle in order to understand the language of regulations and directives as well as the case law of the Court of Justice.

After the Stabilisation and Association Agreement will enter into force some of its provisions will have direct effect, because they will be clear, unconditional and precise and could be relied on before Kosovo courts by persons from Kosovo.

- ***Liability of EU Member States***

The concept of the liability of EU Member States for the breaches of the EU law has been established only by the case law of the European Court of Justice. In the cases Franchovich[42] and Brasserie du Pêcheur[43], the Court developed the principle of the liability of a Member State to individuals for damage caused to them by a breach of EU law by that State.

It follows from the judgements of the Court that the following conditions need to exist for a Member State to be liable under EU law:

- The result prescribed by the directive should entail the grant of rights to individuals;

40 A. Kaczorowska, „European Union Law", Routledge-Cavendish, 2008, p. 299-300.

41 Ibid.

42 Case C-479/93, judgment of the Court of 9 November 1995, Andrea Francovich v Italian Republic, European Court reports 1995 Page I-03843.

43 Joined cases C-46/93 and C-48/93, Judgment of the Court of 5 March 1996, Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others, European Court reports 1996 Page I-01029.

- It should be possible to identify the content of those rights on the basis of the provisions of the directive;
- The existence of a causal link between the breach of the state's obligation and the loss and damage suffered by the injured parties;
- The breach shall be sufficiently serious.

Although the state liability criteria and the right to compensation were formulated by the European Court of Justice as the issues of EU law, the issues of compensation to be paid to the persons whose rights were infringed were left to the national legislation of the EU Member States. The Court just indicated that the substantive and procedural conditions laid down by the national law of the Member States on compensation for harm should not be less favourable than those relating to similar domestic claims and should not be so framed as to make it virtually impossible or excessively difficult to obtain compensation.

Kosovo is not an EU Member State therefore the principle of liability for breaches of EU law is not applicable until Kosovo will become part of the EU. Kosovo, as a sovereign state, has its own legal system and has - formally seen - no connection with the EU legal system. Therefore Kosovo cannot breach EU law, but is of course liable before domestic courts for breaching applicable legislation.

When contractual relations between Kosovo and EU will be established for a first time with the Stabilisation and Association Agreement entering into force, Kosovo will be responsible for its implementation and hence in principle be liable to individuals for damages caused for breaching the agreement. Domestic courts will have jurisdiction in this regard.

3. Short overview: Institutions and functioning of the European Union

This part examines the main institutions of the EU. Article 13 TEU lists seven bodies that are entitled to be referred to as "EU institutions". They are: the **European Council**, the **Council of the European Union**, the **European Parliament,** the **European Commission**, the **Court of Justice of the European Union**, the **European Central Bank** and the **Court of Auditors**.

The seven institutions form the basic structure of the institutional system of the EU. To this basic institutional framework the following institutions and bodies must be added:

- Two main advisory bodies of the EU: the **Economic and Social Committee** and the **Committee of the Regions to assist the Council and the Commission**;
- Institutions necessary to carry out tasks peculiar to Economic and Monetary union which are mainly relevant to the Member States which have adopted the euro as their national currency: the **European Investment Bank** which operates on a non-profit-making basis and grants loans and guarantees finance projects which contribute to the balanced and steady development of the internal market as provided in Article 309 TFEU;
- Bodies which are within the scope of the Treaties and which assist the Council and the Commission in the accomplishment of their tasks: these are **agencies, offices and centers**, such as the European Environment Agency, the European Training Foundation, the European Agency for the Evaluation of Medical Products, the Office for Veterinary and Plant Health Inspection and Control, the European Monitoring Center for Drugs and Addiction, Europol, Eurojust, the Agency for Fundamental Rights and the European Chemicals Agency.

The use of 24 official languages[44] (Croatian added recently) in the EU means that all official meetings are conducted in all official languages, which are translated from one to another simultaneously. Also, all official documents are in 24 languages, although English and French are imposed as working languages. This use of multiple languages is necessary to ensure equality between Member States and transparency.

- ***The European Council***[45]

It is the ultimate political decision-maker in the EU. It comprises the heads of state or government, the President of the European Council and the President of the Commission. The HR participates in the work of the European Council. It meets four times a year in Brussels and publishes conclusions after each meeting.

Do not confuse with the Council of Europe, which is an entirely separate organsiation from the EU and is no part of the EU.

[44] The EU uses three alphabets: Latin, Cyrillic, and Greek.
[45] For more information, please visit http://www.european-council.europa.eu/home-page.aspx.

Main functions of the European Council:

- Shapes the future of the EU;
- Gives the necessary impetus for the development of the EU;
- Settles sensitive matters which the Council is not able to resolve;
- Constitutes a platform for the exchange of informal views;
- Identifies the strategic interests of the EU foreign action including the CFSP;
- Takes decisions concerning the revision of the Treaties;
- Participates in the appointment of senior EU officials;
- Authorises the use of "passerelle" provisions[46].

It does not adopt legislative acts but may adopt decisions and guidelines.

The position of full-time President of the European Council was created by the Treaty of Lisbon. He/She is elected by the European Council acting by Qualified Majority Voting. His/her term of office is two and a half years, renewable once. This post is permanent and its holder is required to be independent.

His/her main tasks are to:

- Prepare the work of the European Council;
- Chair debates of the European Council;
- Facilitate consensus within the European Council;
- Ensure continuity of the work of the European Council;
- Deal with foreign policy issues at a heads of state level but without prejudice to the
- powers of the HR;
- Report to the EP after each meeting of the European Council.

- ***The Council of the European Union***[47]

It represents the national interests of the Member States. It is made up of government ministers from the Member States.

Main functions:

- Jointly with the European Parliaments, adopts EU legislation and the EU budget;
- Ensures co-ordination of economic policies of the Member States;
- Frames the CFSP and takes the decisions necessary for defining and implementing it on
- the basis of the general guidelines and strategic lines defined by the European Council;
- Concludes international agreements.

[46] The Passerelle Clause is a clause within treaties of the European Union that allows the European Council to unanimously decide to replace unanimous voting in the Council of Ministers with qualified majority voting (QMV) in specified areas with the previous consent of the European Parliament, and move from a special legislative procedure to the ordinary legislative procedure. "Passerelle" means "overpass" in the French language.

[47] For more information, please visit http://europa.eu/about-eu/institutions-bodies/council-eu/.

- ***The European Parliament***[48]

The European Parliament is the parliamentary body of the EU and represents the interests of EU citizens. Its members are directly elected by them once every five years.

Main functions:

- Jointly with the Council adopts EU legislation and the EU budget;
- Exercises democratic supervision over all EU institutions including the election of the President of the Commission;
- Elects the European Ombudsman;
- May at the request of one-quarter of its members, establish a temporary Committee of
- Inquiry to investigate alleged contraventions or maladministration in the implementation of EU law;
- Participates in the conduct of external relations.

- ***The European Commission***[49]

Represents the interests of the EU and is made up of 27 commissioners, i.e. one from each Member State.

Main functions:

- Guardianship of the Treaties;
- Initiates legislative measures;
- Drafts and implements the EU budget;
- Exercises executive powers;
- Carries out some international functions;

- ***The Court of Justice of the European Union (The CJEU)***[50]

This collective name covers three courts: the Court of Justice of the European Union, colloquially known as the European Court of Justice (the ECJ); the General Court, which was formerly known as the Court of First Instance (CFI) and specialised courts which were previously known as "judicial panels". At the time of writing there is only one specialized court: the European Union Civil Service Tribunal. The ECJ and the General Court are made up of 28 judges, one from each Member State.

Main function:

- Ensures that in the interpretation and application of the Treaties the law is observed.

48 For more information, please visit http://www.europarl.europa.eu/news/en.
49 For more information, please visit http://ec.europa.eu/index_en.htm.
50 For more information, please visit http://curia.europa.eu/jcms/jcms/j_6/.

- ***The Court of Auditors***[51]

The EU financial watchdog, made up of 28 members, one from each Member State.

Main function: Ensures that the financial affairs of the EU are properly managed.

- ***The European Central Bank (ECB)***[52]

This is the central bank for the EU's single currency.

Main function: Formulates and implements the monetary policy of the EU.

- ***The Council of Europe***[53]

This is an inter-governmental organisation created in 1949 which has a membership of 47 European states. It is not an EU institution at all!

Its main objectives are: The promotion of European unity by proposing and encouraging European action in economic, social, legal and administrative matters;

- The promotion of human rights, fundamental freedoms and pluralist democracy;
- The development of a European cultural identity.

It is best known for its human rights activities including elaboration of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and supervision of its application.

4. Where and how to search for EU law?

This question is crucial before and after accession. EU legal acts are freely available on the Internet. An electronic version of the Official Journal[54] is available at http://eur-lex.europa.eu/en/index.htm.

The Official Journal prints the texts of laws as they were originally adopted and does not consolidate amendments to the original legislation. Consolidated versions of EU legislation may be found at http://eur-lex.europa.eu/en/consleg/latest/index.htm. For preparatory materials for EU legislation, see http://eur-lex.europa.eu/en/prep/index.htm.

A frequently updated Directory of EU Legislation in Force is available at http://eur-lex.europa.eu/en/consleg/latest/index.htm.

Summaries of numerous EU legal acts are available at http://europa.eu/legislation_summaries/index_en.htm.

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51 For more information, please visit http://eca.europa.eu/portal/page/portal/eca_main_pages/home.
52 For more information, please visit http://www.ecb.int/ecb/html/index.en.html.
53 For more information, please visit http://hub.coe.int/.
54 On 1 July 2013, Croatia joined the European Union. From now on, EUR-Lex is also available in Croatian, giving access to EU law in the 24 official languages of the EU.

Information about recent EU legislation may be found in the annual General Report of the Activities of the European Union http://europa.eu/generalreport/ and the monthly Bulletin of the European Union (All latest stories by topic and by month) http://europa.eu/newsroom/index_en.htm.

A directory of proposed legislation is available at http://eur-lex.europa.eu/en/prep/latest/index.htm (Preparatory documents, together with other documents of the European institutions of possible public interest, may be accessed from this page).

Numerous EU publications are freely available on the website of the EU Bookshop available at http://bookshop.europa.eu/en/themes-cbsS0KABst8rMAAAEjcqkY4e5J/.

Chapter 2: Approximation of Laws

The purpose of this chapter is to describe what legal approximation is, what types of legal approximation do exist and which are the main stages in a legal approximation process. Furthermore, the chapter will underline the importance to properly plan the creation of a key strategic document – the National Programme of the Adoption of the Acquis.

Kosovo cannot make progress towards EU without good planning and implementing of the legal approximation programme and any progress will be measured by the quantity and quality of EU compliant legislation adopted and implemented. It has to be known who does what and when regarding the approximation with the EU Acquis.

It should be stressed again that a future SAA, which will establish contractual relations between EU and Kosovo, formally establishes the need for legal approximation. The SAA will entail the details of such obligations to gradually harmonise legislation in specific areas and will be monitored through common bodies established with the SAA. Kosovo will commit itself that its legislation will become gradually compatible with that of the EU based on a legislative programme.

