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UDK: 340.137(497.2:4-672EU)
Pregledni naučni rad

MY EXPERIENCE IN HARMONIZING BULGARIAN LAWS WITH THE EU PRINCIPLES AND STANDARDS

Oktobra 2009. godine u Institutu za uporedno pravo u Beogradu u saradnji sa Europa Institutom iz Ciriha održana je konferencija o razmeni iskustava u implementaciji prava EU u novoprimljenim članicama EU. Tom prilikom, osim profesora Natova iz Bugarske, izlagali su i eksperti iz Estonije, Poljske, Slovačke, Mađarske, Slovenije, Hrvatske, Makedonije i naravno Srbije. Institut za uporedno pravo, štampao je u posebnoj publikaciji, koja se može pročitati na web sajtu Instituta, www.comparativelaw.info priloge svih učesnika, osim profesora Natova i kolega iz Švajcarske i Makedonije. Profesor Natov je bio ljubazan da nam svoj rad prosledi za časopis "Strani pravni život". Rad je posvećen pre svega donošenju Zakona o međunarodnom privatnom pravu u Bugarskoj, koji je usvojen 2005. godine, a koji je 2007. i 2009.godine, pretrpeo amandmane.

Ključne reči: implementacija prava EU; iskustva; Zakon o međunarodnom privatnom pravu; Bugarska

I. Drafting the Code of Private International Law

The history of the codification of Bulgarian Private international law dates back to the beginning of 20th century. First project had been made after the World War One but stopped at a very early stage. In the thirties another project entered the Parliament but for some reasons shared the destiny of the previous one.

During the negotiations for the accessing of Bulgaria to the European Union the question of modernisation and codification of Bulgarian

Private international law was put again. Country needed codification in order to meet the challenges of the full EU membership especially in the field of gradual establishment of an area of freedom, security and justice. Measures had to be taken to facilitate and accommodate the four freedoms of the Internal market within the national economy. Private international law is that branch of law which is able to make sure the smooth entrance and friendly legal environment for the said freedoms. Therefore drafting of the brand new Code of private international law was one of the requirements that the European commission put for the country as a condition to be met before signing of the Accession treaty. The Ministry of Justice of Bulgaria was engaged with the task of finding specialists and organizing the preparatory work.

Three attempts for drafting the Code of private international law were made and the process took couple of years. I had a pleasure and honour to take part in the third attempt. Firstly a contact with Canadian specialists in Private international law was made. The work had begun but at a given stage had been stopped. Then another working group had been formed with specialists from some Member-states but also no significant results at the end of this attempt.

For the third attempt the Ministry of Justice engaged some eminent specialists in Private international law form Max Plank Institute of Comparative and Private International Law in Hamburg – Germany as Prof. Ulrich Magnus, Prof. Dieter Martini and Dr. Christa Jessel-Holst. They worked together with a group of Bulgarian scientists and practitioners in the field.

The draft Code of private international law was ready by the end of 2004 and after having been put under consideration procedure by the Parliament, the Code was enacted on May 17th 2005. During the period of its application the Code was amended twice – on July 20th 2007 and on June 23rd 2009.

The new Code is based on the most modern principles and doctrines of the European Union Private international law as follows:

1. The subject matter covers substantive (private) relations with foreign element as well as procedural relations with foreign element.
2. The Code encompasses substantive as well as procedural rules.

3. The Code regulates grounds for international jurisdiction of Bulgarian courts and other bodies, the procedure before them, the private relations with foreign element as well as the recognition and enforcement of foreign judgments and other acts.
4. The closest connection principle is proclaimed and is accompanied by some escape clauses.
5. The party autonomy is applicable not only to contractual but to non-contractual as well as to family relations.
6. The overriding mandatory rules are specifically regulated.
7. The Code puts limits of the grounds for refusal of recognition and enforcement of foreign judgments.
8. Predominant use of conflict rather than substantive rules.
9. Harmonisation of the rules for determination of the law applicable to contractual as well as to non-contractual obligations with the same rules of the EU PIL.

II. Preparing of an opinion for some Bulgarian official bodies on:

„Relationships of the EU to the new neighbour states (esp. trade relations)"

The essence of the opinion is as follows:

More of the former socialist states of Central and Eastern Europe were signatories of the Central European Free Trade Agreement as well as had many bilateral trade agreements signed. What will be destiny of all these multilateral and bilateral international agreements?

