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State Chancellery
of the Republic of Moldova
Centre for Legal Approximation

Vladimir Međak
Primož Vehar

HANDBOOK
ON THE LEGAL APPROXIMATION AS A KEY ELEMENT FOR THE SUCCESSFUL INTEGRATION PROCESS OF THE REPUBLIC OF MOLDOVA IN THE EUROPEAN UNION

Editura ARC

Chisinau, November 2022

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Acknowledgements

This Handbook represents a joint effort by the team of international and local experts of the TA project "Support for structured policy dialogue, coordination of the implementation of the Association Agreement and enhancement of the legal approximation process for the Republic of Moldova" (EuropeAid/139112/DH/SER/MD). The key role in drafting belongs to Vladimir Međak, a Non-key Expert; and Primož Vehar, the Team Leader and the Project Key Expert. Valuable professional inputs were provided by the following team members: Ilmars Solims, Project Key Expert, and Rodica Secrieru, Aljoša Race and Krisztián Kovács, all Non-Key Experts.

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The Handbook was developed on the basis of the experience of the authors, as well as similar Handbooks developed for other countries (Armenia, Ukraine), in particular those handbooks whose author or co-author was Mr Primož Vehar, namely: "Methodology for law Approximation in the Republic of Moldova" (Chisinau, 2010); "Handbook for Approximation of the Legislation of Bosnia and Herzegovina with the EU acquis" (Sarajevo, 2012); "Practical guide for legal transposition of the legislation of Republic of Kosovo with the legislation of the European Union" (Pristina, 2014); and "Steps to Transposition: Guide for Development of National Legislation Aligned of the Republic of Serbia with the EU acquis" (Belgrade 2016).

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Acronyms

AA	Association Agreement
Acquis/EU Acquis	Acquis/EU Acquis – EU legislation in force
CLA	Centre for Legal Approximation
CFSP	Common Foreign and Security Policy
CSOs	Civil Society Organisations
DAMEP	Department for policy analysis, monitoring and evaluation
DFCTA	Deep and Comprehensive Free Trade Area
ECAA	The European Common Aviation Area
EC	the European Commission
ECJ	The European Court of Justice
ECT	The Energy Community Treaty
EEC	The European Economic Community
EnC	The Energy Community
EU	the European Union
EURATOM	The European Atomic Energy Community
GCEI	Governmental Commission for European Integration
GD	Government Decision
IMF	International Monetary Fund
JHA	Justice and Home Affairs
MFA	Macro-financial assistance
MFAEI	Ministry of Foreign Affairs and European Integrations
Moldova	Republic of Moldova
MP	Member of the Parliament
NAPIAA	National Action Plan on the Implementation of the Moldova-European Union Association Agreement
NPAA	National Program for the Adoption of the Acquis
PAR	Public administration reform
RIA	Regulatory Impact Assessment
RoP	Rules of Procedure
SC	State Chancellery
SEA	The Single European Act
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
ToC	Table of Concordance

Foreword

The EU integration process is of particular importance for the Republic of Moldova, and represents a key component of the country's development strategy. On 23 June 2022, the European Council granted EU candidate status to the Republic of Moldova. But our country's interest and intention regarding our forthcoming accession to the European Union is not just a political and economic matter, it is first and foremost a legal issue.

On the meeting held in Copenhagen in 1993, the European Council adopted conclusion which formulated the accession criteria. One of those criteria is a country's capacity to effectively implement the EU acquis. This accession condition is not open to negotiation, which means that the national legislation must be approximated to the EU legislation before Moldova is permitted to become a Member State. The legal approximation effort will be the largest and most comprehensive task in the accession process. Prior to accession, the Republic of Moldova, like any other country interested in acceding to the EU, must have brought its entire body of legislation into line with EU law. This process implies the use of methods and techniques for transposing EU legislation into Moldova's national legislation and applying implementation systems and procedures which will be manifested in the achievement of individual rights or fulfilment of commitments, within agreed timeframes.

The legal approximation process also requires professional and knowledgeable human resources and well-established institutions. By adopting the Law No. 100/2017 on Normative Acts and the Regulation on harmonisation of the legislation of the Republic of Moldova with the EU legislation, approved by Government Decision No. 1171/2018, the Republic of Moldova determined responsibilities of institutions and the procedure for approximation of legislation. These measures established the entities and legal approximation processes which – having ensured their mutual consistency – will bring Moldova's national legislation into line with EU law.

Drafting laws is a real challenge. Introducing the EU's legal acts into Moldova's national legislation represents an even greater challenge. Prior to drafting a law, a proper planning policy needs to be in place. After the drafting of a given law, the next important step will be its implementation and enforcement. Therefore, developing a draft law is just one component of the legal approximation process. This Handbook will accordingly provide Moldova's legal drafters, who are already familiar with the domestic legal system, with basic information and knowledge about how the EU and its legal system are organised and operated, as well as the key elements and legal approximation techniques.

This Handbook has been produced with the joint input respectively of the Centre for Legal Approximation and the EU-funded Project titled "Support for structured policy dialogue, coordination of the implementation of the Association Agreement and enhancement of the legal approximation process". We would like to thank both these entities for their support towards the development of a methodological and procedural framework for the legal approximation process.

This Handbook deals step-by-step with the aforementioned process, and explains the approximation terms, required procedures, deadlines, principles, approximation methods and levels, the national priorities and legislation regarding approximation, identifying proper EU legal act, analysing the national legislation, choosing the appropriate type of domestic legal act for transposition purposes, developing each normative act and legal transposition, as well as matters relating to the development of the Table of Concordance and the Declaration of Compatibility, etc.

Our country was already involved in this process before the Association Agreement with the EU had been concluded. Once the Association Agreement was signed, the process became even more

important. Meanwhile, the accession negotiations will inevitably pose a great challenge for the public administration, especially in terms of the restructuring of institutions. The Government will have the task of managing the 35 negotiation chapters of the EU acquis. Tens of thousands of pages of acquis will be transposed into the national legislation, with several hundred civil servants applying a Europeanization process to Moldova's legal and institutional framework and engaging in coherent and coordinated communication with the EU's institutions and services. The systemic application of this process is aimed not only at constructing a legal framework that complies and aligns with the EU's requirements, but also at ensuring the administrative, jurisdictional and other capacities which will be needed for the effective implementation and enforcement of that legal framework. Therefore, comprehensive consultations and trainings are required at the level of the public authorities to enable them to lead and implement the accession process at different levels and stages. Any significant results in the area of legal approximation will speed up the EU integration process, as the progress towards accession will be significantly dependent on the progress made in the approximation process.

The Team of the Centre for Legal Approximation

Preface

It was back in 2010, while the Partnership and Cooperation Agreement with the EU was still in force, that the first Methodology for legal approximation was compiled in the Republic of Moldova. It was the product of a joint effort by an EU-funded project and the Centre of Legal Approximation, which was then situated within the Ministry of Justice. Using the content of this publication, a set of extensive trainings was implemented for the staff of all line ministries. Depending on which government was in office, in subsequent years Moldova was to a greater or lesser extent striving to catch up with the Western Balkan countries. Those countries were a step ahead in this process, due to a set of Stabilisation and Association Agreements which had been signed earlier.

Now, twelve years later, the situation has completely changed. The Republic of Moldova is not only a country associated to the EU through the Association Agreement, which is in force already for six years, but it has been also given a very clear EU integration perspective and reached the status of a candidate country for EU membership in June 2022.

Despite some implementational delays in connection with legal approximation, the Association Agreement remains the key contractual basis of Moldova's relationship with the European Union, and it will stay in force until the Treaty of Accession of the Republic of Moldova to the EU is ratified by all the parties involved.

Moldova took a further forward step during this process when it set up an internal EU integration coordination mechanism in November 2022. The proposed mechanism clearly follows the forthcoming negotiation structure, including a set of newly established working groups, and sends a clear signal that Moldova intends to be ready on time for the start of the accession

negotiations. The setting-up of these working groups represents a new approach towards the organisation of the legal approximation process, because Moldova's readiness to start accession negotiations will be assessed not merely on the fulfilment of very demanding political and economic criteria, but principally on the recognition of consistent progress towards legal approximation. This process of approximation will cover not only the EU legislation defined by the Association Agreement, as has been the case so far, but EU legislation in its entirety.

However, the legal approximation process is not dependent solely on legal drafting capacities and the adoption of harmonised legislation, but relies equally on proper implementation and subsequent enforcement. This requires appropriate internal organisation in the Government and improved policymaking and planning skills.

In order to encourage the legal approximation efforts, we have drafted this tailor-made and practically oriented Handbook in close cooperation with, and support from, the experts of the Centre for Legal Approximation. Their support was also essential during the legal revision of the Romanian edition of this Handbook.

With this Handbook we have tried to provide an additional tool to help Moldova's civil servants – especially its legal drafters – to achieve the transposition of the EU's legislation into the Moldovan legal set-up in the coming years. We are fully aware that this is going to be a very demanding process, because those involved will have to be familiar both with the national legal system and the EU's legal provisions, not to mention the national legal drafting techniques.

While we have tried to be as practically oriented as possible in the Handbook, we have also briefly touched on the theory and basic information relating to the EU's legal system, the sources of EU law, and the types of EU legal acts. We have also covered the

origin of Moldova's obligation to approximate its legislation to the EU acquis. We subsequently focused on the actual process of the approximation of legislation, explaining all its stages, the levels of approximation and various achievement methods, including practical tips and examples of what to do and what to avoid. We have covered the process of legal approximation in Moldova with the aid of practical tips and examples of what can be done in different situations. We have also provided basic information about the forthcoming steps in the accession negotiations. The final chapter is devoted to the role of national parliaments in the EU accession process.

Both of us have been deeply involved in the legal approximation process in our own respective countries, and we therefore well understand how much such a Handbook is needed, especially as regards relevant practical examples for legal drafters. Meanwhile, no Handbook can take the place of properly educated, well-trained, well-motivated and adequately renumerated civil servants. Knowing the hard work ahead of you, we hope that our Handbook will help you to easily navigate and successfully find your way through this process.

Vladimir Međak *Primož Vehar*

PART I

THEORY AND HISTORY

CHAPTER 1. The EU law (EU pillars, transformation from Acquis Communautaire to EU law / the Treaty of Lisbon)

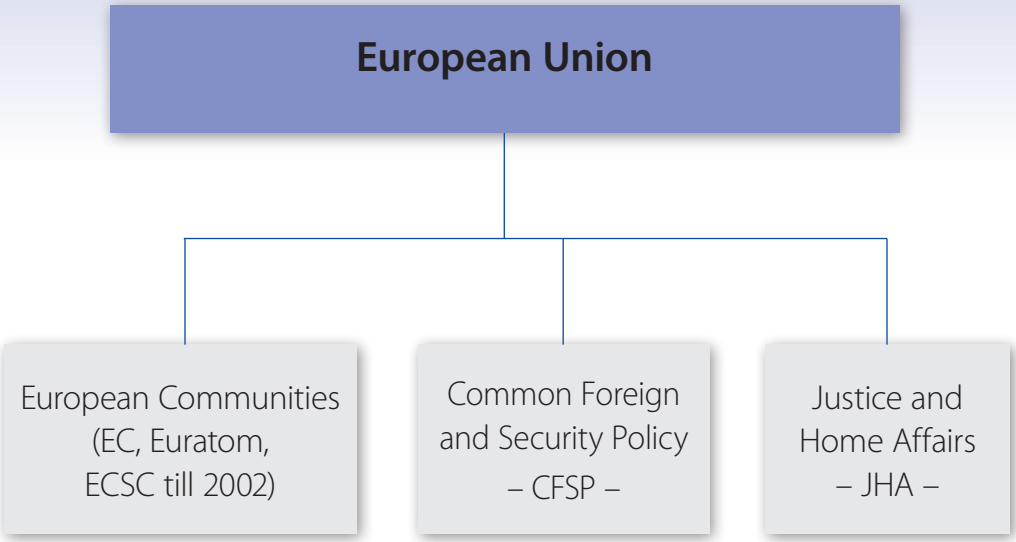
1.1 The EU Law

The origin of the European Union goes back to the 1950s, when the three original European Communities were created (the European Coal and Steel Community – ECSC (1951), the European Atomic Energy Community – Euratom (1957), and the European Economic Community – EEC (1957). The legislation which was created within the framework of the European Communities has long been defined as "**the law of the European Communities**" or the "*Acquis Communautaire*".

The European Union was created with the coming into force of the Treaty on the European Union (TEU) on 1 November 1993. The treaty was signed in Maastricht, Netherlands on 7 February 1992. The Maastricht Treaty created the EU on a foundation comprising **three pillars**, with the three European Communities being the **first pillar**, the Common Foreign and Security Policy (CFSP) being the **second pillar,** and Justice and Home Affairs (JHA) being the **third pillar** (the 1999 Treaty of Amsterdam renamed this to Police and Judicial Cooperation in Criminal Matters); in this schema, the EU was **the roof** that rested on these pillars.

With this Treaty the previous European Economic Community (EEC) was renamed as the European Community (EC). The EU did not gain a legal personality with these treaties. Each of the European Communities was a legal entity with a legal personality that performed all the activities for the EU where a legal personality was required. For example, Association Agreements with third countries were signed by the European Community, the European Energy Community, and their Member States, on behalf of the EU. The Association Agreement signed by the Republic of Moldova in 2014 was signed by the European Union and the European Atomic Energy Community and their Member States, as one party to the Agreement.

Graphic No. 1: *The three pillars as established by the Treaties in the 1990s*



Subsequent amendments to the Treaty on the EU concluded in Amsterdam (known as the "Treaty of Amsterdam", which entered into force in 1999) and in Nice (known as the "Treaty of Nice", which entered into force in 2003) did not change this three-pillar structure. The European Coal and Steel Community ceased to exist in 2002 due to the ending of the 50-year period for which it was established by the founding treaty; this was signed in 1951 and entered into force in 1952. All obligations and rights were transferred to the European Community. Thus only two European Communities remained.

In this period (1993-2009), it was habitual to make a distinction between the "EU law" encompassing all acts adopted by the EU, regardless of the pillar within which it was adopted; and the law of the European communities, or the "*acquis communautaire*". This covered acts adopted only within the first pillar of the EU, the so-called "Communities" pillar. It should be noted that before 2009, the EU's legal structures differed across the pillars, with significant differences existing between the Community pillar and the inter-governmental second and third pillars. The differences covered both the types of acts adopted, their legal nature, the competences for adoption of the acts among the various EU bodies, and the procedures of adoption and jurisdiction of the European Court of Justice (ECJ). The qualified majority voting in the Council, the strong competences of the Commission, the jurisdiction of the ECJ, and the adoption of regulations and directives as the main elements of what was known as the "Community way" or

the "**supranational model**" of decision making, were restricted to the first pillar of the EU. The second and third pillars remained a model of **intergovernmental cooperation** among the Member States, where unanimity was required and where the EU functioned like most international organisations.

With the entry into force on 1 December 2009 of amendments to the **Treaty on EU** (TEU) signed[1] in Lisbon, the architecture of the EU was reconfigured, and the three-pillar structure was abandoned. The Treaty on the European Community was renamed to the **Treaty on Functioning of the European Union** (TFEU), whereby the European Community transferred its legal personality to the EU and thus ceased to exist. The EU became a legal entity. Today we have the European Union as one legal entity and the European Atomic Energy Community (EURATOM) as a separate legal entity. The "community method" – namely the competences of the EU and the principles and manner of generating legislation within the former first pillar – was fully extended to the acts adopted with the framework of the former third pillar (JHA). The former second pillar (CFSP) retained its prior intergovernmental decision-making method and the types of acts adopted, with no judicial review from the European Court of Justice over the acts adopted under this policy.

However, after 1 December 2009, we are talking only about the "EU law" or the "EU acquis", and no longer about the *acquis communautaire*. Nevertheless, legal acts adopted prior to 1 December 2009 remain in force until they are repealed, annulled or amended. The law pertaining to EURATOM still exists, but it falls outside the definition of "EU law" and is therefore beyond the scope of this Handbook.

In addition to knowing about the evolution of the EU law and avoiding possible confusion, it is important for legal drafters to understand that the labelling of EU legislation changed as a result of this evolution. Acts adopted prior to 1 November 1993 bear the label "EEC"[2] (for the European Economic Community); between 1 November 1993 until 1 December 2009 they bear the label "EC"[3] (for the European Community), and after 1 December 2009 they carry the label "EU"[4] (for the European Union).

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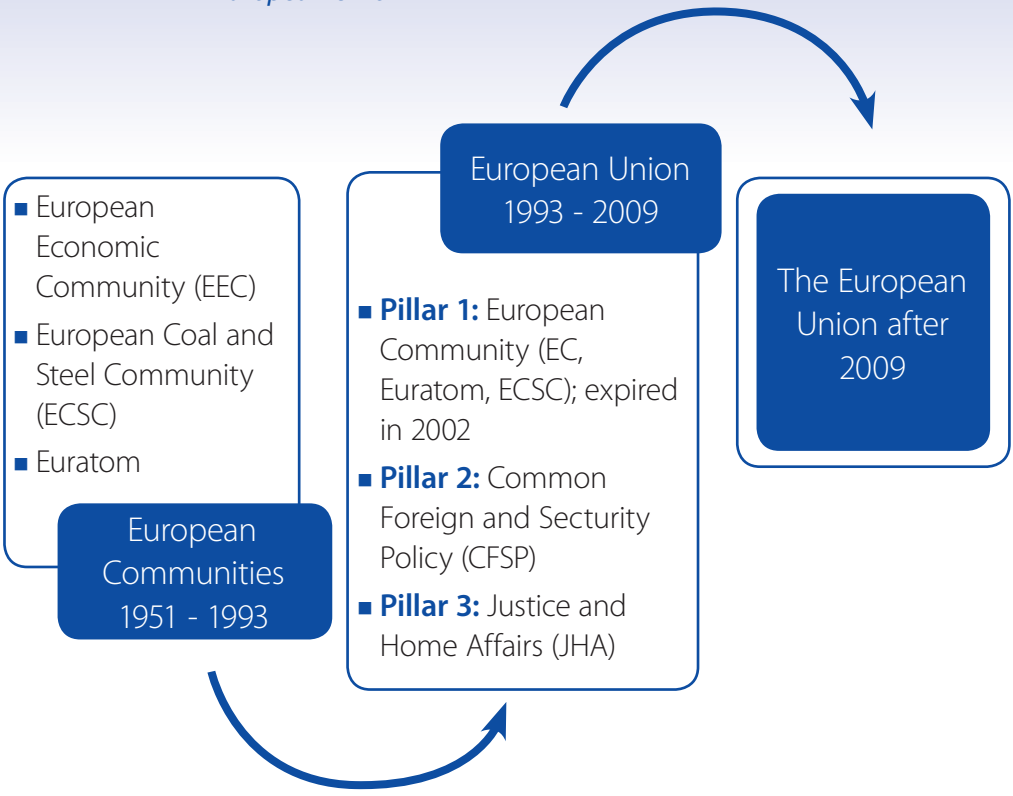
[1] Treaty was signed in Lisbon in December 2007.

[2] Regulation (EEC, Euratom) No 1182/71/EEC of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits.

[3] Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (Codified version), repealing the previous Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings.

[4] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

Graphic No. 2: *The transformation from the European Communities into the European Union*



Like any other international organisation, the EU operates under the set of rules defined and established by its founding entities – in this instance, by the countries that founded the EU. Therefore the EU is founded on the basis of an international treaty(ies) via which its bodies adopted certain decisions and thereby created the body of EU law.

