Ukrainian Private Law and the European Area of Justice

Edited by
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EU Harmonization of Private Law as Exemplified in South-East European Countries

Christa Jessel-Holst

I. Introduction

The focus of the following presentation is on those countries of South-East Europe which had been part of the socialist camp but later transitioned to a democratic system and a free-market economy.

Today, these countries find themselves in different positions vis-à-vis the European Union. Five of them are already Member States – namely, Hungary and Slovenia (since 1 May 2004), Bulgaria and Romania (1 January 2007), and Croatia (1 July 2013). Another four countries (Albania, Macedonia, Montenegro, and Serbia) have reached the status of candidate countries; it should be added that also Turkey belongs to this category. In contrast, Bosnia and Herzegovina and Kosovo are still classified as potential candidates for EU accession.

EU accession presupposes transposing or integrating the *acquis communautaire* (the existing EU legislation) into the national law of the country wishing to join the Union. This is a highly complex and challenging task. The Max Planck Institute for Comparative and International Private Law in Ham-

burg has followed closely and in some cases even actively supported the process of EU harmonization as undertaken in South-East European countries embarked on the path to membership, whereby experts from accession states were invited to Hamburg to develop strategies for dealing with the *acquis* or, alternatively, members of the Institute´s academic staff participated in missions abroad. In what follows, the author aims to share some of her personal experiences with EU harmonization in countries of the region.

II. EU harmonization of company Law in Bulgaria and Romania

1. EU Directives as regulatory instruments

European company law is intended to create uniform minimum standards for businesses throughout the Union. This is for the most part done by means of Directives. Directives do not apply directly, instead requiring the Member States to transpose their content into national law in a manner which each State deems appropriate for its own legislative environment.[1] Countries wanting to accede to the Union must, in advance, transpose all EU Directives into their national legal systems.

2. Co-operation with the Ministries of Justice of Bulgaria and Romania

In the case of Bulgaria, the Ministry of Justice in Sofia contacted the German Federal Justice Ministry in 1996 with a request for expert help as regarding the transposition of six company law Directives. Support was organized by the German Foundation for International Legal Cooperation (IRZ), together with the Max Planck Institute in Hamburg and the Bavarian Chamber of Notaries.

The reform of Romanian company law had its origin in a corporate governance reform project which was conducted on the initiative of the World Bank in cooperation with the Max Planck Institute in Hamburg. At request of the Ministry of Justice in Bucharest, that project was on short notice extended to include the transposition of the same six company law Directives.

3. The starting point

The initial situation was similar in both countries insofar as – after the end of socialism – they were confronted with the task of having to undertake com-

[1] See Art. 288(3) of the Treaty on the Functioning of the European Union, consolidated version OJ 2012 C 326/47–390: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

prehensive legal reforms so as to build and strengthen not only democratic structures but also a free-market economy. The obligation of EU harmonization posed yet another heavy burden on two countries which could rely on only rather limited domestic resources.

In the case of Bulgaria, no commercial law existed until 1991, when a (rudimentary) Commercial Act was adopted. For its part, Romania, in 1990, adopted through an accelerated procedure Act No. 31 on Commercial Companies, legislation basically shaped on models pre-dating the Second World War. Integrating six EU Directives into these Acts proved to be a challenge because the existing company law acts were not sufficiently developed to serve as a good basis. To give just two examples: Romanian Act No. 31/1990 on joint-stock companies established neither a developed two-tier system nor a one-tier system. In Bulgaria, integration of the Third and Sixth Company Law Directives on mergers and on division of companies[2] was made difficult by the circumstance that the authors of the 1991 Company Act had omitted to regulate transformation law with the result that the project had to start from scratch.

4. Some characteristic features of the cooperative partnership with Bulgaria and Romania

a) Bulgaria

The success of legal advice projects depends to a large extent on whether the participants are able to work together closely and confidently. For the drafting of a law amending the Bulgarian Company Law Act, a working group was established which included the Bulgarian Deputy Minister of Justice, leading Bulgarian scholars and practitioners, and German experts. Most of the Bulgarian participants were already known in Hamburg from preceding research stays or from other forms of cooperation. The working group held its meetings in the Ministry in Sofia, but also in Munich and Hamburg. It made ample use of comparative law. In doing so, the focus was not only on Western European EU Member States, such as Germany or France; rather, the reform legislation in other post-socialist countries that had already harmonized their law (namely Hungary and Poland) proved very useful for finding solutions which could be deemed suitable for Bulgaria. In the process of cooperation, the crucial issues were also discussed in a wider circle with Bulgarian judges, representatives from the commercial register, auditors, stakeholders, etc. Preparation of the initial draft was done by two Bulgarian scholars working on the premises of the Max Planck Institute in Hamburg.

