



# Guidelines to the acquis communautaire

Support to promotion of reciprocal  
understanding between the European Union  
and the Western Balkans



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## Guidelines to the Acquis Communautaire

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### **The Logic of the Legal European Integration**

#### **In the pre-negotiation phase**

The candidate country should perform intense work in the field of legal European integration during the preparatory phase, mostly in the framework of the so-called bilateral and multilateral analytical review of the legislation. The purpose of the analytical review is to establish the state of affairs and identify issues from the perspective of adopting the *acquis communautaire*.

In this phase, the country gets acquainted with the relevant *acquis* under each negotiation chapter and with the tools, methods, techniques and acts used by the EU. The candidate country creates the institutional structure for the dialogue with the EU. The other negotiating side, the EU member states through the European Commission, can demand additional information on every matter of interest within the set negotiation subjects. Communication and relationships between the experts of the applicant countries and the European Commission's expert team are initiated. There is active information exchange to clarify specific details of the Community *acquis* and the necessary administrative capacity for its implementation.

Based on the identified *acquis communautaire* in the respective chapter, Bulgaria has undertaken a reform of the normative arrangements even before the official invitation for membership.

#### **During the negotiation process**

After having received an invitation to begin negotiations, the team of the acceding country prepares its position on each negotiation chapter and negotiates based on its positions. The positions are concise, mostly covering:

- » The readiness of the Republic of Bulgaria to adopt and apply the Community law;
- » Exceptions from the requirements of the *acquis communautaire* or transitional periods;
- » The level of concordance between the national and the Community legislation. In the cases of partial concordance the country shall outline its commitments (measures and timeframe) to achieve full correspondence;
- » The status and readiness of the administrative capacity to apply the Community law in view of its functioning in full concordance to the date of accession of Bulgaria to the EU.

Bulgaria's positions propose provisional (preliminary) completion of the respective subject on the basis of the existing European legislation to the respective date.

In its negotiation position the candidate country makes an explicit commitment that in the case of newly adopted EU legal acts, Bulgaria shall assume the possibility of additional negotiations before the completion of the Intergovernmental Conference.

The draft joint position of the EU member states, which is the basis of negotiations on behalf of

the Union, is prepared by the European Commission.

Based on the conclusion that the candidate country has adopted the *acquis communautaire* on a specific chapter and manages its application to a satisfactory extent for the EU, an agreement will be reached for the so-called provisional (preliminary) conclusion of the negotiations on this subject ('closing of the chapter'). All circumstances relevant to the effective integration are monitored, for example possible bilateral and multilateral agreements including provisions that are contradictory to the *acquis communautaire*. The provisional closing of a chapter is deemed to be a success for the candidate country in the complex setting of the negotiation process with all the EU member states, to which the European Commission is added as a significant factor in the formulation of the common position of the Union. The closure is provisional because the negotiations may be renewed at the request of any of the participants.

The monitoring of the accession country's progress does not cease with the provisional closing of a negotiation chapter. The regular annual reports of the European Commission (recently accompanied by a strategic document containing a summary assessment of the acceding countries) relate to both the 'active', and the provisionally closed negotiation chapters.

Technical conclusion of the negotiations and a Safeguard clause Commission is added as a significant factor in the formulation of the common position of the Union. The closure is provisional because the negotiations may be renewed at the request of any of the participants. The monitoring of the accession country's progress does not cease with the provisional closing of a negotiation chapter. The regular annual reports of the European Commission (recently accompanied by a strategic document containing a summary assessment of the acceding countries) relate to both the 'active', and the provisionally closed negotiation chapters.

### **During the preparation and signing of the Accession Treaty**

#### *Technical conclusion of the negotiations and a Safeguard clause*

In the Strategy Paper (2003), published together with the regular reports for Bulgaria, Romania and Turkey, the Commission pointed out: 'In order for accession to take place in 2007, a common Accession Treaty for Bulgaria and Romania should be signed at the latest towards the end of 2005, which would require that the negotiations be finalized in due time before that'. Although the enlargement is formally carried out under conditions and criteria equal to those applied to the ten countries of the eastern 2004 enlargement, more rigorous control will be exercised over the preparation for membership of Bulgaria and Romania (and eventually over Turkey and Croatia). In the opinion of the Commission this is to the interest of both the EU, and the candidate country. Two reasons were pointed out for the introduction of this tool:

- » Some of the countries, which have joined the EU in 2004, have slowed down the speed of their reforms in the period between the signing of the accession treaty and the joining;
- » Bulgaria and Romania are seriously lagging behind in their justice, administrative and even economic reforms when compared with the level the ten had achieved at the time of accession in 2004. Commissioner Verheugen warned that 'Bulgaria has a lot of work to complete yet, for instance 'to improve its achievements' in the combat against corruption and organized crime.

In Bulgaria the responses to the safeguard clause varied from reserved to negative. The most critical saw in the announced 'safeguard', 'guarantee' or 'monitoring' clause an actual delay clause. Conversely, the representative team maintains the assumption that in any case, even in the absence of an explicit clause, the membership date would be postponed in the case of drastic problems with the implementation of the negotiation commitments. This sounds reasonable enough, and therefore a membership 'not later than January 1, 2008' seems to be agreed to the interest of both negotiating parties.

### *The Accession Treaty*

In application of the principle 'Nothing has been agreed until everything is agreed' after the completion of the negotiations a draft agreement is to be prepared, followed by another assessment of the achieved arrangements (the so-called opening of all the negotiation chapters), and only then the Accession Treaty is signed. It incorporates the results from the negotiations on various subjects (negotiation chapters) - arrangements, transitional periods, technical conditions etc. The ten countries acceding on May 1, 2004 have signed a treaty similar to the one signed by Austria, Finland and Sweden in 1995. The treaty is short and contains a preamble and three articles. The content of provisions forms a separate document (Act on Accession), which, together with its accompanying annexes makes an integrate part of the accession agreement. A joint treaty has been prepared for the new acceding countries (similar to previous accessions with the exception of Greece), and the specific conditions for each acceding country are stated in the Act of Accession. In addition there is a Final Act where the plenipotentiaries officially confirm the adoption of the provisions of the agreement, the declarations and protocols.

