Dr. Judit Fazekas: Post-accession duties of legal harmonisation

After the accession Hungary's duty of harmonisation hasn't come to an end, since the Hungarian legal system still has the deadlines set by community law to take into account, and our legal system has to give fast and adequate responses to the community's legal challenges. The State should effectively take part in the decision-making process of the European Union in a way that we could enforce our interests to the most possible extent even after the accession period. It is almost as hard a duty as the accession was and goes with an enormous liability, since after the first of may we will also take part in the European Union's decision-making process.

In the past decade Hungarian legislation was hardly influenced by the process of legal harmonisation. The aim was to be ready for the accession to the European Union, to fulfil one of the fundamental requirements. Hungary has already made a legal commitment in the European Agreement, signed in 1991 and entered into force 1 February 1994, to approximate its legal provisions to community law. In the pre-accession period the process of harmonisation was hardly affected by the fact that Hungary had to harmonise its laws in a really short period of time to a legal system, which had decades to develop. The great amount and time-consuming character of the duties made necessary the enumeration and programming of the tasks. The beginning of the process was helped by the Commission's White Paper on the preparation of the associated countries of Central and Eastern Europe for Integration into the Internal Market of the Union.

Besides the fulfilment of the legal obligations and the creation of the legal background the process of preparation for the accession contained supplementary tasks, just like the creation of the institutional system needed for the implementation of the European legal provisions, the training of experts who will take part in the enforcement. This study will only deal with the features characterising the decade of preparation for the accession and with harmonisation duties arising from Hungary's membership in the European Union.

I. Tools of harmonisation

As regards the amount of duties of preparation, on the day of accession 130.000 pages of legal texts will be in force in the European Union. Hungary has undertaken to be capable of the application of this enormous amount of legal texts. The capability for the enforcement means various means of the preparation and these means are determined by the type of the community legal source.

Directives

The directive is one of the main instruments of harmonisation of national laws. Article 94, under the title „Approximation of laws" expressly makes mention to the directive as an act adopted by the Council for the purpose of harmonising the MS's laws, regulations and administrative acts affecting the building up and functioning of the internal market. Their characteristic is that they are addressed to the Member States, which are bound to implement them, but remain free in choosing the form and method of implementation.[1]So beneath the so-called minimum harmonisation realized by the directive Member States are free to maintain in

[1] Article 249 of the Treaty

force or adopt stricter national rules, since directives do not fix the minimum and maximum level of harmonisation, but only determine the 'lowest common multiple'.[2]

According to the case-law of the European Court of Justice the adequate tools of implementation are national rules, which are transparent, comply with obligations of the legal certainty and do not leave any doubts in citizens regarding their rights and obligations.[3] In Hungary these instruments can be laws, regulations at a governmental or a ministerial level.

In the event of directives the legal meaning of accession is that for the day of accession it is obligatory to implement all directives, which are in force at the time of the accession and for the implementation of which the deadline is already passed. As a member of the European Union we have to tackle deadlines in a different manner. In the pre-accession period deadlines were determined by the commitments made during the accession negotiations and on the date of accession. After May 2004 the deadlines set by the directives themselves will be boundary. These must be taken into account, since the failure to comply with them means a breach of community law.

In their legal effects framework decisions are similar to directives, and are applied as a legal instrument under the Justice and Home Affairs Pillar. These instruments are also binding as to the end to be achieved and also need to be transposed.

Regulations

Community regulations are less known by the public than directives, although this type of statutory instruments affects more directly and strongly national legal systems than directives. Community regulations are directly applicable, which means that they are effective from the date of their entry into force without any other act of the national legislator. Moreover it is even forbidden for the national legislator to implement regulations,[4] since it is the only way to ensure that the aim of the legislator, namely the unique application of law throughout the Union can be achieved. Besides all these it is common that community regulations impose on Member States the obligation of enacting enforcement measures. This kind of activity imposes on Member States the duty of legislation, which is not identical with implementation. It can rather be featured as something similar to the activity of enacting implementing decrees in national law for the purpose of implementing national laws. These measures are not to hinder the effective application of the regulations they are rather to serve their appropriate enforcement.[5] In practice quasi-officially two types of regulations are distincted: basic regulations and implementing regulations.[6] As an example, it is a common practice in connection with agricultural policy that market rules are contained in a Council Regulation, while detailed rules which are necessary for the implementation are contained in a Commission Regulation. The significance of the distinction is that implementing regulations can be annulled without having regard to the issuer.