1.2 Sources of the EU law

The EU acquis is the body of common rights and obligations that is binding on all the EU Member States. It is constantly evolving and comprises:

- the content, principles and political objectives of the Treaties;
- legislation adopted pursuant to the Treaties and the case law of the Court of Justice;
- declarations and resolutions adopted by the Union;
- instruments under the Common Foreign and Security Policy;

– international agreements concluded by the Union, plus those entered into by the Member States among themselves within the sphere of the Union's activities.[5]

Applicant countries are required to accept the acquis before they can join the EU. Derogations from the acquis can be negotiated and granted during accession negotiations, but only in exceptional circumstances. They are also limited in time and scope. Each applicant country must incorporate the acquis into its national legal set-up by the date of their accession to the EU, and is obliged to apply it from that date.

The EU law (or EU acquis) consists of the accumulated legislation which makes up the legal system of the EU. This legislation stems from several sources, namely:

- EU primary legislation;
- EU secondary legislation, namely any act adopted by EU bodies in exercising their competences (Regulations, Directives, Decisions, other acts adopted by EU bodies);
- International treaties concluded by the EU; and
- Principles of the EU law.

1.2.1 Primary legislation

Primary legislation represents the constitutional basis of the European Union and has the supreme position in the hierarchy of norms in the EU legal system. It is equivalent to the constitution of a country. It defines the essential elements of existence of the EU, namely its organisation, membership, functioning, competences, institutional set-up, the internal relations within the organisation, and all the other issues relevant for achieving the goals that the organisation was established to fulfil.

The EU's primary legislation is developed by the Member States of the EU through international agreements. Since the foundation of European communities in the 1950s, numerous changes to the founding treaties have been made. Since 1 December 2009 and the entry into force of the Lisbon Treaty, the founding treaties of the EU are:

the **Treaty on European Union (TEU)**, and	the **Treaty on Functioning of the European Union (TFEU)**

[5] https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/acquis_en

The actual Treaty on EU prescribes (in its article 1) that:

> "*The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as "the Treaties"). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.*"

The Treaty on European Union (TEU) is a relatively short legal act (containing just 55 articles), and comprises a sort of mini-Constitution for the European Union. It sets out the values and aims of the EU, including Article 4 (3), which lays down a foundational principle for the EU legal order, namely **the principle of loyal co-operation**. It stipulates that Member States shall take all appropriate measures to ensure the fulfilment of obligations stemming from EU law; they shall facilitate achievement of EU tasks, and refrain from taking measures that could jeopardize those.[6]

The Treaty on the Functioning of the European Union (TFEU) is the legal foundation for the day-to-day work of the EU. It has 358 Articles, contains detailed rules regarding the institutional set-up of the EU, and comprises dozens of provisions that constitute the legal bases for the adoption of EU secondary legislation. These provisions determine the scope of competence, and they identify the institutions empowered to act and the decision-making procedures that should be followed by the EU institutions.[7]

Apart from these treaties, the primary legislation comprises the treaties of accession of new Member States, including the latest UK-EU Withdrawal Agreement signed in 2019, representing the first example of a country leaving the EU.

Primary legislation also covers the treaties and agreements signed by the Member States in relation to the areas covered by the competences of the EU (such as the Schengen Agreement signed in 1985 and amended in 1990), which today form an integral part of the EU law in the form of Protocol 19 of the TFEU.

All the secondary legislation adopted by the EU institutions, including all international agreements signed by the EU with third parties (such as the Association Agreement between EU and its Member States on the one hand, and the Republic of Moldova on the other), must be in line with the primary legislation.

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[6] CEPA Legal Approximation Handbook, Armenia, 2019, page 6/7

[7] *Ibidem*, page 7/8

Below, we present the list of treaties that represented the primary legislation of the EU in different periods of its history:

- the Treaty of Paris, establishing the European Coal and Steel Community (ECSC) (1951-2002);[8]
- the Treaty of Rome, establishing the European Economic Community (EEC, 1957 - 2009);[9]
- the Treaty establishing the European Atomic Energy Community (EURATOM, 1957, still in force);[10]
- the Merger Treaty (1965);[11]
- the Acts of Accession of the United Kingdom, Ireland and Denmark (1972);
- the Budgetary Treaty (1970);
- the Acts of Accession of Greece (1979), Spain and Portugal (1985);
- the Single European Act (SEA, 1986);[12]
- the Treaty of Maastricht, establishing the European Union (EU, 1992);[13]
- the Acts of Accession of Austria, Sweden and Finland (1994);
- the Treaty of Amsterdam (1997);[14]
- the Treaty of Nice (2001);[15]
- the Treaty of Accession of 10 new Member States (2003);
- the Treaty of Accession of Bulgaria and Romania (2005);
- the Treaty of Lisbon (2009), which is currently in force;[16]

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[8] The Treaty establishing the European Coal and Steel Community (ECSC) was signed on 18 April 1951 in Paris, entered into force on 23 July 1952, and expired on 23 July 2002.

[9] The Treaty establishing the European Economic Community (EEC) was signed in Rome on 25 March 1957 and entered into force on 1 January 1958.

[10] The Treaty establishing the European Atomic Energy Community (EURATOM) was signed at the same time as the EEC Treaty, and they are therefore jointly known as the Treaties of Rome.

[11] The Treaty was signed in Brussels on 8 April 1965 and has been in force since 1 July 1967. It provided for a Single Commission and a Single Council for what then were three European Communities.

[12] The Single European Act (SEA) was signed in Luxembourg and the Hague, and entered into force on 1 July 1987. It provided for the adaptations required for achieving the Internal Market.

[13] The Treaty was signed in Maastricht on 7 February 1992 and entered into force on 1 November 1993. The Maastricht Treaty simplified the name of the European Economic Community to "the European Community". It also introduced new forms of co-operation between the Member State governments – for example on foreig policy and defence, and in the area of justice and home affairs. By adding this inter-governmental co-operation to the existing "Community" system, the Treaty of Maastricht created a new structure with three "pillars" which is political as well as economic.

[14] The Treaty was signed on 2 October 1997 and entered into force on 1 May 1999. It amended and renumbered the EU and EC Treaties. Consolidated versions of the EU and EC Treaties are attached to it. The Treaty of Amsterdam changed the articles of the Treaty on the European Union, which had been identified by the letters A to S, into numerical form.

[15] The Treaty was signed on 26 February 2001 and entered into force on 1 February 2003. It dealt mostly with the reform of institutions so that the Union could function efficiently following its enlargement to 25 Member States.

[16] The Treaty was signed on 13 December 2007 and entered into force on 1 December 2009.

- the Treaty of Accession of Croatia (2011);[17]
- the UK-EU Withdrawal agreement ("The Brexit Treaty") (2019).[18]

It should be noted that Article 1 of the TEU states that subsequent founding treaties void any previous treaties. Treaties of accession stay in force for as long as the corresponding country remains a member of the EU and the treaties are being implemented in line with their final and transitional provisions.

In an associated country like Moldova, primary legislation is usually important as a guideline for the approximation process because it defines the aim of the EU policy that needs to be achieved by the associated country. In some cases, primary legislation represents a direct source of rules that need to be transposed into national legislation, as is the case with the rules regarding competition and state aid (Article 101-109, TFEU). However, this is not a regular occurrence.

Charter of Fundamental Rights of the European Union

Following the entry into force of the Lisbon Treaty on 1 December 2009, the same value was also given to the Charter of Fundamental Rights. The charter is legally binding. In accordance with Article 6 of TEU: "*The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the EU of 7 December 2000, as adapted at Strasbourg, on 12 December 2007,* ***which shall have the same legal value as the EU treaties***." It applies to the EU institutions in all their actions, and to the EU countries when they are implementing EU law. It does not extend the competences of the EU beyond those already granted in the treaties. Broader than the European Convention on Human Rights, it establishes principles and rights for EU citizens and residents in the EU that relate to dignity, liberty, equality, solidarity, citizenship and justice. In addition, in order to protect civil and political rights, it covers workers' social rights, data protection, bioethics and the right to good administration. In terms of legal approximation, the Charter has an important role in relation to fundamental rights during the process of interpreting secondary EU law.

1.2.2 Secondary legislation (binding, non-binding)

Secondary legislation consists of the legal acts adopted by EU institutions in the process of executing their tasks and powers, plus the conventions and international agreements signed by the EU and third parties and international organisations.

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[17] The Treaty signed in 2011 and entered into force on 1 July 2013, when Croatia became the 28th EU Member State.

[18] This entered into force on 1 February 2020, having been agreed on 17 October 2019.

The majority of EU legal acts that need to be transposed during the process of approximation consist of secondary legislation. The choice of the legal instrument used by the EU to regulate a specific area or individual issue is determined by reference to the correct article of the founding treaty forming the legal basis for the EU action. Where the Treaties do not specify the type of act to be adopted, the institutions must select it on a case-by-case basis while complying with the applicable procedures and the principle of proportionality (Article 296, TFEU).

The types and legal nature of the EU legal acts is defined by Article 288 of the TFEU:

> *To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.*
>
> *A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*
>
> *A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.*
>
> *A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.*
>
> *Recommendations and opinions shall have no binding force.*

It must be pointed out that there is no formal hierarchy in relation to these acts. Regulations are not in any sense "superior" to directives, and vice versa. Regulations, directives, and decisions are often interconnected during the development of EU policy in a given area. They are all instruments that have been given to the EU institutions for better achieving the specified goal of the EU policy. Their use depends on the goal: if the EU is aiming at the unification of legislation in all the Member States, it will use a regulation; if it is aiming to approximate the legal systems of its Member States, it will use a directive.

These acts can be subdivided into *binding* and *non-binding*.

Regulations, directives and decisions are binding, and decisions and recommendations are non-binding.

Article 288 is very clear in specifying that regulations, directives and decisions are binding and who is bound by them. The non-binding character of non-binding acts should not be misinterpreted as meaning that they are unimportant or irrelevant. This is discussed in more detail below.

The Treaty of Lisbon introduced a new feature of these acts. The same type of act (regulation or directive) can be legislative in nature, but it can also be delegated, and it can be an implementing act.

Legislative acts are standard acts of a type adopted by EU bodies since the establishment of the European communities. They establish rules, confer certain rights, and impose certain obligations. These are the standard EU acts adopted either during the **ordinary** legislative procedure, involving the Council and the Parliament in the adoption of the act; or during the **special** legislative procedure, involving the Council in the adoption of the act with the participation of the Parliament (a procedure in which the Parliament issues its consent or is consulted), or by the latter with the participation of the Council (Art. 289 & 294, TFEU). They are labelled in the usual way.

The Treaty of Lisbon (Article 290) introduces the possibility that a legislative act (adopted through the legislative procedure) may **delegate** to the Commission the power to adopt non-legislative acts of general application, to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope, and duration of the delegation of power must be explicitly defined in the legislative acts. The essential elements of an area must be reserved for the legislative act, and accordingly cannot be the subject of a delegation of power. Legislative acts must explicitly lay down the conditions to which the delegation is subject. A delegated act must include the adjective "delegated" in its title.

The Treaty of Lisbon (Article 291) also introduces the possibility of having an **implementing** act adopted at the EU level. Where uniform conditions for implementing legally binding Union acts are needed, those acts will confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 (i.e. in relation to the CFSP) of the Treaty on European Union, on the Council. The word "implementing" must be included in the title of an implementing act.

It is important to understand that regulations and directives can be legislative, delegated or implementing in type. The latter two types will be explicitly labelled as delegated or implementing. If there is no label, the act is legislative.

These acts are relevant for the approximation efforts of the Republic of Moldova, irrespective of their purpose within the EU legal set-up. Combined, they create the body of EU law in a given area, and as such are subject to transposition in line with the obligations arising from the Association Agreement.

1.2.2.1 Regulations[19]

Regulations are EU acts that ensure the uniformity of solutions throughout the EU regarding a specific point of law. They apply *erga omnes* (i.e. in relation to everyone) and simultaneously in all Member States.

According to Article 288 of TFEU, a regulation has general application. It is binding in its entirety and is directly applicable in all Member States.

Regulations are addressed to all Member States. In order to prevent the enactment of adverse national legislation, the Member States are not entitled to apply a regulation only partially, or to apply only some of its provisions. Member States are also not entitled to introduce provisions and practices in the national law which would make it impossible to apply the regulation. Unlike the directive (see below), the regulation is an instrument used to unify certain legal provisions across the entirety of the EU.

Member States are not entitled to transpose EU regulations into their national legal set-up as if they were international agreements (there is no "ratification" of a regulation). The European Court of Justice explicitly prohibits the transposition of the provisions of regulations unless the authorisation to transpose is explicitly provided in the relevant Regulation or the ECJ's case law. It explicitly prohibits such so-called "concealment" of the EU nature of an EU rule from those who are subject to it.[20]

As we have seen, it is forbidden for EU Member States to transpose regulations. However, for an associated country like Moldova the authorities need to ensure that the requirements of the EU law (including regulations) are properly implemented. Therefore the approximation of regulations is a necessity for Moldova.

Countries acceding to the EU must abolish national legal acts which transpose regulations upon acceding to the European Union; but those parts which refer to penalties, institutions and implementing measures will remain. Associated countries should therefore keep a record of their transposition of regulations. This will enable them to easily abolish the provisions of those regulations upon acceding to the EU. This is one of the purposes of generating tables of concordances with the EU acquis.

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[19] J.-C. Piri, The Lisbon Treaty: A Legal and Political Analysis (Cambridge Studies in European Law and Policy), Cambridge University Press, 2010.
[20] Case 34/73 *Variola v Amministrazione delle Finance* [1973] ECR 981].

1.2.2.2 Directives

Article 288 stipulates that a Directive is binding upon each Member State to which it is addressed regarding the result to be achieved, but must leave the choice of form and methods to the national authorities.

A directive has three main identifying characteristics.

In the first place, it is a binding legal act, prescribing what needs to be done and the deadline for completing it, but leaving up to the Member State the choice of the most appropriate way of doing it. This is the main distinction *vis-à-vis* the regulation, which unifies an EU rule for all the Member States. The reason for this is the fact that EU consists of 27 members with different legal set-ups and traditions that cannot be unified. Directives are tools of approximation for different national legal set-ups.

In the second place, directives are not directly applicable in legal systems of Member States. The applicability of a directive requires normative action by a Member State. There is an exception to this: a directive can become directly applicable if a Member State has failed to transpose it in a timely or proper manner and the directive accords rights to natural and legal entities, and is clear enough to be directly applicable. This exception can be used only against a Member State (i.e. it has a vertical direct effect), but not against other natural and legal entities (i.e. it has no horizontal direct effect), since they are in conformity with the existing legal set-up and are not responsible for the failure of the state to transpose a directive.

It should be also underlined that the non-implementation of a directive by a Member State within a prescribed time limit produces the following results:

- it becomes directly applicable when the time limit expires;
- its provisions become directly effective, so an individual may rely on them in proceedings before the national courts as soon as the time limit has expired;
- the Commission may bring an action for breaching EU law against the Member State concerned, under Article 258 of TFEU;
- upon the expiry of the time limit, an individual may sue a defaulting Member State for damages, provided certain conditions are satisfied.

1.2.2.3 Decisions

Article 288 stipulates that a Decision is binding in its entirety. A decision which specifies who it is addressed to will be binding only on them. Decisions may be addressed to the EU Member States, EU institutions, and natural or legal persons which reside or are registered in EU Member States. Decisions that are addressed

to all EU members will essentially strongly resemble a general legislative act, like a directive, and might require Member States to undertake a normative activity. Such decisions will probably be of interest to Moldova's national lawmakers.

Decisions are a tool for enabling EU institutions to implement treaties and regulations, which is possible only if they are in position to make measures binding on individuals, enterprises or Member States.

According to the Court of Justice's case law, decisions may have direct effect and can therefore be invoked by individuals before national courts.

The decision is sometimes used as an instrument for setting out rules for certain of the EU's activities, such as setting up Community programmes[21] or defining rules on interinstitutional issues like comitology.[22]

However, decisions are predominantly used to address a particular issue relating to a specific addressee. This is mostly done – and decisions are identified – with cases conducted by the Commission that concern competition and state aid. In these cases, decisions can be a good resource for understanding the reasoning of the Commission, and can provide pointers for the drafters of national legal acts in those areas regarding how to interpret binding EU acts. Therefore, pivotal decisions of the Commission in the area of competition and state aid must be taken into consideration when drafting national legislation.

1.2.2.4 Recommendations, opinions, and "soft law"

Article 288 stipulates that recommendations and opinions have no binding force.

Even though they are legally not binding, these acts have great value for understanding the future activities of EU bodies. They are highly significant for the interpretation of binding EU acts or national legal acts adopted in order to implement EU acts, because these must all be interpreted in line with the provisions contained in opinions and recommendations[23]. Additionally, national courts must consider recommendations and opinions, particularly when conducting judicial reviews of national measures adopted for the implementation of EU acts.[24] National courts can also refer to the ECJ for a preliminary ruling concerning the validity and interpretation of such a measure.[25]

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[21] Decision No 253/2000/EC of 24 January 2000 of the European Parliament and of the Council establishing the second phase of the Community programme in the field of education titled "SOCRATES"

[22] Paul Craig and Grainne De Burka, EU Law, 5th edition, 2011, page 107

[23] Case C-322/88, *Grimaldi v Fonds des Maladies Professionales*, 1989, ECR 4407

[24] Ibidem, *Grimaldi*

[25] Ibidem, *Grimaldi*

The list of EU acts contained in Article 288 is not a closed list, i.e. it is not a *numerus clausus*. EU bodies adopt other acts within their scope of work which can generate legal effects and be of value for approximation efforts.

Those acts are usually ones that are adopted by bodies when regulating their future activities and explaining how they intend to implement binding EU acts. They are used to further develop the policy that an institution (particularly the Commission) is responsible for, but without legislating. These acts, together with opinions and recommendations, form the body of the EU's so-called "soft law" as a supplement to binding so-called "hard law". These acts also increase the degree of legal certainty and predictability, since bodies that adopt them are bound by them in their future activities, thus creating legitimate expectations for other subjects of EU law.

The Treaties do not contain a definition of the EU's soft law. However, several definitions have been proposed by legal scholars, and the following definition of EU soft law can be recommended:

"*Rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects*."[26]

From the point of view of transposition, these acts are highly important for Moldova's drafters, since they will contain detailed information and explanations of the rationale underpinning actions performed by the EU. They will also provide an insight view of solutions used by the EU that are usually not explained in a binding act. Making use of these acts can improve the transposition efforts.

There is no clear classification of these "soft law" acts. The following classification has been developed on the basis of the practice of EU bodies and the case law of the ECJ:

- **preparatory documents** (*White papers, green papers, etc.)*: these papers are developed as policy documents when a new policy is launched before a final course of action is undertaken and binding rules are adopted. Usually, a white paper contains an initial proposal that is presented for public debate and consultations, while a green paper contain the almost-final version of the policy before it is launched into the interinstitutional decision-making process that will end with the proposal of a binding legal act. Action programmes/plans also fall under this category;

[26] Linda Senden, Modern Studies in European Law, Volume 1: Soft Law in European Community Law, Hart Publishing, 2004., p. 112

- **interpretative instruments and decision-making instruments** (*codes, frameworks, notices, guidelines, etc.)*: a good example of such important acts is the notices and guidelines of the Commission that are adopted for implementing the competition and state aid rules, where the Commission has the strongest role. For example, with these acts the Commission explains how it calculates the fines for breaches of competition[27], how it would calculate both a relevant geographical market and a product market[28], what would be considered a *de minimis*[29] breach of rules that would not be investigated, what the Commission considers to be state aid[30], etc. Even though these acts are not binding, the substance of these acts must be transposed into national legislation for Moldova's competition system to be harmonised with the EU's system;
- **informative instruments**: *information and communiqués*;
- **formal and informal governing documents**: *Council conclusions, Member State declarations, Council recommendations, joint declarations*.

1.2.3 International agreements

According to Article 216 of the TFEU, the EU may conclude agreements with one or more third countries or international organisations where the Treaty so provides, or where the conclusion of such agreements is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaty, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. The agreements concluded by the EU are binding on the institutions of the EU and its Member States.

The EU may conclude agreements with one or more third countries or international organisations that establish an association involving reciprocal rights and obligations, common actions and special procedures. The Association Agreement concluded with Moldova, as well as the previous Partnership and Cooperation Agreement, is a relevant example.