There is no legal obstacle to prepare an individual agreement for a given country (on the contrary, a precedent exists - Greece, 1979). There is also the reverse practice: signing a joint treaty with countries, which have achieved readiness at different moments. In any case the preparation and signing of the Accession Treaty is one of a series of key moments for the assessment of the level of concordance between the national legislation and the acquis. It is probable that Bulgaria and Romania will have a joint treaty, however open to signing in a way that does not necessitate waiting for the country with the lower level of readiness (at the time when Bulgaria has concluded its negotiations, Romania's negotiations are in process on seven chapters).

The content of the treaty is prepared by a special working group composed of representatives of the EU member states, with the help of the European Commission and legal experts. The acceding country also participates in the development of provisions. The Accession Treaty for the ten countries was drafted in English, and then translated in the languages of all member states (old and new), where the agreement is considered equivalent in all the languages.

The Treaty will be composed of three parts: treaty in its proper sense, Act of Accession containing the conditions under which the countries join the Union where the safeguard clause belongs, and a third part of annexes and protocols containing the specific conditions, agreed separately by Bulgaria and Romania. The third part describes the conditions under which the negotiation chapters have been closed, and the work on the agreement begins with specifying

the provisions in this particular part. On behalf of Bulgaria, the persons involved are the working group leaders of the extended team. The provisions are translated into Bulgarian and agreed in an interactive regime between the Bulgarian team and the experts of the Commission.

After the signing of the Treaty, it has to be ratified by the EU member states and the membership candidate countries (in accordance with their national legislation) and then it enters into force on a set date (the indicative date for Bulgaria is January 1, 2007). If there is even one EU member state, which does not ratify the agreement within the set timeframe, it cannot enter into force. If a candidate country does not ratify the agreement, the accession is deemed effective for the rest of the states. Such precedent exists. Norway is a country, where two times (1972, 1995) the EU accession referendums produced negative results.

There is no announced political decision yet on whether the ratification of the agreement on behalf of Bulgaria will be through a referendum, but there is expert support and public desire for that.

### **Under membership conditions**

The process of approximation of the legislation is not completed with the country's EU accession. Just the opposite: although in a changing environment, maintaining concordance between the national legislation and the EC/EU legislation is of primary importance in a membership situation. It is ensured and monitored with various tools.

During the process of adopting secondary legislation, terms for transposing the measures to the respective national legislations will be defined. The European Commission maintains a public account (calendar) of the measures subject to transposal, and the implementation of this responsibility by the individual EU states.

Some of the Directives provide for the submission of regular reports on the implementation of certain provisions. Thus for example, in the field of audio-vision the fifth report on the implementation of Articles 4 and 5 was prepared by the Television sans Frontiers Directorate. Those are provisions promoting the European audio-visual production.

Apart from the timely and precise transposal, the EU member states have responsibilities related to the effective implementation of the Community law, meaning the so-called direct effect. This process also is closely monitored by the EU institutions.

### **EUROPEAN COMMISSION. Secretariat General.**

#### **Progress in notification of national measures implementing directives**

**Reference date 31/12/2001**

Ranking	Member states	Directives whose deadline for implementation has passed by the reference date	Directives for which measures of implementation have been notified	Percentages of notifications
1	Denmark	2400	2360	99,17 %
2	Spain	2415	2394	99,13 %
3	Finland	2393	2363	98,75 %
4	Ireland	2411	2376	98,55 %
5	United Kingdom	2394	2357	98,45 %
6	Austria	2400	2357	98,21 %
7	Sweden	2362	2336	98,15 %
8	Portugal	2436	2390	98,11 %
9	Netherlands	2399	2345	97,75 %
10	Belgium	2452	2394	97,63 %
11	Italy	2406	2345	97,46 %
12	France	2398	2336	97,41 %
13	Germany	2398	2334	97,33 %
14	Luxembourg	2401	2333	97,17 %
15	Greece	2401	2332	97,13 %
	Average E.C.	2406	2358	98,03 %

### **Specific problems of the approximation of the national legislation to the acquis communautaire**

#### **Is there a necessity for a law regulating the legal Euro-integration?**

In some of the acceding countries the process of approximation of the national legislation with the EU acquis is regulated by specific legal acts. For example, in Slovakia the regulation is made in 'Methodology for approximation of the legislation with the acquis communautaire'. In Estonia a guide was developed titled 'Methodology for harmonization of the Estonian legislation with the EU law', which serves to unify the work of the team.

In Bulgaria and in the greater part of the 'new ten' there are no explicit laws. Those that transpose the Community law are adopted on equal footing on the basis of the Bulgarian legislative arrangements (the Constitution, the laws and the Regulations for organization of the work of parliament).

#### **Scope of the transposal process**

According to the legal theory the approximation is an activity (in some of the literature an obligation) of the EU member states and the candidate countries to achieve concordance between their national legislations and the Community law. The approximation of the national legislation to the acquis means introduction of the necessary level of concordance of the written law (transposal), effective implementation and enforcement of a system of measures for non-admission and fight against breaches. Those three components together create the necessary 'coordinates' of the functioning of the Community law the national legal systems.

The transposal is related to both 'transferring' and adoption of the principles and norms of the acquis communautaire, and an overall assessment of the national system of normative acts in view of the necessity for ensuring its internal cohesion. In the case of confrontation between the European norms and other active acts, the latter should be amended in a way that avoids impediments to the application of the transposed legislation. Therefore the transposal does not mean simply adopting but also amending and repealing of normative acts. The main tool of the transposal is the so-called Table of Concordance.

The implementation (as an element of the harmonization) is considered from the point of view of the requirements to the country to ensure effective enforcement of the written law. The concordance requires mostly the presence of adequate law-enforcement bodies (administrative capacity) in their creation, powers, the acts they issue and their relations with the rest of the authorities. Thus for example the approximation in certain fields requires the establishment of specific bodies: regulators that should, in their activities, comply with the EU norms for independence of the public administration and the respective market sector. The law-enforcement bodies should be governed in their act-issuing activities by the principles of the Community law. This is, for example, with regard to the introduction of the principles of competition, transparency, publicity etc, in the administrative regulation (licenses, registrations). An important element of the effectiveness of the harmonization process is the training and preparation of the law-enforcement bodies and their administration for



implementing the acquis communautaire.