1. What is legal approximation?

Following the experience of the new EU Member States we can undoubtedly conclude that readiness for EU membership is not only a political and economic question but above all, a legal one. The legal approximation process is the biggest and most comprehensive task during the accession process. Each future EU Member State has to harmonise its own legal system in all the areas where Member States have transferred competencies to the EU - and there are no exceptions in the long run – rarely transitional periods can be agreed in accession negotiations. The EU cannot function if key legislation is not harmonized among its Member States.

Kosovo has no contractual relations with EU yet, therefore there is formally no obligation to harmonise its legislation with EU acquis at this stage. However, without progress on law approximation there will be no progress towards EU Integration. As soon as the SAA is signed, a clear obligation to gradually harmonise legislation with the current and the future EU Acquis based on a legislative programme will have to be agreed upon.

1.1. Definition

In the European Union, the concept of approximation of law means the process of harmonising of national legislation with the EU law.

The process of approximation includes methods and techniques for transposing the EU legislation into the national law, its incorporation into the 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 the Art. 4(3) of the Treaty on European Union, the EU Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising from the Treaties or resulting from the acts of the EU institutions. They also shall facilitate the achievement of the EU tasks and refrain from any measure, which could jeopardise the attainment of the EU objectives.

The EU Founding Treaties use different terms such as: harmonisation, approximation and coordination. These three terms should express different levels of integration processes that are achieved between the EU Member States. It should be stressed that the term most commonly used in relation to countries not yet beeing an EU Member States is "approximation". However, in texts of the Stabilisation and Association Agreements with Western Balkans countries, the term "harmonisation" is used as well.
In conclusion, the meaning in which these terms are used both by EU institutions and officials of the third countries (EU Association Countries, Candidate Countries, Accession Countries or other countries, which established closer cooperation with the European Union) is not always consistent.

It generally should be understood as the following:

- In the broadest sense legal approximation means the **transposition of provisions of EU law into the national legislation**, **implementation** (application) of the provisions of such national legislation by the national competent public authorities and their **enforcement** by the courts and law enforcement agencies.
- In practical terms, irrespective of the difference in the aforementioned terminology used (approximation or harmonisation), one of the clearest indicators of the progress of a country regarding EU integration and approximation is the **quantity and quality of national legal acts transposing the provisions of EU law**, and the evidence of their effective application in practice.

1.2. Types of legal approximation

There are different ways for the EU to harmonise the legislation of Member States. Regularly we distinguish three types of law approximation:

- **Unification**: national legislation is replaced by EU legislation in a certain field where the EU has full competence. Member States shall not regulate those issues themselves. Regulations are the main instruments used for unification;
- **Approximation**: national legislation complies with objectives provided for in EU acts, but Member States decide how they will technically regulate the matter within the frame provided by the EU act. Directives are the main instruments for approximation;
- **Coordination**: 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.

1.3. Main stages

In general, a candidate country preparing for accession to the EU must bring its institutions, management capacity and administrative and judicial systems up to EU standards with a view to implementing the Acquis effectively or, as the case may be, being able to implement it effectively in good time before accession.[55]

Overall, the main stages in the legal approximation process can be outlined as follows:

- **Preparatory stage**: establishment of the necessary institutions for the law approximation approximation and a series of technical activities including distribution and presentation of EU legal acts in particular areas and presentation of the law approximation principles in general.
- **Analytical stage**: definition of priorities based on state priorities as well as on future international agreements, on unilateral EU documents accepted by Kosovo like European Partnership, translation of the necessary EU legal acts in official language(s) and their incorporation in the National Plan for Integration in line with the previously defined priorities.
- **Transposition**: operational elaboration of the new legislation in line with the previously defined plan. At this stage the actual approximation of the Kosovo internal 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.
- **Implementation**: not only adoption of the new laws or amendments of the existing laws in the Parliament or bylaws on lower level, but also their adequate application in practice and management of their effect over the existing institutional infrastructure.
- **Enforcement**: after adoption of legal acts the necessary measures of the competent authorities are needed (for example, monitoring, surveillance, inspection controls, penalties, judiciary measures) to ensure that the law is being complied fully and properly and that performance of sectorial policy is improved.

Drafting a law is a real challenge. But including EU legal acts in the national legislation is an even greater challenge. However, before drafting a law, a proper policy planning is needed. After drafting a law, implementation and credible enforcement is also needed. Elaboration of a draft law is therefore only a part of the process of legal approximation.

[55] For more detailed information, please refer to the Guide to the main Administrative Structures required for implementing the Acquis.. This guide provides a set of standards, on the basis of which an assessment can be made of the administrative capacity of each country for each chapter of the acquis, including the performance of the relevant administrative structures. This working document serves information purposes only, available at http://ec.europa.eu/enlargement/pdf/enlargement_process/accession_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/adminstructures_version_may05_35_ch_public_en.pdf.

1.4. What is a National Programme for the Adoption of the Acquis?

The EU requests from every candidate country to present a National Programme for the Adoption of the Acquis (NPAA) as an instrument of enabling and ensuring the coordination of all Government activities in the accession process but also as a tool for monitoring the progress. All Western Balkan countries, except Bosnia and Herzegovina and Kosovo, already adopted an NPAA or a National Programme for the Integration to the EU (NPI)[56] as a comprehensive picture of reforms and activities that need to be carried out in next years. These documents are much broader in scope as SAA action plans as they are taking into account the entire Acquis and all reforms in order to fulfil the accession (Copenhagen) criteria. Of course they differ in quality but in all countries preparation of such document represented a huge step forward in their accession efforts.

Further, preparation of such documents can be seen as an excellent groundwork for the next steps after SAA such as the questionnaire and even for the start of the negotiations, especially the screening phase.

Such a comprehensive programme[57] goes beyond a pure technical law approximation plan because it defines:

- 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 and
- Additional donor funds needed for the implementation of the planned tasks.

2. Main challenges of legal approximation

Legal approximation is a demanding and complex process which requests proper policy planning, division of tasks, transposition techniques as well as implementation in practice and is a core process during EU Integration which needs trained and capable public administration and also strong political support. Public administration, without necessary political support, cannot do the job alone.

- ***Legal approximation as a key reform process***

The process of establishing a closer association with the EU and Kosovo is at the same

[56] As name NPAA is reserved for the countries with the status of candidate country, potential candidate countries adopted the same kind of the document but under the name NPI (National Programme of Integration).

[57] Examples of NPI/NPAA of Kosovo neighbouring countries:
Albania: http://www.mie.gov.al/ - Strategic documents – NPI for SAA;
Macedonia: http://www.sep.gov.mk/en/content/?id=13#.UhR_M3_UsTY;
Montenegro: http://www.mip.gov.me/index.php/Vazni-dokumenti/nacionalni-program-za-integraciju-crne-gore-u-eu.html;
Serbia: http://www.seio.gov.rs/upload/documents/nacionalna_dokumenta/npi/npi_2009_10_eng.pdf; http://www.seio.gov.rs/upload/documents/nacionalna_dokumenta/npi_usvajanje_pravnih%20tekovina.pdf.

time a transition 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 all economic subjects.

These goals cannot be achieved without new and amended legislation and, prior to that, clear political commitment. A first serious step in the EU rapprochement in Kosovo was the Feasibility Study on the Stabilisation and Association Agreement, which will be followed by negotiations, signature of and implementation of the Stabilisation and Association Agreement in the forthcoming years.

This implies, that agreed law approximation priorities should be defined as a result of proper planning and a clear division between ministries, departments and experts. Ultimately everyone involved in the process needs to know his/her responsibilities within the transposition of each EU legal act. The draft of a legal approximation plan (called National Plan of Integration in the neighbouring countries) should be used as a preparation to the National Plan of the Adoption of the Acquis (NPAA) at a later stage and hence already follow the structure usually expected by the European Commission.

Law approximation is without a doubt the **most important condition for closer economic and political relations with the EU** and the **most demanding task** in the whole Integration process.

- ***Consequences on the national legal order***

Although legal approximation is a key part of successful accession to the EU, "mechanical" transposition of EU legal acts should be avoided as not being sustainable. "Mechanical" in this context means drafting artificial national legislation with the sole purpose to achieving technical transposition, but forgetting the unique characteristics of the national legal system and making their further implementation impossible or overburdened. For example, one national law is often sufficient for transposing two or more different Directives concerning the same field, instead of burdening the legal order with too many separate laws, each conforming to one Directive.

Example: EU legislation on Consumer protection**.** The EU legislation on Consumer protection currently entails 18 Directives, 1 Regulation and 2 Recommendations. Therefore, 21 different Kosovo legal acts would not be an appropriate solution, nor would transposition of all EU Consumer legislation immediately into one law. The best approach would be an assessment of the current situation followed by a decision on how to approach problem.

In all probability, one consumer protection law for directives on consumer rights and consumer contracts would be needed, with separate laws regulating consumer interests in financial services and acts regulating out-of-court dispute settlements. It also depends

on what has already been transposed into the Kosovo legal system in the previous years.

- ***Follow-up the development of EU affairs***

State officials of EU Member States actively participate in legislative processes within the EU[58] and because of that are familiar with future EU legal acts. However, Kosovo officials are in a more challenging situation as they are not present during the negotiations in Brussels.

The process of approximation is certainly rendered more difficult by the absence of a hierarchy of provisions in the European Union itself. The division between the primary and the secondary legislation in European Union is distinct, but there is no further definition of the relationship between the different categories of EU legislation.

Therefore, it is of very high importance that Kosovo legal drafters actively follow the development of EU affairs and of EU legislation in their respective field. An expert on forestry in the Ministry of Agriculture for example needs to closely follow political and legal developments in the EU within this field. It is certainly not enough to familiar only with the domestic legal order within your expert field. In the EU integration process EU developments are increasingly getting intertwined with National affairs.

- ***Getting familiar with the EU language***

Another stumbling block can be posed by the language and wording used in EU legal acts. The EU has developed a specific kind of legal language, which is a result of the differences between the legal systems and languages of Member States. Concepts provided in the legal texts are sometimes difficult to comprehend in terms of both language and meaning.

Therefore, when working on law approximation, it is important to bear in mind that you are drafting domestic Kosovo legislation for your citizens, economic operators and enforcement agencies (ministries, judiciary and inspections). Kosovo legislation entailing EU requirements must be written according to domestic legal traditions, in a clearly understandable way.

3. Levels of legal approximation

Approximation measures are available to the European Union on the basis of its legislative power under different competences, which were defined by the provisions of the EU Founding Treaties[59].

[58] EU legislative process is presented in Chapter 1 of these Practical Guidelines.

[59] N. Reich, „Understanding EU Law: Objectives, Principles and Methods of Community law“, Intersentia, 2003, p. 47.

Member States are obliged to incorporate requirements of EU legal acts into their national legislation. In principle, for EU Member States only EU Directives are law approximation instruments. Whereas, EU Regulations and also Decisions directly enter into force, without need for transposition and without any national policy freedom.

Therefore most of this Chapter applies to the approximation of national legislation with EU requirements, **which are defined by directives**.