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[27] Commission Notice on immunity from fines and reduction of fines in cartel cases, Official Journal (C 298-2006)

[28] Commission Notice on the definition of relevant market for the purposes of Community competition law (C 372/5-1997)

[29] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), (2014/C 291/01)

[30] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, (C 262-2016)

1.2.4 General principles of EU law (ECJ case law)

The general principles of EU law are defined either through the founding treaties of the EU (e.g. the principles of subsidiarity and proportionality)[31], or are defined through the case law of the European Court of Justice.

Even though there is no *numerus clausus* list of these principles, the following are the most important ones for defining the relationship between the EU law and the legal set-ups of the EU Member States:

1.2.4.1 Supremacy of EU law

The principle that EU law takes precedence over the national law of Member States and is superior to them was defined by the ECJ in the early days of the European Economic Community. It was not stipulated anywhere in the Treaties, and even today the Treaty of Lisbon does not contain such a provision. The failed Treaty on European Constitution did contain such a provision. Most provisions of the Treaty on European Constitution were adopted by the subsequent Treaty of Lisbon, but this particular one was left out. However, the Member States adopted Declaration No. 17, referring to the ECJ's case law as the basis for the supremacy of EU law.

This principle is essential for the functioning and survival of the EU's legal system. It was defined in the case *Flaminio Costa v E.N.E.L*. 6/64.

According to this principle, in cases where national and EU law diverge, the latter applies. The basic rule is that the EU's primary and secondary legislation is deemed to form part of the legal system of each Member State (depending on the legal systems of the states, which may differ due to the various aspects of the monist vs. dualist approach), and must also be applied by their courts and competent authorities. EU law takes precedence if the following conditions are fulfilled:

- a conflict exists between the EU law and a law of the Member State in question;
- the EU legislation has been adopted legitimately and is applicable;
- the Member State has not expressed reservations regarding the particular provisions of the EU law at issue.

In the 1970 case *Internationale Handelsgesellschaft,* the ECJ concluded that not even the fundamental rules of national constitutional law could be invoked to challenge the supremacy of a directly applicable EU law:

> *"The validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights*

[31] Protocol No 2 on the application of the principles of subsidiarity and proportionality

as formulated by the constitution of that State or the principles of a national constitutional structure". [32]

The fact that the Court of Justice has declared a domestic law incompatible with EU law (Case 106/77 *Simmenthal*) does not automatically nullify such laws, but the state has an obligation to change the problematic provisions of the law (Case 10 - 22/97 - *Ministero della Finanza v In. Co.Ge.*). In the meantime, the domestic courts should apply the law in question, i.e. they have a duty to interpret domestic law in accordance with the meaning and spirit of the provisions of the EU law (Case 14/83 *Von Colson*). In the *Simmenthal* case the ECJ also declared that:

> "Those provisions and measures [of the Treaty] not only by their entry into force render automatically inapplicable any conflicting provision of current national law but also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions"

1.2.4.2 Direct effect of EU law

In a broader sense, the principle of direct effect means that provisions of binding EU law which are sufficiently clear, precise and unconditional and are to be considered justiciable, can be invoked and relied on by individuals before national courts. In a narrow sense, direct effect implies that such provisions have the capacity to confer rights on individuals.[33]

In its case law (starting with the case *Van Gend & Loos* in 1963), the ECJ introduced the principle of the direct effect of Community law in the Member States, which now enables European citizens to rely directly on the rules of European Union law before their national courts. The transport company Van Gend & Loos had imported goods from Germany into the Netherlands and had had to pay customs duties which it considered to be incompatible with the rule in the EEC Treaty which prohibited increases in customs duties in trade between Member States. The action raised the question of the conflict between national legislation and the provisions of the EEC Treaty. The Court decided the question referred by a Netherlands court by stating the doctrine of direct effect, thus conferring on the transport company a direct guarantee of its rights under Community law before the national court. This decision established a direct link between the EU and the citizens of the EU,

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[32] C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel,* 1970, ECR 1125

[33] Paul Craig and Grainne De Burka, EU Law, 5th edition, 2011, page 180

making them also the "guardians" of EU Treaties and watchdogs regarding their own country's implementation of EU law.

Article 288 of TFEU states that regulations and decisions have direct effect. Directives can also have direct effect, as in the case described above.

1.2.4.3 Direct applicability of EU law

This principle says that EU provisions that are directly applicable must be applied in a uniform manner in all Member States. It also states that there is no need for a national measure introducing them into the national legal set-ups of Member States, and hence no need for transposition.

The following instruments are directly applicable:

- founding treaties (as defined by the ECJ in the judgement in joint cases 9/65 and 58/65 *San Michele SPA*);
- regulations (in line with Article 288 of TFEU);
- decisions (in line with Article 288 of TFEU);
- international agreements concluded between the EU and third countries and between the EU and international organisations that do not require implementing measures at the level of the EU or Member States.

1.2.4.4 State liability for failure to implement EU legislation

In 1991, in the Case *Francovich and Others*[34], the ECJ developed the principle of a Member State's liability to individuals for damages caused to them by that state as a consequence of its breaching Community law. Since 1991, European citizens have therefore been able to bring an action for damages against a state which infringes a Community rule. Two Italian citizens with outstanding salary claims against their bankrupt employers had brought actions seeking a declaration that Italy had failed to transpose Community provisions protecting employees in the event of their employers' insolvency. Following referral from an Italian court, the ECJ stated that the Directive in question was designed to confer rights on individuals which they had been denied as a result of the failure to act by the State, which had not implemented the Directive. The Court thus opened the possibility of an action for damages against a Member State.

[34] Joint cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy,* (1991), ECR I-5357,

1.3 Competences of the EU and the EU institutions

1.3.1 Competences of the EU

The competences of the EU are defined by Articles 2 to 6 of TFEU. The EU has different legislative powers in different areas (policies). Its competences can be 1) exclusive, 2) shared with Member States, and 3) supportive, coordinative, and supplementing. The TFEU defines the powers of the EU in each area that the EU covers. The Member States confer these competences on the EU.

The European Union has **exclusive competence** in the following areas (**Article 3**):

(a) customs union

(b) the establishing of the competition rules necessary for the functioning of the internal market

(c) monetary policy for those Member States whose currency is the euro

(d) the conservation of marine biological resources under the common fisheries policy

(e) common commercial policy

The EU and the Member States have **shared competence** in the following principal areas (**Article 4**):

(a) internal market

(b) social policy[35]

(c) economic, social and territorial cohesion

(d) agriculture and fisheries, excluding the conservation of marine biological resources

(e) environment

(f) consumer protection

(g) transport

(h) trans-European networks

[35] For the aspects defined in this Treaty.

(i) energy

(j) area of freedom, security and justice

(k) common safety concerns in public health matters[36]

In the areas of research, technological development and space, the EU has competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence must not result in Member States being prevented from exercising their own.
In the areas of development cooperation and humanitarian aid, the EU has the competence to carry out activities and conduct a common policy; however, the exercise of that competence must not result in Member States being prevented from exercising their own.

The Union has competence to carry out actions to **support, coordinate or supplement** the actions of the Member States. At the European level, the areas of such action (according to **Article 6**) are the following:

(a) protection and improvement of human health

(b) industry

(c) culture

(d) tourism

(e) education, vocational training, youth and sport

(f) civil protection

(g) administrative cooperation

Article 5 of the TFEU prescribes that the Member States must **coordinate their economic policies** within the Union. To this end, the Council must adopt measures to support these policies, in particular by setting out broad guidelines. Specific provisions apply to those Member States whose currency is the euro. The Union must take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies. The Union may take initiatives to ensure the coordination of the Member States' social policies.

[36] For the aspects defined in this Treaty.

1.3.2 Institutions and functioning of the European Union – a short overview

This sub-chapter examines the main institutions of the EU. Article 13 of the TEU lists seven bodies that are entitled to be referred to as "EU institutions". These are the **European Council**, the **Council of Ministers** (sometimes referred to simply as 'the Council'), the **European Parliament,** the **European Commission**, the **Court of Justice of the European Union**, the **European Central Bank** and the **Court of Auditors**.

The seven above-mentioned institutions comprise the basic structure of the institutional set-up of the EU. To this basic institutional framework must be added the following institutions and bodies:

- two main advisory bodies of the EU: the **Economic and Social Committee** and the **Committee of the Regions** to assist the Council and the Commission;
- institutions necessary to carry out tasks peculiar to Economic and Monetary union which are mainly relevant to those Member States which have adopted the euro as their national currency: the **European Investment Bank,** which operates on a non-profit-making basis and grants loans and guarantees finance projects which contribute to the balanced and steady development of the internal market as provided in Article 309 of TFEU;
- bodies which lie within the scope of the Treaties and which assist the Council and the Commission in the accomplishment of their tasks: these are **agencies, offices and centres**, such as the European Environment Agency, the European Training Foundation, the European Agency for the Evaluation of Medical Products, the Office for Veterinary and Plant Health Inspection and Control, the European Monitoring Centre for Drugs and Addiction, Europol, Eurojust, the Agency for Fundamental Rights and the European Chemicals Agency.

The use of 24 official languages[37] in the EU means that all official meetings are conducted in all official languages, which are translated from one to another simultaneously. Also, all official documents are in 24 languages, although English and French are the working languages. This use of multiple languages is necessary to ensure transparency, as well as equality between Member States.

[37] Three alphabets are in the official use in the EU: the Latin, the Cyrillic and the Greek.

1.3.2.1 The European Council[38]

The European Council is the EU's ultimate political decision-maker. It comprises the heads of state or government, the President of the European Council and the President of the Commission. The High Representative for Foreign Affairs and Security Policy participates in the work of the European Council. It meets four times a year in Brussels and after each meeting it publishes conclusions.

> It is very important not to confuse the European Council with the Council of Europe, which is a different organisation that is separate from the EU and not a part of it. The Republic of Moldova is a member of the Council of Europe.

The main functions of the European Council are:

- shaping the future of the EU by adopting top-level political decisions;
- providing the necessary impetus for the development of the EU;
- settling sensitive matters which the Council is not able to resolve;
- constituting a platform for the exchange of informal views;
- identifying the strategic interests of the EU's foreign actions, including the CFSP;
- taking decisions concerning the revision of the Treaties;
- participating in the appointment of senior EU officials;
- authorising the use of so-called "*passerelle*" provisions[39].

It does not adopt legislative acts, but may adopt decisions and guidelines. The position of full-time President of the European Council was created by the Treaty of Lisbon. The President is elected by the European Council acting under Qualified Majority Voting.

His/her term of office is two and a half years, renewable once. This post is permanent, and its holder is required to be independent.

Their main tasks are to:

- chair debates and drive forward the work of the European Council;
- shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council;
- facilitate consensus within the European Council;

[38] For more information, please visit http://www.european-council.europa.eu/home-page.aspx

[39] The Passerelle Clause is a clause within the treaties of the European Union that allows the European Council to unanimously decide to replace unanimous voting in the Council of Ministers with qualified majority voting (QMV) in specified areas with the previous consent of the European Parliament, and switch from a special legislative procedure to the ordinary legislative procedure. "Passerelle" means "overpass" in the French language.

- deal with foreign policy issues at the heads-of-state level, but without prejudice to the powers of the HR;
- report to the EP after each meeting of the European Council.

1.3.2.2 The Council (the Council of the European Union)[40]

According to Article 13 of the TEU, the official name of this body is "the Council". It is also referred to as the "Council of the European Union" and should not be confused with the European Council. The Council represents the national interests of the Member States. It is made up of government ministers from the Member States.

The Council:

- adopts, jointly with the European Parliaments, EU legislation and the EU budget;
- ensures co-ordination of the economic policies of the Member States;
- frames the CFSP and takes the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council;
- concludes international agreements.

By comparison, in a country with a parliament organised as two chambers (a bicameral parliament) the Council would be the upper chamber.

1.3.2.3 The European Parliament[41]

The European Parliament is the parliamentary body of the EU and represents the interests of EU citizens. Its members are directly elected by them once every five years.

The Parliament:

- adopts, jointly with the Council, EU legislation and the EU budget;
- exercises democratic supervision over all EU institutions, including the election of the President of the Commission;
- elects the European Ombudsman;
- may establish, at the request of one quarter of its members, a temporary Committee of Inquiry to investigate alleged contraventions or maladministration in the implementation of EU law;
- participates in the conduct of external relations.

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[40] For more information, please visit http://europa.eu/about-eu/institutions-bodies/council-eu/
[41] For more information, please visit http://www.europarl.europa.eu/news/en.

By comparison, in a country with a parliament organised as two chambers (a bicameral parliament) the Parliament would be the lower chamber.

1.3.2.4 The European Commission[42]

The European Commission represents the interests of the EU and is made up of 27 commissioners, i.e. one from each Member State:

The European Commission:
- exercises guardianship of the Treaties;
- initiates legislative measures;
- drafts and implements the EU budget;
- exercises executive powers;
- carries out some international functions.

1.3.2.5 The Court of Justice of the European Union (a.k.a. the ECJ)[43]

The Court of Justice of the European Union, consists of two courts: the Court of Justice (composed of 27 Judges and 11 Advocates General) and the General Court (created in 1988 and is made up of two judges from each Member State.). The Civil Service Tribunal, established in 2004, ceased to operate on 1 September 2016 after its jurisdiction was transferred to the General Court in the context of the reform of the European Union's judicial structure.

As part of that mission, the Court of Justice of the European Union:
- reviews the legality of the acts of the institutions of the European Union,
- ensures that the Member States comply with obligations under the Treaties, and
- interprets European Union law at the request of the national courts and tribunals.

The Court thus constitutes the judicial authority of the European Union and, in cooperation with the courts and tribunals of the Member States, it ensures the uniform application and interpretation of EU law.

1.3.2.6 The Court of Auditors[44]

The Court of Auditors is the so-called "EU financial watchdog". It is made up of 27 members, one from each Member State. Its main function is to ensure that the financial affairs of the EU are properly managed.

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[42] For more information, please visit http://ec.europa.eu/index_en.htm.
[43] For more information, please visit http://curia.europa.eu/jcms/jcms/j_6/.
[44] For more information, please visit http://eca.europa.eu/portal/page/portal/eca_main_pages/home

1.3.2.7 The European Central Bank (ECB)[45]

The ECB is the central bank for the EU's single currency, and its main function is to formulate and implement the monetary policy of the EU.

1.3.2.8 The Council of Europe[46]

The Council of Europe is an inter-governmental organisation founded in 1949 with a membership of 47 European states, including the Republic of Moldova. As has already been mentioned, it is not an EU institution at all!

Its main objectives are:

- the promotion of European unity by proposing and encouraging European action in economic, social, legal and administrative matters;
- the promotion of human rights, fundamental freedoms and pluralist democracy;
- the development of a European cultural identity.

It is best known for its human rights activities, including the elaboration of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the supervision of its application.

1.4 Where and how to search for EU law

Identifying the key tools when searching for EU law is crucial both before and after accession. The EU's legal acts are freely available on the Internet.

An electronic version of the Official Journal is available at http://eur-lex.europa.eu/en/index.htm.

The Official Journal prints the texts of laws as they were originally adopted and does not consolidate amendments to the original legislation. Consolidated versions of EU legislation may be found at http://eur-lex.europa.eu/en/consleg/latest/index.htm.

For preparatory materials pertaining to EU legislation, see http://eur-lex.europa.eu/en/prep/index.htm.

A frequently updated Directory of EU Legislation in Force is available at http://eur-lex.europa.eu/en/consleg/latest/index.htm.

Summaries of numerous EU legal acts are available at http://europa.eu/legislation_summaries/index_en.htm.

[45] For more information, please visit http://www.ecb.int/ecb/html/index.en.html
[46] For more information, please visit http://hub.coe.int/

Information about recent EU legislation may be found in the annual General Report of the Activities of the European Union at http://europa.eu/generalreport/ ; and the monthly Bulletin of the European Union (all the latest stories by topic and by month) at http://europa.eu/newsroom/index_en.htm.

A directory of proposed legislation is available at http://eur-lex.europa.eu/en/prep/latest/index.htm (Preparatory documents, together with other documents of the European institutions of possible public interest, may be accessed from this page).

Numerous EU publications are freely available on the website of the EU Bookshop, which is located at http://bookshop.europa.eu/en/themes-cbsS0KABst8rMAAAEjcqkY4e5J/

When developing their impact assessments, Moldova's legal drafters should take as their starting point the impact assessments developed by the European Commission when the EU itself was formulating that EU act. It would be a useful guide as to what impacts could be expected in Moldova.

The list of impact assessments developed by the European Commission and the accompanying opinions of the Regulatory Scrutiny Board are publicly accessible on the European Commission website: https://ec.europa.eu/transparency/regdoc/?fuseaction=ia

1.5 Dynamic character of EU law (repeal, amendment, codification, recasting)

Article 449 of the Association Agreement (AA) stipulates the dynamics of approximation of Moldova's legislation with the EU acquis:

> *In line with the goal of gradual approximation by the Republic of Moldova of its legislation to EU law, and in particular as regards the commitments identified in Titles III, IV, V and VI of this Agreement, and according to the provisions of the Annexes to this Agreement, the Association Council* ***shall periodically revise and update those Annexes,*** *including taking into account the evolution of EU law, as defined in this Agreement. This provision shall be without prejudice to any specific provisions under Title V (Trade and Trade-related Matters) of this Agreement.*

The dynamic character of the process of implementation of the AA stems from the dynamic character of the EU acquis itself. The EU acquis is constantly evolving, sometimes slowly and sometimes in big leaps that bring substantial changes, meaning that the acquis is constantly being amended or repealed according to the

emergent needs of EU Member States, experiences and/or technological progress. Thus Moldova's law makers must always keep track of the evolution of the EU acquis.

Example: Directive 2019/2161 of the European Parliament and of the Council of 27 November 2019 is amending, in connection with the **better enforcement and modernisation of Union consumer protection rules**, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive'), and Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, which previously amended Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council; and is repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

Moldova's legal drafters must consider the 2019 Directive in order to accommodate the new EU rules regarding the enforcement of consumer protection rules. Without proper enforcement of these rules, Moldova cannot claim that its task of approximation has been successfully completed as required by the AA.

The first step in the approximation and legal drafting should be devoted to checking the EU legislation, particularly to see if there are new versions of Regulations/Directives listed in the AA annexes. (*Web links for checking the legislation are provided in the text above*).

Since the EU's secondary legislation is constantly being reviewed and modified, there are several variants of the possible changes at the disposal of EU lawmakers. The legal technique of modifying the EU law is very similar to the legal techniques of EU Member States and most of the legal systems in Europe.

These are the existing options:

repeal	amendments	codification	recasting	consolidation

1.5.1 Repeal

If a Directive or Regulation is no longer needed, it is "repealed", i.e. abolished. Often, secondary legislation is repealed through new legal acts, in particular if higher standards are to be set, or if so many new aspects are to be regulated that merely modifying the legal act in question would be insufficient.

Example: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing previous Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

1.5.2 Amendments

This is the most common legal technique in EU legal system, as well as in any national legal system. The act (Regulation/Directive) is amended by a consecutive act, through changes of certain provisions of the original act and/or through the addition of new provisions. Many EU acts listed in the AA annexes have been amended since the end of the AA negotiations with Moldova in 2015.

Example: We shall use again the Directive 2019/2161 as an example to demonstrate that sometimes one EU amending act can affect several acts listed in the AA annex. At the same time, not all acts amended by such an EU act must be listed in AA annexes.

Previously Directive 2019/2161 of the European Parliament and of the Council of 27 November 2019 is amending, as regards the **better enforcement and modernisation of Union consumer protection rules**, the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive'), and Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, which previously amended Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council; and is repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

All the amended acts (apart from Directive 2011/83/EU) are listed in annex IV of the Chapter 5 of Title IV of the AA.