The Act Concerning the Conditions of Accession of the Republic of Bulgaria and Rumania and the Adjustments to the Treaties on which the European Union is Founded (in short the Act) says that: "With the effect from the date of accession, the new Member States shall withdraw from any free trade agreements with third countries, including the Central European Free Trade Agreement." (Art.6, par.10).

This norm could be interpreted as a rule that *forbids a participation of the new member states to any free trade agreement. This means as follows:*

1) *free trade agreements concluded between a new member state and a third country(or countries) are not acceptable and the new member state should withdraw from them;*
2) *free trade agreements between new member states (two or more), concluded before the accession, are not acceptable and the new member states should withdraw from them;*
3) *free trade agreements between member states are excluded and forbidden for the future;*
4) *all kinds of free trade agreements – bilateral and multilateral, fall under Art.6 par.10 of the Act.*

The above requirements are logical and in conformity with the principles of the internal market. Under the EC Treaty the "internal market" is defined as "an area without internal borders in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty"[1]. Any free trade agreement (bilateral or multilateral) is incompatible with the first freedom, i.e. the free movement of goods and due to this it cannot regulate trade relations within the internal market. It is because the principles of a free trade agreement create privileges for import and export of goods in a given area, for instance the area of the territories of parties of a given free trade agreement. By this the said agreement excludes the goods from other countries from the above privileges established by its rules and as a result creates borders in trade. Obviously this result is in contrary to the above quoted Art.14 (2) of the E.C. Treaty. So the consequence is that such agreements cannot apply in the relations within the Union. When entering the internal market, which happens at the date of accession, a new member state shall withdraw from any free trade agreement signed by it before the date of accession.

A special attention is paid by Art.6 par. 10 to the Central European Free Trade Agreement. The later is a multilateral agreement. The new member states shall withdraw from it too. The Agreement shall continue between the countries that are not entering the Union now.

The new member states are obliged to withdraw from the free trade agreements (bilateral and multilateral) including the Central European Free Trade Agreement, unconditionally and with the effect from date of their accession. *This means as follows:*

1 *Art.14 (2) (ex 7a (2)) E.C. Treaty.*

1) *once an agreement between a new member state and one or more third countries meets the legal features of a free trade agreement, notwithstanding bilateral or multilateral, the new member stare is supposed to withdraw from it;*
2) *the withdrawal should take effect from the date of accession;*
3) *the obligation for withdrawal is unconditional, i.e. the new member state are not entitled to take any measures to adjust the agreement to the requirements of their membership or to other rules etc.;*
4) *the obligation covers unconditionally the Central European Free Trade Agreement too;*

Under subparagraph one of Art.6 par.10 of the Act: "To the extent that agreements between one or more of the new Member States on the one hand, and one or more third countries on the other, are not compatible with the obligations arising from this Act, the new Member State shall take all appropriate steps to eliminate the incompatibilities established. If a new Member State encounters difficulties in adjusting an agreement concluded with one or more third countries before accession, it shall, according to the terms of the agreement, withdraw from that agreement."

The quoted norm introduces *another group of trade agreements from which the new member states are supposed to withdraw.* Some questions could be posed here. Firstly – is it true that subparagraph one deals with trade agreements? Second – does the subparagraph one deal with the bilateral or with multilateral agreements or with both? Third – is the obligation of withdrawal a conditional one? Fourth – when a new member state should take the necessary measures to adjust the agreement? Fifth – when a new member state is supposed to withdraw from it? To my opinion the answers of the above questions should be as follows:

Firstly – having in mind that paragraph 10 of Art. 6 of the Act is devoted to regulation of the obligations of the new member states concerning the free trade agreements (bilateral and multilateral), it is in line with the legal logics to suppose that the first subparagraph of the same paragraph shall deal with other forms of trade agreements. So

this subparagraph is devoted to regulate the attitude of the new member states to another group of trade agreements. *These are trade agreements different from the free trade ones.*

Secondly - the said subparagraph deals with *both bilateral and multilateral agreements*. This is explicitly mentioned in the text by saying "…agreements between one or more…" countries.