The classification and description of these measures is provided further in this Chapter. However, it should be remembered that in most cases EU directives contain a combination of different approximation measures (for example, provisions on maximum and optional approximation).

3.1. Minimum approximation

Minimum approximation means that the EU legal act provides the legal framework and sometimes very detailed rules on the subject matter, but EU Member States are free to introduce higher standards. In the majority of cases the fact that the directive reflects only minimum standards may already be reflected in its title.

For example: Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers[60]. This directive already in the title shows that is dealing only with minimum standards for the reception of asylum seekers.

In Article 4 we can see more favourable provisions; it namely says that:

> "Member States may introduce or retain more favourable provisions in the field of reception conditions for asylum seekers and other close relatives of the applicant who are present in the same Member State when they are dependent on him or for humanitarian reasons insofar as these provisions are compatible with this Directive."

However the legal drafter needs to examine any directive in order to identify the cases, where only the minimum standards were introduced by the EU law.

On the other hand, if a piece of law (usually a directive, but also a regulation), is described as minimum approximation, that means that it sets a threshold which national legislation must meet. However, national legislation may exceed the terms of the legislation if desired. It is usually easier to reach agreement on legislation drafted on this minimum 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.

This also applies for Kosovo legal drafters – if a directive is allowing more favourable

[60] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, Official Journal L 031, 06.02.2003, pp. 0018-0025.

provisions, or exemption, there is no reason not to use it. The decision depends certainly on what is the interest of the state and what is the state policy on the subject matter. Often, a political decision is needed in order to give the political direction in this regard. However, such a solution needs to fall within the frame provided by the directive.

3.2. Maximum approximation

Maximum approximation means that a particular EU legal act (in most cases either a directive or a regulation), provides for the provisions, which are not subject of choice or change. Therefore the EU Member States shall transpose such provisions without amending them or reformulating them in such a way that the provisions in question lose their meaning or the standards set by the EU instruments are not met.

In EU law, the provisions requiring the maximum approximation are used in specific areas, where the uniform approach of all EU Member States should be ensured, such as the trade of different goods in the EU Single market or human safety and health.

For example Article 8 of the Directive 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral water provides for the restrictions and prohibitions in relation to the names of the natural mineral waters and their trade description, which could potentially mislead consumers:

> "1. The name of a locality, hamlet or place may occur in the wording of a trade description provided that it refers to a natural mineral water the spring of which is exploited at the place indicated by that description and provided that it is not misleading as regards the place of exploitation of the spring.
> 2. It shall be prohibited to market natural mineral water from one and the same spring under more than one trade description."

Another example is the Chapter IV of the "Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys". It contains clear requirements on the prohibition of using electricity of certain voltages and of the electrical transformers in the toys:

> "1. Toys shall not be powered by electricity of a nominal voltage exceeding 24 volts direct current (DC) or the equivalent alternating current (AC) voltage, and their accessible parts shall not exceed 24 volts DC or the equivalent AC voltage...
> 2. The electrical transformer of a toy shall not be an integral part of the toy."

The above-mentioned requirements do not provide any options to the EU Member States in terms of their transposition. They shall be transposed ensuring that the above-mentioned restrictions and prohibitions are incorporated into the national legislation.

If a piece of law (usually a directive, but also a regulation), is described as maximum approximation, that means that the national law of EU Member State shall not exceed the requirements of the EU law. In practice, this prohibits gold-plating (See 3.7.) of EU legislation when it is transposed into the national legal order. Traditionally, it was fairly uncommon for EU legislation to be drafted 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 (see below part 3.7). Therefore, a growing minority of EU law contains maximum approximation provisions. It is quite common for a directive or regulation to consist of a mixture of maximum approximation and minimum approximation clauses.

There are several preconditions for transposing the provisions of EU law into the national legislation. In its case law the European Court of Justice (ECJ) 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 EU law.

The ECJ has set out specifications about the character of the transposing national legislation. National authorities must:

- Choose the most effective form of national legal measures;
- Use legally binding measures; and
- Ensure publicity for implementing measures.

The case law of the Court provided for the following preconditions:

- Transposition measures must ensure the actual and full application of EU legislation in a specific and clear way;
- 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;
- National transposition measures should use the same form of legal instruments for transposing directives as used for regulating the same issue in that Member State without the EU instrument.

In spite of these preconditions, Member States still face problems during their transposition process especially relating to correct transposition, timely transposition and gold-plating. 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.

Kosovo legal drafters, as their colleagues in Member States, must transpose such descriptions on the same way as in directive, because there is no other option. If, as example, toys can use max 24 volts electricity there is no possibility to allow in Kosovo 220 Volts electricity for toys. This would be transposition against EU law and against SAA and undoubtedly such a solution would have to be replaced very soon.

3.3. Selective approximation

This method is used in cases where the EU legal act leaves the EU Member State an option to go further and introduce higher requirements than it requires.

For example this type of approximation was used in directives of "the old approach", which often allow the EU Member States an opportunity to permit their manufacturers the right to choose between the agreed rules of EU production standards, which ensure the free circulation of their products, or their national legislation. However, in the latter case, these products were not guaranteed the right of free circulation in the territory of other EU Member States.

This means that Member States may introduce or maintain provisions, which are more favourable than the ones of Directive. However, Member States are not allowed to decrease their national legal standards in cases when they are higher than the ones, which are provided for by Directive.
An example could be found in the Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, where Article 15 says:

> "This Directive shall be without prejudice to the right of Member States to adopt or maintain provisions that are more favourable to third-country nationals to whom it applies in relation with Articles 6 and 13, provided that such provisions are compatible with this Directive."

Also Kosovo legal drafters may introduce or maintain provisions if they already exist, which are more favourable than the ones of Directive. The key issue is that such provisions are compatible with the directive.

Sometimes a number of other types of law approximation measures could be identified in the EU legal acts. Examples of some of them are provided below.

3.4. Mutual recognition of national legislations

This method of approximation was defined by the Court of Justice in its judgments in the cases of "Dassonville" and "Cassis de Dijon". The concept of healthy and safe products should not be much different between the EU Member States. A product that is legally available on the market in one Member State could be also placed on the markets of other Member States except in cases specifically provided for in the EU law. In the Cassis de Dijon case the ECJ held that the German legislation represented a measure having an effect equivalent to a quantitative restriction on imports and was thus in breach of the Treaty.

The major outcome of this case is the principle of mutual recognition. The Court held that there was no valid reason that a product lawfully marketed in one Member State should not be introduced in another Member State.

To soften this wide opening of the gates for intra-EU trading, the Court went on to provide four mandatory requirements that might be accepted as necessary for restricting trading in addition to the fixed derogations of TFEU 36 of the Lisbon Treaty: the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, and the protection of the consumer.

Strictly speaking, this is not a method of approximation of law, but a means of removing obstacles to free trade. However, it may speed up the approximation of national regulations in order to achieve greater product safety.

This principle might have an effect already with SAA and definitely later with membership. Kosovo might breach SAA as an international agreement with eventually introducing new barriers to trade.

3.5. Mutual recognition of rights of control

This method of approximation is limited to recognising the rights of each Member State to have another Member State verify 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). This Directive notes 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, approximation may be restricted to the 'essential requirements'.

This method will be valid for Kosovo after EU membership or when Agreements will be concluded in order to remove technical barriers to trade (like PECA – Protocol to the European Agreement on Conformity Assessment and Acceptance of Industrial Products).

3.6. Approximation of the method of referral

This legal technique is referred 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 the Standards Institute. This technique is recommended as part of measures of the "new approach directives", because the directives of the new approach establish basic technical security features, while other details refer to technical standards.

An example might be the Directive 2004/108/EC of the European Parliament and of the Council of 15 December 2004 on the approximation of the laws of the Member States relating to electromagnetic compatibility and repealing Directive 89/336/EEC which refers to harmonised standards as adopted by European Standardisation body:

> "Article 6
> Harmonised standards
> 1. "Harmonised standard" means a technical specification adopted by a recognised European standardisation body under a mandate from the Commission in conformity with the procedures laid down in Directive 98/34/EC for the purpose of establishing a European requirement. Compliance with a "harmonised standard" is not compulsory.
> 2. The compliance of equipment with the relevant harmonised standards whose references have been published in the Official Journal of the European Union shall raise a presumption, on the part of the Member States, of conformity with the essential requirements referred to in Annex I to which such standards relate. This presumption of conformity is limited to the scope of the harmonised standard(s) applied and the relevant essential requirements covered by such harmonised standard(s)…."

Kosovo legal drafters can also use this method when transposing "new approach"[61] directives also before accession with referring to Kosovo national standards which took over EU harmonized standards.

3.7. Gold plating

The term "gold plating" refers to ways of transposing EU directives beyond what is required by their provisions and, at the same time, which does not infringe these provisions. Although a large number of directives contain minimum requirements for legal approximation, they leave a considerable amount of discretion for the actions of EU Member States, such as adding additional procedural requirements or application of more rigorous penalty regimes than prescribed in the directives in issue.

An example could be when Member State request specific very strict requirements or procedures beyond directive requirements, which can be fulfilled only by specific company which is then in advantage to get a specific job or some higher costs are needed from companies which are for somebody's benefit.

Gold plating is usually presented as a bad practice because it imposes certain costs on natural and legal persons that could have been avoided. It is therefore different from

[61] "New Approach" directives define the »essential requirements«, e.g., protection of health and safety that goods must meet when they are placed on the market. The European standards bodies have the task of drawing up the corresponding technical specifications meeting the essential requirements of the directives, compliance with which will provide a presumption of conformity with the essential requirements. Such specifications are referred to as »harmonised standards«.

a transposition measure in contradiction with a directive and subject to infringement procedures. The best EU contra measure is maximum approximation which effectively precludes Member States to use gold plating.

Gold plating is possible in Kosovo during legal approximation but might lead to introducing new barriers to trade and to freedom to provide services with granting some advantages to certain companies.

4. Methods of legal transposition

A core part of law approximation is the transposition of EU provisions into domestic legal acts. The copy-paste method cannot be used; we are namely drafting domestic legislation for Kosovo citizens and economic operators. Therefore, domestic legal drafting tradition must be respected and language must be clear and understandable.

We are presenting some possible methods all based on practical experiences.

4.1. Legal approximation techniques

The most common legal approximation techniques which are, sometimes with the certain modifications, used by the EU Member States, are the following ones:

- *Logical transposition with reformulation*

The basic method used when transposing directives such as key EU legal acts is a method of correct and detailed transposition coupled with a partial rewrite, whereby the EU act is logically transposed in accordance with national nomo-technical rules. The basic text of EU legal act could be reformulated.

As an example, in the Directive 98/6/EC on consumer protection concerning the indication of the prices of products, there is a provision concerning penalties.

> “ 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. ”

The provision cannot be copy-pasted but shall be logically transposed. Furthermore, the EU cannot use penalty measures in directives because this is a competence of Member States. In the domestic law, we could regulate that the market inspectorate is responsible for the control of indication of prices and at the same time introducing penalty provisions which we deem to be effective, proportionate and dissuasive in fight breaches.