In the period of accession neither regulations nor provisions of the European Agreement were directly applicable. The Council of Constitution has expressed in its decision 30/1998 (VI.25.) in connection with Article 62 paragraph 2 of the European Agreement containing prohibitions in the field of competition law, that Hungarian enforcers can't apply

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[2] Tamás Kende-Tamás Szucs: European public law and politics, Budapest, 2002,page 555.

[3] In this respect see C-41/74 Van Duyn v. Home office (EBHT 1985. page 427), and C-143/83 Commission v. Denmark (EBHT 1985. page 427)

[4] See C-39/72 Commission v. Italy (EBHT 1973. page 101) C-34/73 Variola versus. Amministrazione delle Finanze (EBHT 1973..page 981), C-50/77 Amsterdam Bulb Company (EBHT 1977.page 137)

[5] See C-30/70 Sheer v. Einfuhr und Vorratstelle für Getreide und Futtermittel (EBHT 1970.page1197)

[6] Ernő Várnay- Mónika Papp: European Union Law, KJK-Kerszöv, Budapest, 2001, page 158.

the criteria of application directly, which refer to and which are a part of community law, contained in this paragraph.[7]

The prohibition on implementation also means that provisions regulating the same field, which are contrary to regulations or which have a similar content should not be in force in national law. The reason for this is that the relevant territory of legislation is „occupied" by the community legislator, and there is no power left for the Member States to regulate in the area. This is why the appearance of a regulation originates also a duty of deregulation for Member States: national legislator must ensure that national legislation affecting the area is repealed.

Hungary as an acceeding country also has a duty to give attention to regulations in another respect. In the ten-year period of accession acceding countries have taken into account regulations in the harmonization process during their preparation for the accession. This means that many regulations and provisions of regulations have been transposed similarly to provisions of directives. It hasn't conflicted with the legal character of community regulations, namely the direct applicability, since regulations are only capable of producing such an effect after the accession. At the same time regulations affecting certain sectors, like agriculture or competition contain fundamental norms, the adaptation to which and the acknowledgement of which could not depend on one date, namely the date of accession because of their economic significance and because of the requirements of legal certainty and abiding by law. The transposition of regulations was accepted and even encouraged by the European Union in the pre-accession period.

As a consequence of all these the legislator also had to ensure that the harmonised provisions of community regulations should be taken out of the legal system with the date of accession taking into account the effective enforcement of community regulations. The Hungarian legislator had two methods for resolving the problem. On one hand that in the closing dispositions of the implementing legal instruments a provision prescribing that provisions harmonising with the directive will automatically loose force on the date of entry into force of the law announcing the international treaty on Hungary's accession to the European Union. will be placed. On the other hand in cases when this has not been the case deregulation has to be done before the accession. These tasks were harmonised lately by the ministry of justice within the framework of a submission, which was designed to survey all deregulation tasks affecting the Hungarian legal system and to prescribe harmonisation duties on the right level of legal instruments.

After the accession deregulation tasks in connection with regulations and legislation duties related to enforcement of laws have to be done fast for the regulation to be capable of being applied without difficulties right from its enter into force.

Regulations will be available for the citizens and enforcers in the Hungarian language version of the Official Journal of the European Union, which will be a new official source of law in force in Hungary.

Further legal sources and „negative integration"

Besides directives and regulations, other legal sources like decisions, recommendations and opinions are also liable to produce certain legislation-related duties. Decisions which are boundary for the addressees, are the community law equivalents of administrative acts. Some decisions have a normative character and contain implementing

[7] It has to be mentioned that some authors consider this decision to be mistaken and entangled, admitting its direct effect and applicability. See: Imre Vörös: Az EU-csatlakozás alkotmányjogi, jogdogmatikai és jogpolitikai aspektusai, in: Czuczai Jeno: Jogalkotás, jogalkalmazás hazánk EU-csatlakozása küszöbén, KJK-Kerszöv Kiadó, Budapest, 2003., 47-49.o.