1.5.3 Codification

Codification is the bringing together of a legislative act and all its amendments into a single **new act** through a legislative process. The new act always replaces the act being codified. It combines the original act and all successive amendments **without any further substantive changes** of the text. Codification should contribute to further legal clarity by reducing the number of acts in legal circulation when an act has been subjected to numerous amendments over the years. The approximation process in Moldova should be conducted using a codified act as the basis, not the original acts that have been repealed.

Example: Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste is a codified version of the original Council Directive 75/442/EEC of 15 July 1975 on waste, which has been amended five times.

1.5.4 Recasting

Recasting involves the adoption of a **new legal act** that incorporates in a single text both some substantive amendments to an earlier act and the unchanged provisions of the earlier act. The new legal act replaces and repeals all earlier versions of the act. Unlike codification, recasting **involves making substantive changes** to the original act.

This new act will be assigned a new CELEX number and will replace all previous acts. **Recasting is essentially a codification with additional provisions.** The approximation process is conducted on the basis of a recast version of the act, not the original act that has been repealed.

Example 1: Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions is a recast of six other directives (which were then repealed). This directive was later repealed by Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

Example 2: Industrial Emission Directive 2010/75/EU (IED) is a horizontal recast of the Integrated Pollution Prevention and Control (IPPC) Directive

and six other Directives plus their old and new amendments, bringing them together into a single new legal act. All seven of the source Directives have been repealed by the new Directive on IED.

1.5.5 Consolidation

Consolidation of an act means combining the provisions of an original act and all subsequent amendments in a single text, to make it more transparent and reader-friendly, but a consolidation **does not amend** an original act. It creates a purely declaratory version of the legislation in force, but not a new legal act. **This is an unofficial document with no legal relevance**. The consolidated version will not receive a new CELEX number. The approximation process is conducted on the basis of the original act and all its amendments. The generation of a Table of Concordance (ToC) should be based on this consolidated version, and drafters **should generate a single ToC** for an entire act while listing the CELEX numbers of both the original act and all its amendments.

The EU Publications Office produces unofficial consolidated texts which bring together the original text of an act and its amendments into a single document that is only intended to be used as a documentation tool.

Consolidated texts can be found at *https://eur-lex.europa.eu.*

CHAPTER 2. Sources of the approximation obligation: the Association Agreement, Association Agenda and other agreements

The **EU-Moldova Association Agreement** (AA) is a legally binding and comprehensive international treaty which represents the legal framework for the political association and the gradual economic integration of the EU and its Member States with the Republic of Moldova. It is concluded for an unlimited period.[47] A key section of the AA is the establishment of a deep and comprehensive free trade area (DCFTA), which aims to help to modernise Moldova's economy and integrate it with the EU internal market through the adoption of the trade-related EU acquis. It should be noted that the AA/DCFTA is not a standard EU free trade agreement, as it includes a strong political component which neither explicitly promises nor rules out eventual accession to the EU.[48]

2.1 Aims and General Principles of the Association Agreement

Article 1 defines the aims of the Association Agreement by:

a) promoting **political association and economic integration** between the Parties based on common values and close links, including by increasing the Republic of Moldova's participation in EU policies, programmes and agencies;
b) strengthening the framework for enhanced **political dialogue** in all areas of mutual interest, providing for the development of close political relations between the Parties;

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[47] AA Article 460(1).

[48] The AA Preamble text includes the following statements: "*Acknowledging the European aspirations and the European choice of the Republic of Moldova;*" "*Taking into account that this Agreement will not prejudice, and leaves open, the way for future progressive developments in EU-Republic of Moldova relations;*" and "*Acknowledging that the Republic of Moldova as a European country shares a common history and common values with the Member States and is committed to implementing and promoting those values, which for the Republic of Moldova inspire its European choice*".

c) contributing to the **strengthening of democracy** and to political, economic and institutional stability in the Republic of Moldova;
d) promoting, preserving and **strengthening peace and stability in the regional and international dimensions** by joining efforts in eliminating sources of tension, enhancing border security, promoting cross-border cooperation and good neighbourly relations;
e) supporting and **enhancing cooperation in the area of freedom, security and justice** with the aim of reinforcing the rule of law and respect for human rights and fundamental freedoms, as well as in the area of mobility and people-to-people contacts;
f) supporting the efforts of Moldova to develop its economic potential via international cooperation, also through the **approximation of its legislation to that of the EU;**
g) establishing conditions for **enhanced economic and trade relations** leading towards the Republic of Moldova's gradual integration in the EU internal market, as stipulated in this Agreement, including by setting up a Deep and Comprehensive Free Trade Area, which will provide for far-reaching regulatory approximation and market access liberalisation, in compliance with the rights and obligations arising out of WTO membership and the transparent application of those rights and obligations; and
h) establishing conditions for an increasing cooperation in other areas of mutual interest.

Article 2 sets forth the **general principles**[49] which both Parties should respect and observe and which are defined in the AA as "essential elements" of the Agreement.

Should a party violate any of these "essential elements" of the AA, the other party may suspend the effect of the AA rights or obligations provided in Title V (DCFTA).[50]

[49] These include respect for democratic principles, human rights and fundamental freedoms; respect for the principles of the rule of law and good governance as well as international obligations under the UN, the Council of Europe and the OSCE; commitment to the principles of a free market economy, sustainable development and effective multilateralism; commitment to fostering cooperation and good neighbourly relations; preventing and combating corruption, criminal activities (organised or otherwise) and terrorism; and countering the proliferation of weapons of mass destruction.
[50] AA Article 455(2) and 455 (3)(b).

2.2 Structure of the EU-Moldova Association Agreement

The AA is a complex and lengthy agreement totalling 735 pages. It includes seven Titles divided into 46 Chapters, 35 Annexes and four Protocols, all of which are integral components of the AA.[51] The AA/DCFTA contains 465 Articles that include the following Titles:[52]

Structure of the Association Agreement	
Title 1 – General Principles	Sets forth respect for democratic principles, human rights and fundamental freedoms as the general principles of the AA and its "essential elements", the violation of which may lead to the suspension of the AA.
Title II – Political dialogue and reform, cooperation in the field of Foreign and Security Policy	Aims to further develop and strengthen political dialogue in all areas of mutual interest, including foreign and security matters, as well as to increase the effectiveness of political cooperation and promote convergence in foreign and security matters (including areas covered by the EU's Common Foreign and Security Policy and Common Security and Defence Policy).
Title III – Freedom, Security and Justice	Describes cooperation in the area of freedom, security and justice. This includes respect for the principles of the rule of law, human rights and fundamental freedoms, and the protection of personal data; it includes cooperation in preventing/combating organized crime, corruption and other illegal activities; it also includes cooperation regarding comprehensive dialogue and cooperation on legal/illegal migration, the trafficking of people, border management, asylum/return policies and the movement of people; and it inlcudes judicial cooperation in civil/commercial matters as well as in criminal matters.

[51] The EU-Moldova AA is much longer than the Stabilisation and Association Agreements (SAA) for the Western Balkan states: Serbia's SAA contains 139 articles, seven Protocols and seven Annexes; Albania's SAA comprises 137 articles, and North Macedonia's SAA has 128 articles.

[52] See Deepening EU-Moldovan Relations-What, Why and How, 1st edition (2016) and 2nd edition (2018), edited by Michael Emerson and Denis Cenusa, for comprehensive descriptions of the various AA Titles. Available at: https://3dcftas.eu/publications/deepening-eu-moldovan-relations-what-why-and-how-2

Title IV – **Economic and other Sectoral Cooperation**	Consists of 28 Chapters setting forth cooperation in a variety of sectors, such as energy, environment, transport, financial services, agriculture, information society, company law, consumer protection, public health, employment and social policy, taxation, and statistics, including Annexes of EU legal acts to be implemented by Moldova. Other sectors do not include Annexes, but refer to the cooperation between the EU and Moldova in further developing specific sectors through the exchange of information and dialogue, and other means. It also includes a Chapter which provides the possibility of Moldova participating in 20 different EU agencies and 19 EU programmes.
Title V – **Trade and Trade-Related Matters (DCFTA)**	This is considered to be the "hard core" of the AA's economic content (comprising 14 Chapters), aiming to create a free trade area in goods between the EU and Moldova over a 10-year transitional period and providing for extensive legislative and regulatory approximation through Annexes, including sophisticated mechanisms to ensure the uniform interpretation and effective implementation of the relevant EU legal acts necessary for deep economic integration. (See Section 1.1.1.3 for a more in-depth description of Title V.)
Title VI – **Financial Assistance, and Anti-Fraud and Control Provisions**	States that EU financial assistance to Moldova will be available through EU funding mechanisms and instruments in order to contribute to Moldova's achievement of the AA objectives; sets forth the anti-fraud and control provisions/measures applicable to any financing instrument concluded between EU and Moldova.
Title VII – **Institutional, General and Final Provisions**	Provides a comprehensive joint institutional framework for monitoring the implementation of the AA, and provides a platform for political dialogue; describes two dispute settlement mechanisms (one for the Title V/ DCFTA provisions and a general mechanism for the rest of the AA); includes various general provisions, such as the provisional and final entry into force, the concepts of gradual and dynamic approximation, monitoring and the assessment of approximation.

2.3 Obligations arising from the AA and the Association Agenda

Moldova's obligations arising out of the AA and Association Agenda cover[53] a wide spectrum of areas and policies. These can be divided into three major segments:

Even before Moldova officially applied for EU membership in March 2022,[54] its progress in the implementation of the Association Agreement was assessed against the Copenhagen Criteria for membership, as defined in 1993.

The political obligations are, *inter alia,*

- aiming to promote integration between the Parties on the basis of common values and close links, including by increasing Moldova's participation in EU policies, programmes and agencies;
- strengthening political dialogue between parties;
- enhancing cooperation in developing democracy and the promotion of peace, security and stability;
- promoting the rule of law and respect for human rights and fundamental freedoms;
- developing democratic institutions;
- supporting and enhancing cooperation in the areas of freedom, security and justice, including the independence of the judiciary and the fight against corruption.[55]

The main economic goal is the progressive development of a free-trade area during a 10-year transitional period.[56] In practical terms, this means that by 2024, EU and Moldova will have established a mutual free-trade area for the trade in goods if Moldova implements the necessary EU legal acts and requirements as listed in the

[53] As listed in AA Article 1, Objectives.
[54] Pursuant to Article 49 of the Treaty on the European Union.
[55] Article 1 of AA.
[56] Article 143 of AA.

DCFTA.[57] In this way, the objective of economic integration will have been achieved as set out in Article 1. Other economic objectives include the support of Moldova's efforts to develop its economic potential via international cooperation as well as through the approximation of its legislation to the EU acquis, resulting in leading Moldova's gradual integration with/into the EU internal market. The AA is thus an important instrument for modernising Moldova's economy and speeding up its economic development.

The approximation of Moldova's legislation with the specified EU acquis is a key instrument for achieving the political and economic goals of the AA. Due to the far-reaching scope of the entire AA, its implementation will lead to a correspondingly far-reaching regulatory approximation effort by Moldova. In fact, the approximation goals of this AA are much broader than those covered by the Stabilisation and Association Agreements that the EU signed with the countries of the Western Balkans a decade before; they can be compared to the legal harmonisation obligations of states having an EU candidate status.

This means that Moldova has set itself a more ambitious objective than merely achieving a free-trade area with the EU. If Moldova's legal approximation efforts are successful, its legal system will be much closer to the EU's than standard EU Free trade agreements require. Such an ambitious objective requires an extra effort from Moldova's legislators and policy makers. At the same time, the proper implementation of these obligations will also significantly improve Moldova's economic situation, by opening its access to the EU market.

The AA specifies that Moldova will conduct a gradual approximation process (Article 448):

> *The Republic of Moldova shall carry out gradual approximation of its legislation to EU law and international instruments as referred to in the Annexes to this Agreement, based on commitments identified in this Agreement, and according to the provisions of those Annexes. This provision shall be without prejudice to any specific provisions and obligations on approximation under Title V (Trade and Trade-related Matters) of this Agreement.*

As we have described previously, the approximation process will be of a dynamic character. Specifically, Article 449 states that the evolution of the EU law must be followed, and the Association Council will periodically revise and update the AA annexes containing the list of EU legislation that Moldova is to transpose.

[57] AA – Title V.

2.4 Annexes to the Association Agreement (and their amendments)

Especially in its Annexes, the AA sets forth the specific EU legal acts and the deadlines for Moldova's implementation of them. This indicates that not only is Moldova obliged to approximate its relevant legislation to these particular EU legal acts, but it must implement and enforce them by the specified deadline. It must be borne in mind that Moldova is not an EU Member State and so is only obliged to undertake a *gradual* approximation process, because Moldova is not yet required to undertake a full harmonisation with the EU acquis at the level of the EU Member States, in order to fulfil its AA obligations. However, obtaining the status of a candidate country for EU membership in 2022 calls for greater efforts in terms of harmonizing national legislation with EU legislation not only limited to the EU acquis included in the Annexes to the AA, but also transposing the entire EU legislation.

These Annexes also define the timeframe by which Moldova needs to transpose specific EU legislation and implement the listed EU acquis. The longest deadlines are 9[58], 10[59], 12[60] and even 16[61] years from the date of the AA's entry into force,[62] thus targeting the years 2023, 2024, 2026 and 2030. These longer deadlines are defined chiefly in the areas of Health and Safety at work (Title IV – Chapter 4), Taxation (Title IV – Chapter 8), Environment (Title IV – Chapter 16) and State Aid (Title V – Chapter 10).

The Annexes to the Association Agreement list precisely which EU legal acts (sometimes only individual sections of those acts) Moldova needs to transpose into its legislation and implement. **However, due to the evolution of the EU acquis over time, these Annexes need to be amended and/or updated on a regular basis, to correctly reflect the current state of the EU acquis in a particular sector.**

[58] For example, implementation of certain parts of the Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe.

[59] For example, full implementation of the Directive 2003/10/EC of the European Parliament and of the Council of 6 February 2003 on the minimum health and safety requirements regarding the exposure of workers to the risk arising from physical agents (noise) (seventeenth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC).

[60] Full implementation of the Council Directive 92/91/EEC of 3 November 1992 concerning the minimum requirements for improving the safety and health protection of workers in the mineral-extracting industries through drilling (eleventh individual directive within the meaning of Article 16(1) of Directive 89/391/EEC).

[61] Full implementation of the Council Directive 92/104/EEC of 3 December 1992 on the minimum requirements for improving the safety and health protection of workers in surface and underground mineral-extracting industries (twelfth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC).

[62] Any reference to the date of entry into force of the AA shall be understood as the date from which the AA was provisionally applied, namely 1 September 2014. See AA Article 464(5).

Some newer EU legal acts repeal and replace previous ones, or significantly amend existing ones.

The Annexes are amended through decisions of the EU-Moldova Association Council, the Association Committee in Trade configuration (for Title V Annexes)[63], or particular Sub-Committees.[64] To date, several AA Annexes have been updated and amended by Decisions of the Association Council, the Association Committee in Trade, the Customs Sub-Committee and the Geographical Indications Sub-Committee:[65]

- Annex XXIV-B (Sanitary and Phytosanitary Measures/SPS);
- Annex XVI (Technical Barriers to Trade);
- Annex XXIX (Public Procurement);
- Annexes XXX-C and XXX-D (Geographical Indications);
- Protocol II (Customs) replaced;
- Annex XXVIII-B (Telecommunications);
- Annex XXVIII-D (International Maritime Transport);
- Annexes XV-A, B, C and D (i.e. products subject to annual duty-free Tariff Rate Quotas; products subject to Entry Price for which the *ad valorem* component of the Import Duty is exempted; products subject to anti-circumvention measures, and the Schedule of Concession).

Moldova also undertook the **obligation to withdraw provisions of its domestic law or abolish domestic practices that are inconsistent with EU law or with its domestic law approximated to the EU law in the trade-related areas of Title V**[66] **of this Agreement.**[67] Moldova must also refrain from any action that would undermine the objective or outcome of approximation under Title V of this Agreement.[68] Even though these obligations are specified only for Title V (which are the DCFTA sections), not observing these same obligations for the rest of the AA would eventually lead to inconsistences and difficulties in its implementation, and the approximation process would not be finished.

According to these obligations, not only are so-called **positive activities** required from Moldova during the approximation process (i.e. the approximation of its

[63] AA Article 449 states that the Association Council must periodically revise and update the Annexes, including by taking into account the evolution of EU law, as defined in this Agreement in particular as regards the commitments identified in Titles III, IV, V and VI of this Agreement, and according to the provisions of the Annexes to the Agreement.

[64] The SPS Sub-Committee, Customs Sub-Committee and Geographical Indications Sub-Committee have been specifically granted such powers in the AA.

[65] See the list included in the latest Consolidated version of the EU-Moldova AA, dated 23 January 2020.

[66] Trade and Trade-related Matters/DCFTA.

[67] AA article 408.

[68] Article 410.

current and future legislation with the AA-listed EU acquis), but Moldova also has to **refrain from adopting future legislation that is contrary to the AA objectives and to the listed EU acquis,** and to **abolish existing legislation and practices that are inconsistent with the AA objectives and listed EU acquis**. This necessitates a constant self-screening of Moldova's existing and new draft legislation and amendments to it. EU conducts such screening only once a candidate country starts accession negotiations. Therefore, it is up to Moldova to conduct such self-screening.

Article 13.2 of the Governmental Decision No. 1171/2018 for the approval of the Regulation on harmonisation of the legislation of the Republic of Moldova with the legislation of the EU prescribes, as the second step in the approximation process, "*the identification of the European Union legislation to be transposed*".

> **Recommendation**: To be able to properly identify the EU law to be transposed, being aware of the evolution of the EU acquis, the AA annexes should be checked once or twice a year to determine if any changes in the EU acquis have been made, and thus avoid using obsolete EU legislation. The process of checking for changes in the EU legislation should be performed jointly by the Centre for Legal Approximation (CLA) and the relevant line ministry. The CLA keeps track of the lists of the EU legal acts defined in the AA Annexes and all the subsequent amendments to these Annexes. If there are significant changes in the EU acquis listed in the Annexes, they should be addressed to the AA bodies, discussed with the EU by asking the European Commission for clarifications of the legislation, and the Annexes should be amended accordingly. If the Annexes are outdated, the Moldovan legislation should always follow the current EU legislation rather than feel bound by the AA Annexes that were defined in 2014.

2.5 The Association Agenda

An important companion document to the EU-Moldova AA is the **EU-Moldova Association Agenda**. This document[69] aims to *"prepare and facilitate the implementation of the Association Agreement, by creating a practical framework through which the overriding objectives of political association and economic integration can be achieved"*.[70]

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[69] It replaced the EU-Moldova European Neighbourhood Policy Action Plan as a way to monitor Moldova's progress within the ENP framework.

[70] The text is available at: http://eeas.europa.eu/archives/docs/moldova/pdf/eu-moldova-association-agenda-26_06_en.pdf

This document is mutually agreed to and adopted by the EU and Moldova at the Association Council as a Recommendation. The obligations defined by the Association Agenda are, politically speaking, as important for Moldova as the AA commitments (including the legislative obligations specified for Moldova). Moldova's progress is assessed by the EU on the basis of both the AA and the Association Agenda.

Besides the Association Agreement, other agreements between EU and Moldova consequently are also subject to the obligation of approximation of Moldova's legislation with the EU acquis.

During the writing of this Handbook (i.e. during 2022), the new Association Agenda covering the period until the end of 2027 was being agreed between the EU and Moldova.

2.6 European Common Aviation Area Agreement (ECAA)[71]

It has been envisaged that the European Common Aviation Area (ECAA) will allow gradual market opening between the EU and its neighbours, including Moldova, linked with regulatory convergence through the gradual implementation of the EU's aviation rules with the aim of offering new opportunities for operators and greater choice for consumers. The processes of market opening and regulatory convergence will take place in parallel, in order to promote fair competition and the implementation of common high safety, security, environmental and other standards.