[2] Third Company Law Directive 78/855/EEC on mergers of public limited liability companies, repealed by 2011/35/EU; Sixth Company Law Directive 82/891/EEC on division of public companies, amended by 2007/63/EC.

The Directives were not simply carried over by way of "copy and paste" but were fully integrated in a harmonious manner into the Bulgarian legal order.

A Bulgarian Act concerning the amendment and supplementation of the Commercial Code,[3] integrating the First Company Law Directive of 1968 (disclosure), the Second Directive of 1976 (capital), the Eleventh Directive of 1989 (disclosure in respect of branches), and the Twelfth Directive of 1989 (single-member private limited liability companies),[4] was adopted by the Bulgarian Parliament on 28 September 2000. A second Act concerning the amendment and supplementation of the Commercial Code,[5] integrating the Third Directive of 1978 (mergers) and the Sixth Directive of 1982 (divisions), was adopted on 12 June 2003.[6]

The adoption of these two reform Acts did not mark the end of the work. The task remained to familiarize the Bulgarian legal community with the amendments to the Commercial Act and to facilitate the proper application of the new provisions, in line with the practice in the EU Member States. For this purpose, three publications were prepared. The Ministry of Justice published a Bulletin which was distributed free of charge and contained the Bulgarian translations of all company law Directives as well as synopses (tables of concordance) which had been prepared by the working group for each of the six Directives mentioned above. The tables indicated, first, which provisions in the Directives already had a counterpart in Bulgarian law before the reform; and, second, the table showed exactly where new provisions were located and indicated the provision of the corresponding Directive that the new provision was transposing.[7] In a German/Bulgarian collaboration, Prof. Klaus Hopt, Director at the Max Planck Institute in Hamburg, and Dr. Tania Buzeva, from the Kliment Ohridski University's Faculty of Law in Sofia, edited a book which contained not only all the legislative Acts and draft Acts of the EU in the field of company law but also a collection of relevant articles

[3] Dăržaven Vestnik [State gazette] No. 84/2000, pp. 1–13.

[4] First Company Law Directive 68/151/EEC, on co-ordination of safeguards […] for the protection of the interests of members and others, repealed by 2009/101/EC; Second Company Law Directive 77/91/EEC, on formation of public companies and the maintenance and alteration of capital, updated by 2006/68/EC and 2009/109/EC, repealed by 2012/30/EU; Eleventh Company Law Directive 89/666/EEC, on disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State; Twelfth Company Law Directive 89/667/EEC, on single-member private limited-liability companies, repealed by 2009/102/EC.

[5] Dăržaven Vestnik No. 58/2003, pp. 2–25.

[6] See also *Jessel-Holst,* EU-Harmonization and Corporate Governance Reform in Bulgaria – Some Legal Reform Projects in Retrospect, in: Milisavljević/Jevremović Petrović/Živković (eds.), Law and Transition – Collection of Papers, Belgrade 2017, pp. 205–214.

[7] Ministerstvo na pravosădieto i pravna evrointegracija [Ministry of Justice and Legal European Integration], Pravna evrointegracija/Legal European Integration, Bulletin (Sofia, November/December 1998), 128 pp.

from well-known German professors, each of which was translated into Bulgarian; the book appeared in Sofia in 1999.[8] Last but not least, a group of Bulgarian scholars published a book in Bulgarian containing the revised text of the Commercial Act, comparisons of the old and new versions of the amended provisions, and detailed commentary.[9]

b) Romania

At the start of the project for integrating the six above-mentioned company law Directives into Romanian law, Romania´s EU accession was already imminent. The participants to the project therefore found themselves under a severe time-constraint. Here again, the previous contacts of the Max Planck Institute's South-East European department with leading Romanian scholars proved crucial in establishing excellent cooperation with the domestic authorities (especially the Ministry of Justice and the Commercial Register). Officials were ready to work until late in the evening and, in the end, at times even through the night without ever complaining. A small core working group consisted of representatives of the Ministry and the Commercial Register, a commercial law expert from the Faculty of Law at the University of Bucharest, a Romanian doctoral candidate,[10] and, for the Max Planck Institute, the author of this paper.[11] Once again, every possible effort was made to involve a broader public in the early stages of the project. Thus, every single issue was discussed with leading company law professors from the Bucharest Law Faculty, representatives from the chamber of auditors, owners of major law firms, and stakeholders.

Transparency was considered a priority. Therefore, the individual project steps were documented on the website of the Ministry of Justice. On that same website, the working group published not only the full text of the Directives in English and French, but also the company law Acts of many European countries (again in English or French) in order to demonstrate possible models for reform. In the end, also the Draft Act for amending Act No. 31/1990 on Commercial Companies was published there by the Ministry.