The third element of the approximation is the system of measures and tools (promotional or sanctioning) for ensuring compliance of the addressees with the prescriptions of the law (control, sanctions, mandatory measures that are ultimately targeted at achieving the goals of the act). Those laws that do not provide sanctions for infringements or any other measures limiting the 'territory of non-conformity', are not an effective tool of the harmonization. The same is true about acts that are deprived of an effective system for monitoring the implementation of individual provisions, where there is practically no information as to how much the addressees align their behavior with them.

Very often the studies and analyses of the approximation actually limit their subject to the transposal of norms without affecting the guarantees and mechanisms of implementation of the harmonized legislation (and the EC/EU law in the future).

### **Which acts are subject to transposal? Community law**

The accession negotiations are specific negotiations between a candidate country and the governments of the member-states. They do not correspond to the usual idea of this process. In order to start the negotiation, a country must cover the political criteria from Copenhagen and show significant progress in achieving the economic criteria, which is monitored by the European Commission and reported in the regular annual reports on the candidate country. In the process of negotiations the question of the candidate country's ability to assume the membership obligations is being examined, i.e. the acquis<sup>1</sup>. The parties negotiate on:

- » The content, principles and political objectives of the Treaties;
- » The legislation adopted as a result of the agreements and the decisions of the EC Court;
- » Decisions and resolutions, plans etc, of the EU;
- » Joint strategies, activities, declarations, conclusions and other documents in the framework of the common foreign and security policy;
- » Joint strategies, activities, declarations, conclusions and other documents in the framework of the policies in the field of justice and home affairs;
- » The international agreements of the EC, and those concluded by the member-states related to the actions of the European communities.

### **What needs to be transposed?**

In the process of preparation for membership the content of the Community law (in the narrow sense) does not have to be fully transposed. Firstly, because part of the acts have direct force and are binding not only for the states but also for the persons, and therefore do not necessitate transposal. However, at the time of full membership the law-enforcement bodies

must be ready to apply these legal provisions. Secondly, because part of the content of the Community law only affects those states that are currently EU members. Some parts of the structure of certain sources are not subject to transposal, like preambles, however this matter is important for the purposes of interpreting the provisions.

The main (in terms of volume) efforts related to the transposal of the Community law concern the introduction in the Bulgarian legislation of the provisions of one type of sources belonging to the secondary legislation, the Directives. They provide for the achievement of certain results but leave it to the states to determine the means and methods of achieving them in the process of transposal. Of course, the Directives are not the only sources of Community law that are relevant to the national legislation. Non-binding acts such as recommendations and statements also have their legal significance and the EC Court emphasized that the national courts should take them into consideration.

The content of the national legislation is not fully defined by the Community law. Some major issues that are subject to harmonization are left entirely to the national legislator, and the proportion 'national - supranational' differ across the different sectors. So much more the national decisions prevail the normative acts accompanying a law and most often regulate the rules and conditions for its implementation.

### **How to identify the legislation subject to transposal**

The Europe Agreement contains an entry dedicated to the approximation of the law with that of the EU. The approximation subjects are defined there:

#### **Europe Agreement, Chapter III Approximation of laws**

##### **Article 69**

The Parties recognize that an important condition for Bulgaria's economic integration into the Community is the approximation of Bulgaria's existing and future legislation to that of the Community. Bulgaria shall endeavor to ensure that its legislation will be gradually made compatible with that of the Community.

##### **Article 70**

The approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, nuclear law and regulation, transport and the environment.

### **In what kind of acts is Community law transposed?**

The Community law can be transposed in both laws and secondary legal acts. This is left to the discretion of the national legislation requirements, and where no explicit norms exist to this end, the legislator is free to decide the rank of the act. Sometimes the national legislation

explicitly states that certain matter needs to be regulated by a law. Then naturally the transposal of the Community law can only be made on the level of the law. For Bulgaria such constitutional norms are for example:

- » The tax relieves and fiscal drags, which can only be stipulated in a law (Article 60, paragraph 2),
- » The state and municipal property regime (Article 17, paragraph 4),
- » No person can be arrested, inspected, searched or have his/her personal inviolability encroached, with the exception of the conditions and rules set out in the (Article 30, paragraph 2),
- » No person can be followed, photographed, recorded or be the object of any other similar activities without his/her knowledge or in spite of hi/her explicit non-consent, with the exception of the cases set out by law (Article 32, paragraph 2) etc.

The practice of the EC Court of Justice requires that the directives are transposed into legally binding documents (normative acts). Alternative acts like labor contracts and agreements of the state administration with the trade union are not admissible. Unless otherwise specified, each directive should be transposed into one act only (law).

### **Obligations of the draft mover and of the rest of the participants in the process of transposing the Community law**

The participants in the process of transposal depend on the type of act, into which the Community law will be transposed. Two different procedures can be distinguished: (a) law drafting and adoption and (b) drafting and adoption of a secondary legal acts.

During the preparatory period and the drafting of acts the mover is obliged to take account of:

- » The Community law sources (primary and secondary legislation, decisions of the EC Court, the general principles of the Community law);
- » The tendencies in the development of the Community law and the acts in the process of drafting;
- » The legal systems of the EU member states in the perspective of harmonizing their legislation, and their administrative structures for implementation of the legislation.

The mover is also obliged, in view of the used vocabulary, to align the draft with the terms used in already harmonized acts in the same field.

A mandatory justification of the draft from the perspective of approximation should be envisaged - goals, basic assumptions of the new act, expected results, economic justification, etc . The justification shall have the following minimum mandatory content:

- » Community law sources to be transposed,
- » Reference to their official publications and their official translations into Bulgarian

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according to the adopted uniform nomenclature,

- » Level of concordance (full, partial, missing).

The movement of drafts not accompanied by the relevant table of concordance with the Community law is inadmissible.

After the country's accession into the EU no draft acts falling under the exclusive competence of the EU shall be moved.

If the government is preparing a draft to be moved to parliament, or a minister or head of central administrative body is drafting a decree or normative act, the working group will be composed in accordance with the respective regulations, after the draft has been planned according to the relevant procedure. Apart from the mover, other persons engaged to the concordance with the Community law are: the Euro-integration divisions of the respective ministry (if it is an act of a minister), the Legislative Council with the Ministry of Justice, the 'European Integration and International Financial Institutions' Directorate with the Council of Ministers, the respective working group at the Coordinating Council for European Integration.

Whether it is a piece of secondary legislation to be adopted by the Council of Ministers, or a draft law to be moved to parliament, this algorithm is relatively well established formally, and guarantees exist for a series of assessments of the draft in the course of its movement to a cabinet meeting.