As a result of this agreement, Moldova's legislation will be progressively aligned with European standards in areas such as aviation safety, security, environment, consumer protection, air traffic management, competition issues and social aspects.

2.7 The Energy Community[72]

The Energy Community is an international organisation which brings together the European Union and its neighbours to create an integrated pan-European

[71] The ECAA between the EU and its Member States with the Republic of Moldova was signed in 2012. Text at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22012A1020%2801%29&qid=1618818468642

[72] The protocol concerning the accession of the Republic of Moldova to the Treaty Establishing the Energy Community is available at https://www.energy-community.org

energy market. The organisation was founded by the Treaty Establishing the Energy Community (ECT), which was signed in October 2005 in Athens, Greece and has been in force since July 2006. The key objective of the Energy Community is to extend the EU's internal energy market rules and principles to countries in southeast Europe, the Black Sea region and beyond, on the basis of a legally binding framework.

The Republic of Moldova has been a contracting party to the Treaty Establishing the Energy Community since 2010. As a result of its adherence to the Treaty, Moldova's legislation will be progressively aligned with European Union's acquis in the area of energy, in accordance with the decisions made by the Energy community.

2.7.1 Monitoring of implementation and non-fulfilment of obligation under Treaty Establishing the Energy Community

In accordance with the Treaty, "The Parties shall implement Decisions addressed to them in their domestic legal system within the period specified in the Decision." (Art. 89, ECT). Under the Energy Community's dispute settlement rules, a Party to the Treaty, the Regulatory Board and/or the Secretariat – upon complaint or on its own motion – may bring a case involving a Party's non-compliance with Energy Community law to the attention of the Ministerial Council.

As a rule, there are three possible statuses of a case: registered, opened and closed. A case is registered either upon complaint or by the Secretariat on its own motion. The status of a registered case may change to either open or closed. A case is opened with the sending of an Opening Letter. A case is closed when a Party complies with its obligations under the Energy Community Treaty, either prior to the sending of an Opening Letter or at any time after the dispute settlement procedure has been initiated. A case under Article 91 of the Treaty is also closed with or without compliance with the adoption of a Decision by the Ministerial Council.

In the event that a breach identified by the Ministerial Council has not been rectified by the party to the case, or in other cases of a serious and persistent breach of Energy Community law, a Party, the Secretariat or the Regulatory Board may request a decision from the Ministerial Council, which – acting by unanimity – may suspend certain rights deriving from the application of this Treaty to the Party concerned, including the suspension of voting rights and exclusion from meetings or mechanisms provided for in this Treaty (Art. 92, ECT).

The Energy Community Treaty also regulates safeguarding measures. According to Article 36, in the event of a sudden crisis in the Network Energy market in the

territory of an Adhering Party, the territory under the jurisdiction of the United Nations Interim Administration Mission in Kosovo, or a territory of the European Community, where the physical safety or security of persons, or Network Energy apparatus or installations or system integrity is threatened in this territory, the concerned Party may temporarily take necessary safeguard measures. Such safeguard measures must cause the least possible disturbance to the functioning of the Network Energy market of the Parties, and not be wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen. They must not distort competition or adversely affect trade in a manner that is at variance with the common interest. The Party concerned must without delay notify these safeguard measures to the Secretariat, which must immediately inform the other Parties (Art. 37, 38, ECT). At the same time, the Energy Community may decide that the safeguarding measures taken by the Party concerned do not comply with the provisions of this Chapter, and may request that Party to put an end to, or modify, those safeguard measures (Art. 39, ECT).

PART II

LEGAL APPROXIMATION

CHAPTER 3. Approximation of legislation

The main purpose of this chapter is to explain what the process of approximation is, what types of approximation exist, and what methods can be used in the process, including practices which should be followed and mistakes that should be avoided. It also deals with the requirements related to the national planning of the approximation process.

3.1 What is the purpose of legal approximation?

3.1.1 Definition

The EU's founding treaties use the terms "harmonisation" and "approximation" to indicate that the EU Member States should transpose EU legislation and harmonise their systems with the EU acquis. Analysis of the text of the treaties reveals that these two terms are not always used in a consistent manner. Therefore, using both terms in the context of the EU Member States is permissible.

The Association Agreement between Moldova and the EU consistently uses the term "approximation" to define the obligations of Moldova *vis-a-vis* the EU acquis.

The process of legal approximation with the EU acquis is the most demanding part of the implementation of the AA for Moldova. The lists of EU legislation defined in the AA annexes require a significant legal effort on the part of Moldova, and the financial resources for its proper implementation.

When speaking of Moldova's approximation effort, we can say that:

> **it is a process of transposing the EU legislation into the national legal system, thus incorporating EU rules into the national legislation and procedures so that they match those of the EU. Transposition will be followed by the implementation of national legislation (previously approximated with the EU acquis) by competent authorities and legal and natural persons in Moldova, and enforcement by the national courts and law enforcement agencies.**

3.1.2 Main stages

From the definition above, we can identify three main stages in the process of approximation of legislation:

These main stages are preceded by an additional introductory stage that requires planning and analysis. This initial step is the so-called "stage 0".

3.1.2.1 Preparatory and analytical stage

This phase is defined by the existence of the necessary **institutional framework** for the approximation process and for conducting the EU affairs/integrations process, as well as by the existence of **technical requirements** (documents/tools) necessary in the approximation process like Tables of Concordance and the establishment of the procedure for the approximation of legislation in conformity with the Governmental Rules of procedure. It goes without saying that the existence of an Association Agreement is also a key prerequisite.

All these required mechanisms (both institutional and documentary) already exist in Moldova, and have been in use for several years. The existence of a multi-annual EU dedicated planning document is essential for the approximation process. Such a document is also essential for accession negotiations, particularly when responding to the Commission's Questionnaire, which was the first step after a country applied for membership (*see Chapter 5 below for the main steps involved in accession negotiations*).

In this phase, on the basis of Moldova's obligation arising out of the AA, and from the plans generated using other strategic planning documents, the Government develops the main approximation priorities. The plan should provide information as to what EU acts should be transposed, and when, how, by whom; and it should contain an analysis of the sustainability of the process (regarding financial capabilities, adequacy of human resources, equipment etc).

3.1.2.2 Legislative/normative stage (transposition through the adoption of a normative act)

This stage requires the adoption of a new normative act (i.e. the development of novel legislation or the repeal or amendment of the existing legal act). This is performed in accordance with the plan of approximation. This stage covers the legal and administrative binding acts adopted by the competent authority in order to transpose the provisions of the EU acquis into national legislation. This does not mean merely reproducing the wording of the EU act, but can also cover additional measures, including the repealing of acts or provisions of national acts that contravene the EU act or run counter to its purposes. Additionally, it can also require the establishment of a new institution for the implementation, or it may give additional powers and competences to existing institutions, or rearrange the existing institutional set-up. Such institutional changes must be envisaged through normative acts.

3.1.2.3 Implementation

Implementation essentially means the practical application of the rules newly incorporated into the national legal system in individual cases, principally by state bodies and implementation agencies – for example, by requiring environmental impact assessments before licences are issued to the operators of large industrial facilities.

If rules are prescribed in the legislation but not applied, the approximation process is incomplete. In the European Union, EU rules are implemented by the state bodies of the member states through the individual actions of those bodies. Implementation also requires natural and legal persons in Member States to apply the EU rules during their day-to-day operations.

Implementation can be ensured via on-the-spot checks, inspections and other mechanisms for the administrative oversight of the implementation of legislation. Some also view this kind of checking as a type of legislative enforcement. As a result, the dividing line between implementation oversight and enforcement can sometimes seem rather blurred.

The existence of adequate administrative capacities is essential for ensuring the proper implementation of EU rules. An insufficiency of national administrative capacities does not absolve a Member State from implementing EU rules. As stated in Article 4(3) of TEU:

> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

Regular capacity-building activities, trainings, the construction of physical infrastructure, and the acquisition of new equipment and technologies are all necessary activities for the proper implementation of the EU acquis.

The same applies to the associated countries as regards the implementation of the Association Agreement.

3.1.2.4 Enforcement

Enforcement is by definition a set of rules and actions performed by state bodies, using their force or power (so called "potestas") to ensure proper implementation of the rules that are in force. Competent authorities ensure that existing rules are obeyed by everybody, including through the use of the force possessed by the State. This is performed by means of monitoring, sanctioning and the establishment of corrective measures. Because enforcement, corrective measures and sanctions are often linked with (and conditioned by) judicial control and review, the role of the national courts is highly significant for this stage. The judicial (and also the technical and administrative) capacities of the state's courts for the enforcement of the EU's legislation and national implementing rules are therefore crucial. Providing the courts with the capacities needed to adjudicate highly technical and complex cases (such as competition, environmental and intellectual property rights cases) is considered essential for the proper functioning of those fields of law.

In the associated countries, the courts apply national rules that have previously been approximated with the EU rules. Proper knowledge of the EU legal system and legislation is important for the national judges if the courts are to implement approximated legislation properly and uphold its enforcement. Building judicial (and also the technical and administrative) capacities of the courts is a difficult but highly significant task for every associated country.

> Once all three segments of the process of approximation are successfully completed, a country can claim that it is fully and properly in line (harmonised/approximated) with EU legislation.

* * *

Monitoring of implementation and the non-fulfilment of obligations under an Association Agreement

As part of the approximation process in the EU, Member States submit reports to the European Commission on their progress in the process. If the process is not completed properly or during the timeframe defined by a particular directive, the Commission can initiate an infringement procedure against a Member State.

In the first step, the Commission will request an explanation for the delay and give the state reasonable time to fulfil its obligation. If the obligation is still not met, the Commission will initiate the infringement procedure against that Member State before the ECJ (Article 258, TFEU).

This possibility does not apply to associated countries.

A specific and original element of the Agreement is set out in the provisions regarding the assessment of the implementation of the Agreement. In accordance with Articles 451 and 452 of the Association Agreement, the EU "shall assess the approximation of the law of the Republic of Moldova to EU law... This includes aspects of implementation and enforcement...". The Agreement contains special provisions regarding the assessment of approximation in trade-related areas (Art. 409, AA), the impact of evolution in EU legislation, and modifications in trade-related areas during the process of national legislation approximation (Art. 410, AA)[73]. The assessment by the EU must therefore take into account the existence and operation of relevant infrastructure, bodies and procedures in the Republic of Moldova.

Along these lines, and in the context of the Association Agreement, the EU will assess the implementation of EU legislation at national level in terms of three individual aspects: 1) The incorporation of the provisions of EU legislation into national law in the terms contained in the Agreement and in a correct manner, in order to ensure the compliance of national law with EU standards enshrined in those acts (transposition); 2) Ensuring that recipients of the norm behave in a manner consistent with the legal standards set out in EU legislation in question (application); and 3) The existence of administrative and judicial mechanisms to ensure that those performing the non-compliant behaviour can be found, and that those who do not comply will be compelled to change their conduct (enforcement) (Art. 455, AA). Non-implementation, or the improper or inconsistent implementation of EU legislation in trade-related areas, will have the effect of delaying or postponing the adoption by the Association Council of a decision to open the EU market to Moldova (art. 452 AA). Non-compliance of national legislation with new developments and changes in EU legislation in areas relevant to trade, even if the national legislation has been approximated with EU law and effectively implemented, may entail a temporary suspension of the special benefits granted in the light of Title V (Art. 410, AA). The Inadequate implementation of

[73] AA article 410.1. "The Republic of Moldova shall ensure the effective implementation of the approximated domestic law and undertake any action necessary to reflect the developments in Union law in its domestic law in the trade-related areas of Title V (Trade and Trade-related Matters) of this Agreement."

obligations deriving from the AA can have political effects which do not flow directly from the Agreement.[74]

3.1.3 Types of legal approximation

When we speak about approximation (in the broadest sense of the term[75]) with the EU acquis, the extent and characteristics of the process are determined by the EU's competences. As was described above, EU competences can be: 1) exclusive, 2) shared with Member States, and 3) supportive, coordinative and supplementing.

Therefore, depending on what kind of competences the Member States have accorded the EU in a given area, the legislation of the EU Member States in that area may be respectively:

Example:
Unification of legislation means that the EU legislation replaces the national legislation of Member States, and they stop legislating in that area. This is limited to areas of exclusive EU competences. Regulation is a tool for the unification of legislation.
Approximated
Approximation means that the EU is regulating a given area by specifying the objectives to be reached and the timeframe for doing so. It is left to the Member States to regulate how those objectives will be achieved within their national system. Directives are a tool for the harmonisation of legislation. National legal acts coexist with those of the EU, and they are applicable simultaneously.
Coordinated
The EU is coordinating the national policies of Member States. In this case, the EU legislation provides for the coordination of activities and the exchange of information between the EU and national levels, and among the EU Member States.

Hence the EU Member States are approximating their national legal system with EU legislation only in those areas where it is defined by the founding treaties, and to the extent defined by those treaties. The EU cannot adopt rules in areas where it lacks the jurisdiction to do so. For example, there is no unification in those areas where the EU is coordinating the national systems, such as education or health.

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[74] Natalia Suceveanu, Association Agreement – a combination of traditional classic and original features, Romanian Review of European Law, Second edition, 30 October 2015, pp. 289-290

[75] In this case "approximation" is used to cover any kind of takeover by EU legislation in a national legal system.

As we can see, the approximation process applying to the EU Member States is significantly different from that applying to the associated countries, such as Moldova. For EU Member States, directives represent the main impetus for approximating their legislation with the EU acquis, and regulations can require the adoption of the national legal acts needed for the proper implementation of the regulation. Since the EU acquis is not directly applicable in Moldova, the process of approximation in Moldova cannot rely on the "unification" part, which for the EU Member States is performed by the EU itself.

3.2 What is the National Action Plan for Implementation of the Association Agreement?

Since an AA brings with it an obligation to approximate national legislation with the EU acquis, it is important for an associated country like Moldova to prepare an approximation plan. This plan is even more important for candidate countries, because candidate countries are expected to develop such a document as a preparation for their accession negotiations.

This plan should be multiannual, and should provide for a strategic approach to this process. All associated countries and countries negotiating EU accession have developed such plans. These have been given a variety of names, such as National Programme for the Adoption of the Acquis (NPAA), National Plan for Integration (NPI), National Plan for European Integration (NPEI), and National Action Plan for the Implementation of the Association Agreement (NAPIAA).

In Moldova, the main **policy documents** for planning the implementation of the Association Agreement, incorporating also the approximation of legislation during the 2014-2019 period, were two consecutive National Action Plans for Implementation of the Association Agreement (NAPIAA):

- NAPIAA 2014-2016
- NAPIAA 2017-2019.

The development of NAPIAA 2017-2019 was a highly centralised process led by the Ministry of Foreign and Affairs and European Integrations (MFAEI) and the Centre for Legal Approximation, which was responsible for coordinating the legislative part of the Programme.

NAPIAA 2017-2019 was approved by the Government[76] in December 2016. It lapsed in 2019 and has not been replaced by any new EU planning document.

[76] National Action Plan for the Implementation of the Republic of Moldova – European Union Association Agreement for the period 2017-2019 (approved by Government Decision No. 1472 from 30.12.2016).

Following the submission of the application for EU membership, it is expected that the Government will develop a new planning document.

3.3 What is a National Plan for the Adoption of the Acquis (NPAA)?

Before starting its accession negotiations, a candidate country is expected to develop and adopt an overall strategic plan for the harmonisation of its legislation with the EU acquis. This document is called the National Plan for the Adoption of the Acquis (NPAA).

The Association Agreements of some Western Balkan countries contained a clause stating that the "*approximation shall be carried out on the basis of a programme to be agreed between the European Commission and the associated country*"[77].

In the case of Moldova's Association Agreement, no such clause exists. However, even in the absence of such a provision, the logic of accession negotiations and the accession process itself demand the existence of such a document.

The main purpose of this document is to provide a **strategic vision and a clear and concrete plan regarding how a candidate country would envisage becoming ready for EU membership.** This document is important for steering the internal reform process and providing clear guidance to the administration, but it also demonstrates to the EU and its members Moldova's capacity to become a Member State. Specifically, it demonstrates its capacity to understand the full complexity of the obligations arising from EU membership and the country's readiness to fulfil them.

The NPAA is a **multi-annual programming document** that covers the **entire EU acquis** and provides a strategic overview of how and when a candidate country will plan to fully harmonise its legislation with the EU acquis. In that sense, the NPAA is broader in scope than the NAPIAA previously developed by Moldova, which focused on the implementation of the Association Agreement (because the AA does not cover the entire EU acquis).

NPAA is a policy document, not just an extensive table focused on legislation. It provides policy plans of what is planned to be achieved, and contains plans for the adoption of policy documents (like strategies and action plans) that will elaborate

[77] SAA EU-Albania Article 70, SAA EU-Montenegro Article 72, SAA EU-Serbia Article 72, SAA EU-Bosnia Herzegovina Article 70.

the policy plan in detail. It does not replace the sectorial strategies and documents, but includes and summarises their content, and incorporates it in an overall plan.

The NPAA covers the entire EU acquis. This includes the political and economic criteria which will be the subject of the accession negotiations. It also covers all of Moldova's obligations arising from the AA and all the other agreements Moldova has with the EU. The NPAA should also contain plans for the development of administrative and judicial capacities of the country that are necessary for the implementation of the EU acquis. It provides the basis for developing an initial impact assessment analysis of the accession process, plus the basis for estimating the costs and budgetary effects of the activities covered by it.

The NPAA provides the basis for future accession negotiations, because it incorporates guidance regarding the plans of the Government. It is the basis for Moldova's presentations during the first step of the EU accession negotiations (the Screening process), particularly when the EU requires Moldova's plans.

It also provides the basis for Moldova's negotiation positions (i.e. the legislative and administrative plans which are the essential elements that the EU expects to be defined by Moldova in its negotiation position for each individual chapter).

The process of developing the NPAA links the entire EU acquis with Moldova's national legislation and its competences for the implementation of the EU legislation, which are distributed across the administration of Moldova. This allows for the identification of gaps in the national system regarding Moldova's competences for implementing the EU acquis.

In essence, the NPAA enables strategic planning to be performed during the accession negotiations. With the introduction of clusters into accession negotiations (in accordance with the new EU Methodology of accession), such strategic planning becomes ever more necessary at the cluster level. (The list of clusters is annexed to this Handbook.) After a cluster is opened, the obligations incurred by Moldova's negotiation positions are programmed into the revised NPAA, and are monitored quarterly.

To be able to develop the NPAA and conduct accession negotiations, every candidate country has had to develop a coordination mechanism based around the 35 negotiation chapters. Moldova established such a system in September 2022 with the adoption of the **Government Decision regarding the approval of the coordination mechanism of the accession process of the Republic of Moldova to the EU.**

After the coordination system for accession negotiations is established, developing the NPAA is the next step.

3.4 Levels of approximation (possible and required)

In the EU system, the level of approximation of legislation of Member States depends on what is provided by the founding Treaties, namely by the TFEU. The EU cannot go beyond the powers it has been given by the Member States via the Treaties. Therefore, the Treaties set the boundaries of what EU is able to do. Setting the ceiling of what the EU can regulate does not necessarily mean that EU will in reality regulate at that level, but in any case, it cannot go beyond what was written in the Treaties. Member States are obliged to transpose the legislation adopted by the EU.

As has already been mentioned, regulations and decisions are directly applicable to the EU Member States and do not require any approximation activity from them – only implementation measures. Directives are a tool for approximating national legislations with the EU acquis. The approximation methods described below apply to approximation with EU legislation/requirements stemming from directives.

There are several preconditions for transposing the provisions of EU law into the national legislation. The ECJ has developed a number of requirements concerning this in its case law, which are aimed particularly at ensuring the effectiveness of the directives and guaranteeing legal certainty. These requirements can be seen as conditions when transposing EU law.

