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Salomé Lachat, Daniel Lachat

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Methodology for approximating national normative acts

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Methodology for approximating national normative acts

Méthodologie pour l'approximation de textes normatifs nationaux

Includes a bibliography / *Comporte une bibliographie*

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Contents / *Contenu*

1. Drafting normative acts / *Écriture de projets de lois*
2. Upgrading normative acts / *Mise à niveau de textes normatifs*
3. Approximating normative acts / *Approximation de textes normatifs*
4. European normative acts / *Textes normatifs européens*
5. Compliance analysis / *Analyse de conformité*

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Salomé Lachat
Daniel Lachat

Methodology for approximating national normative acts

Abstract

There is a need for a methodology to meeting the legal approximation requirements set up by a Partnership and Co-operation Agreement (PCA). The present research work aims at providing a methodology avoiding inconsistencies appearing when (1) Performing a selection of provisions from different origins (Provision shopping), (2) Revamping a non-compliant existing normative act, (3) Approximating to a Standard practice, (4) Taking ownership of an existing incomplete normative act, or (5) Filling a hierarchised list of issues (Template). The selected methodology asks for involving two bodies: (a) a Co-ordinator at Government level, and (b) a Submitting body in charge of preparing the draft normative act.

Résumé

Est ressenti le besoin d'une méthodologie pour satisfaire aux exigences d'un Accord de Partenariat et de Coopération (APC) en matière d'approximation législative. La présente recherche propose une méthodologie évitant les incohérences apparaissant lors (1) d'une Sélection de dispositions provenant de différentes origines, (2) d'une Mise à niveau à partir d'un texte normatif non approximé, (3) d'une Approximation à partir de pratiques constatées, (4) de la Nationalisation d'un texte normatif incomplet, ou (5) de la complétion d'une liste hiérarchisée de sujets à traiter (Squelette). La méthodologie sélectionnée implique deux organismes : (1) Un Organisme de coordination au niveau du Gouvernement, et (b) un Organisme chargé de la rédaction du projet d'acte normatif.

Foreword

According to a PCA – Partnership and Co-operation Agreement, approximating a national normative act to a European normative act is implementing all of the necessary national normative acts and their subordinate rules in order to reach the results foreseen by the European law. If this definition does not ask for comments, its reduction to practice is not easy.

The following research paper proposes a methodology providing with national normative acts meeting the PCA requirements. The aim is explaining how to write a set of national normative acts within a limited period of time, usually with the technical assistance of experts. Jurisprudence cannot be accepted as a means for approximating national normative acts to European normative acts because there are not enough cases referred to Courts in developing economies, Jurisprudence can be reverted to its former state (lack of legal security), and because technical assistance cannot be provided to Courts.

Thus, the proposed methodology asks for involving two bodies:

- 1. The Co-ordinator, which is to be a central state administrative authority (usually at Government level) of a given country (hereinafter referred to as “the Country”) that has committed itself when signing a PCA, and which is responsible for transposing the relevant European normative acts according to the PCA.*
- 2. The Submitting body, which is a Ministry or any other body in charge of preparing a specific draft normative act meeting the requirements of the PCA. It is a subcontractor of the Co-ordinator.*

A third group of bodies and people is the so-called “interested parties”. They should not be neglected in the legal approximation process since they mostly suffer of legal inconsistencies, of technical flaws, and of the excessive burdens put on them by inappropriate normative acts.

Approximating normative acts is a very demanding undertaking involving highly trained staff knowledgeable in legal issues, understanding Western European languages like English, French, and German, and showing good writing skills in the national official languages. Foreign technical assistance may be necessary.

The Submitting body should also select the less expensive implementation meeting the PCA requirements. Solutions adopted by industrialised countries may prove unaffordable for developing countries. It is the duty of the Co-ordinator to check whether a less expensive solution is known and is workable in the Country. It should be kept in mind that national bodies often consider that expensive schemes are a proof of their international standing.

It is worth noticing that there is no publication (whatever its name) explaining how compatibility, approximation, or harmonisation of European law should be performed by a third country. It is left to experts to elaborate methodologies meeting their needs. It seems that only Slovakia published a methodology for legal approximation.

The following methodology for approximating national normative acts to European normative acts should not be confused with standards for drafting and passing national normative acts.

The objective of the proposed methodology is to enable the reader to produce normative acts that serve the needs of the Country and to solve efficiently possible issues. It focuses on how one drafts national normative acts, not on the details of the substantive law that the Submitting body must deal with.

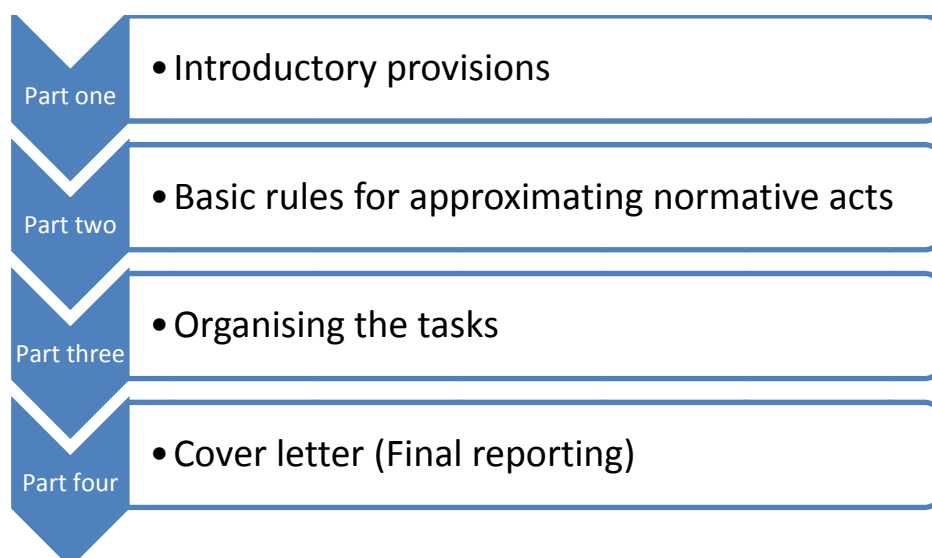
This methodology proves being efficient in PCA related issues because:

- 1. Referring directly and only to the European sources of law.*
- 2. Not referring to indirect sources of law like the normative acts of other countries having signed a PCA with the European Union.*
- 3. Eschewing “provision shopping”, that may be described as the process of assembling provisions of normative acts of different origins leading to an increased risk of inconsistency.*
- 4. Avoiding revamping through amending provisions of an existing non-compliant model normative act chosen mainly for its easy linguistic access.*
- 5. Leading to an effective dialog between a Co-ordinator at Government level and a Submitting body in charge of drafting the expected normative act and, if foreseen its subordinated legislation.*
- 6. Foreseeing an involvement of the interested parties, which should be able to comment on the brief of the Co-ordinator to the Submitting body, and on the draft normative act prepared by the Submitting body.*

The proposed methodology can also be adapted for several WTO issues that are very close to the PCA requirements.

Figure 1

Reading about approximating normative acts: The four steps



The Research work proceeds as follows. Figure 1 presents the four steps that are to be developed when undertaking a legal approximation.

Since the user of the present publication is usually not a specialist of European law, it was deemed necessary to accustom him/her with the main sources of European law (Part one, page 7), while the basic rules for approximating normative acts are set in Part two (page 16). The third Part proposes a series of steps to be undertaken to efficiently perform a legal approximation. It may be said that Part two is provision (object) –oriented, while Part three (page 22) is performance (process) –oriented. The series of tasks to be performed by the Submitting body ends up with a final reporting of the Submitting body to the Co-ordinator that briefed it to approximate a national normative act to a European normative act (Part four, page 41).The final reporting is usually put down in a cover letter including a self-assessment of the achieved degree of compliance by the Submitting body.

PART ONE

Introductory provisions

The introductory provisions will define the grounds on which the approximation of normative acts, *eg* laws, regulations, etc., is based. Please note that approximating normative acts means that both the provisions of the normative acts and the normative acts themselves are to be consistently approximated.

1. Purpose of the methodology for the approximation of normative acts

A purpose of the present methodology for the approximation of national normative acts is to lay down rules for the process of legal approximation with a view of drafting and adopting legislation that will become a functional part of the national legal system of the Country, and be compatible with, approximated to, or harmonized with the relevant normative acts of the European Communities and/or of the European Union (European law).

Table 1

List of the PCA signed by the European Union

(Source : http://europa.eu.int/comm/external_relations/ceeca/pca)

Country	Date of coming into force
Armenia	1 July 1999
Azerbaijan	1 July 1999
Belarus	Signed in March 1995 but not yet in force
Georgia	1 July 1999
Kazakhstan	1 July 1999
Kyrgyzstan	1 July 1999
Moldova	1 July 1999
Mongolia	1 March 1993 (Trade and Co-operation Agreement)
Uzbekistan	1 July 1999
Russian Federation	1 December 1997
Tajikistan	Signed 11 October 2004 but not yet in force, Interim Agreement
Turkmenistan	Signed 25 May 1998 but not yet in force, Interim agreement
Ukraine	1 March 1998

Another purpose of the present methodology is to assess the potential quality of national normative acts that have been prepared for meeting the requirements of compatibility, approximation, or harmonisation set up by any international agreement similar to the PCA.

When signing a PCA – Partnership and Co-operation Agreement establishing a partnership between the European Communities and their Member States, on one hand, and the Country, on the other hand, the Country has committed itself to make its national law compatible with, approximated to, or harmonized with the relevant European normative acts.

Since most of the Republics of the former USSR have signed a PCA (as it may be seen Table 1), they will enjoy a common modern legal environment making easier their access to the WTO after performing the requested approximation.

Other agreements meeting specific issues have been signed by the European Union with other countries (*eg* SAA – Stabilisation and Association Agreement, ENP – European Neighbourhood Policy, etc.). They also include provisions relative to legal approximation.

2. Scope

The present methodology for legal approximation is setting out the basic rules and methods of approximation, and is giving explanations concerning the compatibility clause with the European law.

In line with PCA, the present methodology understands that national legislative drafters belonging to the Submitting body should refer solely to European law and to all of the relevant European law. This includes both Primary and Secondary law. The only exception is when the European law itself is subordinated to an international treaty.

A difference is made between the rules to be applied when writing a provision and the methodology giving the series of steps to be undertaken for approximating a national normative act to a European normative act. PCA do not provide with rules for quality assessment. Assessing whether the approximation process is successful is within the scope of the said series of steps.

The present methodology is to be applied after drafting the legislative framework of the subject matter. Approximation is not just selecting a subject matter, identifying the relevant European normative acts that are to be approximated, and drafting the wished national normative acts. Before all, successful approximation needs designing a framework that should fit into the national legal system and accept the approximated national normative acts. This framework makes possible the simultaneous approximation of a set of normative acts pertaining to related subject matters.

For example, technical regulation has two major components, namely the product or process characteristics, and the administrative procedures. The latter require that a regulatory authority be identified besides means for providing the evidence that the products meet the stated technical requirements. This service is provided by independent third party laboratories and certification bodies that should be technically competent... The number of national normative acts may be disputable.

3. Compliance degrees

The PCA is using a specific vocabulary defining three **degrees of compliance**:

(1) **Compatibility:**

Two normative acts are compatible when the provisions of one normative act do not exclude any provision of the other.