The Bulgarian legislation provides power of legislative initiative of individual members of parliament. This opportunity, stipulated in the Constitution, allows the parliamentary committees to distribute low-quality provisions that appear directly at the parliamentary stage. Indeed, the mover had the right to ask the statement of the Legislative Council with the Ministry of Justice or of the respective working group in the extended negotiation team, but such practice is limited and the statements usually do not compensate for the full drafting of the experts from the specialized administration (as is the case with the alternative acts initiated by the Council of Ministers).

When they are moved to parliament, the drafts follow their normal route of procedure. By the parliament spokesman's appraisal, the drafts are distributed to the respective subject committees, and to the special (created by this parliament for the first time) standing Committee of European Integration. So far this committee has not been sufficiently effective because the lack of consensus does not allow for a statement to be made and the draft goes straight to the plenary agenda - practice has been introduced to discuss drafts without a statement from the Committee of European Integration. The branch (subject) parliamentary committees have achieved different levels of competence as far as the harmonization of the legislation is concerned, and in reality the Community law is largely unknown.

There is no sustained tradition to require the expertise of various European institutions on the drafts. There is the tendency in some of the parliamentary committees to trivialize the negative opinions of the European institutions as 'advisable' and 'non-binding'.

The power to focus the legislator's attention to certain provisions and decisions that seem problematic from the perspective of the legal Euro-integration is vested with the President of the Republic within the framework of his right of motivated suspensive veto.

Finally, the role of the courts deserves undivided attention: of the SAC for the secondary legal acts, and of the Constitutional court for the laws. The courts have not acquired the proper significance in terms of control of the concordance with the Community law yet.

### **The role of the so-called extended team**

The institutional structure of the negotiations has established working groups on each of the negotiation chapters (also known as 'extended team'). They incorporate the prominent experts in the sector, regardless of whether those are civil servants, representatives of the business or of the third sector. Mandatory participants in the working group are the respective ministries, jurists, representatives of the economic and social partners. The working groups perform on-going monitoring of the newly adopted European legislation by sending monthly information to the Minister of European Affairs. They have very important functions in the approximation of legislation process:

- » Drafting sector negotiation positions and presenting them to the respective minister or head of administrative body for approval;
  
- » Discussing drafts of normative acts, introducing the Community law, delivering opinions on them and on the table of concordance; the opinions are signed by the heads of the working groups;
  
- » Make analysis of the membership requirements and prepare materials and documents for the Bulgarian positions in the dialogue with the European Union and for the accession negotiations; prepare and deliver to the competent authorities data on the analytical review of the legislation (screening) and information on the database about the national harmonogram (Progress Database);
  
- » Analyze and propose to the coordinating council activities related to the implementation of priorities and engagements made in the process of EU accession negotiations;
  
- » Prepare a general statement on the concordance of the achievements of the Republic of Bulgaria with the EU membership requirements to be considered at the meetings of institutions of the Europe Agreement during the working group sessions at the respective ministry, presided by the responsible deputy minister;
  
- » Participate in the information and communication campaign on matters of the European Union integration;
  
- » During the preparation of draft negotiation positions and positions for the dialogue with the European Union institutions the working group heads can have consultations with NGO representatives;

- » Analyze in-depth the priorities of the Republic of Bulgaria in the respective sector, and based on that prepare a motivated proposal for undertaking specific actions to be included in the National Program for adopting the acquis communautaire;
- » Determine the order of priority for translation of the European Communities normative acts and of the national legislation in the respective field, and deliver information on it to the 'European Integration and International Financial Institutions' Directorate with the Council of Ministers;
- » Agree the specific terminology in the acts, translated and edited by the Center for translation and editing, and adopt the translation;
- » Discuss the program priorities in the framework of the pre-accession financial tools and make recommendations for drafting specific programs and documents;
- » Perform on-going monitoring of the newly adopted European legislation by sending monthly information to the Minister of European affairs.

### Table of Concordance with the European Communities law

Name and identification of the normative act(s) of the European Communities	Name of the national normative act draft	Level of concordance
Text of the respective normative act(s) of the European Communities article by article	(Amendment, SG, 56, 2004) Bulgarian legislation	(Amendment, SG, 56, 2004) a) Full; b) Partial. Specification of the act introducing the requirement, including date/term. Comment on the reasons for non-introduction or partial introduction of the provisions; c) not subject to introduction. Comment; d) The Republic of Bulgaria shall not utilize the proposed option. Comment.

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### **Tables of Concordance**

In view of the need for constant maintenance of the concordance, achieved at the date of provisional closing of a negotiation chapter, there is the requirement to enter each piece of legislation related to negotiation matters into a table of concordance with the acquis. This provides the opportunity to track down whether the dynamics of the national legislation corresponds to the dynamics of the Community law.

Apart from being positive, this process has its negative aspect as well: no provisions should be allowed that might diminish or delete an already achieved concordance effect.

As regards the administrative capacity, the same principle should be applied: no qualitative and quantitative changes in the institutional structures should be made, if they might have a negative effect on the already achieved level of effectiveness of the Community law implementation.

### **Systematic character of the transposal**

In the process of approximation of the Bulgarian legislation to the Community law the so-called coherence principle is applied by the Commission. According to this principle the measures taken in a given field should be systematically reviewed and applied in conjunction with measures in other related fields. Thus for example the EU negotiation position on the policies in audio-vision special attention should be paid to the relations with negotiation chapters like Company law in its intellectual property protection aspect, Telecommunications and information society and external relations.

### **Communication to the EU and assessment of the pace of preparation**

The EU uses formal and informal procedures to monitor the direction and pace of the legislative reforms and the administrative capacity building after the provisional closing of the chapters. There are regular planned meetings at government and parliamentary level with representatives of the candidate country and the respective EU institutions with hearings on the achievements in the past year. The communications are prepared by the working groups, adopted with a consensus and signed by the working groups chairpersons. When new acts (draft laws) are prepared, the reasons and objectives, and the basic new positions of the act should be presented, while the full text of the drafts is delivered upon request. The representatives of the European Commission pose additional questions and require preliminary or additional information with the help of which they can have as complete idea as possible of the legislation and administrative capacity in the respective field.