The ECJ has set out certain specifications regarding the character of the transposing national legislation. Namely, the national authorities must:

- choose the most effective form of national legal measure;
- use legally binding measures; and
- ensure publicity for implementing measures.

The case law of the Court has provided for the following preconditions:

- transposition measures must ensure the actual and full application of EU legislation in a specific and clear way;
- where a directive is aimed at creating rights for individuals, they should be able to ascertain the full extent of these rights from the national provisions, and be able to invoke them before the national courts;
- national transposition measures should use the same form of legal instrument for transposing directives as it would have used for regulating the same issue in that Member State in the case when there was no EU directive.

In spite of these preconditions, the Member States still face problems during their transposition process, especially regarding correct transposition, timely transposition and "*gold-plating*"[78]. Such problems primarily result from the content and quality of the EU legislation, and capability of Member States to incorporate it into national administrative structures and existing legal systems.

3.4.1 The 'minimal' method

In this case the EU legal act defines the legal framework – sometimes with very detailed rules in a given area – while still permitting Member States to freely regulate/introduce higher standards than those of the EU. Very often the name of the act contains the adjective "minimal" in its title, indicating that it involves minimal approximation.

Example 1: **Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising** sets minimum and objective criteria for determining whether advertising is misleading. This Directive must not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection for traders and competitors regarding misleading advertising, since this kind of advertising is regarded as an undesirable practice.

However, this Directive prohibits Member States from introducing stricter conditions than those laid in the Directive as regards comparative advertising (maximal approximation).

The aim with this approach is to adequately fight misleading advertising while allowing comparative advertising on the EU market, because it can be useful to consumers.

When minimal approximation is used for products, MSs with stricter rules **cannot** prevent products from other parts of the EU that comply with the EU requirements from being offered in their own national market.

The aim with this approach is to adequately fight misleading advertising while allowing comparative advertising on the EU market, because it can be useful to consumers.

[78] The term "Gold plating" will be explained later in the text, chapter 3.3.8.

When minimal approximation is used for products, MSs with stricter rules **cannot** prevent products from other parts of the EU that comply with the EU requirements from being offered in their own national market.

Example 2: **Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers**. Already the title shows that this Directive only involves the setting of minimum standards for the reception of asylum seekers. In Article 4 we can find more favourable provisions: "*Member States may introduce or retain more favourable provisions in the field of reception conditions for asylum seekers and other close relatives of the applicant who are present in the same Member State when they are dependent on him or for humanitarian reasons insofar as these provisions are compatible with this Directive*."

In this case, there is the possibility of applying more favourable legislation than is contained in the EU provisions. Such a method of approximation is mostly used in areas relating to social policies, consumer protection, some health-related issues, and human rights. It is easier for Member States to agree on the minimum level and then to apply better national standards in those areas.

Example 3: **Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption (recast)**. Article 4 says:

"*Without prejudice to their obligations under other Union law, Member States shall take the measures necessary to ensure that water intended for human consumption is wholesome and clean. For the purposes of the minimum requirements of this Directive, water intended for human consumption shall be wholesome and clean if all the following requirements are met:*

(b) that water meets the minimum requirements set out in Parts A, B and D of Annex I;"

This Directive does not prevent Member States from introducing higher standards for drinking water.

3.4.2 The 'maximal' method

This approach toward approximation means that the EU act (directive or regulation) includes provisions which leave no room for options or amendments. Member States are obliged to transpose such provisions without amending them or reformulating them in a way that dilutes or alters the meaning or standard of the EU provision. This method is used where a uniform approach is needed across the EU, particularly in the EU single market, in relation to the marketing of goods, or human safety and health.

Example 1: Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys contains clear requirements on the prohibition against using electricity of particular voltages, and of including electrical transformers in the toys:

"*1. Toys shall not be powered by electricity of a nominal voltage exceeding 24 volts direct current (DC) or the equivalent alternating current (AC) voltage, and their accessible parts shall not exceed 24 volts DC or the equivalent AC voltage...*

2. The electrical transformer of a toy shall not be an integral part of the toy."

There is no choice left for EU Member States when it comes to transposing this Directive. They must ensure these requirements are transposed into their legislation.

When an EU act uses maximum approximation, it means that Member States cannot go beyond the EU's requirements. The above-mentioned **Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising** is a good example in the section concerning comparative advertising, where it prohibits Member States from introducing stricter conditions than those laid down in the Directive concerning comparative advertising. In this case, a single directive is an example of both minimal and maximal approximation.

The maximum approximation method is a way of preventing so-called "gold plating" (see 3.3.8 below) from being used for protectionist purposes, as certain EU Member States have occasionally done.

3.4.3 The 'selective' method

This method is used in cases where an EU legal act gives an EU Member State the option to go further than the EU act requires by introducing more stringent requirements.

For example, this type of approximation was used in directives of the so-called "*old approach*", which often gave Member States the opportunity to permit their manufacturers the right to choose between agreed EU production standards – which would permit the unrestricted distribution of their products – or their own national legislation. However, in the latter case, the products were not guaranteed the right of unrestricted distribution in the territory of other Member States.

This means that Member States may introduce or maintain provisions which are more favourable than the ones specified in a Directive. However, Member States are not allowed to lower their national legal standards in cases when they are higher than those specified by a Directive.

> An **example** could be found in the **Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 specifying minimum standards regarding sanctions and measures against employers of third-country nationals staying illegally**, where Article 15 states that:
>
> "*This Directive shall be without prejudice to the right of member states to adopt or maintain provisions that are more favourable to third-country nationals to whom it applies in relation with Articles 6 and 13, provided that such provisions are compatible with this Directive.*"

Moldova's legal drafters may introduce or maintain provisions if they already exist which are more favourable than the ones contained in a Directive. The key issue is that such provisions must be compatible with the directive.

3.4.4 Mutual recognition of national legislation

This method of approximation was defined by the Court of Justice in its pivotal judgments in the cases of **"***Dassonville*[79]**" and "***Cassis de Dijon*"[80]. In the Cassis de Dijon case, the ECJ held that the German legislation represented a measure having an equivalent effect to a quantitative restriction on imports, and was thus in breach

[79] Case 8/74 *Procureur du Roi v Dassonville*
[80] Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein*

of the Treaty. The major outcome of this case is the principle of mutual recognition, also known as the "*Cassis formula*". According to it, any product legally placed on the market of a single Member State can be legally marketed on the market of any Member State of the EU.

Restrictions to this formula are defined in Article 36 of the TFEU, which allows for prohibitions or restrictions on imports, exports or goods in transit that are justified on the grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. The ECJ added some additional grounds for restriction to the list contained in Article 36, namely the effectiveness of fiscal supervision; the protection of public health; the fairness of commercial transactions; and protection of the consumer.

Mutual recognition is based on the notion that the health and safety rules of the legal systems of the Member States are not that different. Strictly speaking this is not a method of approximation that can be used by the Member States, but is a general formula used by the EU to allow for free movement of goods across the EU market.

3.4.5 Mutual recognition of right of control

A mutual recognition of right of control can be seen as a variation of this approach, in which the Member States do not recognise each other's legislation but recognise the right to check the fulfilment of certain requirements. This method of approximation is limited to recognising the lights of each Member State to have another Member State verify the fulfilment of certain conditions.

> An **example** of "mutual recognition of the right to control" is that of **Council Directive 88/320/EEC of 9 June 1988 on the inspection and verification of Good Laboratory Practice (GLP)**. This Directive notes that the results of laboratory inspections and study audits on GLP compliance carried out by one Member State shall be binding on the other Member States.

The principle of mutual recognition means that not all sectors need to be fully harmonised, and that in these sectors, approximation may be restricted to the "*essential requirements*".

3.4.6 Approximation by referral

With this method, the national legislation transposes certain provisions contained in the relevant directive, while other issues (usually of a technical character) will be referred to decisions of the relevant bodies. These are usually standardisation bodies, such as CEN, CENELEC, ISO etc. This method is used with so-called "*new approach*" directives. It should be stressed that this is an option only for EU Member States, but not for candidate/associated countries, unless such a standard was adopted by national authorities and published in the national Official Gazette, in which case, drafters can refer to a national act introducing such a standard.

3.4.7 Alternative methods (optional)

This method is used in cases when an EU act gives Member States the option of how they will comply with the requirements of that act. Once a state chooses an option, it must apply it consistently throughout the system.

Example: The **Directive 2019/1 of the European Parliament and of the Council of 11 December 2018** to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

It is a great novelty for the EU to be regulating the area of competition with directives. For decades, this was the strongest "regulation only" area, where the essential rules were defined by the Treaty itself and subsequently developed through regulations, the practices of the Commission and its decisions in individual cases, and ECJ case law.

The Directive provides Member States with options on how to ensure the imposition of a fine. Member States have two alternatives:

"*Member States shall ensure that national administrative competition authorities may either **impose by decision** in their own enforcement proceedings, or **request** in non-criminal judicial proceedings, the imposition of effective, proportionate and dissuasive fines on undertakings and associations of undertakings where, intentionally or negligently, they infringe Article 101 or 102 TFEU.*"

Member States can choose to authorise the competition authority to do this or to ask a court to do it. In either case the fines must be *effective, proportionate and dissuasive*.

3.4.8 Gold-plating

Gold-plating is the term used when the implementation exceeds what is required by a Directive. This may take the form of:

- extending the scope, adding in some way to the substantive requirement, or substituting wider national legal terms for those used in the Directive; *or*
- not taking full advantage of any derogations which keep requirements to a minimum (e.g. for certain scales of operation, or specific activities); *or*
- retaining pre-existing national standards where they are higher than those required by the Directive when the Directive does not require doing so; *or*
- applying sanctions, enforcement mechanisms and obligations such as burden of proof which impose a greater burden on businesses than required by the Directive; *or*
- premature implementation, i.e. before the date stipulated in the EU act.[81]

Example: The EU competition legislation defines the concept of "**dominant position**" through the jurisprudence of the ECJ as follows:

"*The dominant position thus referred to by Article [82[82]] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*".[83]

However, it does not define how large the market share of such a company would need to be to represent market dominance. Every case is assessed individually. The jurisprudence of the ECJ suggests that market shares greater than 40-45% (when other factors allow for such a conclusion), especially when they exceed 50%, constitute dominance. However, market share alone is an insufficient ground for establishing the existence of dominance. In Serbia's Law on Competition from 2009 (OJ 51/2009 and 95/2013), the legislator set the threshold for the legal presumption of the existence of dominance to be the point at which the market share of an assessed company exceeds 40%. A company with this market share could

[81] UK Government's Transposition Guidance: How to implement European Directives effectively, London, 2018.
[82] Today this is Article 102 of the TFEU
[83] Case C-27/76 *United Brands Company and United Brands continental BV v Commission*, (1978) ECR 207, para. 65.

prove that it does not hold a dominant position despite having such a high share of the market. In this case, the burden of proof was shifted from the Competition Authority to the company itself. This threshold does not exist in the EU legislation. **Shifting the burden of proof from the state authorities to companies is a clear textbook example of gold-plating.** In 2013 this legal presumption of dominance was deleted through amendments. The 40% threshold remained as the level below which dominance will most likely not be assessed.

The main result of gold-plating is usually the imposition of extra burdens on the operators in a particular national market or on the citizens of that country, such as higher costs, the introduction of new barriers to trade, etc.

The EU's countermeasure against national gold-plating is maximal approximation.

It must be underlined that gold-plating is often unintentional on the part of legal drafters; they must therefore always keep it in mind as a possible pitfall.

3.5 Methods of legal approximation

3.5.1 Legal approximation techniques

The key part of the approximation process is the transposition of EU provisions into national legal acts. National legislation is applicable to the citizens and legal entities of that country. Therefore legal traditions and established practice should be honoured and maintained as much as possible unless they are an obstacle to the approximation process.

The language must be understandable and clear. The approximation process does not mean turning the national legal set-up upside down, but modifying it to make it compatible with the EU system. In practice, for associated countries there are two possible techniques of transposing EU legislation. These are presented below.

3.5.1.1 Copy-out technique

This technique implies the literal copying of the text of EU provisions into national legal system. This is the only choice for certain parts of EU acts (regulations and directives) that must have the same meaning in all EU Member States, such as definitions, numerical values for certain parameters, complex technical concepts and terms, and technical specifications. In these cases, a country can only copy the EU text, being careful that its translation into its own official language does not alter or lose and part of the meaning of the EU term. For Moldova, because the Romanian language is an official EU language, it is easier to avoid such problems.

However, it must be borne in mind that it is not possible to copy out the entire texts of directives and expect a positive result. Every EU act must be placed into the national context and institutional set-up. If this is not done, the implementation of copied EU legislation becomes difficult if not impossible.

Therefore the copy-out technique should be used for definitions, formulas, charts, numerical values, different types of limitation and exception, and annexes with technical specifications, because in these cases only the copy-out technique can provide full and proper transposition.

Example 1: With **Directive 75/442/EEC on Waste**, the definitions of the terms "waste" and "disposal" must be copied. For the purposes of this Directive:

(a) "waste" means any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force;
(b) "disposal" means:
– the collection, sorting, transport and treatment of waste as well as its storage and tipping above or under ground;
– the transformation operations necessary for its re-use, recovery or recycling.

Example 2: Article 23 of **Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty** defines the limits regarding how high fines can be imposed on companies: *"The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:*
(a) they infringe Article 81 or Article 82 of the Treaty; or
(b) they contravene a decision ordering interim measures under Article 8; or
(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.
For each undertaking and association of undertakings participating in the infringement, ***the fine shall not exceed 10% of its total turnover in the preceding business year.***
Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10% of the sum of the total turnover of each member active on the market affected by the infringement of the association."
This means that the limits on the fines that may be imposed and the way they are calculated are set by the EU, and countries can only copy this formula.

For the rest of the EU provisions, transposition with reformulation should be used. In this way, the aim of an EU provision will be transposed into the national legislation much better.

3.5.1.2 Technique of transposition with reformulation

As the name implies, this technique requires the reformulation of an EU provision in order to transpose it into the normative national act. Accordingly, the EU provision is transformed to fit the national system while preserving the essence, meaning and objective of the EU provision. Such transposition protects the national legal order and terminology. This technique allows to take from an EU act only those parts that are relevant for transposition, and to honour the intent of actions prescribed by the EU act, especially with directives which demand particular actions from Member States. In this way, a normative national act can be defined with a certain level of discretion regarding how the aim of the EU act will be reached while still honouring the national traditions, institutional set-up and terminology.

This is the most widely-used technique, since it allows the transposition to be conducted with the least degree of stress on the national legal system, and allows the 27 different legal systems of the EU Member States to function within the same Union, with the same EU legal system being in force in all of them.

It also allows the transposition of several EU acts into a single national act, thus avoiding overregulation. It also makes it possible to distribute the substantive content of a single EU legal act among multiple national legal acts when the subject of the EU act is already regulated by several different national acts.

However, this technique requires a lot of effort, knowledge and drafting time. But it is the only way to perform the task properly.

Even though Romanian is an official language of the EU, Moldova's drafters should (except with the Romanian version of the EU act) also consult the versions drafted in other languages, particularly in the case of doubt regarding the meaning of an EU provision.

Example 1: Article 4 of the **Directive 75/442/EEC on Waste**, requires actions by Member States, stating that

"*Member States shall take the necessary measures to ensure that waste is disposed of without endangering human health and without harming the environment, and in particular:*
– without risk to water, air, soil and plants and animals,
– without causing a nuisance through noise or odours,
– without adversely affecting the countryside or places of special interest."

It is up to the Member States to define and subsequently implement the appropriate "necessary measures" enabling safe waste disposal.

3.5.1.3 Transposition by a reference technique

This technique is available only to the EU Member States, and even so they use it only rarely. In such a case, the approximation is performed by reference to an EU act (e.g. the technical annex of a regulation or international standard, such as ISO, CEN or CENELEC). In case they want to use this technique, Moldova's legislator can refer only to Moldova's legislation. In this example, this means that Moldova's legislator can refer to these international standards only if they are already transposed into the national legislation of Moldova.

Referring to EU law is not an option for an associated country. Legally speaking, for Moldova's citizens EU law is foreign law, and it is not relevant to them. Referring to EU law would give rise to the issue of the constitutionality of such action.

Practically speaking, it would be difficult to operate in Moldova if an act that one needs to obey has not been published in the Official Gazette of the Republic of Moldova. Therefore this technique must be avoided in Moldova.

3.5.2 Transposition of secondary legal acts

Here we will analyse how the various types of EU legal act are transposed. Earlier, we analysed the legal status or character of all these acts. As we have already mentioned, in the EU directives are the sole tool for the legal approximation of the EU Member States' legal systems. On the other hand, regulations and decisions are directly applicable in the entire EU, and there is no need for Member States to transpose them (there is even a prohibition against doing so). However, for associated countries like Moldova, this distinction does not apply. Moldova needs to transpose all these legal acts, sometimes even including provisions of the EU's founding treaties (for example, Articles 101-108 of the TFEU on competition and the rules regarding state aid).

Additionally for associated countries, non-binding EU acts are a significant source of laws to be transposed through binding national acts.

3.5.2.1 Transposition of directives

Since the transposition of directives is a regular occurrence in the EU, most of the guiding principles of that process and in-depth explanations are supplied by the ECJ's jurisprudence.

> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. (Article 288, TFEU).

As we can see from Article 288, a directive is binding as to the result. The choice of the method to achieve such a result is up to any Member State. However, this choice is not absolute. The national legal act transposing a EU directive regarding a given issue must be of the same rank and type as a national act would be when regulating that particular issue without the transposition of the EU directive. In other words, when something is regulated in Moldova by a law, transposition of the same matter covered by a EU directive must also be performed in the framework of a law.

National legal instruments transposing directives must be legally binding and effective/applicable (e.g. a law, Governmental decree, binding act of a minister, court decision), and must be made known to the general public and published in the official gazette of the country.

> *The provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights.*[84]

According to the ECJ, directives (and other acts of EU law) may only be transposed in national law by means of *"national provisions of a binding nature which have the same legal force as those which must be amended"*. This means that existing national legislation that is not in line with the EU acquis, and which is being replaced by new legislation approximated to the acquis, must be replaced with acts of the same rank. It also means that non-binding administrative acts like orders and guidelines cannot be used for the transposition of directives, and they cannot be used to amend legislation which is hierarchically superior to them. The Court held in the same case that: *"This is not the case of "mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity."*[85]

This may look obvious in terms of the legal reasoning, but the jurisprudence of the ECJ shows otherwise. So where principles of directives, obligations, restrictions and the rights of legal entities and individuals are concerned, an act adopted by the

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[84] C 2/97 Judgment of the Court of 17 December 1998. – Società italiana petroli SpA (IP) v Borsana Srl. – Reference for a preliminary ruling: Tribunale di Genova – Italy

[85] C-168/85, Judgment of the Court of 15 October 1986, Commission/Italy, ECR 1986, p. 2945, point 13; Judgment of the Court of 2 December 1986, C-239/85, Commission / Belgium, ECR, p. 3645; Judgment of the Court of 3 March 1988, C-116/86, Commission/Italy, ECR, p. 1323; Judgment of the Court of 17 November 1992, C-235/91, Commission/Ireland, ECR, p. I-5917, points 9-10; Judgment of the Court of 9 March 2000, Commission/Italy, C-358/98, ECR, pI-1255, point 17

Parliament would be needed. Governments cannot use administrative measures for achieving the goals of particular directives.

For technical and other issues that will be amended frequently, the bylaws of the Government, ministers or other agencies will be much more applicable as tools of approximation in such cases, but they must have a legal basis in the law.

The entire and verbatim text of a directive must not be transposed into national legislation. However, it is important to fulfil the requirements and goals of the directive. As was previously mentioned, all definitions, formulas, charts, numerical values, different types of limitation and exception, annexes with technical specifications, etc., must be copied out word-by-word from the directive. They do not have to be legally codified; bylaws are much more suitable for formulas, charts, annexes with technical specifications, etc. It is up to the drafter to choose the approach that is the most appropriate for Moldova's legal tradition in each individual case.