provisions for regulations or directives and that is why they need to be transposed into national law. Recommendations, opinions and other sources of soft law, like communications, guidelines and resolutions are not boundary, but this does not preclude Member States from acting in compliance with them. National courts though have to pay due attention to them when applying or interpreting community law (or national rules related to community law), especially when they contribute to the interpretation of community or national law.[8]

Recommendations can contribute to harmonisation of laws in another way as well. They can be applied in areas where circumstances are underdeveloped and situation is not yet ready for harder regulation. For example in the area of stock market transactions, a directive enforced the ethical code enacted in 1975 in the form of a recommendation in 1989.[9]

Another important area of harmonisation is the reflection of the case-law of the European Court of Justice in national law. Fundamental features and characteristics of the enforcement of community law as a legal order free from international and national law were characterised by the European Court of Justice, the only institution to interoperate community law. These are fundamental principles like the supremacy of community law, direct applicability, direct and indirect effect, which have became determining attributes of enforcement and application of community law. National laws must be ready for the application of these principles.

In the above I mentioned those tasks arising from community law, which are to ensure the compliance with secondary acts issued by community institutions. Harmony between national and community law should also be ensured in areas where there are no harmonisation provisions in existence, but there are prohibitions based on primary legislation, on the provisions of the Treaty of Rome. This is what is called by literature negative integration, opposed to what is called positive integration, the feature of which is that it is regulated by harmonised, concrete provisions of regulations and directives. This kind of a duty is for example in the area of free movement of goods the principle of mutual recognition, which prescribes that goods which are legally manufactured and selled legally in a Member State should not be precluded from being sold in the territory of another Member State, save based on grounds of public health and public security.

II. Changes in harmonisation duties after the accession

The amount of duties is obviously different before and after the accession process, since before the accession the implementation of the whole acquis had to be ensured and coordinated. We had to approximate our law to almost 1800 directives, 6000 decisions, to almost 10 000 legal texts of secondary legislation. After 1 May 2004 it will be only the acts enacted later to which we will have to adjust. After the accession besides changes in the amount of duties two fundamental changes are to come. Firstly, legal harmonisation won't be valued as the preparation for a future event, namely the accession, it will be the mere compliance of a duty coming from Article 10 of the Treaty, the clause of sincere cooperation.

As a consequence sanctions of failure to act and institutions based for the enforcement of sanctions and procedures are also different. During the accession period the Commission has evaluated the process of implementation in the acceding countries in its annual reports. The Commission had expressed its critiques and experiences within the framework of these reports, but it could impose no sanctions, it could only postpone the date of accession.

The sanctions for the member states for the failure in the field of approximation of laws are contained in the Treaty. As the last instance the procedure of the Court of First

[8] C-322/88 Salvatore Grimaldi versus Fonds des maladies professionelles (EBHT 1990. page 4407. o.)
[9] László Kecskés: EK jog és jogharmonizáció, Közgazdasági és jogi Könyvkiadó, Budapest, 1993., 225.o.

Instance can be initiated, but national courts and the Commission as the guarantor of the Treaty also has an important role to play in creating the harmony between national and community law.

If Hungary as already a member of the European Union fail to implement or implements incorrectly a directive or in another way breaches community law (as an example enacts a national law contrary to community law) it will be made liable for the damages caused to its citizens and others.[10] Liability of the member states for damages is even strengthened by the fact that they can be made liable not only for the failure to fulfil their implementation duties but also for the failures of their administrative authorities –in cases where implementation was done in time and correctly but the authorities of the member state did nothing for the enforcement, and also in cases when supreme courts of the member states infringe community law.

After the accession the directives themselves will determine dates for the implementation and Hungary will have no opportunity to determine the date by itself taking into account political and economical arguments. In the period of the European Agreement, the legislator had used this method frequently, postponing the entry into force of laws, which affected our general interests even till the last date, the date of the entry into force of the Accession Treaty.