An EU legislative act is to be transposed according to national standards and norms, and

shall include all objectives of the EU legal act. By using the logical transposition method, the national legal system and legal terminology language is preserved. Reformulation also provides the opportunity to exclude irrelevant parts of the text and gives the drafter the freedom to act in accordance with the national legal system.

This technique is usually the most used technique which allows transposition in own words and preserves the domestic legal tradition, domestic terminology and domestic drafting techniques. One article of the directive could be transposed in several articles of the domestic legal act.

- *Literal transposition*

The second way of transposing legislation is literal transposition or the "copy-paste" method. Certain parts of an EU act are literally copied into a national legal act. This method is useful where we have technically detailed parts of the EU act, such as definitions, charts, formulas, accounts, and ensures full and correct fulfilment of the imposed obligations.

Taking as example the same Directive 98/6/EC on consumer protection in the indication of the prices of products, we can see that in the Article 2 we have definitions which we have to transpose literally and we cannot exclude, reformulate or change.

> "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. "

In this case, definitions need to be copy-pasted in order to ensure full approximation with the directive. That applies to charts, formulas or accounts as well.

However, it may result in the use of terminology which is unusual or unknown in the national legal terminology, and may be inappropriate or incomprehensible within its new context.

This technique cannot be avoided because there is no other way than to literally and gradually transpose definitions, numbers and formulas. However, there is some room for manoeuvre in most cases: a transitional period can be introduced. Transitional periods allow a clear approximation process with the requirements from the directives, while at the same time allowing for a certain flexibility and time to adapt to the provisions, especially for the domestic economic operators.

- ***Transposition by reference***

In rare cases transposition is theoretically achievable through reference to the relevant parts of a particular type of EU legal act (a directive) for the same reasons as above, where the method is copying. In most cases there are technical annexes to the directives. Such an approach is used by some of the EU Member States, however, because it can create confusion it should be avoided, especially in cases when a directive directly provides for rights and obligations of natural or legal persons. Usually, non EU member States cannot use this technique, because the national legal system does not allow to refer to foreign legislation.

An example could be when there are large Annexes with listed information (like all banks and other financial organisation working in the EU) and in domestic law we just refer to this annex and we do not repeat all data.

In any case, it should be emphasised that any institution drafting or harmonising legislation should avoid making such references, since such refernces would violate the Constitution, which does not allow references to foreign legislation. This technique should not be used in Kosovo or in very rare exemptions, for example, concerning driving licenses in Kosovo the provisions of Directive 2006/126/EEC should be used.

4.2. Transposition of main EU secondary legal instruments

Here we will present the methods of transpositing of different EU legal acts. As already mentioned an EU Directive is a classical instrument for approximation which has to be transposed in domestic legal order, while Regulations in the EU are directly applicable and are an instrument of unification. They are applicable directly in the EU at the same time in all Member States. For directives there is a certain period provided, often up to 24 months, during which the directive has to be transposed intothe internal legal order.

- ***How to transpose a directive?***

The form and methods of approximation as well as the choice of which national legislation is most appropriate for implementation is the choice of the national legislator. The national legislation does not have to repeat the EU Directive word for word or completely follow its structure. The national legislation must give the individuals concerned a clear and accurate indication of their rights and obligations and allow the public institutions to ensure compliance with these rights and obligations.

Some directives are more general, setting only minimum requirements others are more detailed going into maximum approximation without leaving much space for transposition. Detailed examination of the text of the directive is essential when harmonising national legislation with the directive since it contains different provisions, some of which are obligatory and some which are optional. Operational provisions setting out 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 approximation[62] is required.

Each Directive has to be read as a whole before transposition starts, not only the core text of the articles but also the recitals and the reasoning. After that, a decision is needed in which domestic legal act or acts this directive will be transposed. The recitals often contain further information as what is to be expected by the national legislator when transposing the operative clauses.

The following points are important:

- The text of directive 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;
- Some articles are the subject of minimum approximation or others where exclusion is possible and is the decision of the state if these Articles will be included or not;
- The other parts of the Directive could be non-obligatory parts and contain provisions which are not subject to approximation and do not require transposition. They do not create any legal obligation.

Attention should be addressed to the minimum approximation requirements of the Directive which allows more favourable provisions in national legislation.

- ***How to transpose a regulation?***

With regard to EU regulations, which are directly applicable within the EU, it is recommended not to change the text in the current approximation process. Since they have no direct effect, Kosovo not being an EU Member State, it is advisable to copy and paste the text of the regulation unchanged in a Kosovo law, while paying attention when adapting the right terminologies according to Kosovo standards. Only after EU accession, when the regulations become directly applicable in Kosovo, the entire law can easily be repealed.

However, legal drafters shall analyse an EU regulation in a manner similar to the analysis of the directive above. Often it is practically impossible to avoid rewriting regulations in national legislation because Kosovo cannot develop certain areas and meet the

[62] Maximum and minimum approximations are explained in the previous chapter.

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 domestic legislation. The wording should be as close to the EU regulation as possible. Otherwise divergence may occur during application if, after EU accession, a domestic legal 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 domestic legislation introduced for the purpose of harmonising with EU regulations disregards those amendments.

Since the regulations do not 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 define a national body for surveillance, etc. Also the regulation itself could delegate this authority in the following form: "Enforcement of procedures 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.

Kosovo as non EU Member State has to harmonise also Regulations, which are for EU member states directly applicable, therefore the same techniques as described for Directives should be used.

- ***How to transpose requirements of EU decisions?***

As mentioned above, in accordance with Article 288 (4) of the TFEU, a decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. It may also be addressed to natural and legal persons, or only to one or a few EU Member States. Therefore a legal drafter should identify whether the provisions of the decision are applicable to all EU Member States and thus should also be transposed at some point in Kosovo, or they are applicable to the specific EU Member States, companies or persons. In the latter cases, they do not need to be transposed in Kosovo.

Decisions need to be read carefully and only if relevant for Kosovo they should be transposed. In most of the cases decisions are not relevant for Kosovo; they are usually addressed to a specific Member State (or a group) or specific legal or natural persons. In case of relevance for Kosovo, the same techniques as described for directives should be used.

- *How to transpose requirements of EU recommendations and opinions?*

As mentioned above, recommendations and opinions belong to the EU "soft law", which nevertheless may be applicable in practice. Their provisions are frequently used by EU institutions in order to clarify the provisions of legally binding EU legal acts.

Member States as well as the countries willing to join the European Union should follow the directions, which were set by the recommendations and opinions.

The recommendations "cannot in themselves confer rights on individuals upon which the latter may rely before national courts. However, national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law."[63]

Thus Kosovo legal drafters may also transpose the provisions of recommendations and opinions into national law if they consider it necessary and if these provisions are sufficiently clear and therefore could be "converted" into legally binding rules. In doing this proper attention should be paid by the legal drafters to the content of the recommendations and opinions in issue in order to avoid the issues of possible "gold-plating" (please see above on this subject).

- *Overview*

	Effects	**Addressed to**	**Transposition for Member States**	**Transposition for Kosovo**
Regulations	Directly applicable and binding in their entirety	all Member States and natural and legal persons	generally not necessary: directly applicable	Necessary - in accordance with national priorities and with legal approximation plan
Directives	Binding with respect to the intended result.	All or specific Member States	necessary	Necessary - in accordance with national priorities and with legal approximation plan
Decisions	Directly applicable and binding in their entirety	All or specific Member States, specific natural or legal persons	not necessary	Not necessary – only if specifically relevant for Kosovo
Recommendations and opinions	not binding	All or specific Member States, other EU bodies, individuals	not necessary	Not necessary – only if relevant specifically relevant for Kosovo

[63] Case C-322/88, Judgment of the Court (Second Chamber) of 13 December 1989, Salvatore Grimaldi v Fonds des maladies professionnelles, European Court reports 1989, p. 04407.

5. Do's and Don'ts

Here some basic principles and criteria of legal approximation are presented as well as practices to be avoided based on practical experiences.

5.1. Principles of correct legal approximation

The only criteria or principles of correct legal approximation are defined by the European Court of Justice for EU Member States. Since regulations (with a few exceptions, which are described above), are not meant be transposed into the legal systems of EU Member States, but are to be transposed in the legal system of Kosovo (which would like to have contractual obligations with EU starting with the Stabilisation and Association Agreement), it is presumed that the same rules could be used also for the transposition of the regulations, directives, decisions, framework decisions and, if necessary – some EU soft law instruments.

Such principles shall be of course adjusted to the case of Kosovo as a non-EU Member State. However, the experience of other non-EU Member States shows that progress in the area of legal approximation is measured by the European Commission using almost exactly the same methods as for the EU Member States.

The most important criteria and principles of correct legal approximation in EU are the following:

- ***Criteria and principles***

The Member State may choose whether to include the provisions of a Directive into the existing legislation or to adopt a new legal act and, in doing so, the national legislator may use the most appropriate and familiar legislative techniques of its choice.

The same is valid also for Kosovo. Provisions of a directive could be included in the existing legislation in the form of amendments or a new legal act is adopted. Of course, domestic legal drafting techniques should be used. The result will be an amended or a new Kosovo legal act in both it cases will be adopted to serve Kosovo citizens and domestic economic operators. Therefore proper timing and strategic planning is needed. In any case, the SAA will have some detailed requirements regarding timing, in other cases interest of state should be followed expressed in the national programme of approximation clearly stating "who does what and when".

The choice of the national legal act by which a directive shall be transposed depends on the constitutional order and hierarchy of legal acts of the country. However, irrespective of the type of national legal act that is chosen, the directive shall be transposed in a way that is legally binding for all institutions, natural and legal persons, its application by

the administration and courts is ensured throughout the state, the text of the national legal act, is published and communicated to the public e.g. through the Official Gazette or similar sources. On the other hand, internal instructions or other similar documents, as well as the national courts' case law, are not deemed the proper instruments for legal approximation.

If a directive intends to grant certain rights to individuals, the provisions of the national legal act shall grant these rights in a very clear manner and these individuals shall be able to rely on these rights, including protection by the domestic courts. The same principle applies when on national institutions or individuals certain obligations are imposed. In these cases, a law should be used for a transposition of such provisions and not a bylaw.

- ***Definitions to be transposed***

Definitions, which are provided in the directives, should usually be transposed into national legislation. The issue of correct transposition of the definitions is very important since the meaning of the same legal or other term could be very different in every EU Member State. Non-transposition of the definitions causes problems, especially when a directive includes rather precise and detailed definitions of the main concepts used in this directive[64].

Thus, the lack of definition may result in the interpretation and application of the relevant provisions of the national legislation in manner and meaning while not totally coherent with or even contrary to the meaning of the provisions of the EU law.

- ***Literal transposition is not a rule***

While transposing a directive, its objective shall be achieved fully, with clarity and legal certainty. A Directive does not necessarily require the literal transposition of its provisions. Although sometimes it is the most obvious solution, there is no requirement that the national legal act, transposing the provisions of the directive, shall follow the structure of a directive. In addition to this, it must be noted that one directive can be transposed, for example, into one law and a number of by-laws if it is considered necessary. The reverse also applies, for example, in the event that some directives are transposed in the form of one law (usually accompanied by a few by-laws), since each directive regulates just a part of a whole area. To conclude, in each case an individual approach applied by the drafter is needed during the transposition of a particular directive.