It can be concluded from the regular annual reports of the European Commission on Bulgaria that the progress on both the open and the provisionally closed chapters is being monitored. The progress is assessed based on the information delivered by the countries and combined with various forms of direct provision of information on behalf of the European institutions. Therefore, in spite of the lack of formal negotiation process, the activities on the approximation of the legislation after the provisional closing of a chapter should follow their normal pace. Even

after the regular annual report is completed, the progress will be strictly monitored and reflected in the so-called monitoring reports.

The EU programs open to Bulgaria are assisting the approximation since the assessment of achieving legislative concordance is one of the conditions for eligibility of the country for a given program (for instance MEDIA+). The funds facilitate the fuller implementation of the harmonized legislation and the fulfillment of the EU requirements in the field.

### **Importance of the Council of Europe acts**

Other organizations outside the European Union and their acts are also important for the approximation to the Community law. For example, the external environment of the EU policies is formed by the acts of the:

- » Council of Europe;
  
- » World Trade Organization and the Organization for Economic Cooperation and Development;
  
- » World Intellectual Property Organization etc.

These organizations have indirect effect on the national legislation through the Community law, but also a direct impact. Bulgarian laws are developed under the direct influence of other normative legal frames and hierarchies of acts, in particular the acts adopted within the system of the Council of Europe. This is valid to a varied degree for the different fields of the negotiation process and the approximation of the legislation, but there are fields (like culture, education, science, audio-vision) where the acts of the Council of Europe have stronger influence. Such are the multilateral agreements (conventions) of the Council of Europe, as well as the acts of the:

- » Parliamentary Assembly of the Council of Europe (decisions);
  
- » Council of Ministers (recommendations);
  
- » Standing Committee for Trans-border Television (opinions);
  
- » European Court for Human Rights (decisions).

The various types of acts have different importance and different mechanisms for influencing the national legislation of the Republic of Bulgaria.

**A. The Council of Europe Conventions** are mandatory and binding for their addressees. The provision of Article 5, paragraph 4 on the Bulgarian Constitution apply to them - when ratified, published and entered into force in Bulgaria, they form a part of the active law and have primacy over any norms of the internal legislation that contradict them.

An important feature of the conventions is that they are open to integration to the European Community.



The enforcement of the Council of Europe conventions for the acceding countries is very economical from the point of view of the legislative process: a single ratification introduces a system of norms without having to apply the standard procedure of drafting and discussing future acts. Unfortunately though, even if we presume that the content of a convention will be identical to that of a directive, at least two evident problems emerge:

- » The provisions of the conventions do not envisage specific sanctions, which remains an open matter to the legislative technique used in Bulgaria;

- » The conventions do not apply to all the EU member states.

**B. The recommendation adopted by the Council of Ministers** and the Parliamentary Assembly of the Council of Europe form a second important channel of influence over the development of the national legislation. They are not binding but their infringement in the field of human rights, the freedom of speech, the independence of the regulators etc. is treated as a refusal to adopt proven and deeply grounded into practice democratic principles.

The Council of Europe has formalized procedures for monitoring the compliance of those principles and standards by the new democracies and a negative report would have unfavorable impact on the assessment of complying with the political criteria for the country's EU membership.

**C. The opinions** of the special convention bodies have legal justification in the texts. Those bodies can interpret the text of the conventions and adopt opinions. The opinions are not binding but are usually a forerunner of future amendments to the act.

**D. The Decisions of the European Court of Human Rights** in application of the European Convention for Human Right define the standard applicable in audio-vision regarding the right of free expression of opinion, access to information etc. The decisions of the Court have fundamental importance for the European legislation and the contemporary legislators cannot afford to ignore the decisions safeguarding personal privacy, the human dignity, and the secrecy of the information sources. No successful development of the national legislation in the field of human rights is possible outside the standards of the ECHR.

**E. The expertise on active or future laws** is yet another function that the Council of Europe performs in relation to the Bulgarian audio-visual legislation. The Council of Europe provides methodological assistance to the countries that have made an explicit request for it. There is an established practice to request the so-called expertise for concordance with European standards when draft laws are developed. This expertise is assigned to outstanding experts with authority and the national legislators take them into account.

Therefore, the obligation of the extended negotiation team to observe the dynamics of the Community law, and the dynamics of the so-called external environment of the Community policies remain relevant. What was explained about the acts of the Council of Europe is equally valid about the acts of the World Trade Organization, the World Organization for Intellectual Property (copyright and related rights) etc.



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1 The phrase *acquis communautaire*, or *acquis* in short, stands for the entire range of principles, policies, legislation, practices, obligations and objectives that have been agreed within the framework of the European Union. In view of the context the translation uses the phrases 'Community law' or 'Community legislation'. Where used in its most general sense, the word *acquis* has been preserved.

### **Transposal in the circumstances of Community law reform**

In order to include the activities on the creation and implementation of the Community law in a uniform effective mechanism, the European Commission analyzes periodically the status of the law-creation and law-implementation and makes proposals for improvements in the EU legislation<sup>2</sup>. The same is done by sector, especially where there is huge in volume and diverse Community legislation. Even in its early acts the Commission distinguished between five phases of the impact mechanism ('regulatory chain')

- » Development and formulation of the EU policies;
- » Legislative process;
- » Transposing and practical implementation of the acts;
- » Monitoring, Feedback and assessment of the impact effectiveness;
- » Control and sanctions (including solution of arguments and examination of appeals).

In a 1996 Commission act the regulatory chain was defined as a process of initiating, development, adoption and implementation of legislation with a parallel effectiveness assessment in each phase. The transposal is the process of introducing legal, regulatory or administrative binding measures for incorporating rights, obligations or powers envisaged in the Community acts, mostly directives to the national legal norms. The Commission pointed out explicitly that the transposal is not just a reproduction of the directive's provisions but also amendments or repealing of provisions contradicting the directive, so that the national law in its entirety ensures its effective functioning. The practical implementation means incorporating, introducing the Community law into specific and individual decisions (directly to the regulations and the directly applicable directive provisions as well as indirectly through the national legal instruments). Here, according to the Commission, in all cases it is essential to create the necessary infrastructure, establish adequate institutions, and select and train competent personnel in order to build capacity for the implementation of their powers in accordance with the requirements of the acquis. The practical implementation is related to the last phase of the mechanism (enforcement), covering all the measures and actions that guarantee concordance of the behavior of the addressees with the requirements of the law (control, sanctions, corrective mechanisms).