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[8] *Hopt/Buzeva (eds.),* Evropejsko družestveno pravo: Direktivi na Evropejskata Obštnost v oblastta na družestveno pravo – Tekstove i komentar, izbrani studii i statii [European company law: Directives of the European Community in the area of company law – Texts and commentary, selected studies and articles], Sofia 1999, 358 pp.

[9] *Gerdžikov (ed.),* Novite položenija v tărgovskoto pravo, promenite v tărgovskija zakon [Revision of company law, the amendments to the Commercial Act], Sofia 2000, 544 pp.

[10] See *Răduleţu,* Der Schutz von Minderheitsaktionären nach rumänischem und deutschem Aktienrecht unter Berücksichtigung des EU-Acquis, Frankfurt/Main 2010.

[11] See also *Jessel-Holst,* Reforma dreptului românesc al societăţilor comerciale şi armonizarea cu acquis-ul comunitar [Reform and EU harmonization of Romanian company law], in: Ad honorem Stanciu D. Cărpenaru – Studii juridice alese, Bucharest 2006, pp. 34–42.

It must be mentioned that the working group received welcome support from the United States Agency for International Development (USAID) in Bucharest. Inter alia, USAID made it possible to send the initial draft which had been prepared by the working group to hundreds of recipients all over Romania (law faculties, law firms, auditors, associations, etc.) for comments, proposal, and criticism. The feedback was rather impressive. Each statement which arrived at the Ministry was discussed by the working group and received a reasoned reply. A number of comments could be used to improve the draft.

Act No. 441/2006 to amend and supplement Act No. 31/1990 on Commercial Companies and Act No. 26/1990 on the Commercial Register[12] was adopted unanimously by both chambers of the Romanian parliament.

III. Private international law reforms under the influence of the *acquis communautaire* in Albania, Bulgaria, and in Yugoslavian successor states

The following remarks refer to Albania, Bulgaria, Kosovo, Macedonia, Montenegro, Serbia, and Slovenia, these being countries which the Max Planck Institute has in one way or the other supported in the process of EU harmonization in the field of private international law.

1. EU Regulations as regulatory instruments

In contrast to European company law, European private international law consists mostly of Regulations. Regulations are directly applicable.[13] For new Member States they enter into force automatically on the date of accession, without any need for transposition. What is needed, however, is a mechanism for making the Regulations work. For this purpose, implementing provisions have to be adopted which (i) designate the competent authorities for fulfilling certain tasks, (ii) determine language issues, and (iii) regulate other technical aspects. These implementing provisions should be in force at the time of accession and should therefore be prepared in advance.

2. EU Regulations as models for reform in South-East European countries

Although the countries aspiring to membership are not obliged to harmonize their private international law with the EU Regulations, many of them have taken steps to do so voluntarily well in advance of accession. There are vari-

[12] Monitorul Oficial No. 955/2006, pp. 1–25.

[13] See Art. 288 (2) of the Treaty on the Functioning of the European Union: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."

ous reasons for this. Bulgaria, until 2005 (i.e. two years before accession to the Union) had never codified private international law. For the elaboration of the Bulgarian Draft Private International Law Act, it appeared appropriate to follow the EU standards as closely as possible since they would apply in the near future in any event.

Yugoslavia had in 1982 adopted an Act concerning the resolution of conflicts of laws with the provisions of other countries in certain matters. After the country's break-up, the successor states, recognizing a need for comprehensive reform, oriented themselves on EU law, not only because it set the standards in Europe but also as a means of expressing their desire the join the EU as early as possible. An additional advantage is that the legal community can familiarize itself with an important part of the *acquis communautaire* in advance of accession.

Albania, during its era of socialism, had adopted in 1964 an Act titled "On the enjoyment of civil rights by foreigners", which consisted of only rudimentary provisions. In drafting Law No. 10428/2011 on Private International Law, orientation towards the European *acquis* was considered an obvious choice.

3. Cooperation with the Ministries of Justice

The drafting of new legislation was done in various cooperative efforts undertaken between, on one side, Ministries of Justice and other institutions in the target countries and, on the other, the Max Planck Institute. Thus, the Bulgarian Private International Law Act of 2005 was elaborated in close cooperation with experts from Hamburg, and the actual drafting was done by Bulgarian scholars on the premises of the Max Planck Institute. The author of this paper was invited to participate in the working group drafting the Montenegrin Private International Law Act of 2014 as well as in the groups working on the 2015 Macedonian draft law and the 2018 Kosovo draft law. Scholars from Slovenia and from Serbia[14] were invited to perform their own research in Hamburg and received active support for their work in different ways.

The work was supported by the German Foundation for International Legal Cooperation (IRZ) as well as by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH.