The two normative acts are of equal standing.

(2) **Approximation:**

A normative act is approximated to another normative act when the first one is modified to become the closer possible to the second one. The aim is the elaboration of a common set of requirements.

The second act is of higher standing than the first act.

(3) **Harmonisation:**

Harmonisation, *ie* a common rule, is the ultimate goal of approximation. Harmonisation may be regarded as the drawing up of common or identical rules by different authorities like the EU, the EU Member states, and the foreign countries who committed themselves to a PCA.

Where harmonisation is considered feasible, it is generally understood being a better tool than compatibility or approximation. Harmonisation is a “maximal” option which is not always practicable, for example because of its potentially high cost.

Harmonised normative acts are sharing the same basic concepts mainly through using the same wording (or an accurate translation).

This vocabulary is not defined as such in the PCA. However, the use of three different words in the same agreement means that they do not refer to the same process. The definitions given above are common understanding inferred from the PCA itself.

However, this vocabulary is exceptional and usually the wording “approximation” is used without specifically referring to one of the three PCA degrees of compliance.

4. Vocabulary used in relation with the present methodology

For the purposes of the present methodology:

(1) **European law** (*acquis communautaire*) means:

- a) normative acts of the European Communities,
- b) normative acts of the European Union, and
- c) non-normative acts that made it possible to attain the requirements of the PCA.

(2) **Member State** means a Member State of both the European Communities and the European Union.

(3) **Normative act** means a legal provision of normative nature, issued by a competent body; normative acts can have the form of legally binding acts.

(4) **Reception of laws** means a process aimed at transposing the legal system, a part thereof and/or legal culture of another State, Union, etc., into the legal system of the Country.

Reception of the European law takes the form of legal approximation.

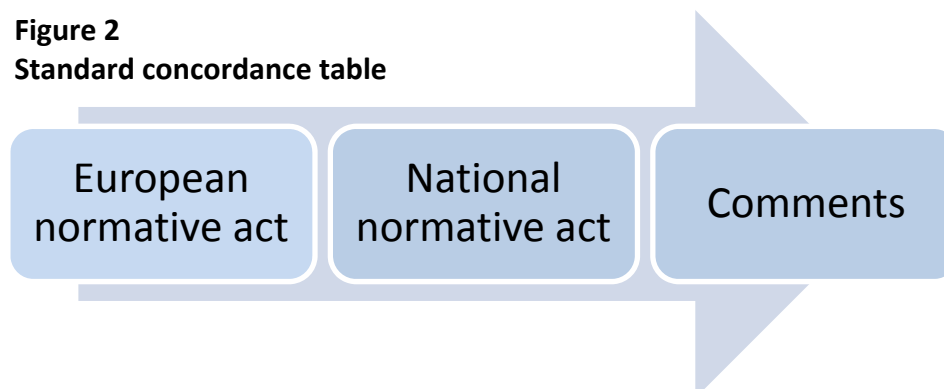
(5) **Approximation** is the process of drafting and adopting normative acts and creating conditions for their proper application with a view to the gradual attainment of **harmonising** the national normative acts of the Country with the European law.

The approximation of law has the following forms:

- a) **Transposition** is a process aiming at attaining with national normative acts the same effect as with the relevant European normative acts through adopting, amending, supplementing or abolishing national normative acts.
- b) **Adaptation** is the process aiming at adapting national normative acts to reach conformity with the relevant European normative acts through adopting, amending, supplementing or abolishing national normative acts.
- c) **Co-ordination** is the process of aligning either the legislation or administrative practices.
- d) **Implementation** is the process of transposing normative acts and issuing implementing rules.

It also includes interpretation, application, enforcement of and compliance with normative acts that are in agreement with the law of the European law by the bodies of public power.

Figure 2
Standard concordance table



It is obvious that a mere translation is not satisfactory because it does not guarantee that the new national normative act will be consistent with the national legal system. On the other hand, a national normative act approximating a European normative act should be more than a new layer in the national legal system because it may mean

that the internal consistency of the national legal system may be disrupted. However, national normative acts may be a mere translation of a directive where it is not possible to use a regulation for constitutional grounds, *ie* the balance between directives and regulations according to the treaties governing the European Union. Translations avoid disparities between the laws or administrative measures adopted by the Member States (*eg* Directive 2002/95/EC of 27 January 2003 on the restriction of certain hazardous substances in electrical and electronic equipments).

Approximating should not lead to “gold plating” (*ie* adding conditions that are not foreseen by the European law) or “picking & choosing” (*ie* selecting only some of the conditions foreseen by the European law).

(6) **Co-ordinator** is a central state administrative authority of the Country. It is responsible for the transposition of the relevant European normative acts into the national legal system according to the PCA.

(7) **Submitting body** is the body in charge of preparing and submitting a draft normative act to the Co-ordinator according to a brief of the latter.

(8) A **concordance table** is a three-column table where:

- a) The first column is giving the provision of the European normative act to which the provision of the national normative act is to be made compatible, approximated, or harmonized. These provisions are consistent with each other, and they are not mixed with subordinate legislation in accordance with the European standard practice. Moreover, it is unlikely to happen that a single provision of a national normative act be approximated to several provisions of a relevant European normative act because this would mean that there are several provisions dealing with the same issue within the same European normative act despite experts’ work from all of the Member States.
- b) The second column collects provisions of the national normative act proposed by the Submitting body. These provisions should be approximated to (*ie* “derived from”) the relevant European normative acts.
- c) The third and last column is reserved for comments. These comments may be an assessment of the approximation. In this case, the usual heading of the third column is “*degree of compliance*”.

Figure 2 shows the three column headings of a standard concordance table. The underlying arrow indicates that a concordance table should be read from left to right.

5. Main sources of European law

The **acquis** is a system of legal rules adopted by the bodies of the European Communities on the basis of authority conferred on them from the bodies of Member States of the European Communities by common will of these Member States. It is a *sui generis*

legal system whose norms are binding both for Member States and natural persons and legal entities in these States.

The distinction between European Community law and European Union law is that based on the Treaty structure of the European Union. **Acquis** refers to the total body of normative acts accumulated so far.

(1) The law of the **European Communities** is constituted by the following sources of law:

a) **Primary law** are the “**founding treaties**”:

1. The Treaty of Paris, establishing the European Coal and Steel Community (entered into force in 1952 and expired in 2002).
2. The Treaty establishing the European Atomic Energy Community (Euratom).
3. The Treaty establishing the European Economic Community (EEC) entered into force in 1958 (When the term “Treaty of Rome” is used, only the EEC Treaty is meant).

b) **Secondary law**:

1. **Regulation** is a legally binding act issued either by the European Parliament together with the Council of the European Union, by the Council of the European Union or the Commission of the European Communities (hereinafter referred to as “**competent body**”), which is legally binding in its entirety and directly applicable in each Member State. Normative acts are also deemed as regulations where, despite their different names (designations), they have the character of regulations in terms of their content by decision of the Court of Justice.
2. **Directive** is a legally binding act issued by a competent body which is binding, as to the results 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 of its introduction in the national legal system.
3. **Decision** is a legally binding act issued by a competent body which is binding in its entirety upon those to whom it is addressed. Normative acts are deemed as decisions where, despite their different names (designations), they have the character of decisions in terms of their content by decision of the Court of Justice.
4. **Recommendation** or **opinion** is a normative act issued by a competent body. It is not binding.
5. **Decision (ruling) of the Court of Justice of the European Communities** is a decision on merits issued in:
 - i. The proceedings on preliminary rulings under the founding treaties,

- ii. The proceedings on declaring a normative act void under the founding treaties,
 - iii. The proceedings on non-compliance with obligations arising from founding treaties,
 - iv. The proceedings on non-applicability of regulations under the founding treaties,
 - v. The proceedings concerning non-fulfilment of obligations arising from the Statute of the European Investment Bank, or
 - vi. The proceedings concerning non-fulfilment of obligations arising from the Treaty establishing the European Community and the Statute of the European System of Central Banks.
 - vii. Interlocutory decisions.
 - viii. Decision on the merits of the case.
6. **General legal rule** is the rule of conduct arising from the provisions of the founding treaties or from the case law of the Court of Justice of the European Communities (such as the principle of legal certainty, principle of proportionality or non-discrimination principle), as well as the rule of conduct having the form of established procedures or decisions of legal nature which presuppose a long period of usage and conviction about legally binding character.
7. **Treaty-based source of law** is an international treaty concluded between the European Communities and third States, or among Member States of the European Communities.

(2) The **law of the European Union** is a system of legal rules adopted under the Treaty on the European Union governing the issues relating to common foreign and security policy and to police and judicial co-operation in criminal matters. The law of the European Union is constituted by the following sources of law:

- a) **Primary law:** The Treaty on the European Union (Maastrich, 1992 and its revisions, Amsterdam, Nice).
- b) **Secondary law:**
 - 1. **General Guideline** or **principle** is a normative act governing the issues related to common foreign and security policy, including defence-related matters.
 - 2. **Common Strategy**
 - i. is a normative act governing important common interests of Member States and defining the objectives, duration and means that shall be made available by the European Union and Member States.

- ii. has the form of a recommendation and is implemented mainly through the adoption of joint actions and common positions.
- 3. **Joint Action** is a normative act adopted to address specific situations in the field of common foreign and security policy where operational action by the European Union is deemed to be required. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation.
- 4. **Common Position** is a normative act governing issues of common foreign and security policy which defines the approach of the Union to a particular matter of a geographical or thematic nature.
- 5. **Decision** is a normative act issued on the basis of general guidelines providing for the issues of common foreign and security policy.
- 6. **Decision** is a normative act, which provides for issues relating to police and judicial co-operation in criminal matters, excluding issues relating to the alignment of normative acts of Member States in this area.
- 7. **Common Position** is a normative act governing issues related to police and judicial co-operation in criminal matters, which defines the approach of the European Union to a particular matter.
- 8. **Framework Decision** is a normative act which is legally binding upon each Member State for which it is intended as to the result to be achieved, but shall leave to the national authorities the choice of the form and methods. It shall not entail direct effect.
- c) **General legal rule** is the rule of conduct arising from the provisions of the Treaty on the European Union (such as the principle of the rule of law, principles laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms, etc.), as well as the rule of conduct adopted in the form of an established procedure or decision of legal nature which presupposes a long period of usage and the conviction about legally binding character.
- d) **Treaty-based source** is an international treaty (such as convention, agreement...) that individual Member States are required to adopt within the prescribed time limit in accordance with their respective constitutional requirements (eg the *Schengen acquis*), and measures for its implementation.

(3) Normative acts belonging to the secondary law of the European Union have the same characteristics as normative acts of the secondary law of the European Communities only where this is provided in the Treaty on the European Union or where the Court of Justice (assisted since 2004 by a lower Court, the **Court of First Instance**) issued a decision to this effect.

6. Some data

(1) It may be interesting to know that around 100 directives are passed every year. This number is of the same order of magnitude as the number of laws passed in a medium-sized country. In addition, 60 regulations are passed every year.

Today, approximately 5,200 regulations are in force while 1,250 directives are operative.

Accordingly, the PCA commitment of approximating the relevant EU normative acts for selected issues (usually 20 to 25 as it may be seen for example at Annex 1, page 46) can be fulfilled within five to eight years, since the political pressure to become a EU Member State does not exist.