The other important hangmen is that Hungary, as a Member state will take part in the Union's decision-making process. Participation in the technical preparation of legal instruments is especially important, since here participants have equivalent rights in discussing the different alternatives for decision, and in the last phase of the decision-making process small states are in a disadvantage in comparison to greater ones because of their fewer votes.[11]

Taking part in the Union's decision-making process have two main consequences: partly there is no need for starting the programming of harmonisation by unifying the great amount of legal texts enacted in a long period of time in one program, since duty to approximate will originate from legal instruments of the community issued individually, partly, taking into account that ministries responsible for the enactment of certain kinds of acts are already designated, this designation can be seen as the designation of the ministry responsible for starting the programming process related to the implementation, moreover the starting date of the process is also at our dispose, since it is determined in the date of the end of the decision-making process.

III. Institutions for the performance of duties of harmonisation

As it becomes obvious from the abovementioned, compliance with community law is a multifold activity. It requires the creation of a system, order within the administration that ensures the most effective way the fulfilment of the tasks arising from community law's provisions. The last decade, the decade preceding the accession can be characterised as a training period, the experiences of which should be used after the accession.

Hungary had chosen the model of centralized coordination, which is successful and that is why should be maintained in the future as well. This coordinating activity of legal harmonisation was the duty of the ministry of justice even from the start, but all ministries had to prepare the plans for harmonisation in their own territory.

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[10] See C-6/90 and C-9/90 decision in Francovich case (EBHT 1991. page 5357)

[11] Verebélyi Imre: Konvergáló és divergáló közigazgatási tendenciák a közös Európában, in: Cuczai Jeno: Jogalkotás, jogalkalmazás hazánk EU-csatlakozása küszöbén, KJK-Kerszöv Kiadó, Budapest, 2003., page 69.

After the accession it will be altered by a Government Resolution enacted in April 2004[12]. According to the new regulation, the responsible ministry (or other state-body) will be the one, which was already responsible for the development of our standpoint for the discussions, and which has taken part in the decision-making process of the Union, in the future. As regards the implementation of the already adopted and published EU acts the so-called approximation proposals are to be submitted. The approximation proposal indicates the EU act to which it pertains, specifies the steps necessary in national legislative process and the level of legal instruments required, any legal act that has to be amended, the ministry in charge of the process, and the time limit within which is has to be completed The deadline must be determined with regard to the deadline for enforcement determined by the community legal instrument. The deadline specified has to indicate the month and year, indicating the date release for administrative debate, and the date of the respective Government decision (or adoption of the ministerial decree), and furthermore, the date proposed for Parliamentary decision.

The Minister of Justice has multiple duties on different levels of legislation, which contain the harmonisation of legal harmonisation duties. Within its framework the Minister works out the order of programming legal approximation duties, arranges tasks in a data-base, follows with attention and promotes the performance of tasks related to harmonisation and ensures theoretical and technical unity of activities of legal approximation. Firstly it is worth to mention his coordinating activities.

Harmonisation must be performed on the level, which is required by the Legislation Act for the regulation of the same area for the adoption of legal instruments of national law by the Legislation Act. For the preparation of these laws the minister responsible for the topic is responsible. Before the accession it was the task of the Minister of Justice to arrange the great amount of community legal acts in an agenda for the date of accession according to the submissions of the ministries, which was enforced annually by the government in a decree.[13] This was called the program of legal harmonisation, which after the accession should not be performed in such form, but the government's submission of action plan and legislation

[12] Government Resolution 1036/2004. (IV. 27.)

[13] Programming of the legal harmonisation was performed into he following government decrees:
- Gov. Resolution 2174/1995 (VI. 15.) on the five-year program of legal harmonization
- Gov. Resolution 2403/1995 (XII. 12.) on the performance of duties in connection with the White Paper on internal market integration
- Gov. Resolution 2282/1996 (X. 25.) on the amendment and consolidation of the programs on internal market integration and on legal harmonization preparing the accession to the European Union
- Gov. Resolution 2212/1998 (IX. 30.) on legal harmonisation program for the period till 31. December 2002.and on duties connected the implementation of the program
- Gov. Resolution 2280/1999. (XI. 5.) on the amendment of government. Regulation 2212/1998 (IX. 30.) on legal harmonisation program for the period till 31. December 2002. And on duties connected to the implementation of the program
- Gov. Resolution 2140 /2000. (VI. 23.) on legal harmonisation program for the period till 31. December 2002 and on the amendment of the government. Regulation 2212/1998 (IX. 30.) already amended on multiple occasions
- Gov. Resolution 2158/2001 (VI. 27.) on the amendment of government. Regulation 2212/1998 (IX. 30.) on legal harmonisation program for the period till 31. December 2002. and on duties connected to the implementation of the program
- Gov. Resolution 2099/ 2002 (III. 29.) on the legal harmonisation program and on duties connected to it
- Gov. Resolution 2072/2003 (IV. 9.) on legal harmonisation program and on duties connected to its implementation
- Gov. Resolution 2065/2004 (III. 18.) on legal harmonisation program and on duties connected to its implementation
- Gov. Resolution 1036/2004 (IV. 27.) on the System of Specifying, Scheduling and Control of the Implementation of Legal Approximation tasks deriving from Hungary's Accession to the European Union