It is important to avoid reducing the scope of the meaning of a directive when specifying in the national act what the directive generally defines. Sometimes it is useful to consult versions of the same directive that are written in other languages to understand better the scope and the goal of the directive.

Definitions from the directive must be fully and literally transposed into national legislation. Internal difficulties and restrictions are not an excuse for not transposing a directive (or any other EU legal act).

Directives are not applicable *per se,* and Member States must adopt binding legal acts that will enable the implementation of the directives on their territory, and agree a transitional period during which national legislation which is not in line with the new legislation will be repealed.[86]

EU Member States are obliged to transpose directives even if they regulate a situation not applicable to those states (for example, maritime legislation in landlocked countries).

All countries must implement a directive in the timeframe defined by the directive itself.

According to Article 4 of the TEU, Member States must take any appropriate measure, general or particular, to ensure the fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

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[86] ECJ, 18 December 1997, Case C 129/79, Commission v Belgium

This also applies to the transposition and implementation of directives. This duty applies to all the institutions of the state, including its courts. This means that the national courts have a duty to interpret national legislation in the spirit of the EU directive in order to achieve the aim of the directive.

Directives should be interpreted in their entirety and in the context of the entire body of EU law covering a particular area, not merely as an individual item or element of legislation. Individual provisions should be interpreted to achieve the declared aims of the entire piece of legislation, and narrow literal interpretations should be avoided if they would be contrary to that aim.

Directives contain obligatory and non-obligatory provisions (transitional provisions). They also contain provisions relevant only for EU Member States (duties to report to the Commission) or for the EU commission (duty to provide reports to the Council). **Moldova must transpose only the obligatory provisions.**

Even though Moldova is an associated country, most of these principles apply to its approximation efforts. The list of directives, their scope and the timeframe for their approximation is defined by the Association Agreement or Association Agenda, not by EU law. In the future, the scope and timeframe will be defined by the accession negotiation process with the EU. Nevertheless, the principles regarding how to transpose a directive apply equally during every phase of the process.

In the previous chapters we presented the levels of approximation within the EU, including the minimal and maximal methods of transposition, which are highly important when it comes to transposing directives.

The practical aspects of the transposition of directives and regulations are discussed in chapter 4.8.2.

3.5.2.2 Transposition of regulations

> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. (Article 288)

As we have mentioned, regulations are directly applicable in the Member States, so there is no need for them to be transposed. However, the Member States are obliged to introduce implementing measures that the regulations themselves require.

> For **example**, a regulation may require Member States to prescribe the enforcement procedure by stating: "*Enforcement of procedures shall be governed by the Member State*". **In this case, Moldova will act in the**

same way as if it was an EU Member State. Such a provision should not be copied into the national act, but Moldova must define the entire national enforcement procedure. The procedure should not necessarily be a completely novel procedure, but existing institutions and procedures may be used and upgraded. This means that if a regulation requires administrative enforcement, Moldova will designate the competent authority to enforce the national act transposing the regulation. It may also assign additional competences to a competent authority to enable it to enforce the legislation. In certain cases, criminal or misdemeanour penalties will need to be introduced into national legislation in order to enforce EU regulation. This would require amending the criminal code or other relevant law.

However, for the essential components of a regulation that regulate a particular issue in the EU, Moldova will have to transpose the regulation into its legal system. To achieve the goals defined by the Association Agreement, Moldova must replicate the EU legal system that is based on regulations (in areas covered by the AA). In an associated country, national legislation must provide the legal framework that in EU Member States is established at the level of the EU.

In this case, Moldova will have to transpose regulations in the same way that it transposes directives. This means that definitions, numerical values, technical requirements and technical details will have to be copied out into national legislation. In associated countries, the principles explained above regarding directives apply also to regulations.

The wording should be as close to the EU regulation as possible, otherwise divergences may occur during their application. Other provisions will have to be transposed with reformulations, while bearing in mind the objective of the regulation.

With the approximation of regulations, the most important aspect is the development of an institutional system that is capable of implementing national legislation which was previously approximated with the EU acquis.

To create such a set-up, the material and procedural provisions of EU regulations must be transposed. Since the EU does not have a criminal system of its own but relies on the national systems, the EU Member States must also ensure proper enforcement through penalties if such an obligation is included in a regulation.

Example 1: Article 126 of **Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals**

(REACH), establishing a European Chemicals Agency defines the penalties for non-compliance. It states that:

"*Member States shall lay down the provisions on penalties applicable for infringement of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission no later than 1 December 2008 and shall notify it without delay of any subsequent amendment affecting them.*"

It is up to Moldova (just like the Member States) to create a system for imposing penalties that can be used following infringement of the provisions of this Regulation, and implement it.

As an associated country, Moldova must also transpose Regulations which for EU Member States are directly applicable. Moldova should use the same set of tools and techniques as has been described for directives.

3.5.2.3 Transposition of decisions

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. (Article 288)

Decisions are binding on those addressed by it. They can be addressed to natural or legal persons, to a single Member State or to several Member States. Therefore, the drafter of the normative act should determine whether a decision is applicable to all Member States, in which case the decision should be analysed for possible transposition; or whether it is addressed only to some Member States or to a company, in which case it is not necessary to transpose it.

For **example**, under **Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001** on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, each unit packet of tobacco products, except for tobacco for oral use and other smokeless tobacco products, and any outside packaging, with the exception of additional transparent wrappers, must carry a general warning and an additional warning taken from the list set out in Annex I to that Directive.

The decision about whether to use such warnings is left to the discretion of the EU Member States. The Member States could decide whether health warnings in

the form of colour photographs or other illustrations are required in combination with the additional warnings. Such combined warnings must comply with the Commission Decision of 5 September 2003 on the use of colour photographs or other illustrations as health warnings on tobacco packages.

Since the Decision of the Commission defines what Member States should do, this decision should be transposed into Moldova's legislation. In this example, the choice of a national act transposing this decision (law or bylaw) should follow the same principles used as those applicable when drafting Directive 2001/37/EC itself, and the decision should be transposed in a legislative/normative package when Directive 2001/37/EC is transposed.

Additionally, in certain cases individual decisions might be pivotal decisions (particularly Commission's decisions) that clarify particular issues in each policy area. Commission decisions in individual competition cases, where the reasoning of the Commission can supply an interpretation of EU legislation and provide new avenues for Moldova's drafters – even though the decision itself is not being transposed – represent a good example. Such decisions will certainly be subjected to judicial review by the ECJ. If the ECJ upholds them, they will become part of the currently applicable acquis.

Table 1. *Types of EU legal acts*[87]

	Directive	Regulation	Decision
Entry into Force	Upon the date specified in the directive or on the 20th day after publication in the Official Journal.	Upon the date specified in the Regulation or on the 20th day after publication in the Official Journal.	Upon notification to the persons to whom it is addressed.
Approximation Deadline	Stated in the directive: the same as the date of transposition unless other date(s) is (are) indicated in the directive. May be 1 month to 3 or more years after entry into force. Some directives can have direct effect if the Member State fails to transpose them into national legislation.	Not applicable. Direct application and effect. Enters into force upon publication in the Official Journal.	Not applicable. Direct application and effect. Binding on the parties to whom it is addressed on the date of entry into force.

[87] Primoz Vehar and Jasna Marin, Steps to transposition. Guide to development of the national legislation aligned with the EU acquis, Belgrade, 2016, pages 51-52

	Directive	Regulation	Decision
Usage and Frequency	The most frequently used instruments of EU law for the harmonisation of laws, especially environmental laws.	Are used when a unified policy system is needed: funds, institutions; EU voluntary schemes such as eco-labels, EMAS; controls on products or trade – ozone-depleting substances, control of chemicals (REACH), food safety, etc.	Used to specify detailed administrative requirements or update technical aspects of regulations or directives – reporting, ratification of international agreements and protocols.
Legal Obligations of the Member States	Adoption of laws, regulations and procedures to give effect to the directive by the transposition deadline.	Establishment of institutions and procedures; they must repeal any conflicting national provisions.	Binding on the parties to whom they are addressed; these may or may not include the Member States.

3.5.2.4 Transposition of recommendations and opinions

Recommendations and opinions shall have no binding force. (Article 288).

As has been elaborated above, recommendations and opinions, together with other acts (not codified in the treaties) adopted by EU bodies, particularly the Commission, form the body of **soft law**. These acts are mostly used by institutions to provide further clarity and explanations of legally binding acts. The goal of these acts is to increase the level of legal certainty and predictability in the EU. Although they are non-binding, national courts must take them into consideration when interpreting legislation in the disputes brought before them.

> The recommendations *"cannot in themselves confer rights on individuals upon which the latter may rely before national courts. However, national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law."*[88]

[88] Case C-322/88, Judgment of the Court of 13 December 1989, Salvatore Grimaldi v Fonds des maladies professionnelles, European Court reports 1989. P. 04407

Both the Member States and the associated countries should follow the guidelines provided by these acts. For the associated countries, these acts are important for strengthening the capacity of their institutions to implement the EU acquis in the national legal system. Since national legislation is being approximated, the institutions responsible for implementing that legislation must develop their practices for its implementation in line with the practices of the EU and its Member States. These non-binding acts can provide national bodies with useful insights and valuable guidelines concerning the reasoning of EU bodies.

It should be underlined that when national bodies plan to implement the national legislation in the same way that the EU implements its own legislation, it would be desirable to transpose EU non-binding acts clarifying EU actions into the national legal system. To increase the level of legal certainty and predictability, national bodies should transpose EU non-binding acts, preferably through a binding national act that can be brought before courts. This is particularly important for the area of competition and state aid, where Commission notices play an important role.

In this case, such notices should be transposed, preferably by Governmental decrees or through the binding acts of implementing agencies (if such a possibility exists). This would raise the level of legal certainty in Moldova while still giving the system some flexibility.

3.5.2.5 Transposing requirements of EU framework decisions

Before the Treaty of Lisbon entered into force on 1 December 2009, Article 34 (2) (b) of the TEU provided for the possibility that the Council may adopt framework decisions for the purpose of approximating the laws and regulations of the Member States. These framework decisions were adopted in the previous second pillar Common Foreign and Security Policy (CFSP) and predominantly in the previous third pillar, Justice and Home Affairs (JHA).

Their purpose and nature were very similar to directives, since they were binding on Member States as to the objective to be reached, while leaving to those states the choice of method for achieving it. Unlike with directives, there was no possibility of framework decisions having direct effect under any circumstances.

Such decisions were adopted for the approximation of the criminal law and criminal procedure law of the EU Member States, as well as for the strengthening of judicial and police cooperation in criminal matters.

Since the entry into force of the Treaty of Lisbon, these framework decisions are being replaced by directives, and those still in force will be gradually repealed by new legislation in the form of directives. However, for as long as they remain in

force, and if they are covered by the AA, an associated country should transpose them.

The principles applying to directives are also applicable to the transposition of framework directives.

Table 2. *Overview of the legal nature of EU acts*

	Directive	Regulation	Decision	Recommendations and opinions	Interpretative instruments (Notices/ Guidelines)
Effects	Binding with respect to the result	Directly applicable and binding in their entirety	Directly applicable and binding in their entirety	Not binding	Not binding
Addressed to	All or specific Member States	All Member States and natural and legal persons in the territory of the EU	All or specific Member States, mostly specific natural or legal persons	All or specific Member States, other EU bodies, natural and legal persons in the territory of the EU	All Member States, other EU bodies, natural and legal persons in the territory of the EU
Transposition for Member States	Necessary	Not necessary: directly applicable. Possible implementing measures	Not necessary	Not necessary	Not necessary
Transposition for Moldova	Necessary – in accordance with AA provisions and national priorities	Necessary – in accordance with national priorities and with legal approximation plan	Not necessary – only if specifically relevant for Moldova (restricted number of cases, explained above)	Not necessary – only if specifically relevant for Moldova (restricted number of cases, explained above)	Not necessary, but can be a source of legal thinking and could sometimes be transposed into binding legal acts (bylaws)

3.6 Practices/tips to be used and practices to be avoided (do's and don'ts)

3.6.1 Tips to be used[89]

The criteria or principles required for an accurate legal approximation are defined by the ECJ for Member States in those cases where they have transposed directives. Since regulations are not meant to be transposed into the legal systems of Member States (apart from the few exceptions described above), but are to be transposed into the legal system of Moldova (as defined by the Association Agreement), it should be assumed that the same rules could also be used for the transposition of the regulations, directives, decisions, framework decisions and – where necessary – some EU soft law instruments. These principles should be adjusted to Moldova's situation and the goals defined by the AA.

Even though we have analysed most of these issues in previous chapters, they have been consolidated and presented below in a condensed form for greater ease of use. Accordingly, the following tips can be used by Moldova's drafters during the process of approximation:

3.6.1.1 Prioritising and finding the EU acquis

For prioritization, planners should always start from the existing obligations arising from the AA, Association Agenda, and other bilateral agreements with the EU. Then national policy priorities should be considered. Cost-benefit analysis should be the guiding principle here, and Moldova should always focus on measures that will yield more benefits with lesser costs while trying to introduce costly measures only in accordance with the financial capacity of the country. Once EU accession negotiations begin, the results of the negotiations and the commitments undertaken by Moldova during those negotiations will become a top transposition priority. As has previously been said, all unfulfilled obligations arising out of the AA, Association Agenda and other bilateral agreements with EU will become benchmarks in the individual chapters during the accession negotiations, and will have to be dealt with at the beginning of those negotiations in order to make it possible to move forward in the accession process.

A useful guide to the EU legislation contained in an individual chapter – and a good tool for prioritizing the transposition effort – is the legislation screening lists (i.e. the agendas for the meetings of explanatory screenings) presented by the European Commission to candidate countries during their accession negotiations.

[89] Ibidem, Vehar and Marin, pages 92/94

The agendas for the explanatory screenings prepared by the Commission for Serbia during 2013-2015 are available on the website of Serbia's Ministry for EU Affairs[90]. These can be used as an assistive tool, but due to the elapsing of eight years since the screening it must not be assumed to be fully current, because during this period the EU acquis has continued to evolve. The negotiations with North Macedonia and Albania will be a source of updated lists that cover the most important current EU legislation.

The easiest way to track the current EU legislation is to use the EUR-Lex[91] website, which presents summaries of the EU's legislation[92] that are organised by area of EU law. This legal database provides an overview of the most important EU legislation, and makes visible the connections between different legal acts, thereby providing a holistic view of each area.

3.6.1.2 Choice of the national legal act

The Member States may choose whether to incorporate the provisions of a directive in existing legislation or to adopt a new legal act, and when doing so the national legislator may choose to use the most appropriate and familiar legislative techniques. This also applies to Moldova – in other words, the national legal techniques should be used. Moldova's drafters should use the same type of normative act as they would use for regulating a given area as if there was no need for approximation.

It is very important that directives should be transposed into domestic legislation by a proper domestic legal act.

The following examples show how a EU legal act can be wrongly transposed:

- by an internal normative act (e.g. an instruction of the responsible institution), which is therefore not legally binding on individuals and legal persons;
- by a bylaw which may not impose penalty provisions, or may not establish new state institutions or bodies; or
- when there is no proper delegation (legal basis) in the national law which would provide for the right of the legal delegation of the competence to adopt it (e.g. to the Government or to the minister or other competent authority).

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[90] https://www.mei.gov.rs/eng/documents/negotiations-with-the-eu/screening/explanatory-screening/

[91] Eur-lex hompage https://eur-lex.europa.eu/homepage.html

[92] Summaries of EU legislation https://eur-lex.europa.eu/browse/summaries.html

Drafters of legislation must carefully study an EU legal act before they transpose it, and subsequently decide which domestic legal act should be used for the harmonisation process: it could be a law adopted only by the Parliament, a bylaw adopted by the Government (or by a Minister), or even through administrative instructions.

> Conducting the approximation process by transposing everything into laws adopted by the Parliament is not advisable, and may not even be possible. Flexibility of the legal system must be maintained.
>
> Approximation cannot be accomplished merely through bylaws either. Rights and obligations/restrictions cannot be given or imposed through bylaws. Legal certainty must be maintained.
>
> Legal tradition defining the matter/substance of laws and bylaws should be maintained if possible.
>
> One directive/regulation does not mean one domestic law. Do not overregulate!
>
> Internal instructions or other similar documents, as well as case law generated by the national courts, are not deemed to be proper instruments for legal approximation.

The choice of the national legal act by which a directive must be transposed will be dependent on the constitutional set-up and the hierarchy of the country's legal acts. However, irrespective of what type of national legal act is chosen, the directive must be transposed in a way that is legally binding for all institutions and natural and legal persons; its application by the administration and courts must be ensured throughout the state; and the text of the national legal act must be published and communicated to the public, e.g. through the Official Gazette or a similar source(s).

If an EU act intends to grant certain rights to individuals, the provisions of the national legal act must grant those rights in a very clear manner, and these individuals must be able to rely on those rights, including by means of protection provided by the domestic courts. The same principle applies when particular obligations are imposed on national institutions or individuals. In these cases, a law should be used for the transposition of such provisions, and not a bylaw.

When new rights and obligations are created, and when penalty provisions are required, the corresponding EU acts must be harmonised with a law.

Bylaws should be used only when their legal background exists in a higher-level act, and they cannot introduce new rights, obligations, penalties or sanctions. Bylaws can only define in detail legislation that already exists. National legislation, including all bylaws, must also be published in Official Gazette.

Example 1: A bylaw appears to suffice for defining how geographical markets will be assessed by the Competition authority in competition cases. But a law is needed in order to define which kinds of market behaviour comprise a breach of the Competition Law.

Example 2: Article 23 of the **Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty** defines the limits of what fines can be imposed on companies:

"2. *The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:*
(a) they infringe Article 81 or Article 82 of the Treaty; or
(b) they contravene a decision ordering interim measures under Article 8; or
(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year.

Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.

3. *In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.*"

Here, the maximum amount of the fine (10%) must be located in the Law on Competition. However, the obligation to take into account both the gravity and the duration of the infringement can only be fulfilled with a bylaw (e.g. by a Government decision), since formulas and calculations are a subject matter for a bylaw. Also, such formulas are changeable, and introducing new approaches to what are essentially procedural matters should not require a change in the law.

A bylaw defining the method of calculating fines should transpose **the Commission's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02).**

The EU located the same rules as are shown in Example 2 in another act, in this case in the **Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.**

Article 14 **Calculation of fines**

"1. Member States shall ensure that national competition authorities have regard both to the gravity and to the duration of the infringement when determining the amount of the fine to be imposed for an infringement of Article 101 or 102 TFEU[93]."

Article 15 **Maximum amount of the fine**

"1. Member States shall ensure that the maximum amount of the fine that national competition authorities may impose on each undertaking or association of undertakings participating in an infringement of Article 101 or 102 TFEU is not less than 10% of the total worldwide turnover of the undertaking or association of undertakings in the business year preceding the decision referred to in Article 13(1)."

Therefore the transposition of this Directive is performed with the same act and in the same manner as was done for the transposition of Council Regulation 1/2003. If the Regulation 1/2003 had already been transposed by 2019 and the adoption of Directive 1/2019, then no action is required by Moldova regarding the manner in which fines are set.

As the previous example demonstrates, strategic planning is essential for being able to cover the entirety of the EU acquis. This will involve following the timetable defined by the AA and Association Agenda and the anticipated accession negotiations. **Having a single EU-only planning document will enable this demanding task to be undertaken better and with more coherent planning.**

If the implementation of an EU legal act falls within the scope of the competences of several ministries and central public authorities, proper cooperation of the

[93] Both acts refer to the same Treaty Articles, but the difference is the consequence of renumbering the Treaty articles after the entry into force of the Treaty of Lisbon on 1 December 2009.

different ministries in legal drafting process must be ensured. This includes their cooperation during the preparation of the required Table of Compliance.