(2) Every regulation and directive is caught into the cross-fire of some 15,000 lobbyists and 1,600 accredited journalists, all of them operating in Brussels. 2,600 interest groups have an office in Brussels. This shows that regulations and directives are thoroughly discussed by all of the interested parties that are aware of the goals of the European Commission that makes public every year its annual action plan, and every five years a strategic action plan.

(3) For information, the French legal system dividing normative acts into two kinds – laws passed by the Parliament and by-laws promulgated by Ministries – entails that only one third of the directive are harmonised by laws while two-thirds are harmonized by by-laws (subordinate legislation).

7. Referring to a European normative act

(1) The Submitting body shall use the following wording to make accurate reference to the normative act: “normative act of the European Council/Council No. XXXX/YY/ABCD (XXXX representing the serial No. of the normative act, YY the year of adoption of the normative act and ABCD abbreviation of the Treaty) of ... on/concerning ... (full name of the normative act).

(2) When making reference to the Treaty on European Union, the Submitting body shall use the following wording: “Article ... of the Treaty on European Union.”

(3) When making exact reference to a decision of the Court of Justice of the European Communities, the Submitting body shall use the following wording: “decision of the Court of Justice of the European Communities No. XX/YY (XX representing serial number of the decision and YY year of decision) in the case of ... (case name) and the year of publication of decision, name of the digest of court decisions (European Court Review) and the page on which the relevant decision was published”.

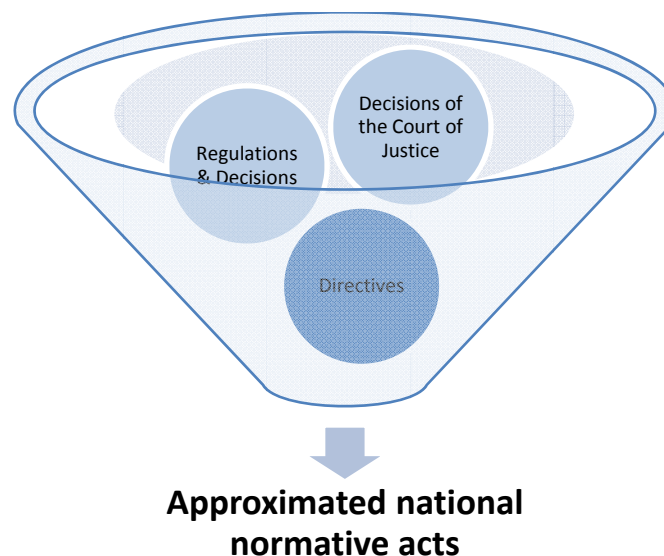
PART TWO

Basic rules for approximating normative acts

This second part intends to describe in depth the basic rules applied when approximating national normative acts. It is “provision oriented”, *ie* directed to comparing provisions of a national normative act with those of the relevant European normative act. The case of several European normative acts (Regulations and Decisions, Directives, Decisions (rulings) of the Court of Justice of the European Communities) will be studied.

Figure 3 is showing that all of the different European categories of normative acts are to be approximated by national normative acts. Several categories of EU normative acts may be melted down into a national normative act.

Figure 3
Getting national normative acts approximated



8. Common provisions

(1) With regard to legal approximation, the body submitting the draft normative act shall be obliged:

- a) To take account of primary law of the European Communities, primary law of the European Union, secondary law of the European Communities, secondary law of the European Union, decisions of the Court of Justice of the European Com-

munities, general principles of the law of the European Communities, general principles of the law of the European Union, treaty-based sources of law of the European Communities and/or treaty-based sources of law of the European Union,

b) To take account, as appropriate, of the proposals to amend European law, draft European law, and draft European normative acts, insofar as the Submitting body has the knowledge of such proposals, and

c) To optionally consider the legal systems of Member States from the perspective of approximation of their laws, as well as administrative infrastructure and application of laws in these countries.

(2) The approximation shall concentrate primarily on normative acts governing the areas where approximation is required under the PCA.

(3) The Submitting body shall prepare, as a matter of priority, draft normative acts that are designated in the PCA (For example, in the case of the Republic of Tajikistan, please refer to article 40 of the PCA, and to Annex 1, page 46).

(4) The Submitting body shall examine the wording of the legislation published in the Collection of Laws of the Country to ascertain whether the degree of its compliance is the same as it was in the draft.

If the draft normative act does not reach the required degree of compliance, the Submitting body shall continue in its approximation (*eg* through proposing its amendment, supplementing or annulment) until the required degree of compliance is attained.

5) Where the provisions of this methodology impose obligations on the Submitting body, they are to be construed as applying to the Co-ordinator within the meaning of provisions on co-ordination (Please, refer to Co-ordination with other normative acts, page 18).

9. Adaptation of a regulation or decision

(1) The adaptation of a regulation or a decision shall consist in adapting valid national normative acts of the Country to the requirements of the PCA.

The adaptation of a regulation or a decision is the only case where a unique European normative act is not to be approximated by a Member State. It may be suitable to take “as is” the regulation or the decision in the national legal system to harmonising the national normative act with the relevant European regulation or decision. It may be said that there is no approximation of the regulation or decision but a mere transcription where the national normative act is a “carbon copy” of the European normative act.

(2) When adapting a regulation or a decision, the Submitting body shall first identify the corresponding provisions of the national normative acts and examine the degree of their compliance with the provisions of the European regulation or decision.

The Submitting body shall also make comparison with other related national normative acts.

Based on this examination, the Submitting body shall identify the national normative acts that need to be adopted, amended, supplemented or abolished to reach full compliance with the relevant European regulation or decision.

Adaptation of a single European regulation or decision may involve several national normative acts.

For avoiding inconsistencies between normative acts and their subordinate legislation, the Submitting body shall submit legislative proposals on both the normative act and its subordinate implementing regulations even if their entry into effect is expected at a later date.

10. Transposition of directives

(1) Transposition of directives shall take place exclusively by means of generally binding national normative acts. Contrarily to European regulations and decisions, which usually ask for harmonisation, directives are only asking for drafting national normative acts that are transposed from the directives.

(2) The Submitting body shall be obliged to enact, as a matter of priority, general principles provided for in a directive in the form of a national normative act.

(3) When transposing a directive, the Submitting body shall proceed in conformity with the Common provisions described above (please, refer to page 15). Transposing a directive may require several national normative acts.

The Submitting body shall, as a matter of priority, transpose the directive in a single national normative act if the object of the directive is not provided for in any of the existing national normative acts. If a directive is transposed by means of a national normative act and a corresponding subordinate implementing normative act, the Submitting body shall submit both legislative proposals at the same time, including cases where the implementing regulation is scheduled to enter into force at a later date.

(4) The Submitting body shall have the right to transpose (“to copy”) the normative text (as opposed to the Preamble and the Recitals) of a directive or part thereof in its entirety provided that:

- a) The normative text of the directive represents an independent and integral part of the normative act,
- b) No normative act provides for the issue in question, and
- c) This will not interfere with the national legal system.

(5) Two deviations from the provisions of a directive may occur in its transposition:

- a) Deviation from the terminology used in the directive (hereinafter referred to as “**terminological deviation**”).

The Submitting body shall use this deviation if it leads to adopting a terminologically accurate, linguistically and stylistically correct normative act conforming to the rules of orthography of the official national language, except where such deviation could result in changing the substantive content.

b) Deviation from the content of the provisions of a directive (hereinafter referred to as “**substantive deviation**”).

The Submitting body shall use this deviation only if it is allowed under a provision of the directive itself.

(6) The Preamble of a directive, which specifies the legal source for the adoption of the directive, shall not be transposed into the national normative act. For example, the Preamble may be read “*Having regard to the Treaty..., Having regard to..., Acting in compliance with...*”.

In the event of a substantive deviation based on primary law of the European Communities, the Submitting body shall examine the source of law specified in the preamble of the directive in order to ascertain whether and under what conditions a substantive deviation is possible.

(7) Recitals (Whereas) provide the background that lead to the directive. It means that implementing the directive should make obsolete the Recitals. It is generally accepted that they have no independent legal value but this may be disputed because the difference with the provisions of the directive is that Recitals are not promissory. Accordingly, they do not need to appear in the national normative act transposing a directive. However, in case of litigation, the Courts can take them into consideration to ascertain the intention when drafting certain provisions. No particular importance should be attached to the order in which they appear, which is the same as in the directive and does not imply any hierarchy.

(8) In the event of minimum approximation, where the substantive deviation consists in the introduction of a more stringent national normative act, this normative act applies to both national and foreign goods, people, capital and services, unless the provisions of the directive imply otherwise.

(9) When transposing a directive, the Submitting body shall always check:

a) Whether the directive is not intended to regulate relations only among Member States,

b) Whether the provisions of the directive are not contrary to the provisions of international treaties binding upon the Country.

(10) The Submitting body may deviate from the provisions of the directive also on political, economic or social grounds, or on the ground of deviation being conditional on the conclusion of a treaty between the Country and the European Union and/or its Member States.

(11) The Submitting body must justify any substantive deviation and specify it in the cover letter provided when delivering the draft national normative act to the Coordinator (Please, refer to Part four, Cover letter of draft normative acts, page 41. The

Submitting body shall also specify the deviation in the compatibility clause and in the “Comment” column of the concordance table (Please, refer to Figure 2, page 10).

(12) The Submitting body shall duly transpose the directive in terms of form, content and time. The Submitting body shall act in conformity with any decision of the Court of Justice and make sure that the interests of the Country are not endangered and that the rights and legitimate interests of natural or legal persons are not prejudiced.

(13) Should the provisions of valid normative acts be in conflict with the provisions of a directive adopted at a later date, the Submitting body shall be obliged to propose an amendment or annulment of conflicting provisions within the applicable time limit with effect from the date of entry into force of the PCA.

11. Co-ordination with other normative acts

(1) The Submitting body shall co-ordinate the draft national normative act, in particular, with normative acts of secondary European law.

(2) The Submitting body shall co-ordinate draft normative acts and the existing national normative acts belonging to the national legal system. If necessary, the existing normative acts should be modified.

Typically, co-ordination is necessary if the draft national normative act is subordinated to an existing national normative act of higher level. For example, in some countries, the Criminal Code is subordinated to the Constitution, but is of higher level than usual normative acts. A provision of a draft national normative act may include a penalty while the Criminal Code does not present a mirror provision. If only the Criminal Code may provide with penalties, Judges are not to apply the new provision.

(3) The Submitting body shall present changes of or amendments to an existing national normative act as a separate normative act. So-called “omnibus laws” modifying several national normative acts should be prohibited.

12. Approximation of decisions (rulings) of the Court of Justice

(1) The Submitting body shall take account of the decisions (rulings) of the Court of Justice and, in approximating these decisions (rulings), shall recognise the fact that the Court of Justice is not bound in its decision-making by its previous decisions.

Where the Court of Justice makes two decisions (rulings) on the same issue that differ from or are contrary to one another, the Submitting body shall consider only the decision that was published later.

(2) If the national normative act has been approximated with a European normative act that the Court of Justice subsequently declared to be invalid (*eg* non-applicable), the Submitting body shall, where necessary, propose a change or annulment of that national normative act.

(3) If an omission prevented approximating the national normative act to the relevant European normative act, the Submitting body shall be required, as of the date of entry into force of the PCA, to submit a draft of the omitted national normative act.