When transposing a directive it is not enough to transpose the provisions into the national legal act. It should be ensured that the existing legislation is in line with this new legal act and does not create a conflict of laws which will result in potential problems in the implementation of this harmonised national legal act.

In most cases transposition of a new directive means adoption or the amendment of new

[64] Bernard Steunenberg, Wim Voermans, "The transposition of EC directives: A Comparative Study of Instruments, Techniques and Processes in Six Member States", University of Leiden, 2006.

national legal acts. The cases where the existing national legislation does not contradict the provisions of the directives and transposition is not required are quite rare and usually the Member State needs to prove to the European Commission that the existing legislation is already in line with the new directive and transposition is not needed (sometimes even in the European Court of Justice).

In Kosovo most of the time, approximation with the EU Acquis will require new domestic legislation or amendments of existing legislation.

- ***Annexes are important***

Proper attention should be paid to annexes of a Directive as they usually contain technical provisions which are very important. However, there is no uniform rule on the correct method of transposition of annexes into the national legislation: the main objective is to transpose their contents into the national legal system.

Therefore it should be indicated that while the numerous decisions of the European Court of Justice may provide some guidance on principles of correct legal approximation, there are no uniform rules on legal approximation techniques. Each Member State that has an obligation to approximate its legislation to the requirements of EU law shall choose its own way.

The same applies also for Kosovo: there is no general rule how to transpose annexes.

- ***Tables of Compliance and Statement of Compliance***

Tables of Compliance are used to facilitate monitoring of the transposition of EU law into national laws by the Member States. They show in technical terms precisely how provisions in EC directives have been transposed at national level[65]. The Table of Compliance should clearly indicate the level of compliance for each EU legal act as well as future plans for full approximation where possible.[66]

Tables of Compliance are not used by member states only which have to submit them to European Commission to prove the transposition but also by EU (potential) candidate countries in accession process for internal reasons: to follow progress in law approximation and to help legal drafters in the transposition process.

A Statement of Compliance is also used by legal drafters in countries in the accession process. This fulfilment helps them in drafting as well as to the EU Integration institution to follow the progress especially the relation of new legislation towards a SAA and a legal approximation plan.

[65] European Commission Glossary, available at http://ec.europa.eu/governance/better_regulation/glossary_en.htm.

[66] Please see Annex to these Practical Guidelines for the requirements of Administrative Instruction on standards for drafting normative acts.

It is important for Kosovo legal drafters that Table of Compliance as well as Statement of Compliance are useful tools assisting them in legal transposition. Both instruments are created above all to help legal drafters to better prepare new legislation as well as that EU Integration institution can monitor the progress and quality achieved.

- ***Terminology***

The terminology in the Kosovo legislation should, as far as possible, be based on the language use of EU legislation not forgetting the main rules of legal drafting that language must be clear, simple and understandable for end users. It might happen that certain terms are already defined by the national legislation as Kosovo legislation soemtimes already uses some terminology deriving from EU Directives.

If this is the case, the drafter should check first if the terms have the same meaning; if so, then he/she has to reflect the article of the national act in the Table of Compliance and the degree of compatible; if it is partially in compliance, it is necessary to indicate the degree of compliance in the Table 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 differs in meaning, the authority should introduce the definition or meaning into the draft in question.

The Table of Compliance must reflect all the similar existing terms/definitions contained in the national legislation by which a certain term is considered to be transposed, in order to avoid overlapping in regulation of the same issues. Also, approximation of the national legislation to the EU law normally includes introducing new terms and definitions contained in the EU acts into domestic legislation.

Specific attention must be paid to the use of the phrases and terminology of EU legal acts (such terms as for example "third country", "Standing Committee", "Member State", etc. in domestic legal acts. In the pre-EU accession phase such terms, which cannot simply be transposed using the "copy-paste" approach, should be evaluated in accordance with the situation in Kosovo.

If such terms do not yet exist in the domestic official languages or there is a doubt about the meaning of seemingly the same terms in one or more official languages, the new terms, as a consequence, will need to be developed.

Especially regarding technical legislation there will be certain number of new terms or new instruments (like "technical approval") which are currently not used in Kosovo. In any case it is recommended to start as soon as possible with an organized process of translation of the Acquis using experience as well as already translated material from both, southern and northern neighbouring countries, which languages are also official also in Kosovo.

- ***Transitional periods***

Another example would be if an EU act requires that the EU Commission or Member States be informed about certain actions deriving from a directive; it is the decision of the state if such an article should be transposed into national legislation or if the adoption of administrative decision would be sufficient.

It is recommended that legal drafters transpose such requirements into national law with a special transitional article on entering into force with the date of accession to the European Union. Such an approach may be applied only from the moment Kosovo starts active EU accession negotiations to avoid constitutional problems.

A transitional solutions such as: "Article 12 of this law enters into force with the date of Kosovo Accession to the European Union" should be avoided at least until Kosovo has entered accession negotiations because they could be recognized as being contrary to the Constitution and rules of legal certainty as regards some future and uncertain legal regulations. When the negotiations for EU membership are underway such solutions could be more suitable for implementation in domestic legislation.

- ***Choice of domestic legal act: Law or bylaw?***

Since laws are binding in Kosovo and are directly applicable they 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 detail legislation that already exists. National legislation, including all bylaws, shall be also published in Official Journal.

If implementation of an EU legal act falls within the scope of competences of several ministries and central public authorities, the proper cooperation of different ministries in legal drafting process shall be ensured, including the cooperation in the preparation of the Table of Compliance for the draft legal act.

When new rights and obligation are created as well as penalty provisions are needed one will harmonise EU acts with the law. As already mentioned one directive does not mean one domestic law. Example: To define how ID card of market inspector should look like – bylaw is enough. But to define rights and obligations of market inspectorate we need a law.

- *Internal coherence with the domestic legal system*

When harmonising with the provisions of EU law, it is not enough to transpose the provisions of EU legal acts into national legislation. The new legal act shall be also internally coherent with the domestic legal system. If necessary other laws which are in force shall be amended in order to ensure the absence of conflicts of norms of the older and newer legislation. Transitional periods are important during drafting because what is stipulated in EU law for EU Member States cannot always be immediately implemented in Kosovo. Time is also needed to establish the necessary institutions and to make them operational. The financial impact shall be also carefully assessed.

As an example of an EU policy with a large budgetary impact, it is useful to mention the area of environmental protection. Some EU environmental legislation obligations may have a social impact, for example as a result of high environmental standards closing a factory is needed (and having many workers unemployed) or budgetary impacts due to the need to invest great amount in cleaning systems. The transitional periods of the domestic legal acts shall also take into account the obligations arising from the bilateral agreements concluded.

- *Referring to EU legal act in Kosovo legislation*

For EU Member States, it is obligatory to refer to EU legal acts which are transposed in domestic legislation. Such requirements are in majority of cases contained in directives as standard clause. Member states can choose their own way of referring to such provision.

Such referring gives information to natural and legal personsthat certain directive is transposed in domestic legal order and also allows the national court familiarity with the directive especially in case of problems or need for preliminary ruling of ECJ.

For Kosovo, although in its yet early stage of accession, it is recommended to commence with referencing of EU legal acts in first Article[67], as per Annex 13. Administrative Instruction no. 03/2013 on standards for drafting legal acts clearly defines at Articel 7 that referral to EU legislation is mandatory in the firot Article:

> “ In cases when EU legislation is transposed, the provisions for the purpose of the normative act should list the EU legislation transposed during the drafting of the normative act, as defined in Annex No. 13 (thirteen): Example of the purpose when EU legislation is transposed during the drafting of the normative act.

67

Annex 13:

> Article 1
> Purpose
>
> This law regulates the granting of asylum and recognition of refugee status and the granting of subsidiary or temporary protection, to persons in need and their return to their country of origin, descent or a third country. This law is in accordance with the Directive on Asylum Procedures (Directive 2005/85/EC) and the Directive on conditions of admission for asylum seekers (Directive 2003/9/EC) ..... (Continue with listing if there is any additional EU Acquis act). ”

5.2. Practices to be avoided

This chapter provides for a number of “bad” examples of legal drafting activities, which need to be avoided during the law approximation process.

- ***Automatic reliance on the state of approximation***

The legal drafter needs to consult with the existing domestic legislation and to properly identify whether the current legal acts are in line with the requirements of the directive in issue.

Automatic reliance on the fact that, for example, a Kosovo legal act contains a reference to the Directive or the history of its adoption (different explanatory documents, which accompanied previous legal drafts etc.) would be incorrect approach, as the legal drafter should have in his/her possession the Table of Compliance, which would prove that the respective Directive was fully transposed into national legal act (-s).

Many times it looks like a Directive is fully transposed and after examination we realise that transposition is only partial or does not exists at all. Therefore a Statement of Compliance (SoC) and Tables of Compliance (ToC) should be obligatory and filled in by legal drafters and checked by the EU Integration Institution.

- ***Copy-pasting or copying legislation from a neighbouring country***

We have situations where the related domestic legislation was drafted by the responsible institutions on the basis of researching the legislation of the different Member States or candidate countries from the region, especially if there is no language barrier.

Simple copying of foreign legislation could lead to mistakes due to differences between domestic and foreign legal systems, wrong transposition due to translation issues or non-adaptation to the Kosovo situation. It could happen also that the other country did not fully transpose the EU legal act or has transposed it incorrectly and with copying their legislation we can copy also their mistakes.

It is recommended to check the solutions from the region but critical distance is needed. Legal systems are not completely the same and solutions are not always compatible. Additionally, in neighboring countries there might be mistakes within transposition or transposition is incomplete. Foreign solutions are helpful and are recommended to be checked, but attention is needed because legal systems are not the same plus as not to repeat the mistakes in transposition they made.

- ***Failure to identify the related directives***

All relevant EU legal acts from one sector must be identified; therefore a legal approximation plan is needed to know what exists, what and when it is relevant for Kosovo and "who does what". Many times transposition of one directive request also transposition of related others in the same domestic law.

Example: The drafter identified the need for the transposition of Directive 2006/112/EC. This directive contains rules on value added tax (VAT) which, until this moment, in some cases, was subject to interpretation by the EU Member States. Even if the drafter checks for the amendments to Directive 2006/112/EC, he/she also needs to check for the implementing measures, which are not contained in this directive or its numerous amendments made for the last five years. Since July 2011 the additional legal act applies, which did not amend the mentioned directive, but contains the implementing measures - Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax[68]. In order to apply VAT system correctly before accession the drafter needs to transpose also the provisions of the Implementing Regulation (EU) No 282/2011 into Kosovo national legislation. Otherwise the application of the VAT tax will not be fully in line with EU legal requirements.

The legal drafter must always check not only a directive which should be transposed but also related ones. Many times in one domestic law more directives which are connected will be included. A national programme of legal approximation will beneeded with clear definition of all EU legal acts from the area with planned transposition time table and who is responsible for what.