program should be created with regard to the submissions on legal approximation. After the accession this will only affect newly enacted legal acts. The approximation proposals will be integrated into the legislation process. In preparation of the Government's six-month action plan and legislation program the approximation proposals submitted for the bills tabled for the purpose of approximation must be taken into consideration. With regard to ministerial decrees, the competent ministers take into account of the approved approximation proposal and incorporate them into the ministry's action plan. Any amendment that may be contained in the action plan and the legislation has to be recorded in the approximation databank, which is created and operated by the Ministry of Justice.

Programming is only reasonable when it is carefully looked after. This process and the acknowledgement of which legal instrument implements which instrument of community law is promoted by the harmonisation clauses placed in the closing dispositions of laws. These must refer concretely to the relevant community instruments and to the level of harmonisation. This clause serves a double aim: on one hand it fulfils the obligation arising from directives that measures taken by Member States must contain reference to the directive. On the other hand it makes possible to search the legal instruments of national law which implements community law. This information is really useful since it is not a requirement of community law that a directive should be implemented by one single act, the task of implementation can also be featured with regard to the national characteristics of national laws in different legal instruments of the same or of a different level. The only requirement is that the legal instruments in whole should cover the whole directive in content. The harmonisation clause promotes to a great extent the following of implementing measures, implemented community law provisions. The form of references is to be determined by the Member States themselves according to the standard form of directives. In the period of the European Agreement the reference to the Agreement was made obligatory by the ministerial decree of the minister of justice 12/1987 (XII.29.), amended by the ministerial decree of the minister of justice 13/1995 (VI.29.). After the accession these references should not be used. The determination of a new legal base is not obligatory, since the obligation to make a reference in case of directives comes from the directives themselves, and in the case of other instruments it is an obligation undertaken by the Member States.

The clause should by its terms cover two groups. The first group contains directives, which need implementation, and normative decisions, the enforcement of which also needs implementation, and sources of soft law, which the legislator want to transpose into national law, while the other contains those regulations for the implementation of which national measures has to be done, national legal acts have to be enacted. The two distinctible groups need the application of texts of different terms.

The practice will be maintained even after the accession that legal harmonisation clauses should be placed among the closing dispositions of legal instruments. It is worth to consider however that the clause should have an own title instead of being placed under the title of closing dispositions. This would facilitate transparent search for the clause as the clause containing information about community law. For the content of the legal harmonisation clauses and for the placement of them in the system of legal norms guidance will be given by the ministerial decree of the minister of justice 12/1987. (XII.29.), amended by ministerial decree of the minister of justice 17/2004 (IV.27.).

Duties of harmonization cannot be performed by the mere acknowledgement of the fact, that a certain instrument of the legal system contains a clause asserting that harmony between national and community law already exists. Only harmony in content and quality can be considered as fulfilment of the duties. Incorrect implementation, national legislation contrary to provisions of community regulations is an infringement of community law. That is why the compatibility has to be examined before the acceptance of statutory instruments, in

the period of drafting. Introduction of a bill concerning a law aimed at legal harmonization before the Parliament, and the acceptance of governmental decrees serving the same aim, needs the prior consent of their minister of justice, in case of a ministerial decree only the opinion of the minister of justice is required. This deficiency of the present system is to be eliminated by the draft of the new legislation act, which requires the consent of the minister even in case of ministerial decrees. In these cases in the event of a debate between the ministry of justice and the relevant ministry, the government would be made responsible for making the decision. This provision would hardly promote the effectiveness of the control over the activities of legal harmonization of the minister of justice.