It should also propose to amend or supplement any existing national normative act within the meaning of the decision (ruling) of the Court of Justice, immediately after the Court of Justice has issued a decision on this matter under the founding treaties.

(4) In the event of improper approximation of a national normative act to a European normative act, the Submitting body shall be obliged, as from the date of entry into force of the PCA, to submit a draft of the omitted national normative act.

It should also propose to amend or supplement any existing national normative act within the meaning of the decision (ruling) of the Court of Justice, immediately after the Court of Justice has issued a decision on this matter under the founding treaties.

13. Minimizing approximation consequences

A special attention should be paid to avoiding asking for tasks that are difficult to be performed in a developing country, at least because these tasks require trained staff, who are not available. A task may only be well performed when it repeatedly occurs during a given period of time, *eg* every week, month, etc. If this is not the case, the efficiency of the staff may be low, and the risk of mistakes dramatically increases. Moreover, no self-training occurs.

National bodies often consider that sophisticated national normative acts are a proof of the level of development of the Country. They neglect the necessary consistency of the legal system with the level of development. A typical example is with the substantive examination process of patent applications where the Country sees less than one application per week (Please, refer to several of the developing countries of the CIS).

Accordingly:

(1) The national normative act should minimize both the tasks of the administration and the administrative burden put on the users.

(2) Approximation should be performed in a way that minimizes:

- a. The Government spending, including recurrent spending, and/or
- b. The cost for the users.

(3) The cost for the economy of the Country occurring both from approximating national normative acts according to the PCA requirements, and from their degree of compliance, should be estimated.

PART THREE

Organising the tasks

Approximating national normative acts to European normative acts implies very demanding tasks for all of the parties involved. These tasks should be carefully planned and monitored. The two main actors are the Co-ordinator and the Submitting body while the interested parties are only called in for providing with a critical advice because treaties signed with the European Union and/or its Member States do not provide with a commitment to seek comment on draft national normative acts (please refer to Annex 3, page 49).

Accordingly, a series of steps may be proposed for approximating normative acts.

14. Co-ordinator and Submitting bodies

(1) The Co-ordinator shall be responsible for transposing European normative acts in their entirety, using adequate forms and methods, while meeting requirements of the PCA.

(2) The Co-ordinator shall organise the drafting of national normative acts, in particular, by proposing submitting bodies and providing them with a brief.

The Submitting bodies must, where necessary, co-operate with the Co-ordinator.

(3) The Submitting bodies shall be responsible for preparing and submitting draft national normative acts to the Co-ordinator, and for preparing concordance tables in respect of the normative act concerned. Accordingly, Submitting bodies shall liaise with the interested parties and obtain third party assessment of the draft national normative acts.

(4) The Co-ordinator should circulate draft national normative acts and their cover letter because the Submitting body, which has provided a self-assessment on the draft national normative acts it prepared, should not be able to interfere with a third party assessment.

(5) The Submitting body is a sub-contractor of the Co-ordinator, which shall monitor the whole approximation process.

15. What is a brief?

A brief is an official document sent by the Co-ordinator to the Submitting body and giving to the latter the responsibility to drafting a series of national normative acts that will become functional part of the national legal system.

16. Should a brief be made public?

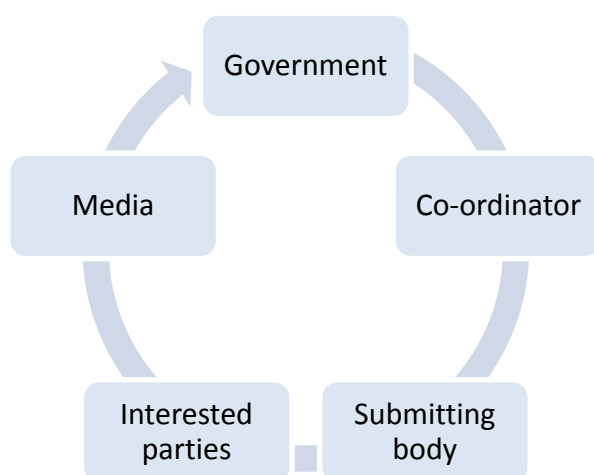
It is questionable whether a brief should be made public.

In a democracy, the brief should be made public because there is no reason to hide a law making process. Moreover, the latter process involves the interested parties that should come to a consensus on both the necessity of a new national normative act and its contents. It means that the brief should also be commented by the interested parties.

Making public a law making process implies often press conferences that should be considered as a means to make more visible the tasks and achievements of the Government.

Figure 4 shows that the decision of making public a brief is a political issue left to the Government that should have informed all of the players. For example, a Government may prefer to communicate on some selected issues while not on others.

Figure 4
Information flow during a law making process



17. The brief specifies the expected characteristics of the requested national normative act

Usually a brief sent to the Submitting body by the Co-ordinator is:

1. Giving a provisory name to the requested national normative act. The name should make clear the subject matter.
2. Stating that the national normative act should be approximated to the relevant European normative act according to the PCA commitments of the Country (and not to any loosely defined international best practice).

3. Listing the main issues that are to be considered when drafting the requested national normative act.
4. Specifying the expected degree of compliance of the requested national normative act with the European law, *ie* whether compatibility, approximation, or harmonisation are to be reached.
5. Indicating the foreseen level (*eg* law, by-law...) of the requested national normative act within the national legal system and whether the subordinated legislation (*eg* implementing regulation) should be prepared and submitted together with the requested national normative act.
Preparing simultaneously the normative acts and of their subordinated legislation usually increases their consistency but may be more difficult to manage because the aims are different: superior normative acts are aiming at approximating a national normative act to the relevant European law, while their subordinate legislation is targeting practical implementation.
6. Informing about its communication policy in relation with the requested national normative act.
7. Providing with a tentative list of interested parties and of entities that should be involved in the circulation process of the requested national normative act
8. Providing for its own upgrading, including if the interested parties provided relevant comments.
9. Setting a deadline for delivering the requested draft national normative act and its cover letter to the Co-ordinator.
10. Organising a follow-up of the tasks performed by the Submitting body.

In other words, the brief is providing terms of reference (ToR) to the Submitting body. They will also be used by the Co-ordinator for monitoring the Submitting body. Since monitoring will be mainly undertaken through assessing the veracity of the self-assessment of the compliance of the approximated draft normative act, it is recommended to keep the tables ascertaining the degree of compliance.

18. A series of steps for performing an approximation

According to the present methodology, four stages are necessary for approximating a national normative act to the relevant European normative act. It comes:

- a) Assembling a task force.
- b) Confirming the brief.
- c) Approximating the national normative act to the relevant European normative act.
- d) Delivering the draft national normative act with a self-assessment and a third party assessment.

Stage a) is relative to assembling a task force for undertaking the approximation work. It means that the Submitting body is to be selected taking into account the skills of its staff and preliminary version of the brief.

Stage b) is devising an adequate wording for the brief, which may be modified to meeting the comments of the interested parties, and to taking into account the economic consequences of approximating a given national normative act to the relevant European normative act.

Stage c) is pertaining to approximating the national normative act to the relevant European normative act.

Stage d) is relative to delivering the requested draft national normative act to the Co-ordinator. The delivered draft national normative act is self-assessed by the Submitting body for its compliance with the brief (and with the PCA commitments). A third party assessment is made possible if the draft national normative act is circulated. However, in some Countries, the interested parties are not invited to comment. However, the rules on normative act drafting may ask for consulting the “Interested authorities”, *ie* Ministries, State Bodies and Organisations... but no representatives of enterprises or consumers.

The four stages can be divided into steps in order to provide with a workable methodology. It comes:

a) Assembling a task force

1. The Co-ordinator is preparing a preliminary draft brief.
2. The Co-ordinator is Identifying the Submitting body.
3. The Submitting body is discussing the preliminary draft brief with the Co-ordinator and the interested parties.
4. The Co-ordinator is modifying the preliminary draft brief (if suitable) to meeting observations of the Submitting body and of the interested parties.
5. The Submitting body is suggesting the Co-ordinator to allow recourse to national or foreign technical assistance (if suitable).

b) Confirming the brief

6. The Submitting body (with the technical assistance of national or foreign experts if suitable) is identifying the relevant sources of law.
7. The Submitting body (with the technical assistance of national or foreign experts if suitable) is selecting the relevant issues.
8. The Submitting body (with the technical assistance of national or foreign experts if suitable) is estimating the cost for the economy of the Country of an approximation according to the PCA commitments and to the degree of compliance requested by the brief.
9. The Submitting body is informing the Co-ordinator of the cost to the economy of the Country involved by the approximation according to the level of compliance requested in the brief.
10. The Co-ordinator is confirming or amending the brief (if suitable).

c) Approximating the national normative act to the relevant European normative act

11. The Submitting body (with the technical assistance of national or foreign experts if suitable) is choosing a drafting technique.
 12. The Submitting body (with the technical assistance of national or foreign experts if suitable) is drafting the approximated national normative act according to the relevant drafting technique selected by the said Submitting body.
- d) Delivering the draft national normative act with a self-assessment and a third party assessment
13. The Submitting body is assessing (self-assessment) whether the draft national normative act is meeting the degree of compliance required by the brief.
 14. The Submitting body is preparing the cover letter .
 15. The Submitting body is submitting cover letter and draft national normative act to the Co-ordinator.
 16. The Co-ordinator is circulating the draft national normative act among the interested parties.
 17. Interested parties are providing their comments on the draft national normative act and its cover letter.
 18. The Co-ordinator is providing a revised brief to the Submitting body for taking into account the relevant comments of the interested parties (if suitable).
 19. The Submitting body is selecting relevant comments of the interested parties and is modifying (if suitable) the requested draft national normative act and its cover letter.
 20. The Submitting body is submitting the cover letter and the requested draft national normative act to the Co-ordinator for further action (Parliament, etc).

Communication with the media is not taken into account in the above series of steps. Usually, media are informed when presenting the brief to the interested parties, and when the Submitting body delivers the cover letter and the requested draft national normative act to the Co-ordinator. This aims at developing and implementing national normative acts based on transparency, consensus, and participation of the interested parties.

19. Assessing the degree of compliance

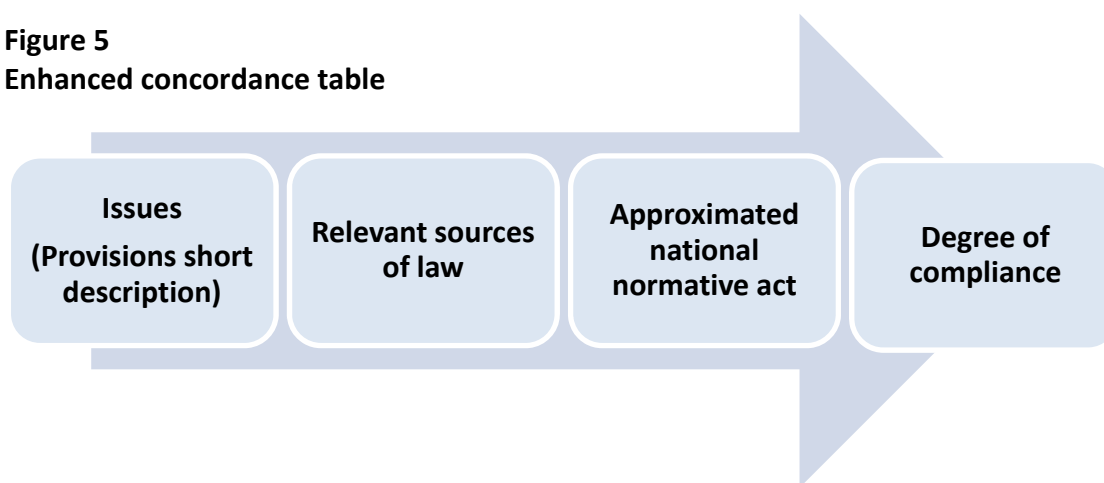
Compliance is an objective concept relative to performing the approximation process to meeting the PCA commitments of a Country. Assessing a degree of compliance is limited to three grades by the PCA: compatibility (the less demanding grade), approximation, harmonisation (the more demanding grade).