- ***Incorrect terminology used in the domestic legal act***

Mistakes in the legal or technical terminology, non-existence of the particular terms in Kosovo official languages, mistakes in the translation of the directive into Kosovo official languages may cause the incorrect transposition of EU legal act into Kosovo legal system.

Translation and its legal and professional review is of key importance as we are dealing with creating domestic terminology.

[68] Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax,, Official Journal L 077 , 23/03/2011 p. 0001–0022.

Example: Do we speak about "safety" or "security"of toys?

A system of translation, with professional, legal and linguistic proof reading should be established as soon as possible. Cooperation with neighbouring countries which are using Kosovo official languages is recommended. If wrong terminology is used in domestic legislation it will take years to remedy the situation.

- ***Implementation of the directive which was repealed or amended***

Many EU legal acts were repealed or amended with the same or by some other acts. Legal drafter must be very careful that they are transposing the latest version.

Example: Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC[69]. The Regulation repealed the Directive 89/106/EEC and also provided for transitional provisions in Article 66:

> "Article 66 Transitional provisions
> 1. Construction products which have been placed on the market in accordance with Directive 89/106/EEC before 1 July 2013 shall be deemed to comply with this Regulation.
> 2. Manufacturers may draw up a declaration of performance on the basis of a certificate of conformity or a declaration of conformity, which has been issued before 1 July 2013 in accordance with Directive 89/106/EEC.
> 3. Guidelines for European technical approval published before 1 July 2013 in accordance with Article 11 of Directive 89/106/EEC may be used as European Assessment Documents.
> 4. Manufacturers and importers may use European technical approvals issued in accordance with Article 9 of Directive 89/106/EEC before 1 July 2013 as European Technical Assessments throughout the period of validity of those approvals."
> Therefore if legal drafter starts work on the new national act in 2012 he/she study the requirements of this Regulation as the EU current legal regulation created by the mentioned Directive will cease to exist in 2013. "

The legal drafter should be careful, because the legal regime as in the Directive will not be valid from 2013 on. Therefore it is better not to transpose such a solutions that will be in force only some months.

[69] Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC Text with EEA relevance, Official Journal L 088 , 04/04/2011 p. 0005-0043.

- *Referring to an EU legal act instead of transposing it*

Never use such a technique of referral because it is against the constitution referring to a foreign law. The directive should be transposed not only referred to.

Example: "For production and marketing of mineral waters in Kosovo, EU Directive 2009/54/EC should be applied".

Such an approach is completely and absolutely wrong as currently EU legal acts are not meant to be made binding for Kosovo directly. Referring to EU legal act instead of transposing them is also against the Constitution, because foreign legal acts cannot be in force in Kosovo.

- *Changing or non-transposition of the definitions*

The majority of directives contains the definitions in the second or third article which are very important and have to be transposed and should not be changed. The majority of directives contain different definitions, which, if transposed without transposing also definitions, may lead to serious breaches of EU law

Example:
Directive: "Consumer is a physical person, who....."
National law: "Consumer is a natural or legal person who..."

To change key definitions from a directive is a wrong approach which causes amendments of a legal act in a near future and additional efforts because of that. We recommend to not skip or change the definitions because all directive transposition might go wrong. Change of key definition as in example makes all transposition completely wrong. However, the definitions transposed in the national legislation must be compatible with the national terminologies.

- *Referring to annexes from directives*

Directives are not directly binding for legal and natural persons in Kosovo and they have to be transposed correctly into domestic legislation. The same is valid for annexes which are part of EU legal acts.

Example: During the transposition of Directive 2006/38/EC of the European Parliament and of the Council of 17 May 2006 amending Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures[70] the drafter makes reference to the Annex I „Emission limits [for vehicles]" indicating that „Emission limits are to be found in Annex I to the Directive 2006/38/EC".

[70] Directive 2006/38/EC of the European Parliament and of the Council of 17 May 2006 amending Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures, Official Journal L 157, 09/06/2006, p. 0008-0023.

Before accession to the European Union such an approach to transposition is not correct, as there are no EU official translations of EU legal acts into domestic languages and EU Directives are not binding for natural or legal persons of Kosovo. Such an approach is absolutely wrong and against the Constitution because foreign legal acts cannot be in force in Kosovo. Do not use such an approach!

- ***Using obligations for EU Member States to establish the enforcement***

Member States are obliged to establish necessary penalty provisions or the proper control measures in case of import of certain goods. The EU as such has alone no such competencies.

Example: EU Member State shall establish proper penalty measures or proper surveillance system for imports of certain goods.

The Kosovo legal drafter cannot use such formulations as: „The State will establish proper control....or Kosovo shall establish proper penalty measures …". It has to be clearly indicated which domestic institution (-s) will deal with the subject matter. The relevant measures shall be clearly prescribed in the national legal act or acts.

Special attention must be paidto the fact that two or more domestic laws do not prescribe the same penalties or – even worse – that they prescribe different penalties for the same offense.

- ***Requirements of EU legal acts for the EU Institutions should not be transposed***

Some of the provisions of EU legal acts contain obligations directed towards EU institutions and this has nothing to do with Member States obligations.

Example:
Para. 3, Article 7, Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC
"3. The Commission shall ensure that information on best energy-saving practices in Member States is exchanged and widely disseminated."

Kosovo cannot implement the obligations addressed to the European Commission, which is mentioned above. The provision as such does not require any transposition measures at the national level.

- ***Non-inclusion of the references to the transposed directives or, requested by the EU law, references to other EU legal acts***

When Member States adopt those provisions, they shall contain a reference to the Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

If the national legal act in a Member State does not contain the reference to the transposed directives or other EU legal acts, the law approximation obligation has not been duly fulfilled and it should be considered only as partially compatible with EU legal requirements.

Although Kosovo is not an EU Member State we do recommend a reference to the transposed Directive. It will allow easier monitoring of the transposed EU legal acts and legal certainty. More about references in subchapter 5.1. - Referring to EU legal acts in Kosovo legislation.

- ***Directive implemented by the wrong type of national legal act***

It is very important that directives are transposed into domestic legislation with the proper domestic legal act.
The directive could be wrongly transposed:

- by the internal legal acts (e.g. instruction of the responsible institution) and therefore be not legally binding for individuals and legal persons).
- With a by-law which may not impose the penalty provisions or may not establish new state institutions or bodies, or
- There is no proper delegation in the national law, which would provide for the right of ministry to initiate the harmonised draft by-law and/or for the government or other competent authority-the legal delegation of the competence to adopt it.

Kosovo legal drafters must carefully study the directive and before transposing it, it must be decided which domestic legal act will be used for approximation. It might be a law only adopted by the Parliament, a bylaw adopted by the Government, a bylaw adopted by a minister or administrative instruction. But the following should be kept on mind: only with the law the new rights and obligations could be created as well as penalty provisions.

- ***Non-compliance of the draft national legal acts with the national priorities***

Any legal approximation efforts are following the domestic plan of legal approximation which follows the SAA and national priorities and defines who does what and when.

Law approximation is not an ad hoc activity but should be a well organized system due to the huge amount of EU legal acts to be transposed into the domestic legislation.

Example: The future "National Plan of Legal Approximation" provides for that certain EU legal act should be transposed into domestic legal system by 1st quarter of 2015, but the draft law is delayed.

A National Plan of Legal Approximation will be required by the SAA and with the candidacy status a National Plan of the Adoption of the Acquis (NPAA) will have to be developed and approved by the Government.

- ***Wrong method of transposition***

Although it is up to the country to decide on the number of national legal acts, which transpose one or more directives, the good practice shows that on the issues where a lot of directives were adopted (for example, in the areas of labour law or migration law) it is more appropriate to have single national legal act (in some countries-code), which would provide for the well-structured and logical transposition of several EU directives.

The practice of elaborating one special national legal act to transpose only one directive may be justified in specific cases, for example, when the subject matter was not previously regulated by any national legal acts and is completely new for the country, or when the subject matter is very technical one etc.

Kosovo legal drafters must carefully study the directive(s) and before transposing it (them), it has to be decided whether different directives will be transposed into a single or several domestic legal acts; whether several directives will be transposed into a single or several domestic legal act.

- ***Non-compliance with international obligations***

International agreements always have deadlines for certain legislation to be adopted or amended and every state has to respect it to stay credible in international relations.

Example: After the SAA or Interim SAA will enter into force certain EU legislation will have to be adopted in Kosovo by certain deadlines. If not, Kosovo will breach an international agreement.

The Kosovo Government will have to prepare a special Plan of SAA implementation where all deadlines will have to be included. Especially in the area of customs duties and measures with equivalent effect plus competition and state aid deadlines will follow soon after entering into force. Kosovo legal drafters will have to follow carefully the SAA negotiations as well as its implementation.

Step 1: National priorities for legal harmonisation

Kosovo aspires to join the EU and a condition for successful accession is the transposition and enforcement of the EU Acquis in the Kosovo legal system before the date of membership. Therefore, in order to follow the EU path, Kosovo needs to develop a plan of transposition of the whole Acquis, defining timelines, responsibilities and method of approximation for each single relevant EU legal act. Such plan becomes mandatory in the course of the integration process to reach the candidacy status and is called "National Plan of the adoption of the Acquis" (NPAA) or during the status of potential candidate country - "National Plan of Integration" (NPI)[71] .

Another requirement for accession is the delivery to EU institutions of the translated EU Acquis in Kosovo's official languages. In this regard, a complex system of translation and revision needs to be established and functional, while cooperation with neighbouring countries sharing the same official languages is also essential.

[71] Examples NPI (2009) and NPAA (2013) - Serbia: (http://www.seio.gov.rs/upload/documents/nacionalna_dokumenta/npi/npi_2009_10_eng.pdf and http://www.seio.gov.rs/upload/documents/nacionalna_dokumenta/npaa13_16.pdf) ,NPI Montenegro: www.gov.me/files/1207847691.doc

Guiding questions (See Chapter 1):

- Is the approximation with the particular EU legal act planned in one of key documents: Stabilisation and Association Agreement, references to their implementing documents such as national legal approximation plan?
- Are deadlines, methods and responsibilities for approximation clearly defined?
- Has the EU legal act been translated and legally revised in Kosovo official languages?

The transposition of the EU directives and regulations, for instance in the environment sector, will lead to profound reforms and largely impact on economic actors in different sectors, such as agriculture, energy or transport, both at national and local levels. Kosovo cannot reach overnight all EU standards through a transposition exercise. Approximation with the EU Acquis is therefore not a mere technical lawyer's exercise but a cumbersome planning process triggering reviews of national development plans and the involvement of a large range of planning actors.

Step 2: Identification of the EU legal act

Drafting a national legal act and transposing the requirements of the EU legislation requires team work of lawyers, translators and sector experts in the specific policy areas. In order to draft a law harmonised with the EU legislation, it is crucial to be familiar with the relevant EU law.

Before starting approximation with a certain EU legal act, it is recommended to get familiar with the "adoption history" of the EU legal act. Special emphasis should be put on the proposals of the EU Commission, the opinions of the European Parliament and Council in the course of the EU legislative procedures, as well as the different Green and White papers ("soft law") drafted as preparatory documents before the legislation is adopted within EU.