Since 2001 the European Union has launched an active reform of the law-creation and law-enforcement in the EC, simplification and improvement of the legislation. With the full political support of the EU member-states, the reform aims to:

- » 'Cleaning the dry branches' - repealing of superfluous and outdated provisions, in the Commission's appraisal some 30% of the overall volume of the Community law;
- » editing legal provisions with the purpose of consolidating and systematizing them;
- » Applying measures for improving the manner of presentation, the access and opportunities for understanding and implementing the Community law;

» beginning a long process of modernization, simplification and - without deregulation - replacing the existing instruments with others, more adequate and proportionate to the objectives of the respective policy<sup>4</sup>.

The European Commission appealed to both the EU institutions and the national institutions to focus their attention on the following order of tasks: simplification - consolidation - codification - modernization - monitoring the effectiveness. In response the EU member states have either adopted or updated the existing national programs for regulatory reform<sup>5</sup>. Many of them surpass the goals set out by the Commission and proceed to actual deregulation.

Additional efforts are being made to improve the legislative technique in the drafting of the Community laws. The clear Community acts are considered the most important condition for correct and adequate transposal. The governance is being increasingly optimized in accordance with the requirements for effective communications. The influence of the law is a communication process and a big part of the measures for increasing the effectiveness of the Community law are related to providing access to the acts, their delivery in a clear form, use of techniques for more effective understanding between legislator, law-enforcement bodies and addressees. To this end the explanatory reports, texts and tables, which further clarify or interpret the meaning of the acts, including the tables of concordance of the national measures with the Community acts, are gaining wider popularity.

At the end of 2003 the European Commission made an account of the achievements during the year of reforming the legislative mechanism<sup>6</sup>. The action plan 'Updating and simplifying Community acquis'<sup>7</sup> defined as target of this reform all the binding acts of the secondary legislation. At the end of 2002 they were around 14 500 with a total volume of 97 000 pages. The conclusions are important for the countries in the process of accession because they outline the priorities, tendencies and perspectives of the lawmaking and law-enforcement in the EU. The key measures for improving lawmaking and law-enforcement are determined to be as follows:

### **A. In terms of lawmaking:**

- » Defining minimum standards for the consultative process;
- » New rules for higher expertise of the decisions;
- » Impact assessment;
- » Selection of tools (conventional and alternative);
- » Provisions on the obligations concerning the assessment of the effectiveness of the acts;
- » Applying the right of withdrawing projects that have become out of date or for other reasons.

### **B. In terms of law-enforcement:**

- » Boosting the effectiveness of the enforcement through a better selection of tools;

- » Updating and simplifying of the existing legislation;
- » Increasing the methods and techniques for examining and concluding the effective transposal of the Community law.

All the measures envisaged to create a sustainable mechanism for increased quality and effectiveness of the Community law are valid in terms of national legislation, too (consultative process, impact assessment, organization of feedback etc.). The mechanism of functioning of the Bulgarian law (lawmaking and law-enforcement) is pending reforms - not only in view of the future accession but also due to its insufficient effectiveness. The results of the reform in the EU that started with the White Paper on Governance of 2001<sup>8</sup>, are encouraging.

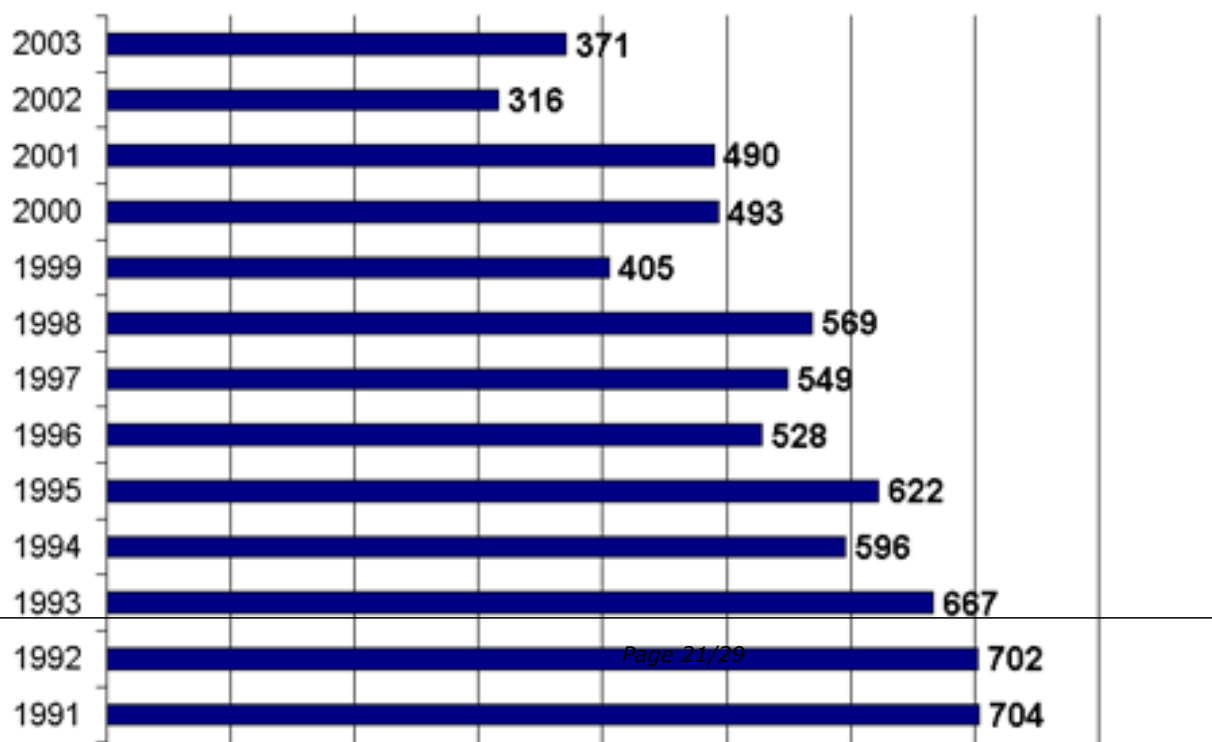
The consultative process is improving - for 2003 in 60 cases the Internet was used, minimum time for public consultations was introduced (8 weeks, 12 - for the United Kingdom), also introduced was the obligation to inform the participants on the level of acceptance of their proposals and why, a single inlet was created for public consultations in the network<sup>9</sup>.