Thirdly – the new member states *are not unconditionally obliged to withdraw from the second group of trade agreements under subparagraph one of par.10 of Art.6.* They have two options of attitude which are proclaimed here. One – when an incompatibility (or incompatibilities) with the obligations arising from the Act of Accession is established, the new member state is supposed to take all appropriate steps to eliminate the incompatibility (or incompatibilities if they are more). It is possible the incompatibility to be full, i.e. to cover all the agreement as well as all the obligations of the new member state, or to be partial, i.e. to cover part of the agreement or part of the arising obligations of the new member state. *The text doesn't point who is entitled to establish the incompatibilities.* Logically these could be the appropriate bodies of both the new member states as well as the European Union (the national Parliaments and the Commission). As far as the steps to be taken is concerned, obviously these cover all possible legal steps in conformity with the EU law, with the national legislation of a new member state as well as with the agreements in question. The Act doesn't define the possible steps. The Act is satisfied by the result only. The later covers the elimination of the incompatibilities established, i.e. a total disappearance of the incompatibilities. The result is that the agreements are adjusted so they are in compliance with the obligations of the new member state arising from the Act. Two – in case a new member state encounters difficulties in reaching the above result, i.e. the said adjustment is not achieved before the accession then the new member state should withdraw from the agreement. *The unsuccessful actions of a member-state to fulfill this stage are precondition for the second option under subparagraph one of par.10 of Art.6.*

Fourthly – all the appropriate steps for adjustment of the agreements in question should be taken by a new member state before the accession. *A new member state is supposed to have an active position, in other words it should initiate steps for adjustment of an agreement or agreements.* The steps should be in conformity with the respective terms

of a given agreement. These steps could be of various kinds depending on the requirements of the agreement but their purpose is to adjust the agreement to the obligations of the new member-state arising from this Act. Therefore if a new member-state failed to initiate proper steps until the date of accession, a question about fulfillment of the obligation under Art.6 subparagraph one, could be posed.

In case the date of accession has passed with no result (the adjustment has not been reached) and this is not a fault of a member state, the first option expires and a member state faces the second option which is a withdrawal from the agreements according to their terms. Due to the fact that the Act does not define the term "difficulties" I would like to propose the following way of interpreting this term – as the Act needs a result (an adjustment), when the result is not reached this should mean that a member state encounters difficulties in adjustment. It follows that this member state should withdraw from the agreement. Of course as it has been mentioned above, here a question about whether a new member state has properly fulfilled its duties under Art.6 subparagraph one could be posed. *To me the withdrawal would be in conformity with the requirements of Art.6 subparagraph one of the Act only if a new member-state has fulfilled its duties to initiate steps for adjustment of the agreement to the obligation arising from this Act and the said steps appeared to be unsuccessful due to the reasons that are not a fault of a member-state.*

And fifthly – the withdrawal should take place after the date of accession and only if the new member-state did not manage to adjust an agreement with its obligations under this Act before the accession date. There is no term for withdrawal proclaimed by the Act. To my opinion the new member-state should, by using diplomatic routes, address an announcement for withdrawal (made in conformity with the terms of a given agreement) to a third country or countries shortly after the accession date. The withdrawal is going to take place later on and in compliance with the conditions of cessation of a given agreement stipulated in it. This means that the agreement shall cease to be in force on a concrete date or several months from the date of delivery of the proper diplomatic document for termination to the respective bodies of the third country or countries.

III. New Code of Civil Procedure of Bulgaria - 2008

I was only an observer of the process of drafting of this Code and made some remarks about the Chapter seven of the Code of civil procedure. The remarks made referred to the need of taking into consideration that the EU Regulations have supremacy over national legislation of the member-states as well as direct effect and immediate applicability. Based on these I tried to stress on the rules of Chapter seven of the new Code that (in their majority) are devoted to an implementation of some of EU Regulations and also tried to explain to the drafters that such an approach contravenes to Art. 249 of the EC Treaty.

Other specialists in Private international law shared my position and strived to convince drafters to make some changes in the project of the Code in question. Unfortunately these opinions were not taken into consideration and as a result we faced a new Code of civil procedure that implements in its Part seven some of the EU Regulations and introduces them into Bulgarian legal order.

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MOJE ISKUSTVO U HARMONIZACIJI BUGARSKOG PRAVA SA PRINCIPIMA I STANDARDIMA EU

In October 2009. in the Institute of Comparative Law in Belgrade it was held the conference concerning the exchange of the experiences in the implementation of the Acquis. The Institute published a book about that (see www.comparativelaw.info) with the contributions of experts from Estonia, Poland, Slovakia, Hungary, Slovenia, Croatia, and Serbia. This is the contribution of professor Natov from Bulgaria. In the contribution first of all the word is about the Code of Private International Law. That Code was enacted in 2005 and was amended in 2007 and 2009.

Key words: implementation of the Acquis, experiences, Code of Private International Law, Bulgaria