Assessing the degree of compliance of a national normative act with the relevant European normative act is the thirteenth task of the series of tasks to be undertaken when performing a legal approximation. In most of the cases, the Submitting body is self-assessing the degree of compliance it achieved with the approximation process, mainly because there is no third party with trained staff.

It may be efficient to use a four column table (enhanced concordance table). Figure 5 is to be read from left to right. It shows the usual headings. The first column that describes shortly the issues met by the provisions is often used as a title for the said provisions. The second column quotes the relevant sources of law, *ie* the provisions that are selected, including their origin. The third column shows the corresponding provisions of the national draft normative act, *ie* the approximated provisions. The fourth column states the degree of compliance between the sources of law and the approximated provisions.

Listing the issues facilitates controlling whether all issues have been considered while quoting the relevant sources of law for a given issue shows whether its meaning has been well appreciated by the Submitting body. Comparing the second column (relevant sources of law) and the third column (approximated national normative act) makes easy a check of the self-assessment of the degree of compliance by the Submitting body.

Figure 5
Enhanced concordance table



Such four column table may prove being very useful in relation with reporting to the Co-ordinator (Please, refer to Part four, Cover letter of the draft normative act, page 41).

The brief specifies the degree of compliance to achieve (compatibility, approximation, and harmonisation) for meeting the PCA commitments of a Country. Assessing the degree of compliance after having approximated a national normative act to the relevant European normative act can be performed through comparing each of the provisions of the draft national normative act with the said European normative act.

However, this formal assessment technique may not always provide with a fair view of the achievements of the performed approximation process. A questionnaire may

prove being more efficient for assessing the degree of compliance of the draft national normative act with the relevant European normative act. Such questionnaire achieves a fair assessment of the degree of compliance through a four step process:

1. Identifying the issues to be solved by the approximation process.
2. Checking whether all issues are solved by the provisions of the draft national normative act (Yes/No).
3. Checking the internal consistency of the draft national normative act (Yes/No)
4. Checking whether the draft national normative act is compatible with the national legal system (Yes/No).

20. Five drafting techniques

Steps 11 and 12 are the key steps in the above series of steps. Then the requested draft national normative act is prepared. The next issue is to identify a suitable technique for drafting the requested draft national normative act.

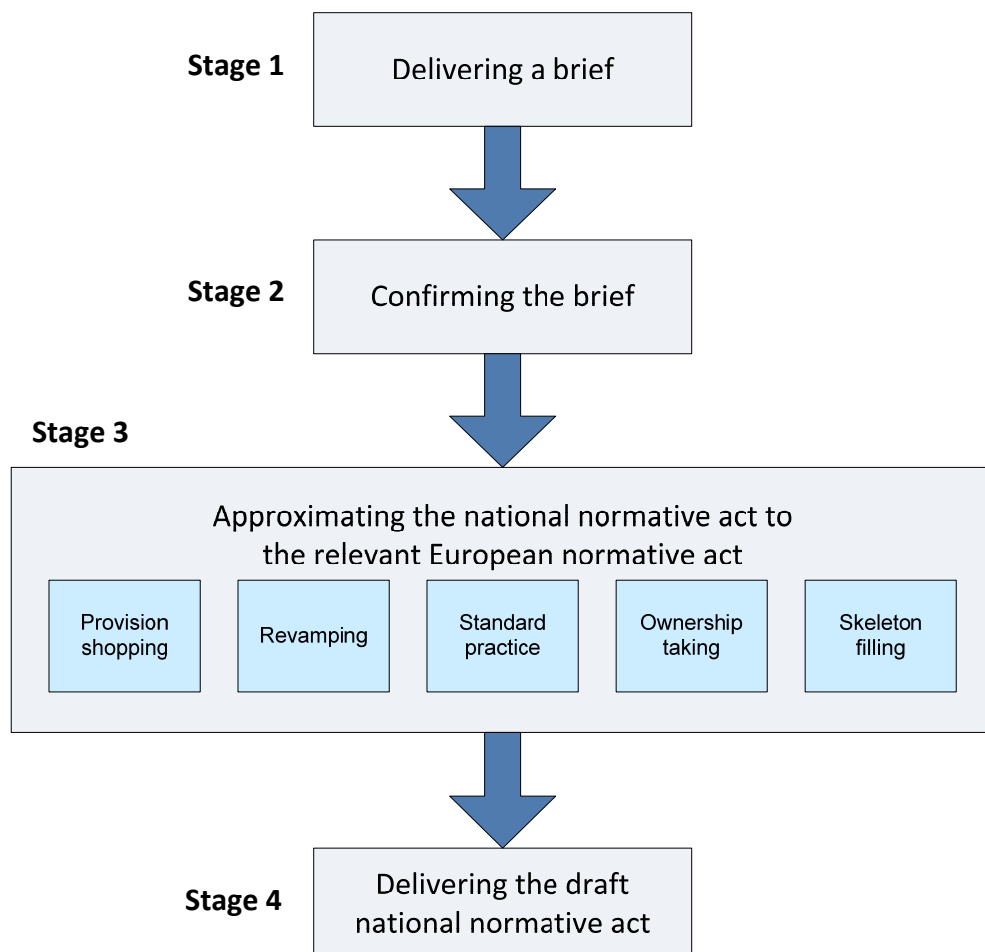
Table 2
Risk involved by the selected drafting technique

Name of the technique	Main steps of the technique	Main risks
Provision shopping	Selecting & assembling provisions of different origins, including non EU Member States	Inconsistencies because the provisions may not be based on the same concepts
Revamping	Selecting an existing non-compliant national normative act & increasing its degree of compliance through amendments	Inconsistency of the amendments with the remaining provisions of the national normative act
Standard practice	<ul style="list-style-type: none"> – Selecting normative acts transposed by Member States for identifying a Standard practice – Approximating the national normative act to the Standard practice 	<ul style="list-style-type: none"> – Inconsistencies in the Standard normative act – Technical flaws
Ownership taking	Selecting an foreign compliant normative act & making it consistent with the national legal system through supplementing the failing provisions	Inconsistency of the existing compliant normative act with the supplemented national provisions
Template Filling	<ul style="list-style-type: none"> – Asking interested parties for assistance in identifying issues & building a template – Identifying sources of law – Filling up the template 	<ul style="list-style-type: none"> – No interested parties helping to put down a relevant template – Non relevant template – Technical flaws

Any drafting technique should not only provide with the foreseen degree of compliance but also with a relevant result at the lowest possible cost. This latter issue should not be underestimated since drafting a normative act has an intrinsic cost that cannot be neglected. The PCA commitment of approximating numerous national normative acts should be met within a limited period of time. Usually, PCA foresee five years for approximating national normative acts to European law. Experience shows that reaching this target may be difficult for CIS countries even if technical assistance is provided. Technical assistance is a scarce resource that implies a capacity and a will to receive it. Moreover, once enacted, the approximated national normative act may have unpleasant economic consequences (Please, refer to Minimizing approximation consequences, page 20).

Five drafting techniques may be identified (Provision shopping, Revamping, Standard practice, Ownership taking, and Template filling) as shown Table 2. All of the five techniques show advantages and drawbacks. The Submitting body is to select the better technique given its skills and the possible assistance of experts.

Figure 6
Inserting the drafting technique within the third stage of the approximating process



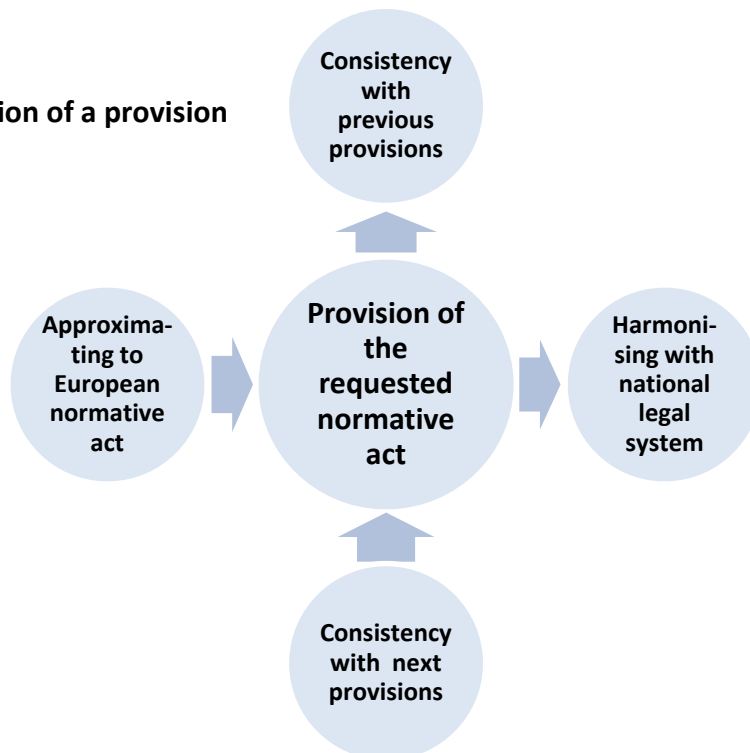
These five drafting techniques are to be inserted in the series of stages necessary for approximating a national normative act to the relevant European normative act. They are included within the third stage as shown Figure 6. The Submitting body is free to select the drafting technique it thinks to be the more efficient given the brief and its environment. As much as possible, this choice is to be made for objective reasons and the reasons themselves should be fully documented to allow an *ex post* monitoring.

Key step 12 is relative to drafting the requested national normative act, which is made of a series of provisions. If one turns to the central position of the provisions of a national normative act, a cross appears, as shown Figure 7.

a) The horizontal branch of the cross is dealing with compliance: the provision of the requested national normative act is approximated to a/several provision(s) of a European normative act, and the said national provision is to be at least compatible, at best harmonised, with the national legal system. It means that any provision of a national normative act is to be compliant with both the European normative act, *ie* with the European legal system, and with the national legal system.

b) The vertical branch is dealing with the internal consistency (sometimes referred to as “contextual ambiguity”) of the national normative act. It means that its provisions should be consistent with each other.

Figure 7
The central position of a provision



Since PCAs require approximating national normative acts to relevant European normative acts, the national legal system has to be modified for becoming consistent with

the draft national normative acts. Modifying draft national normative acts for safeguarding the consistency of the national legal system can only be accepted if the modified national normative acts are still approximating the relevant European normative acts. If it were not the case, the national legal system should be modified. This shows how far reaching are the changes entailed by a PCA.