The improvement of the methodologies for assessing the impact of the public policies and acts continues. The Commission makes these analyses in two forms<sup>10</sup> - preliminary impact assessment and extended assessment (Ex-IA). In 2004 about a half of the Commission proposals are prepared on the basis of an extended assessment, which undoubtedly enhances the virtues of the drafts. The insufficient use of qualitative methods of evaluation and forecast, especially in the financial aspect, is still considered a shortcoming.

Data from 2003 show a decreasing number of drafts proposed by the Commission.

### Number of Commission proposals 1990 - 2003

\* situation at 03/11/03 (source for 1990/2001: Eur-Lex; for 2002/2003: Pre-Lex)



### **Number of proposals for regulations, directives, decisions and recommendations**

The increased expertise in the creation of policies and acts was assessed in two directions: expert selection procedure and frequency of the expert (scientific) support in the creation of policies and acts.

Certain success was marked, for example the Lisbon process and the development of the '3% Action Plan', and the still unutilized capacity of science in decision-making, including the so-called early warning of problems of public interest.

In the conclusion<sup>11</sup> of the 2003 report the Commission pointed out that for the first time in history a global policy for management of Community law was introduced. This initiative aims to ensure a clear, up-to-date and effective legislation in the name of the citizens of the European Union.

The process of preparing the European Constitution attracted increased public attention. The Irish presidency (June 2004) managed to achieve approximation of the EU member-states' positions on the final draft of an agreement, which will replace the present agreements - the EU legal basis - with a single act, the Constitution<sup>12</sup>. If the Constitution enters into force, the Accession Agreements (including for Bulgaria) will acquire the status of an annex to it. Regardless of the fact that there is still a difficult way to go until the signing and ratification



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stage is reached, the draft outlined the directions and tendencies in the development of the EC law.

» There is a tendency towards simplification of the hierarchy of acts - the EU law will only consist of framework laws, laws, normative acts and a broad category of administrative acts with binding effect, recommendations, opinions etc. The lawmaking process will be optimized.

» A social section (III-64 - III-68) is dedicated to the approximation of the legislations. Tools for agreement before the laws and framework laws of the EU are adopted will be introduced, as well as prior to the adoption of the national laws, which have to agree with the EU acts.

» The citizens (one million signatures) will have the right to activate the legislative initiative of the Commission. On the Union level new guarantees for civil participation in the government, concerning transparency and publicity of the functioning of the institutions will be introduced, alongside the access to information on their performance.

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2 COM (2001) 726 final, Simplifying and improving the regulatory environment;

COM (2002) 278 final, Simplifying and improving the regulatory environment;

COM (2003) 71 final, Updating and simplifying Community acquis.

3 COM(96)500 final, Implementing Community environmental law: Commission Communication to Council and Parliament, Annex I, Definitions

4 COM (2003) 71 final, Updating and simplifying Community acquis

?????????????????: ?Regulatory Reform: The Government?s Action Plan? (2003).

5 COM(2003) 770 final, Report ?Better Lawmaking 2003?

6 COM(2003) 623 final, First Report on ?Updating and simplifying the Community acquis?.

7 COM (2003) 71 final, Updating and simplifying Community acquis

8 COM(2001) 428 final, European Governance. White Paper.

9 [http://europa.eu.int/yourvoice/consultations/index\\_en.htm](http://europa.eu.int/yourvoice/consultations/index_en.htm).

10 COM (2002) 276 final

11 COM (2003) 623 final

12 [http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/c\\_169/c\\_16920030718en00010105.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/c_169/c_16920030718en00010105.pdf)

### The practices of transposal

The process of transposal of the Community law has been regulated in details in some of the member-states, and in others such regulation is missing. A significant role in the coordination and organization of the process of transposal is played by the European Commission. The Commission issues guidelines and directions on certain matters of the transposal. The Commission has published a guide to facilitate the negotiation process<sup>13</sup>, a guide for drafting legislation (in conjunction with the European Parliament)<sup>14</sup>, and a guide for the implementation of the directives regarding the so-called new approach<sup>15</sup>, where in order to facilitate the EU member states the principals, procedures, rights and obligations of the various entities in relation to the transposal and implementation of those directives are explained in a systematic way.

The new ten member states of the Union are adapting their normative systems to functioning under the membership conditions in different ways. Some of the states adopted special normative acts regulating the methodology of the transposal of the Community law. For example, Slovakia's methodology<sup>16</sup> contains provisions regarding:

- » Terminology - primary and secondary legislation, types of acts;
- » Obligation of the draft normative act mover, including the obligation to agree the draft with the primary and secondary Community legislation, the proposals for amendments to the Community law, the decisions of the European Court of Justice and the national practices of the EU member states;
- » Enforcement of the primary legislation and references to it (cross-references, legislative technique issues);
- » Functioning of the regulations and references to them;
- » Transposing of directives: rights and obligations of the institutions, references to the directives - legislative technique issues);
- » Enforcement of the European Court of Justice decisions;
- » Procedure and obligations of the responsible institutions in the examined field, including the planning and implementation of the following activities:

1. preparation of proposals for legislative amendments;
2. establishment of a law-enforcement body, where appropriate;
3. holding consultations with the addressees of the acts;
4. writing guides, instructions and rules for the administration;
5. creating conditions (financial, economic, staffing) for the implementation of the act;
6. establishing a clear information procedure (public awareness, notification of the rest of the EU member states of the status of the transposal and the implementation of the Community



law etc.)

- » Drafting an annex on the completed transposal (annex requisites).

Such acts introduce clarity not only in terms of the procedure, but also on the requisites and form of the acts of the national legislation when the country has become a EU member. The level of the act is a separate matter. In Bulgaria the normative acts are regulated by law and it seems proper to preserve this arrangement.

In some of the EU states the provisions related to the transposal are included in normative acts dedicated to the legislative process or in the statutes of the parliament or the government. An example of this is Ireland<sup>17</sup>, where on the level of government when draft acts aimed to apply the Community law are drafted, the following set of documents should be prepared:

- » The text of the act to be transposed;
- » The table of concordance and sufficient information about how each provision of the transposed act will be applied;
- » If a provision is not proposed for transposal, an explanation of the reasons should be attached;
- » When an amendment to an act is being transposed, which has already been transposed into the Irish law, the entire information on the previous transposal should be attached.