The storage and refreshment of data about this huge amount of legal instruments and following with attention the activity of legal harmonization nowadays can only be resolved by the modern instruments of informatics. This aim was served by the formation of the database on legal harmonization developed by the ministry of justice, which will be achievable for the public on the Internet after the accession according to the plans of the ministry.

After the accession the minister of justice and the foreign minister will be responsible for the following with attention of the negotiations concerning the draft of the union during the decision-making process, and this way they will be able to control if there is a need of making a submission on legal harmonization and when it should be done.

The fulfilment of legal harmonization duties, the following with attention of the preparation of the drafts will be the task of the minister of justice. Its official form is the report on legal harmonization made every half-year for the government. If in case of certain tasks of harmonisation there is a need of sudden act or there is a significant lag these also have to be submitted to the government individually.

The last station of the harmonisation process is the notification to the European Commission, and the forwarding of the written form of the announced act.[14] This duty originates from Article 10 of the Treaty, which prescribes that to apply community law and to ensure the appliance with community law is the obligation of the Member States. The Commission as the guardian of the Treaty has an exclusive role in the enforcement. It is the task of the Member States to make the measures necessary to ensure the compliance with provisions of the Treaty and fulfil obligations arising from the acts of the community institutions. One element of the cooperation between Member States is that they facilitate the performance of the tasks of the Community, and they will abstain from any acts that would endanger the realization of the aims contained in the Treaty.

In the process of notification the ministry in charge of the preparation of legislative bills for the purpose of approximation without delay notifies at the chief executive level of Ministry of Foreign Affairs and the Ministry of Justice - for the purpose of notification of the European Commission - when a legal act adopted for the purpose of approximation has been published, and indicates the legal the EU legal act with which it is fully in compliance. If the community legal instruments prescribe the notification of the transparency table as well which shows the harmony between the individual provisions of the instruments this table also have to be filed. If the ministry of justice agrees with the position of the responsible ministry, signals this to the ministry of foreign affairs, which procure the electronic version of the legal instrument and makes the notification to the European Commission. In the practice of the original member states the form of the notification is in paper, but it is awaited that after the accession it will be possible to make notifications electronically. It would be more useful to Hungary for reasons of fastness and the easier following with attention of the processes.

As I have already mentioned it is a huge amount of legal instruments to which we had to approximate our laws for being ready for the accession. The acquis is criticised not only in

[14] Gov. Resolution 1036/2004. (IV. 27.) paragraph 14

amount but also in quality. The Community has already recognised this problem more than a decade ago, and the Commission had worked out its first program for the simplification and amelioration of the community law in 1995.[15] The key words of the Commission communication in 2002[16] were legislating less but better. This besides stressing the liability of the community institutions notifies that the Member states also has apolitical liability in simplifying and developing community law in a governmental and parliamentarian level as well. The effective and successful transplantation of community legal instruments would in a positive way affect legislation culture of the European union. What could be done by the Member States for better legislation? Firstly they should perform their implementation duties in time. Secondly they should involve their institutions responsible for the transposition and application of directives in the process of legislation. This way precedingly the results of community legislation which require further national implementing measures should be surveyed before their adoption, and public should also be involved in the legislation process. The development of coordination between community institutions and member states would also contribute to a better legislation.[17]

As a conclusion it can be stated that legal harmonisation process has not come to an end with the accession, it must continue with the utilization of the experiences required in the accession period, it had to be continued with regard to the fact after the accession our failures of harmonisation can have serious consequences, and our most important aim should be to avoid these consequences.

[15] Commission reports to the European Council's Better Law-making' on the application of the subsidiarity and proportionality principles, on simplification and on consolidation -1995 (CSE (95) 0580-C4-0561/95)
[16] Commission communication, Action plan simplifying and improving the regulatory environment, 6 June 2002 (COM (2002) 278 final)
[17] The commission evaluates the acts of institutions and Member States in its reports on better legislation (11th report in 2003. COM (2003) 770)