Accordingly, the following provision-focussed methodology may be proposed:

1. Drafting a national provision approximating to the relevant European provision.
2. Merging the draft national provisions into a draft national normative act.
3. Checking the vertical consistency (internal consistency) of the draft national normative act for eliminating internal inconsistencies and technical flaws.
4. Solving compatibility issues occurring between the draft national normative act and the national legal system.

Drafting national normative act compliant with the national legal system may be subject to constraints imposed by the hierarchy of legal authority, by the scope of delegated powers, and by the accepted hierarchy.

The lack of compatibility between the draft national normative act and the national legal system is not always discovered when drafting national normative acts. Once the national normative act put into force, Judges have the task to propose a consistent understanding of the national normative act within the framework of the national legal system. Several years may be needed before a case comes before a Court.

It is worth noticing that there is no economy of scale because the approximation work is performed at the provision level and not at the normative act level. If there is no compliance for a provision, the normative act is not compliant.

21. Provision shopping

Provision shopping is selecting and assembling provisions of different origins. There is no evidence that these provisions taken out of national normative acts of foreign Countries (non-EU Member States) are compliant to the European law. They are often extracted from normative acts of Countries using the same official language as the Country that undertakes an approximation (*eg* Russian) but without third party compliance check even if the Country has signed a PCA.

This induces a strong risk of inconsistencies because the selected provisions may not be approximated to the European law or based on the same basic concepts. Such inconsistencies are likely to appear where some of the provisions are of European origin, while some others are reflecting other rules like, for example, those of the former USSR.

Provision shopping has its own limits when merging the different provisions, which need to be logically hierarchised and organised within the draft national normative act.

Usually, Submitting bodies using a provision shopping technique for preparing a draft national normative act do not select single provisions but series of foreign provisions that are easier to hierarchise and to organise, and then to merge in a single text. This makes identifying blanks a difficult exercise. Redundancies are also difficult to discover where similar provisions are not using the same vocabulary albeit relative to similar issues.

Some countries favour a dual structure of normative acts. First, a vocabulary is provided, and, second, the rules are given. Inconsistencies are avoided through providing that the vocabulary has only an informative value and that it cannot be used for construing the normative act. This limitation lessens the capability of a vocabulary for avoiding inconsistencies originating in a Provision shopping.

The Provision shopping technique may be performed according to two series of steps according to the position of the approximation step. According to a first solution, the approximation is relative to the whole draft normative act (“Whole Content Approach”); according to a second solution, approximation is relative to each single provision before merging all of them in a single draft normative act (“Single Content Approach”).

When the whole draft normative act is considered (first solution “Whole Content Approach”), the Provision shopping technique asks for eight steps:

1. Selecting a set of foreign normative acts that are highly ranked by experts and/or interested parties.
2. Identifying provisions that might be useful in the requested draft national normative act.
3. Pruning the identified provisions.
4. Merging the pruned provisions into a single text.
5. Approximating the single text to the European normative act to obtain the draft national normative act.
6. Cleaning the draft national normative act of its internal inconsistencies and redundancies, and filling up the blanks.
7. Making compatible the draft national normative act with the national legal system.
8. Assessing the degree of compliance of the draft national normative act with the approximated European normative act.

The last step is necessary. It is also a pre-requisite to self-assessing by the Submitting body whether the draft national normative act is meeting the degree of compliance required by the brief (Please, refer to step 12 of the Proposed series of steps, page 26).

At least two issues may be disputable: the meaning of “highly ranked” is purely subjective, and no objective criterion is proposed for identifying provisions.

According to the second solution (“Single Content Approach”), it is proposed that each pruned provision be approximated to its corresponding European provision (*ie* before

step 5, Merging). This early approximating step needs identifying the corresponding European provision before the approximating task is performed. It comes:

1. Selecting a set of foreign normative acts that are highly ranked by experts and/or interested parties.
2. Identifying provisions that are might be useful in the requested draft national normative act.
3. Pruning the identified provisions.
4. Approximating the pruned provisions to the corresponding European provisions
5. Assessing the degree of compliance of the approximated pruned provisions with the said European provisions.
6. Merging the approximated pruned provisions.
7. Cleaning the draft national normative act of its internal inconsistencies and redundancies, and filling up the blanks.
8. Making compatible the draft national normative act with the national legal system.
9. Assessing the degree of compliance of the draft national normative act with the approximated European normative act.

For achieving the same results this technique requests one more step than the previous one. Hence, it does not meet the universal request for succinctness provided by the Ockham's law: "One should not multiply entities beyond necessity – *Entia non sunt multiplicanda sine necessitate*". The shorter technique should be preferred.

Provision shopping should be prohibited, at least because provisions may be inconsistent with each other without warning. Submitting bodies use this technique when they do not have staff sufficiently trained for being able to deliver high quality work. However, Provision shopping may be useful for benchmarking normative acts competing with another for offering solutions to an issue. This is the case with national normative acts compatible with another within the framework of an international treaty. An example may be provided with normative acts relative to industrial property abiding by the WIPO rules.

22. Revamping

Revamping is selecting a non-compliant normative act and increasing its degree of compliance through amendments (*ie* through modifying provisions or parts of provisions).

Accordingly, Revamping is often used where an existing non-compliant normative act is formally kept for political reasons. The aim is avoiding modifying the national legal system through minimizing changes in the national normative acts with the risk of a non-compliance with the European law.

There is a risk of elaborating upgraded provisions that are inconsistent with the remaining non-upgraded provisions. Often eliminating inconsistencies is asking for sev-

eral successive upgrades of the national normative act, making the work of the Submitting body a Siphysian task. Finally, the Submitting body may decide to undertake a full rewriting of the whole normative act.

Using the Revamping technique requires undertaking seven steps:

1. Identifying the existing non-compliant national normative act that is to be approximated to a European normative act.
2. Identifying the issues that are not compliant.
3. Identifying the provisions that should be approximated.
4. Approximating said provisions.
5. Cleaning the draft normative act of its internal inconsistencies and redundancies, and filling up the blanks.
6. Making compatible the draft national normative act with the national legal system.
7. Assessing the degree of compliance of the draft national normative act with the approximated European normative act.

The Revamping technique presents at least two drawbacks because it is inverting the approximation process and asking for identifying an existing normative act.

a) Inverting the approximation process is debatable. The Revamping technique makes a non-compliant provision compliant with the burden of making consistent provisions of a same normative act. A more robust methodology would be starting with a relevant provision of the European normative act, consistent with all of the other provisions of the latter normative act, and to draft the provision to be inserted into the national normative act.

b) Identifying an existing normative act seems easy. However, very often several national normative acts cover (if not conflicting) the same issue. Once the national normative act selected, the second step asks assessing issues in relation with the corresponding European normative act. It means assessing whether the issue will be at least compatible, at best harmonised, with the national legal system. After modifying a provision, it should also be checked whether the internal consistency of the national normative act is kept. It is worth noticing that the upgrading work is substantially less than with the Provision shopping technique.

The Revamping technique is efficient if the national normative act is close to the European normative act.

23. Standard practice technique

The **Standard practice** technique is derived from the search for a reference text following international best practices. In the case of a PCA, this is not relevant because there is a commitment to approximate national normative acts to European normative acts.

However, a parent technique may be proposed if the specificities of the European law sources are taken into account.

European law sources may be divided into two groups: normative acts that are directly applicable and normative acts that need being transposed in the national legal system of each of the Member States. It means that in the first case there is only one normative act (one regulation, one decision), while there are as many national normative acts for each directive as there are Member States. There is little freedom for differences between the national normative acts but they do exist.

The PCA asks for approximating national normative acts to the relevant European normative acts. Accordingly, if the European normative act is a directive, the draft national normative act acquires the same standing as the normative acts of Member States.

The seven main steps of the Standard practice technique are:

1. Collecting the normative acts passed by the Member States to meeting the requirements of the European law.
2. Merging the normative acts with the aim of getting a single new normative act establishing a standard practice for meeting the requirements of the European law.
3. Preparing a standard normative act corresponding to the identified standard practice.
4. Cleaning the standard normative act of its internal inconsistencies and redundancies, and filling up the blanks.
5. Approximating the existing national normative act to the standard normative act.
6. Making compatible the draft national normative act with the national legal system.
7. Assessing the degree of compliance of the draft national normative act with the European normative act.

This technique seems easy to implement although its second step needs writing a standard normative act with all the usual risks implied by this kind of undertaking. Approximating the national normative act to the standard normative act is mainly bringing the risk of a non-compliance of the national normative act with the national legal system.

The risk of technical flaws should not be underestimated because merging national normative acts close to each other is apparently easy to perform by non-trained staff.

The Standard practice technique cannot be accepted if the collected normative acts are not belonging to the same system. For example, the author's right / copyright dispute between Europe and the USA makes impossible writing a standard normative act approximating to both the European and the US practice.

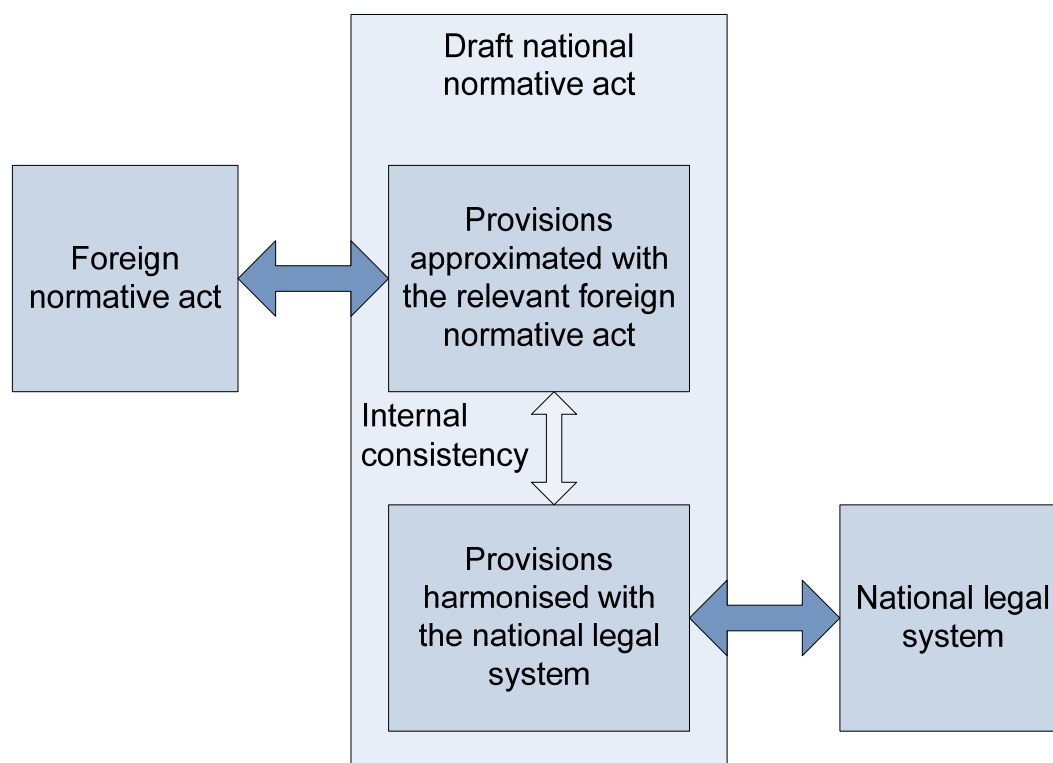
24. Ownership taking

The **Ownership taking** technique is mainly used when an existing foreign normative act is deemed compatible and is readily available but is unusable as a national normative act because some provisions are failing. Such foreign normative act may be a European regulation or an international agreement that pertains only to substantive law, and hence that cannot be implemented without relevant national procedural rules. The existing foreign normative act needs to be made consistent within the national legal system through supplementing the necessary provisions. The Submitting body takes ownership of the foreign normative act when supplementing the failing provisions.