4. Conceptual issues

At the moment of EU accession, national law provisions of the acceding state which served to transpose the content of EU Regulations into the national law

[14] For an English translation of the Serbian (Draft) Private International Law Act of 2014 see *Basedow/Rühl/Ferrari/de Miguel Asensio (eds.),* Encyclopedia of Private International Law, Vol. 4: Legal Instruments A–Z, Cheltenham 2017, pp. 3717–3764.

will automatically cease to be in force. In their stead, the relevant Regulations will apply directly.

In all countries, the focus was on harmonizing the provisions governing the determination of the applicable law. From European procedural law, only a small number of rules could be used as models for reform in non-Member States.

As compared to the transposition of Directives, verbatim transposition was employed more often as regards efforts to achieve harmonization with EU Regulations.

Countries aspiring to EU membership will harmonize their private international law with Regulations which exist already at the time of drafting the relevant Act. It would be unrealistic to expect candidate countries to amend their national private international law legislation every time new Regulations are adopted by the EU. Therefore, the earlier the national reform is completed, the more reduced the impact of European law. In other words, the degree of harmonization to a large extent depends on the time when drafting has been done.[15]

Once a country has acceded to the EU, it should purge the national law of provisions which were formulated after (or are in contradiction to) EU Regulations. Unfortunately, this step is often omitted. Thus, the Bulgarian Private International Law Code of 2005 still contains provisions on the law applicable to contractual and non-contractual obligations which were initially taken from the draft version of the Rome I and II Regulations, although the relevant provisions now constitute dead law subsequent to the entry into force of Rome I and II. The Slovenian Private International Law and Procedure Act of 1999 still contains provisions which were modelled after the Rome Convention on the law applicable to contractual obligations of 1980, provisions which long ago became irrelevant. As a positive example, reference can be made to the recent Croatian reform. With the adoption of the new Croatian Private International Law Act of 2017,[16] all earlier provisions which were not in compliance with the *acquis* have been formally repealed.

[15] For more details see *Jessel-Holst,* The Reform of Private International Law Acts in South East Europe, With Particular Regard to the West Balkan Region, in: Anali pravnog fakulteta univerziteta u Zenici, Vol. 9, No. 18 (November 2016), pp. 133–145; *Jessel-Holst,* Dilemmas in Application of EU International Family Law in Most Recent EU Member States, in: Župan (ed.), Međunarodno privatno pravo u praksi europskih sudova – obitelj u fokusu [Private international law in the jurisprudence of European courts – family at focus], Osijek 2015, pp. 59–69.

[16] Narodne novine 2017 No. 101.

5. Remedies for the lack of legal literature

The application of harmonized legislation is greatly facilitated when the involved legal actors, e.g. judges, can refer to relevant legal literature in their native language. Therefore, cooperation with South-East European countries on EU harmonization has also included initiatives aiming to generate such literature. Examples regarding the Bulgarian company law reform have already been mentioned above. As far as private international law is concerned, a Bulgarian scholar who had been involved in the drafting was invited to Hamburg and prepared a commentary on the 2005 Code.[17] A textbook on the Montenegrin 2014 Private International Law Act was prepared by a Max Planck Institute scholarship recipient who came from Podgorica.[18] In cooperation with a professor from the University of Zagreb Faculty of Law, a bilingual (English–Croatian) collection of sources of private international law, especially European law, was published for use in the whole region.[19] For the proper understanding of European law, one must also take into account the practice of the EU Court of Justice (CJEU) in Luxemburg. Here also, in cooperation with Zagreb-based scholars, a bilingual (English-Croatian) collection of CJEU decisions in the field of private international law was published in 2014.[20] Additionally, with support from the Konrad Adenauer Foundation, a team of authors from Tirana and Hamburg has prepared an Albanian-language commentary on the 2011 Albanian Private International Law Act, a resource which is about to be published and which will, inter alia, serve as teaching material for the Academy of Judges of Albania.

IV. Closing remarks

As demonstrated above, EU harmonization constitutes a complex task. The present contribution could only highlight certain aspects based on the experience of the Max Planck Institute with its South-East European partners.

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[17] *Stančeva-Minčeva,* Komentar na kodeksa na meždunarodnoto častno pravo [Commentary on the Private International Law Code], Sofia 2010, 607 pp.

[18] *Kostić Mandić,* Međunarodno privatno pravo [Private international law], Podgorica 2017, 471 pp.

[19] *Babić/Jessel-Holst,* Međunarodno privatno pravo – Zbirka unutarnjih, europskih i međunarodnih propisa [Private international law – Collection of national, European and international acts], Zagreb 2011, 1621 pp.

[20] *Jessel-Holst et al.,* Međunarodno privatno pravo – Zbirka odluka suda Europske Unije [Private international law – Collection of decisions of the Court of Justice of the European Union], Zagreb 2014, 775 pp.