The drafter should further study the regulatory framework of the EU legal acts and development tendencies in the field regulated by that act and shall understand which domestic legislation should be adopted or amended.

During the legislation drafting process, the EU primary and secondary legislation from the field as well as the judgments of the Court of Justice should be taken into account.

Following the political and professional decisions for the approximation of certain EU legal acts planned in the national legal approximation program, the drafter may be included in translation activities or in activities of legal revision of translated texts to become familiar with the terminology.

Guiding questions:

- What is the purpose of the EU legal act?
- What is the legal basis for the adoption of the EU legal act?
- What are its content, definitions, terminologies and other factors, which impact the approximation?
- What are the connections with the provisions of the TFEU or the TEU?
- Are there judgments of the European Court of Justice, which interpret the EU legal act?
- What is the history of adoption of the EU act? White and Green papers, opinions of EU institutions during EU legislative procedure, opinions of the international organisations, commentaries of independent academia, EU law practitioners and think tanks...?

Before starting with legal approximation, read carefully the EU legal acts and its history. Depending on the type of EU legal act: regulation, directive, decision or others, the methods and techniques of the law approximation, which should be used by the legal drafter, will differ.

Step 3: Analysis of the national legislation

Before starting with the transposition of EU legal acts, the domestic legislation must also be analyzed and well known to legal drafters. It might be already partially in line with the EU requirements and decision should be taken on how to approach to legal drafting.

Guiding questions:

- How should we proceed: through amendment of an existing legal act or adoption of a new national act? Through law or secondary legislation?
- Was legal approximation already conducted in the area before? Is the current domestic legislation in line with EU legislation? To what extent?
- If it is not fully in line, then to what extent is the existing national legislation compatible with the EU directive in the given field?
- Does any other national act already transpose this EU legal act or parts of it?
- How many transposition activities are required in order to transpose the obligatory requirements of the directive in a manner compatible with national legal traditions?

There is no correct transposition if you are not familiar with domestic legislation in the area. Legal approximation is about drafting domestic legislation and including in it the requirements of the EU Acquis. What does already exist in the domestic legal system? Do not regulate the same issue twice!

Step 4: Choice of the right type of domestic legal act for transposition

The legal instrument intended for implementation of the EU legislation into national law needs to be binding and effective. Nevertheless, the choice of appropriate instrument is left to the legal drafters of Kosovo, depending on the nature and scope of the EU policy included in the provisions that are the subject of the approximation.

Generally, laws should rather be used for approximation with EU Regulations (which in EU Member States are directly applicable without transposition) and with Directives which include general principles of the specific area or horizontal directives. Laws will also be used for directives which confer the rights and obligations to natural and legal persons and for all legal acts whose transposition is intended for amending the existing laws or has political implications.

In return, bylaws should rather be used for approximation of technical legislation and other legislation when new institutions, new rights and obligations or penalty provisions are not needed.
New obligations, new institutions and penalty provisions cannot be introduced with a bylaw!

Guiding questions:

- What type of domestic legal act should be used when transposing a certain EU legal act: law, governmental decision or decree of the Minister?
- Does transposition of an EU legal act request new rights and obligations, penalty provisions, new institutions?

If you choose a Governmental decision or a decree of the Minister, please make sure that the proper transposition of EU law provisions can actually be ensured by means of the bylaw. Such choice for transposition should indeed not create any obstacles for the effective implementation and enforcement of the provisions of the EU law in the future.

For example, the relevant Kosovo laws have to provide proper delegation to the Government to legislate certain issues with bylaws. The format of the by-law allows more in details description of certain issues but cannot create new institutions and other obligations neither prescribe penalty provisons – because these issues could be only subject of regulation by the law.

Be careful that the same issue is not regulated twice, if you adopt new domestic legal act make sure to repeal the old one from the same field which is delaing with the same issues and solving the same problems.

Step 5: Legal drafting and legal transposition

After completing the former preparatory and analysis steps, the concrete legal drafting and transposition exercises can be performed. It requests a deep knowledge both of the EU legal act (Step 2) and of the national legal system (Step 3) leading to the choice of the right domestic instrument for transposition (Step 4). Furthermore, the overall process should be guided by a national plan of legal approximation (Step 1), framing the responsibilities, deadlines and approach of approximation.

Guiding questions (See Chapter 2):

- 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 also going to transpose all the amendments?
    - In any case if the directive has been amended, it shall be properly indicated in the Table of Compliance
    - If you use the official publication of the consolidated directive, it shall be properly indicated in the Table of Compliance.
    - 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 digital version of the consolidated directive at the EU legislation website, you should refer to the directive and the amending directives as to the separate EU legal acts.
- What legal approximation technique is to be used for the legal drafting: Direct transposition, method or logical transposition?
- What level of approximation is required?
- Any transitional periods needed for the full transposition of directive?
- Does the directive contain any provisions, which may be applicable only upon accession to the European Union?
- Are there any reasons why the wording of the domestic legal provision should deviate from the terminology of the directive?
- Is there anything unclear in the directive, which should be explained in national legislation in more detailed manner?
- Is full approximation with the provisions of the directive possible at the current moment or should it be only partial? When would full approximation be implemented: on some particular date before accession to the EU or even upon accession to the EU? Is it possible to completely transpose the requirements of directive at this moment? Be aware that directives are written for EU member states and not for potential candidate countries!

Law approximation is not a copy paste exercise but drafting domestic legislation which end users are citizens, economic operators, judiciary and other state and municipal institutions in Kosovo. Therefore it is important to use domestic drafting techniques and domestic legal tradition in combination with simple and understandable language.

Use your domestic wording and tradition in drafting, follow the EU definitions and use your language when following the objectives of the directive. Ensure that you formulate provisions of the draft national act in a clear and precise manner following the requirements of the national legal drafting techniques[72].

Be careful not to transpose those parts which are only for member states or for EU Institutions or parts which might have negative impact on economy or society at this stage of Kosovo integration, therefore impact assessment of a new legislation should be done.

Try to avoid gold-plating as described in these Practical Guidelines.

Contact enforcement institutions during the drafting process if needed (judicial authorities or ministries and other central public authorities like inspectorates) for advice and orientation to achieve proper enforcement.

Check whether directive requires changes to the structure of the existing governmental institutions or the establishment of the new ones.

Step 6: Tables of Compliance and the Statement of Compliance

The Table of Compliance and the Statement of Compliance are the documents elaborated by a legal drafter to help in legal transposition and to provide information about the degree of compatibility of a draft legal act with the requirements of EU law as provided in Article 30 of Administrative Instruction No. 03/2013 on Standards for the Drafting of Normative Acts.

> "1. During the process of drafting normative acts, the proposing body prepares a Statement of Compliance and Table of Compliance with the EU Acquis.
> 2. The Tables of Compliance and Statement of Compliance should be prepared by the Line Ministries which are the initiators of draft normative acts, as defined in Annex No. 15 (fifteen), 16 (sixteen) and 17 (seventeen).
> 3. The Tables of Compliance and Statement of Compliance are working comparative documents, that demonstrate the level of compliance between a domestic draft normative act and the EU Acquis."

Statement of Compliance and Tables of Compliance are both requested also by Kosovo National Assembly as specified in the Article 54 of the Rules of Procedures of the Assembly.

> "1. The Draft-Law presented to the Assembly shall contain the following:
> a) An explanation note on the objectives that are aimed to be achieved

[72] See Annex: Administrative Instructions on standards for drafting normative acts.

by the Law, its harmonization with the applicable legislation and reasoning of the provisions of the Law.

b) Declaration on budgetary implications in the first year and subsequent years.

c) Declaration on approximation and harmonization with the EU legislation and with the comparative table of acts it refers to.

2. Each Draft-Law presented to the Assembly shall be drafted in the following languages: Albanian, Serbian and English, in hard copy and electronically.

3. The Table Office of the Assembly shall verify the formal-legal aspect of the Draft-Law, record it based on the presented order and distribute it to the Members of the Assembly.

4. The Presidency of the Assembly, in its next meeting, shall assign a functional – lead committee for a review of the Draft Law in principle. ”

It is recommended that Tables of Compliance are filled by legal drafters during drafting process and not to be done later by other persons. Those who fulfil the Tables must be familiar with the draft legislation prepared as well as with specific solutions provided. Tables of Compliance shall be submitted to the Ministry of European Integration, which has to issue Opinion on Compatibility (see Step 7).

- *Overview*

	Table of Compliance “Republic of Kosovo – European Union”	Table of Compliance “European Union – Republic of Kosovo”	Statement of Compliance
Aim	Assess the compliance of one Kosovo legal act with the relevant EU Acquis	Assess the degree of transposition of one EU legal act within the Kosovo legal framework	State the degree of compliance of the Kosovo draft legal act with the EU Acquis
Manner	1 Table for each relevant Kosovo draft legislation	1 Table for each relevant EU legal act	1 Statement for each Kosovo draft legislation
Template	Annex 16 of the Administrative Instruction No. 03/2013	Annex 17 of the Administrative Instruction No. 03/2013	Annex 15 of the Administrative Instruction No. 03/2013
Responsible person	Kosovo legal drafter	Kosovo legal drafter	Kosovo legal drafter
Timeframe	During the legal drafting process	During the legal drafting process	During the legal drafting process
Checking	Department of EU Law, Ministry of European Integration through the Opinion on Compliance	Department of EU Law, Ministry of European Integration through the Opinion on Compliance	Department of EU Law, Ministry of European Integration through the Opinion on Compliance
Instructions	See below (1)	See below (2)	See below (3)

1. How to fill a Table of Compliance "Republic of Kosovo – European Union"

The Table of Compliance "Republic of Kosovo – European Union" is a mandatory Table as regulated under the Administrative Instruction No. 03/2013 on Standards for the Drafting of Normative Acts. The Annex 16 of the Administrative Instruction No. 03/2013 provides with the official template of the Table of Compliance "Republic of Kosovo – European Union".

The Table of Compliance must be drafted by the Kosovo legal drafter in the course of the legal drafting process. This Table will in particularly be used by Kosovo legal drafters to assess the compliance of one particular draft legislation with the requirements from different EU legal acts.

In the **introductory table**, the legal drafter must indicate:

- The **title of the Kosovo normative act**;
- The **proposing body** of the Kosovo normative act;
- The **date** of completing the table (date/month/year);
- The **list of relevant EU legal acts** (full title of the act and number) with which the normative act of the Republic of Kosovo is compliant;
- The **level of compliance** of the Kosovo draft legal act with the relevant EU legal acts: "fully compliant" "or "partially compliant"; "not compliant"; "not applicable".

Then, the legal drafter must fill in the table "Republic of Kosovo – European Union":

In the first column (a), the Kosovo draft legislation must be copy-pasted in its entirety, full text, and divided into articles, paragraphs, sub-paragraphs, etc. The provisions of the Kosovo legal act shall not suffer any changes from the legal drafter compared to the text of the original draft legal act. Several provisions may be grouped together only if jointly they form a whole that can meaningfully be compared in order to establish their compatibility with the EU legal acts.