An example of foreign normative act that need national provisions to be integrated into a national legal system is with the WIPO agreements that need to be signed and implemented within the national legal systems according the PCA commitments (Please refer to article 39 and annex IV of the PCA signed by the Republic of Tajikistan, page 48).

Figure 8

The two categories of provisions of the Ownership taking technique



The approximated national normative act presents two different categories of provisions. As shown Figure 8, approximated provisions have their origin in the existing foreign normative act, while the other provisions are making the approximated provisions compatible with the national legal system. The Ownership taking technique takes “as is” the provisions of the foreign normative act.

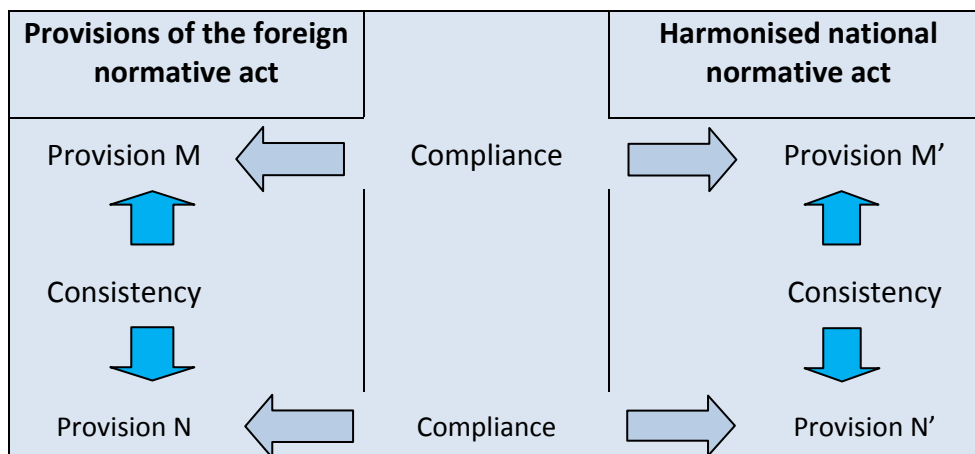
In the best case, the Ownership taking technique allows to putting down a national normative act that is harmonised with (and not only approximated to) the existing foreign normative act, while other provisions are harmonised with (and not only approximated to) the national legal system. These latter provisions may often be copied from a similar national normative act. It may also be necessary to revamp these provisions when there are no convenient similar national normative acts. Accordingly, the risk is in the consistency of the two categories of provisions, each of them harmonised with different sources of law. If the inconsistency of the two categories of provisions cannot be reduced, it means that the commitments of the Country having signed a PCA lead to modifying the provisions having their source in the national legal system, with the risk of being forced to modify the national legal system.

The Ownership taking technique requires seven steps:

1. Identifying the relevant existing foreign normative act (and its subordinate implementing regulations if suitable).
2. Identifying the issues that are to be ruled by national normative acts (because irrelevant at international level or with the European system).
3. Writing the national provisions corresponding to said issues.
4. Merging said national provisions with the foreign normative act for obtaining a draft national normative act.
5. Cleaning the draft national normative act of its inconsistencies and redundancies, and filling up the blanks.
6. Making compatible the draft national normative act with the national legal system.
7. Assessing the degree of compliance of the draft national normative act with the European normative act.

Figure 9

Consistency and degree of compliance of harmonised national normative acts



The Ownership taking technique may be preferred where there is a need to approximate a set of provisions (like presented by European regulations or Decisions, or Inter-

national treaties) that are already consistent but that need to be made acceptable by a national legal system.

One of the derived advantages of the ownership taking technique is then with the consistency of the draft national normative act as shown Figure 8.

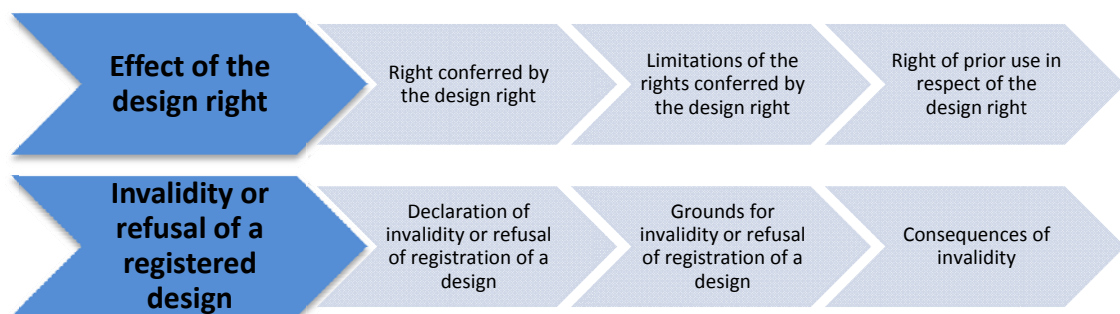
Figure 9 illustrates the fact that the internal consistency (vertical arrows) of the foreign normative act (eg European regulation or Decision, or International treaty) is integrally transferred to the harmonised national normative act, which, in turn, becomes internally consistent. This is the case because harmonising (full compliance, horizontal arrow) with a regulation or a decision usually means copying it as is. The same concepts are used and an accurate translation is provided.

25. Template filling

Finally, the **Template filing** technique is preparing a template (a hierarchised list of issues) or outline that is to be filled with relevant provisions. It means that a preliminary assessment of the relevance and of the feasibility is to be performed prior to approximating the national normative act with the relevant European normative act.

This technique can be selected where interested parties may represent their views and provide with a complementary expertise to that of the Submitting body. The role of the Submitting body is then limited. It plays the mere role of a facilitator for reaching a consensus among the interested parties. This facilitator is also able to provide them with technical assistance.

Figure 10
Exemple of template



Template filing is also preferred where the existing national normative act is fully outdated, *ie* where it is obvious that amendments imply too much work. The aim is maximizing the compliance of the draft national normative act with the European law. The risk is in the absence of compatibility of the draft national normative act with the national legal system. It means that the approximating process of national normative acts

to the European law may be a powerful tool for improving a national legal system when using the Template filling technique.

The Template filling technique allows dispatching the work between several task groups working independently from each other.

Drafting an approximated national normative act according to the template filling technique asks for four steps:

1. The Submitting body and the interested parties are identifying issues,
2. The Submitting body is arranging issues in order to built up a template,
3. The Submitting body is identifying the relevant sources of law for each issue of the template,
4. The Submitting body is filling up the template, *ie* proposing provisions (with the degree of compliance requested in the brief sent by the Co-ordinator to the Submitting body) for each issue of the template.

The first step of the Template filling technique may be uneasy to perform since European directives do not always provide with concepts but only with the targets that are to be reached by the passed national normative act according to the PCA commitments of the Country. European normative acts are issued from negotiations between the Commission, the Member States, the European Parliament, and the interested parties. Often a consensus can be obtained on the aims of a normative act, while the underlying concepts remain specific to the national legal systems of each Member State. This means that a list of “Do and don’t do” may be put down, leading to complex and detailed normative acts to the point of unintelligibility, and seldom containing any reference to the underlying concepts, like often the case with English normative acts.

Figure 10 shows part of a template. The figure is relative to two chapters of a normative act pertaining to industrial designs (hence two headings): “*Effect of the design right*” and “*Invalidity or refusal of registration of a registered design*”. The short descriptions of the issues corresponding to provisions are grouped in chapters with their specific headings. Each short description leads to a single provision. There is no provision without a short description because the subject of the provision cannot be identified. Accordingly, there is no provision immediately following a chapter heading.

Moreover, preparing a template involves splitting the subject matter into chapters (categories) and provisions (subcategories). A rational split follows four rules:

1. Chapters are mutually exclusive,
2. Provisions are mutually exclusive,
3. When combines provisions must equal the whole normative act,
4. The division must be based on one consistently applied principle.

A technique for checking the effectiveness of a template is to prepare a flowchart, which is simply a schematic diagram of the national normative act to be drafted by the Submitting body. Doing a flowchart:

- Provides the drafter with the underlying logic of the requested normative act.

- Determines the headings of the template corresponding to the requested normative act.
- Identifies blanks often born from “*if...then...*” constructions because a flow-chart will illustrate the “*if*” clause when satisfied and what happens when not satisfied. It also shows the lack of consequences.

PART FOUR

Cover letter of the draft national normative act

The Submitting body is to deliver the draft national normative act to the Co-ordinator according to the brief issued by the latter. A cover letter (final reporting) is to be drafted by the Submitting body to inform both the Co-ordinator and the interested parties of the result achieved when drafting the requested national normative act.

26. Why is there a need for cover letter?

A cover letter is a means for the Submitting body to report on the correlation between the brief issued by the Co-ordinator and the normative act it produced. It is a self-assessment of the normative act produced by the Submitting body. It is very unusual that a brief entrust an independent body with a third party assessment.

The cover letter shall be kept to a minimal length. They should be read without effort by many people. The language should be made as simple as possible in order to be understandable by a layman.

27. Title of the draft normative act

The title of a normative act is providing with the standard means for retrieving it in a data base. Accordingly, the title should indicate the nature of the normative act (law, by-law, etc), and give a short description of its content.

The Submitting body shall adapt the title with regard to the type of the national normative act, which is to meet the PCA requirements. For example, it should refer to the national normative act to which it is subordinated, and, if accepted by the national legal system, to the European normative act to which it is approximated.

28. Contents of the cover letter

- (1) The Submitting body shall specify the entity that has initiated the approximation.
- (2) The Submitting body shall propose the administrative body that might draft the implementing rules, if necessary and if not specified in the brief, and if not prepared by the Submitting body itself.
- (3) The Submitting body shall state whether the draft national normative act constitutes a priority under the PCA and shall refer to the specific article of the PCA.

(4) The Submitting body shall present obligations arising from the PCA. It may be useful to present short Policy Papers explaining both to the Co-ordinator and the interested parties the objectives of the draft national normative act. This is recommended when new concepts are introduced.

(5) The Submitting body shall specify the sources of law taken into consideration, *ie* European primary law, European secondary law, decisions of the European Court of Justice, general legal principles, and treaty sources.

It shall also give brief characteristics of the relevant sources of law including information as to where their translation in an official national language, if any, can be found.

The Submitting body shall also specify the timetable for implementing the approximated normative act consisting, in particular, in the identification of the following points:

- a) Preparation of proposals of legislative changes related to the implementation, where necessary.
- b) Establishing a body responsible for the implementation, where necessary.
- c) Consultations that may have been held with other Governmental bodies and NGOs and interested parties affected by implementation (such as big companies, importers and exporters or environmental organisations, etc.).
- d) Preparation of administrative instructions and procedures for competent bodies, where the implementation requires it.
- e) Creating adequate material and staffing conditions, unless such data have already been given in the clause on financial, economic, environmental and employment implications.
- f) Information concerning practical implementation of the proposed normative act (informing the public on obligations arising from its implementation, provision of relevant documents, certificates, notifying other states on the attained state of implementation, etc.).