The United Kingdom does not have a detailed legislative act regarding the methodology of the transposal of the Community law. The United Kingdom's European integration is based on a concise law - The European Communities Act (1972). It only regulated the power but not the procedures. The government administration has issued a guide<sup>18</sup> to be applied in the drafting of legislative acts. The guide defines the obligations of the actors in the process of transposal of the directives 'from the formulation through the negotiations to the implementation', and the principles and rules governing the process. Unlike the quoted act of Ireland and the majority of the EU states, the regulation in the United Kingdom was established when the reform in the legal system of the EU was already in course and reflected the principles and requirements of the reform.

The experience of the United Kingdom is interesting as a systematic and effective national response to the package 'new and innovative tools' of the European Commission on the reform of the governance in the EU adopted with the above-stated Commission acts from 2002 and 2003 in specification of the White Paper on the Governance of Europe from 2001. The government administration of Great Britain adopted, apart from the already mentioned guide for transposal, detailed regulation of the various aspects of the reform:

- » Regulatory Reform: The Government's Action Plan;<sup>19</sup>
- » Code of Practice on Written Consultation;<sup>20</sup>
- » Guide to Regulatory Impact Assessment.<sup>21</sup>

These acts are applied and their joint action has had a significant integrative effect on the formulation of public policies and their implementation through the legislation. Furthermore, they are accompanied by sector acts and specific sector instruments that continue the line set by the government.

The transposal of directives guide formally states the principles of the state policy in the field of transposal of the Community law (directives), and then analyzes in details the participation of Great Britain in two mutually related processes: the drafting of Community acts and the implementation of Community acts.

### **A. Before the formal final drafting of the directive**

The experts representing their states in the Community acts drafting committees should be guided by the principles adopted by the government:

- » Proportionality: state influences only where necessary, with justified intensity and at minimum expenditure;
- » Accountability: each decision should be publicly motivated;
- » Transparency: the institutions and the acts should be open;
- » Systematic character: the measures and rules should have a systematic effect;
- » Focus: the impact should be focused on finding solutions to specific problems and the side effects should be limited.

### **They have to analyze issues like:**

- » Is it appropriate to take the decision at the Community level? Is it possible to take at the national or lower level?
- » Is it possible to limit the side effects for the state through corrections to the proposal (in this case Great Britain)?
- » Is it clear how the future act will be implemented in the country?

The process of drafting legal provisions itself is governed by specifically adopted general (inter-institutional) rules<sup>22</sup> for guaranteeing high quality of the Community legislation - it must be 'clear, simple and precise.'

### **B. After the directive has been drafted**

The transposal is an activity subject to planning and coordination. The plan should answer the questions what needs to be transposed, how, what is distribution of roles in this activity and what are the interim and final deadlines.

The main question at this stage is how the drafted act will influence the country and how effectively it is likely to function. In this point the transposal of the Community law is related to

two other processes, always a priority to the reform: the mandatory conducting of various (in terms of technique, task and timing) evaluations of the regulatory impact and the consultative process with the future addressees of the act. The preliminary impact assessment gives an idea of the price of introducing the new act.

The clarification of the conditions is a prerequisite for the formulation of options - the directives (acts binding for results) give lesser or greater freedom of choice of the means, the strategies for achieving the searched results. It is recommended that the option is chosen in a way that does not create difficulties and bureaucratic impediments. After the ideas that would form the foundation of the act are defined, the most adequate legislative technique that will produce precise and clear text should be applied - we should not forget that this text will be applied by the administration and the courts, and in the case of obscurity in the interpretation the Community law will have priority. If an amendment to a Community act is transposed, it is recommended that the wording of the main act is preserved as far as possible (problems emerge with acts when long time has past between them and the developments in the terminology of the first act is firmly fixed in the national legislation).

Generally speaking, two conceptions of the transposal technique exist:

- » Strict adherence to the text of the directive (copy-out) and
- » Development of a new text (elaboration).

The two approaches may be combined to a certain extent. With the copy-out there is the risk of trespassing the national legal tradition, vocabulary and practice. The positive aspect is the high level of correspondence. Conversely, when a new text is developed the national specifics are accounted of but the risk of imprecise interpretation of the directive and the meaning of its provisions remains. In Great Britain there is a special parliamentary committee to assist the choice of approach<sup>23</sup>.

The rules regarding the sense of proportion of the transposal are of special importance. The directives containing minimum standards, the respective bodies should deliver the appropriate justification each time they propose in a national act:

- » Extension of the scope of requirements, or use of terminology with a larger scope;
- » Non-use of all the opportunities for derogation, which keeps the normative requirements at their minimum level;
- » Introduction of minimum sanctions that are stricter than envisaged;
- » Determining deadlines for introduction of the measures that are earlier than those provided by the directive etc.

It should also be analyzed whether there is sufficient administrative capacity for the implementation of the act or whether new administration needs to be created, or measures are needed to create prerequisites: infrastructure, human resources, financial. From the point of view of legal technology, there is the question of the necessity for implementation acts or other administrative measures that would make the future implementation of the new act more

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effective.

### **C. Effective implementation**

The effective implementation of the Community law depends on the established positive and corrective mechanisms. The sanctions envisaged by the national legislation should be effective, proportionate and creating motivation for non-infringement. The positive and promotional measures are not less important. To facilitate the addressees the practice of writing accompanying materials, guides, instruction and document templates to be readily used in the respective sector is gaining impetus. Under the contemporary conditions the information through the Internet has special significance.

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13 Enlargement of the European Union Guide to the Negotiations, 1999, 2003.

14 Interinstitutional style guide published by the Office for Official Publications of the European Communities, 1997.

15 Guide to the implementation of directives based on the New Approach and the Global Approach European Commission L-2985, 1999.

16 Slovak Republic, Methodology of the Approximation of Law, 2001.

17 Ireland, Cabinet Handbook, 1998.

18 Transposal Guide. How to transpose European Directives effectively.

19 Regulatory Reform: The Government's Action Plan.

20 Code of Practice on Written Consultation.

21 Guide to Regulatory Impact Assessment .

22 Inter-Institutional Agreement on common guidelines for the quality of drafting of Community legislation.

23 UK Parliament's Joint Committee on Statutory Instruments



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