In the second column (b), individual boxes must contain all relevant provisions of all relevant EU legal acts that were used for drafting the related provisions of the Kosovo legal act as stated in the column (a). The provisions of EU legal acts must be copy-pasted in their entirety, full text, and shall not suffer any changes from the legal drafter.

According to Article 33.5 and 33.6 of the Administrative Instruction No. 03/2013 on Standards for the Drafting of Normative Acts, when referring to EU Legislation, only the official and certified translation in Albanian and Serbian is allowed. (see below)

> "33.5. Referring to EU legislation in the Tables on Compliance is allowed only in versions of the Acquis which are translated and certified in Albanian and Serbian. In the absence of certified translated versions of Acquis legislation,

the English version of the Acquis should be used. ”

“ 33.6. Until the EU Acquis is translated or secured in Albanian or Serbia, only the English version of the Acquis will be used. ”

In the third column (c), the legal drafter must indicate for each individual box, provision by provision, the degree of compliance of the Kosovo legal act (column (a)) with the EU legislation (column (b)): either “fully compliant” “or “partially compliant”; “not compliant”; “not applicable”.

In the fourth column (d), the legal drafter must indicate in each relevant box the reasons for “non-compliance” or “partial compliance” (column (c)) as well as the period foreseen for achieving “full compliance”.

2. How to fill a Table of Compliance “European Union – Republic of Kosovo”

The Table of Compliance “European Union – Republic of Kosovo” is a mandatory Table regulated under the Administrative Instruction No. 03/2013 on Standards for the Drafting of Normative Acts. The Annex 17 of the Administrative Instruction No. 03/2013 provides with the official template of the Table of Compliance “European Union – Republic of Kosovo”.

The Table of Compliance should be drafted by the Kosovo legal drafter in the course of the legal drafting process. This Table will in particularly be requested by EU officials during the integration process as a control instrument of the transposition of one EU legal act within the Kosovo legal framework.

In the **introductory table**, the legal drafter must indicate:

- The title of the EU legal act according to the standard provided under the Article 1 of the Annex 13 of the Administrative Instruction No. 03/2013 on Standards for the Drafting of Normative Acts;
- The proposing body of the EU legal act;
- The date of completeing the table (date/month/year);
- The list of the relevant national legislation (full title of the act and number) that transpose this EU legal act;
- The level of transposition of the EU legal act within the Kosovo legislation: “fully compliant” “or “partially compliant”; “not compliant”; “not applicable”.

Then, the legal drafter must fill in the table “European Union – Republic of Kosovo”:

In the first column (a), the EU legal act must be copy-pasted in its entirety, full text, and divided into articles, paragraphs, sub-paragraphs, etc. The provisions of the EU legal act shall not suffer any change from the legal drafter.

According to Article 33.5 and 33.6 of the Administrative Instruction No. 03/2013 on Standards for the Drafting of Normative Acts, when referring to EU Legislation, only the official and certified translation in Albanian and Serbian is allowed. (see below)

> “33.5. Referring to EU legislation in the Tables on Compliance is allowed only in versions of the Acquis which are translated and certified in Albanian and Serbian. In the absence of certified translated versions of Acquis legislation, the English version of the Acquis should be used.
> 33.6. Until the EU Acquis is translated or secured in Albanian or Serbia, only the English version of the Acquis will be used.”

In the second column (b), individual boxes must contain all relevant provisions from all relevant Kosovo legal acts that transpose the related provisions of the EU legal act as stated in the column (a). The provisions of the Kosovo legal acts must be copy-pasted in their entirety, full text, and shall not suffer any change from the legal drafter compared to the text of the draft legislation.

In the third column (c), the legal drafter must indicate for each individual box, provision by provision, the degree of compliance of the EU legal act (column (a)) within the Kosovo legislation framework (column (b)): either “fully compliant” “or “partially compliant”; “not compliant”; “not applicable”.

In the fourth column (d), the legal drafter must indicate in each relevant box the reasons for “non-compliance” or “partial compliance” (column (c)) as well as the period foreseen for achieving “full compliance”.

3. How to fill a Statement of Compliance

The Statement of Compliance is a mandatory Statement as regulated under the Administrative Instruction No. 03/2013 on Standards for the Drafting of Normative Acts. The Annex 15 of the Administrative Instruction No. 03/2013 provides with the official template of the Statement of Compliance.

The Statement of Compliance must be drafted by the Kosovo legal drafter in the course of the legal drafting process based on the Tables of Compliance. A Statement of Compliance must be drafted even when there is no EU legislation with which compliance is required.

The Statement of Compliance contains the following mendatory information:

- The proposing body of the normative act;
- The title of the draft normative act;
- The compliance of the draft normative act with provisions of the Stabilisation and Association Agreement or Interim Agreement, including:
    - SAA provisions and Interim Agreement regarding the normative content of the normative act.

- Deadline set for compliance and harmonisation of legislation in accordance with the SAA provisions and Interim Agreement.
- Assessment of the level of fulfillment of duties/obligations that derive from the aforementioned provisions of the SAA and Interim Agreement.
- Reasons for partial fulfillment, or non-fulfillment/failure to fulfill obligations that derive from the above-mentioned provisions of the SAA and Interim Agreement
- Relation to the National Integration Program NIP/NPAA (in the present case relation to the WPEP)
- Compliance of legislation with the EU Acquis:
- List of primary sources of EU law and compliance with them
- List of secondary sources of EU law and compliance with them
- List of other sources of EU law and compliance with them
- Reasons for partial compliance or non-compliance
- Time period set for the full realization of compliance of legislation with the EU Acquis
- Specify when there is no EU legislation with which compliance is required (in this case, it is not necessary to fulfill the table on compliance with legislation).

- Are the above mentioned sources of EU law translated in the official languages;
- The participation of consultants in drafting normative acts and their opinions on compliance (attach documents of those consulted about drafting normative acts).
- Signature of the Head of the Legal Department of the state body, or proposer of the normative act
- The signature of the Minister or the head of the state body, or other proposer of the normative act

Step 7: Opinion on Compliance

The draft legal act must be submitted to MEI together with the Statement of Compliance (SoC) and with the Tables of Compliance (ToC). Only with both documents attached MEI could issue substantial Opinion on Compliance (OoC). The MEI Legal Department checks compliance of the draft with the Constitution(s) and national legislation, international agreements, but above all, with the EU Treaties, other secondary EU legislation, general principles of EU law, and case law of the Court of Justice – if any exist.

Article 30 of Administrative Instruction No. 03/2013 on Standards for the Drafting of Normative Acts:

> “4. The Ministry of European Integration issues a Legal Opinion on Compliance with the EU Acquis, as defined in Annex No. 18 (eighteen).”

Do not forget to attach Table of Compliance and Statement of Compatibility when sending draft legal act to the MEI. Do note that only the final version of the draft shall be submitted to the MEI. It is recommended that also opinions of other ministries are attached. Do submit all the working materials which may support your view of the draft legal act as being compliant with EU requirements to the MEI (studies, researches, opinions of experts and any other information).

Step 8: Legal Opinion

Any domestic draft legal act must be submitted to the OPM Legal Office which checks compliance with the Constitution and with the legal system and domestic drafting techniques as well as with the ratified and published international treaties.

Article 15 of the Regulation No 13./2013 on Governmental Legal Service defines preliminary review of the draft:

> "1. Legal Office after receiving the normative draft act with all accompanying documents by the relevant Ministry, reviews the consistency with constitutional and legal provisions and the procedural progress of the draft law and legislative drafting standards.
> 2. If the normative draft act does not meet the principles and standards set forth in paragraph one (1) of this article Legal Office, with a corresponding justification returns the normative draft act and requires its amending or revision.
> 3. Legal Office in certain cases in cooperation with the Office of the Prime Minister shall also make amendments and supplementation in the draft normative act before submitting it for approval to the Government."

Article 16 of the Regulation No 13./2013 on Governmental Legal Service defines preparation for Government approval:

> "1. Upon completion of review of the final version of the normative draft act, OPM LO shall prepare:
> 1.1. Recommendation for approval of normative draft act to the Government, and
> 1.2. Statement of Compliance of the normative draft act with provisions of Regulation No. 09/2011 of the Rules of Procedure of the Government of the Republic of Kosovo and standards of drafting legislation.
> 2. Legal Office and Government Coordination Secretariat, ensure that the document for review and approval in the Government meeting must contain all accompanying documents required by the RRPK and RRPGRP and applicable standards."

After having the Opinion on Compliance issued by the MEI, as well as the Statement of Financial Impacts by Ministry of Finance, the OPM Legal Office checks the draft and

prepares the Recommendation for approval of the normative act and the Statement of Compliance of the normative act with Governmental Rules of procedure.

Step 9: Submission to the Government

Draft legal acts which are sent to the Government should be accompanied by the Statement of Compatibility and the Table of Compliance, both prepared by the legal drafter as well as with the substantial Opinion on Compliance prepared by MEI. the draft legal act must have also received a positive statement of the Ministry of Finance regarding its impact on budget and the OPM Legal Office concerning compatibility with the Constitution and the domestic legal system,

Article 17 of the Regulation No 13./2013 on Governmental Legal Service defines review of the draft act by the Government:

> "1. Government in accordance with RRPQ shall make the review and approval of draft legislation acts.
> 2. Draft normative acts when not approved by the Government, or postponed in order to meet the material shall be returned to the proposing body in accordance with Regulation No.09/2011 of the Rules of Procedure of the Government.
> 3. Draft Laws returned from Parliament for revision, shall be returned to the relevant Ministry that has been bearer of the Draft Law."

It is crucial that only drafts of normative acts well prepared with all requested documents are submitted to the Governmental session for approval.

Step 10: Submission of draft laws to the Assembly

Draft laws are to be sent to the Parliament and entail Tables of Compliance, Statement of Compliance and Opinion on Compliance included allowing the Assembly of the Republic of Kosovo to perform its scrutiny role according to the rules and procedures.

Parliamentary Rules of Procedure in Article 54 presents the conditions for draft law, where we stress the point c) regarding EU approximation:

> "1. The Draft-Law presented to the Assembly shall contain the following:
> a) An explanation note on the objectives that are aimed to be achieved by the Law, its approximation with the applicable legislation and reasoning of the provisions of the Law.
> b) Declaration on budgetary implications in the first year and subsequent years.
> c) Declaration on approximation and approximation with the EU legislation and with the comparative table of acts it refers to.
> 2. Each Draft-Law presented to the Assembly shall be drafted in the

following languages: Albanian, Serbian and English, in hard copy and electronically.
3. The Table Office of the Assembly shall verify the formal-legal aspect of the Draft-Law, record it based on the presented order and distribute it to the Members of the Assembly.
4. The Presidency of the Assembly, in its next meeting, shall assign a functional – lead committee for a review of the Draft Law in principle. ”

The main responsibility or legal approximation process is on the Government which defines priorities and is resonsible for preparing harmonised draft legislation, the parliament's role is scrutiny over the process through its EU Committee as well as other standing Committees and plenary.

A coherent system of legal approximation should be established for checking not only governmental draft laws but also of the compliance of parliamentary amendments tabled by the Members of the Parliament.

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