(6) The Submitting body shall describe the selected drafting technique and the encountered (potential) risks.

(7) The Submitting body shall specify the degree of compliance of the requested draft national normative act with the relevant European normative act.

The Submitting body shall give the grounds for declaring non-compliance, and the date by which it is to be eliminated.

The Submitting body shall also specify any possible future non-compliance with the European normative act, and its grounds.

(8) The Submitting body shall state that the draft national normative act underwent a check for possible lack of internal consistency, for semantic ambiguity (word misuse), and for syntactic ambiguity (uncertainty in the order in which words appear and how they are punctuated).

(9) The Submitting body shall state whether the draft of the national normative act has been prepared with the involvement of local or foreign legal experts, whether the interested parties have made comments on the draft, and what these comments are. This is necessary because foreign expertise is never innocent.

(10) The costs of implementing the requested level of compliance should be estimated and the choices made in the national normative act should be discussed.

29. Checks to be performed by the Co-ordinator

In principle the Co-ordinator is not to perform any check since neither his staff has got the necessary technical skills (the technically skilled staff is with the Submitting body) nor there is any reason to believe that the submitting body did not carry out the tasks requested by the brief.

Since the Co-ordinator is the only entity possessing an overview of the approximation work undertaken by the different Submitting bodies, it should identify any overlap with other draft national normative acts. A special attention should be given to avoiding “gold plating” (Please refer to page 11). Where a specific condition is to be introduced, it should be duly stated in the cover letter.

Another task entrusted to the Co-ordinator is checking that the brief could not have asked for a more comprehensive work of the Submitting body working on PCA approximation. For example, a brief is requesting a Submitting body to approximate an existing national normative act to the relevant European normative act. In principle no other task is foreseen including any change in the duties of the Submitting body. A more comprehensive work might be designing a new administrative organization meeting “soft” requirements like improving the chain of command, governance, or avoiding conflicts of interest.

30. What should be published?

Publishing means making known to the public by any means, including electronic or paper versions.

Draft national normative acts are to be submitted to the Parliament for making them enforceable. Members of the Parliament have to be (fully) informed about the acts they may approve. Moreover, informing the interested parties about a draft normative act to be passed by the Parliament offers the opportunity to lobby the Parliament. This is the last opportunity to get a third party assessment before passing the national normative act. In a democracy, the media should also be informed.

It is suggested to publish at least:

1. A cover letter explaining why a new or an amended national normative act is required,
2. The draft national normative act(s) and its (their) subordinate legislation, if relevant, and
3. The relevant European law that is to be approximated although it may imply a substantive translation work.

31. When should interested parties be called in?

In many countries, drafts normative acts are prepared by a sole Submitting body (Ministry, Agency, etc) without a brief issued by a Co-ordinator, and without systematically consulting the interested parties or other stakeholders, including other government departments. Draft normative acts are sometimes circulated among the interested parties before being submitted to the Parliament but comments are done in isolation. There is no process for ensuring that all of the interested parties or stakeholders are called in.

It may be expected that calling in the interested parties and stakeholders at the beginning of the approximation process avoids both representing priorities that are not those of the Country, and imposing important costs on certain sectors of the business or of the civil society.

Annexes

Annex 1: Areas subject to approximation according to article 40 of the PCA signed by the Republic of Tajikistan

Annex 2: International agreements to be signed by the Republic of Tajikistan according to article 39 and annex IV of the PCA

Annex 3: Commitment to seek comment on draft national normative acts

Annex 4: English-French vocabulary pertaining to legal approximation

Annex 1

Areas subject to approximation according to Article 40 of the PCA signed by the Republic of Tajikistan

The areas of the national legal system subject to approximation may be given by the PCA. For example, according to Article 40 of the PCA signed by the Republic of Tajikistan, the approximation of national normative acts to the European law shall extend to the following areas in particular:

1. Customs law
2. Company law
3. Laws on banking and other financial services
4. Company accounts and taxes
5. Intellectual property
6. Protection of workers at the workplace
7. Rules of competition, including any related issues and practices affecting trade
8. Public procurement
9. Protection of health and life of humans, animals, and plants
10. The environment
11. Consumer protection
12. Indirect taxation
13. Technical rules and standards
14. Nuclear laws and regulations
15. Transport and electronic communications

A detailed description of the commitments of the EU and its Member States, and of Tajikistan is given in further articles. For example, article 45 of the PCA pertains to Public procurement. It reads:

Article 45: Public procurement

The Parties shall cooperate to develop conditions for open and competitive award of contracts for goods and services, in particular through calls for tenders.

Article 46 pertains to standardisation. It reads:

Article 46: Cooperation in the field of standards and conformity assessments

1. Cooperation between the Parties shall promote alignment with internationally agreed criteria, principles and guidelines in the field of metrology, stan-

dards and conformity assessment, to facilitate progress towards mutual recognition in the field of conformity assessment, and to improve the quality of Tajik products.

2. To this end the Parties shall seek to cooperate in technical assistance projects which will:

- Promote appropriate cooperation with organisations and institutions specialised in the fields;
- Promote the use of Community technical regulations and the application of European standards and conformity assessment procedures;
- Permit the sharing of experience and technical information in the field of quality management.

Annex 2

International agreements to be signed by the Republic of Tajikistan according to Article 39 and Annex IV of the PCA

Chapter VI

Intellectual, Industrial And Commercial Property Protection

Article 39

- (2) Pursuant to the provisions of this Article and of Annex IV, the Republic of Tajikistan shall continue to improve the protection of intellectual, industrial and commercial property rights in order to provide, by the end of the fifth year after the entry into force of this Agreement, a level of protection similar to that existing in the Community, including effective means of enforcing such rights.
- (3) By the end of the fifth year after entry into force of this Agreement, the Republic of Tajikistan shall accede to the multilateral conventions on intellectual, industrial and commercial property rights referred to in paragraph 1 of Annex IV to which Member States are parties or which are de facto applied by Member States, according to the relevant provisions contained in these conventions. For implementation of this provision, the Community will provide support wherever possible.

Annex IV

Intellectual, Industrial and Commercial Property Conventions referred to in Article 39

.....

- (4) Article 39(2) concerns the following multilateral conventions:
- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 1961);
 - Protocol relating to the Madrid Agreement concerning the International Registration of Marks (Madrid, 1989);
 - International Convention for the Protection of New Varieties of Plants (UPOV) (Geneva Act, 1991).

.....

Annex 3

Commitment to seek comment on draft national normative acts

The two conditions

Seeking comments on draft national normative acts means that there is a commitment of the Country and that the draft normative acts are translated into one of the languages commonly used by experts (*ie* English).

China had to accept such conditions in its Accession Protocol to the WTO (WT/L/432 dated 10 November 2001).

The Chinese exception

China has undertaken a general obligation to seek comment on a broad range of normative acts. Specifically, the WTO Accession Protocol requires China to provide a reasonable period of comment to the appropriate activities on all normative acts pertaining to or affecting trade in goods, services, TRIPS, or the control of foreign exchange before their implantation except where their enforcement might be impeded. Since comments to be sought are not expressly limited to those of WTO Members, any private person or entity is also entitled to provide input. However, only experts belonging to the limited circle of the interested parties are able to comment on draft national normative acts.

In the WTO accession protocol, China committed itself to translate all national normative acts and other measures pertaining to trade into at least one official language of the WTO (English, French, and Spanish) and to make such translations available to WTO Members. This commitment seems to be extremely burdensome to accomplish. It is unlikely to be undertaken for draft normative acts.

International commitments

Treaties signed with the European Union and/or its Member States do not provide with a commitment to seek comment on draft national normative acts.

However, Directive 98/34/EC is laying down a procedure for the provision of information in the field of technical standards and regulations, and Directive 98/48/EC is laying down a procedure for the provision of information in the field of technical standards and regulations.

A WTO Member does not have a general commitment to seek public comment on all of its draft national normative acts. Under existing WTO rules, only in certain specifically defined circumstances is a WTO Member obliged to solicit comments from other Members and from interested parties on its draft national normative acts (Please refer to TBT Agreement –Technical Barriers to Trade Agreement).

Annex 4

English-French glossary pertaining to legal approximation

This glossary of key terms in legal approximation was developed to reduce the terminological confusion frequently encountered in this areas. Over the years, definitions evolved in such a way that they were bristled with *faux amis*, ambivalence and ambiguity. It had become necessary to clarify and refine the language employed and to give a common basis. Albeit, terminology will continue to evolve alongside changing practices, this glossary is a „state-of-the-art“ of key terms used today.

English	French
Adaptation	Adaptation
Approximation	Approximation
Benchmarking	Étalonnage
Brief	Lettre de cadrage
Commitment	Obligation
Common position	Position commune
Common strategy	Stratégie commune
Compatibility	Compatibilité
Compliance	Conformité
Concordance table	Table de concordance
Co-ordinator	Organisme de coordination
Decision (ruling)	Décision
Decision	Décision
Decision on the merits of the case	Décision sur le fond
Directive	Directive
<i>Ex post</i> evaluation	Evaluation postérieure
Framework decision	Décision-cadre
General guideline	Orientation générale
Harmonisation	Harmonisation
Implementation	Insertion dans le système légal
Interested parties	Milieux intéressés
Interlocutory decision	Décision avant dire droit

Joint action	Action commune
Legal certainty	Sécurité juridique
Monitoring	Suivi
Normative act	Texte normatif
Omnibus law	Loi « fourre-tout »
Opinion	Avis
Ownership taking	Nationalisation (réception)
Policy paper	Document d'orientation
Principle	Principe
Provision shopping	Meccano législatif
Reception (of law)	Réception (d'une loi)
Regulation	Règlement
Relevance	Pertinence
Revamping	Mise à niveau par amendements
Self-assessment	Auto-évaluation
Standard practice	Pratique constatée
Submitting body	Organisme chargé de la rédaction
Substantial deviation	Déviatiion substantielle
Technical assistance	Assistance technique
Template filling	Introduction de dispositions dans un plan
Terms of reference	Cahier des charges
Terminological deviation	Déviatiion terminologique
Third party assessment	Evaluation externe
Transposition	Transposition

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List of Acronyms

IS	Confederation of Independent States
EC	European Communities
ENP	European Neighbourhood Policy
EU	European Union
PCA	Partnership and Co-operation Agreement
SAA	Stabilisation and Association Agreement
TBT	Technical Barriers to Trade Agreement
TRIPS	Trade-Related Aspects of Intellectual Property Rights
USSR	Union of the Soviet Socialist Republics
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation (treaty)

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The Authors

Both authors are assisting Governments for upgrading and approximating their national laws in the framework of technical assistance missions organized by the European Union, the UNIDO, the UNDP, and the Asian Development Bank.

The Paper

This paper aims at assisting lawyers – drafters – civil servants working directly on the preparation of national normative acts approximated to foreign normative acts, and official responsible for planning and implementing legislative activity of a Country.

A simple methodology for approximating national normative acts to the relevant European normative act is presented.

60 pages, 10 figures, 2 tables, 4 Annexes, and usual tables

This paper helps you in performing your task.

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