3.6.1.3 Definitions must be transposed

Definitions contained in the directives should usually be transposed into national legislation. The correct transposition of definitions is very important, since the meaning of the same legal term could be significantly different in each EU Member State. Non-transposition of definitions causes problems, especially when a directive includes rather precise and detailed definitions of the main concepts used in this directive.[94]

The absence of proper definitions may result in the interpretation and application of the relevant provisions of national legislation in a manner – and with a meaning – that is not fully coherent with, or is even contrary to, the meaning of the provisions of the EU law.

> Before transposing a definition into a new normative act, it is important to check if a definition for that EU provision has already been provided in another national legal act. Missing out this check could lead to different definitions being incorporated into different national legal acts that pertain to the same EU provision. This would inevitably lead to problems in implementation and judicial review, since both the courts and the administration would be confused as to which definition should be used.

3.6.1.4 Literal transposition is not mandated

When a directive is transposed, its objective must be achieved fully, thereby ensuring clarity and legal certainty. A directive does not necessarily require the literal transposition of its provisions. Although this is sometimes the most obvious solution, there is no requirement that the national legal act transposing the provisions of the directive must follow the structure of a directive. In addition, it must be noted that a directive can, for example, be transposed into a law plus a number of bylaws, if this is considered necessary. The reverse also applies in the event that several directives are transposed in the form of a single law (usually accompanied by a few bylaws), since each directive merely regulates part of an entire area.

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[94] Bernard Steunenberg, Wim Voermans, "The transposition of EC directives: A Comparative Study of Instruments, Techniques and Processes in Six Member States", University of Leiden, 2006.

In other words, the drafter must apply an individual approach during the transposition of a particular directive.

When transposing a directive, it is not enough to transpose the provisions into the national legal act. It must be ensured that the existing legislation is in line with this new legal act and does not create a conflict of laws which will result in potential problems with the implementation of this harmonised national legal act.

In most cases, the transposition of a new directive means the adoption or amendment of new national legal acts. Cases where the existing national legislation does not contradict the provisions of the directives and transposition is not required are quite rare, and usually the Member State needs to prove to the European Commission that the existing legislation is already in line with the new directive and that transposition is not needed (sometimes even before the European Court of Justice).

3.6.1.5 The annexes of the EU acts are important

Proper attention should be paid to the annexes of the EU acts, as they usually contain important technical provisions. However, there is no uniform rule regarding the correct method of transposition of annexes into the national legislation: the main objective is to transpose their contents into the national legal system. Therefore it must be emphasised that while the numerous decisions of the European Court of Justice may provide some guidance regarding the principles of correct legal approximation, there are no uniform rules regarding legal approximation techniques. Each Member State with an obligation to approximate its legislation to the requirements of EU law must choose its own pathway. This also applies to Moldova. The main thing that needs to be kept in mind is that the annexes must be transposed.

3.6.1.6 Inapplicable provisions

Some of the provisions of the EU legal acts specify obligations of EU institutions, which are separate from Member State obligations. Obligations of the European Commission which are included in directives or regulations do not require any transposition at the national level.

A good example would be the case when an EU act requires that the EU Commission must be informed about certain actions deriving from a directive by EU Member state. In this case it is up to the Member State to inform the Commission about actions taken, but for Moldova there is no such obligation, nor should such a provision be incorporated into national legislation. Other examples of inapplicable

provisions are provisions defining the entry into force of a regulation in the EU, the deadline for the transposition of a directive, the method of adoption or implementation of an EU act, and the transfer of responsibility to the Commission for the purpose of adopting an act at the EU level.

In the case of the so-called alternative obligations/options, the option that is not used becomes inapplicable. Such a situation exists when a regulation of the EU explicitly leaves it to the discretion of a Member State to choose one of the possible ways of fulfilling an obligation. Selecting one of these options nullifies the obligation to transpose other options into a national regulation.

Also inapplicable would be the provisions of a European Union regulation which leaves it to the discretion of a Member State to decide whether to transpose such a provision, but which does not oblige it to do so (the so-called discretionary provision).

For Moldova's legal drafters, such provisions are irrelevant and should be marked "inapplicable" in the Table of Concordance.

On the other hand, when the provisions of an EU act give the EU Member States discretionary powers to do something, Moldova's normative act should not copy-and-paste this provision. When an EU directive prescribes that "national authorities will create adequate conditions for....", to state in the national normative act that "the authorities of Moldova will create adequate conditions for..." would be the wrong decision, because such a national provision would be incompatible with the goal of approximation. The duty of the drafter is to *actually create* the "adequate conditions" for fulfilling the obligation. This can be achieved by defining the steps, designating the responsible authorities, stating the requirements for acquiring the rights, etc, that may be necessary for creating those conditions.

3.6.1.7 Internal coherence with the domestic legal system

When transposing the provisions of EU law, it is not enough to transpose the provisions of EU legal acts into national legislation. The new legal acts must be also internally coherent with the domestic legal system. If necessary, other laws which are in force must be amended to eliminate conflicts of norms between the old and new legislation. Transitional periods are important during drafting, because what is stipulated in EU law for EU Member States cannot always be immediately implemented in the national legal set-up. Time is also required for establishing the necessary institutions, and to make them operational. The financial impact should also be carefully assessed.

For an **example** of an EU policy with a large budgetary impact, it is useful to highlight the area of environmental protection. Some EU environmental legislation obligations can have a social impact – for example, when high environmental standards force the closure of a factory (making many workers unemployed), or when the need to invest large amounts in cleaning systems has high budgetary impacts. The transitional periods of domestic legal acts must also take into account the obligations arising from any bilateral agreements concluded.

If no deadlines are defined in the AA or Association agenda, investigate how long it took for former and current accession countries to comply with the EU requirements. This could provide a good indication regarding the complexity of the transposition effort that lies ahead.

3.6.2 Examples of bad practice to be avoided in the transposition process[95]

In this sub-chapter we will examine some negative practices that have been identified using a set of comparative assessments.

Do not take for granted the previously declared level of approximation. When initiating the drafting process, drafters must consult existing documents relating to the national act that is being amended, and should take into account the previous activities connected with the transposition of relevant EU legal acts. Automatically relying on the fact that an approximation clause exists, and that the explanatory note has declared the level of transposition, may lead to wrong conclusions.

The only reliable source of information regarding the level of approximation is the tables of concordance prepared during previous rounds of approximation. Without tables of concordance for every EU act that has allegedly been transposed, the correct level of transposition cannot be precisely established. Drafters should therefore prepare ToC's before starting this task in order to establish the real level of approximation in relation to all the EU legal acts that are planned for transposition, and to identify where the provisions corresponding to the EU legal acts are located in Moldova's legal system.

This does not apply if ToC's were previously developed. If they were, the drafters should check if there have been any changes in the situation since the ToC's were last updated.

[95] Ibidem, Vehar and Marin, pages 95/97.

It should be noted that instances have occurred in which a country was claiming, even during its accession negotiations, that its national legislation had been approximated to particular EU legal acts. After ToC's were prepared for each of the EU legal acts in question, or when an analysis was performed by the European Commission, it was realised that this was not the case.

3.6.2.1. Copying-and-pasting, or copying legislation from a neighbouring country

This issue may arise when countries have the same language. Problems can arise with copying-and-pasting, due to the fact that each country has a different administrative system and procedures. Copying without consistent reformulation and adaptation to the local environment could generate negative results. It could also be the case that the other country had not fully transposed the EU legal act, or had transposed it incorrectly. Copying their legislation would lead to copying their mistakes. It could also happen that the country one was copying from had copied its own act from a third country during the process of accession. If this has happened the problem can multiply if the first country has made mistakes in the transposition.

Since Romania is a Member State and Romanian is an official language in Moldova, using Romania's own solutions is an obvious choice. However, always check whether the Commission has initiated any inquiry or proceedings against Romania for not properly transposing the EU legislation you are analysing.

It is always advisable to adapt foreign solutions to your own national legal and administrative context and environment. The same solutions might not always be implementable in different legal systems, regardless of whether the same language is being used.

3.6.2.2. Failure to identify the related directives

All the relevant EU legal acts from a given sector must be identified; an overall legal approximation plan is therefore needed in order to ascertain what exists (i.e. what is in force and what is not), what is or is not relevant for Moldova, and which institution is responsible for what EU legal act. Often, the transposition of one directive also demands synchronised transposition of connected EU acts into the same domestic law, or into another law which must be amended in order to produce a coherent system (i.e. a package of laws).

Example: **EU Directive 2019/1 of the European Parliament and of the Council of 11 December 2018** to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, defines those features of the competition enforcement system that every country of the EU must include. The Directive has been adopted to improve the implementation of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, which is the pivotal EU act of secondary legislation in the area of competition. The directive does not prescribe who will perform the role of competition authority in a Member State, but regardless of who will be doing it, that institution must possess certain features and powers. It is up to the individual Member State to decide who will perform that role, but it will have to analyse its system and the provisions of the legislation regarding the country's central bank, the national judicial system, its administrative procedures, etc. If this analysis shows that these laws do not allow for the proper implementation of the Directive, or are regulating competition law in different manner (different defections are used, or different fines are imposed), some or several of those laws will have to be amended simultaneously, to allow for the full implementation of the directive. Special attention must be devoted to avoiding situations where two or more domestic laws prescribe the penalties for the same offence, or – worse still – prescribe different penalties for the same offence.

The provisions of both Regulation 1/2003 and Directive 1/2019 should be transposed through same acts, thereby defining the competition law of Moldova.

The legal drafter must always check not only the directives which must be transposed, but also the related acts. In many cases, several connected directives will be incorporated into a single domestic law. A national programme of legal approximation will be needed with clear definitions of all the EU legal acts relating to each area, including a planned transposition timetable and specifying who is responsible for what.

3.6.2.3. Implementation of the repealed or amended directive

Many EU legal acts have been repealed or amended. Legal drafters must be very careful to transpose the latest version. The drafters also need to take care because the legal situations for many of the directives being amended are valid only until

a particular date, or for a limited period. It is therefore better not to transpose a solution that would be valid only for (say) a couple of months.

Consolidated versions of EU legislation can be found on the following web page:
http://eur-lex.europa.eu/en/consleg/latest/index.htm.

3.6.2.4. Referring to a EU legal act instead of transposing it

Such an approach is substantively incorrect. Never use such a technique, because referring to an EU legal act instead of transposing it also contravenes the Constitution – foreign legal acts cannot be enforced. A directive should be transposed, not referred to.

3.6.2.5. Changing or non-literal transposition of the definitions

The majority of directives set out their definitions in their second or third Articles. Those definitions are very important; they must be transposed, but not be changed.

Example: The majority of directives contain different terms and concepts which, if transposed without definitions, could lead to serious breaches of EU law. To change a directive's key definitions is a wrong approach that would require amendments of a legal act in the near future to rectify and impose corresponding extra burdens. We recommend not skipping or changing the definitions, because doing so could make the transposition of the entire directive go wrong.

3.6.2.6. Referring to annexes from directives

Directives are not directly applicable. They must be transposed correctly into domestic legislation. The same is true for Annexes, which are part of the EU legal acts. To fulfil its requirements for proper enforcement, a Member State is obliged to establish necessary penalty provisions or suitable control measures. The EU as such usually lacks such competencies; therefore it obliges Member States to prescribe penalties for violations of the EU law by means of provisions contained in the directives or regulations.

It must be clearly indicated which domestic institution will deal with the subject matter. The relevant measures must be clearly prescribed in the national legal act or acts.

3.6.2.7. Selecting the wrong transposition method

It is possible for too many different directives to be transposed into a single domestic law, or for every directive to be transposed by a single special domestic legal act. Decisions regarding how best to organise them have to be made on a case-by-case basis.

> **Example:** Too many different directives were transposed into a single domestic legal act, or each directive was transposed into its own special law or bylaw. Although it is up to each country to decide on the number of national legal acts needed to transpose one or more directives, good practice shows that in areas where many directives have been adopted (for example, in the areas of labour law or migration law) it is more appropriate to have a single national legal act (or in some countries a legal code), which would enable the well-structured and logical transposition of several EU directives.

The drafting of a dedicated single national legal act for the transposition of only one directive might be justified in particular cases, such as when a particular issue has not previously been regulated by any national legal act and is completely novel for the country (e.g. the Law on State Aid or the Competition Law), or when the subject matter is very technical, etc.

3.6.2.8. Non-compliance with international obligations

International agreements always contain deadlines for the adoption or amendment of specific items of legislation, and a state needs to respect them in order to maintain its credibility in international relations. The AA, which is one example of an international agreement, specifies numerous deadlines that must be respected concerning legal harmonisation.

PART III

LEGAL APPROXIMATION IN THE REPUBLIC OF MOLDOVA

CHAPTER 4. Normative framework, procedures and practice

4.1 Law 100/2017 on Normative Acts

Law No. 100/2017 on Normative Acts defines the categories and hierarchy of normative acts, the principles of the legal drafting of normative acts, the stages and procedures involved in legal drafting, the stages of the legislative process, the basic requirements regarding the structure and content of normative acts, the procedures for the entry into force and termination of normative acts, the procedures for the interpretation of normative acts, the monitoring of the implementation of normative acts, and the revision of normative acts.

This law dating from 2017 repealed Law No. 780/2001 on legislative acts and Law No. 317/2003 on normative acts of the Government and other authorities of central and local public administration.

The Law treats the approximation process as an integral part of the legislative process in Moldova. *Inter alia*, the Law clearly defines the role of the Centre for Legal Approximation (CLA) as the main body within the Government for overseeing all the phases of the legal approximation process. This role is further elaborated in Governmental Decision (GD) No. 1171/2018.

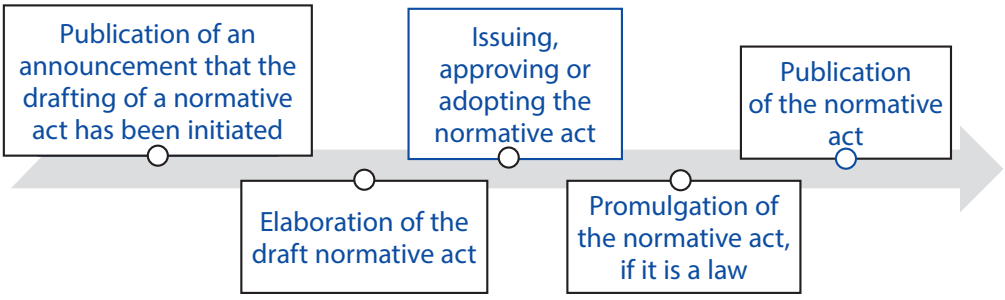
It establishes clear procedures for – and determines the responsibilities of – all the institutions involved in the legal approximation process, and sets the requirements for the transposition process. It also defines the requirements for interinstitutional consultations, conflict resolution and public consultations.

The Law states in Article 3, para. (3) that the national legislation should meet the provisions of Moldova's Constitution, the international treaties to which Moldova is a party, the principles of international law, and the legislation of the European Union[96]. **This gives the EU law the highest rank of importance for legal drafters.**

[96] Article 3, para. (3): The normative act should meet the provisions of the Constitution of the Republic of Moldova, international treaties to which the Republic of Moldova is a party, generally accepted principles and rules of international law, as well as the legislation of the European Union.

Section III on the Law-making activity (Articles 20-40) defines all the stages of the law-making process (i.e. initiating the drafting of normative acts; the substantiation of draft normative acts; the drafting of normative acts; the endorsement, public consultation and expert review of draft normative acts; and the finalising of draft normative acts). This section defines the legal approximation process as an integral part of the law-making process.

The Law on Normative Acts regulates the legislative process, prescribing the following stages:



The legislative drafting procedure (Article 21) consists of the following steps:

- designation of the responsible person or, when appropriate, the formation of a working group, that will elaborate a draft normative act, and assurance of the technical, organizational and financial capacities for the elaboration process;
- determination of the category, concept and structure of the draft normative act;
- elaboration of the initial version of the draft normative act and the preparation of an **Explanatory Note;**
- **development of the table of concordance (ToC) if the draft normative act is intended to harmonise the national legislation with the EU acquis.** This is performed in parallel with the development of the normative act (not after the act is finalised);
- holding of public consultations, approval of the draft normative act by the public administration authorities whose competence is directly or indirectly related to the subject of regulation, and the carrying out of those tasks that require special expertise. These include anticorruption expertise, legal expertise, and, **where appropriate, expertise related to compatibility with the EU acquis** and the expertise of the Working Group of the State Commission on Regulating Business Activity;
- preparation of a Summary of the objections and proposals of the public administration authorities and, as the case may be, preparation of a Synthesis of the recommendations of the representatives of civil society;

- elaboration of the final version of the draft normative act.[97]

Every draft act needs to be accompanied by an Explanatory Note (as stipulated in Article 30) that contains all the information regarding the draft, its substance, the reasons for drafting it, its components, etc. For drafts that have the purpose of harmonising the national legislation with the EU legislation, the Explanatory Note contains, *inter alia*, a description of the degree of compatibility with the EU legislation, and the findings of the review of compatibility with the EU legislation (which will be prepared by the CLA in the review stage).

Work on drafting the Explanatory Note should start from the moment that the drafting of the act begins. Together with the Explanatory Note, drafters are required to start developing the ToC relating to the EU acquis (Article 21).

This is a very important solution, since it is crucial to start drafting and developing the ToC and the act simultaneously, thereby using the ToC as a helpful tool to check whether the draft has succeeded in achieving the planned level of approximation. This is also required by GD No. 1171/2018 (Article 13). **If the ToC is developed only after the draft is finished**[98]**, the ToC will not be a helpful tool but just an administrative burden.** The same approach (i.e. development in parallel with legal drafting) applies to the ex-ante impact assessment required by Moldova's legislation[99].

Article 31 of Law No. 100/2017 prescribes that draft normative acts which have the purpose of approximating the national legislation with the legislation of the EU **must be marked with the EU logo and must contain a clause on harmonisation**. This is very useful for distinguishing the EU-related acts from the other acts. This article also prescribes that the author/s of the draft must prepare ToCs for draft normative acts that have the purpose of harmonising the national legislation with the EU legislation. These ToCs will be subject to review by the CLA.

Article 32 prescribes the endorsement, public consultation and expert review of draft normative acts. It stipulates *inter alia* that draft normative acts submitted by Members of Parliament must be sent for endorsement to the Government in accordance with the Parliament's Rules of Procedure, which – being enacted in the form of a law – also apply to the Government. This is highly important, because MPs might use their right of initiation to submit bills that would adversely affect

[97] Emphasis added.
[98] A common approach in administrations where approximation with the EU acquis is not accepted with enthusiasm by civil servants.
[99] Government Decision No. 23/2019, "On the approval of the Methodology for Impact Analysis in the Process of Substantiation of Draft Normative Acts".

the Government's approximation efforts. Since the MPs do not have the same support from experts as the Government, the Government's endorsement/opinion is essential for safeguarding the approximation process**.**

Article 33 sets a limit of 10 working days for the endorsement of a proposal, and 30 working days for endorsing large or complex proposals. It also stipulates that draft normative acts bearing the EU logo must be endorsed by all authorities and interested institutions, which is a good solution in light of the complexity and impacts which approximation can bring with it. This is also restated in Article 38 for the EU approximation process.

Article 36 of the Law prescribes the CLA's review of the legal approximation. It stipulates that all draft normative acts bearing the EU logo[100] must be sent to CLA for a review of their compatibility with EU legislation, **including those acts from specialised central public administration authorities** and from autonomous public authorities which were established in order to approximate the national legislation with that of the EU. The compatibility review with the EU legislation must be conducted in accordance with the procedure set forth by the Government, and with the methodology approved by the CLA. Draft normative acts developed by the President of the Republic of Moldova, Members of Parliament and the People's Assembly of ATU Găgăuzia must be sent for endorsement[101] to the Government, accompanied by the ToC[102]. This means that the CLA will also review this legislation when its purpose is the approximation of the national legislation with the EU legislation. **The CLA issues an opinion on all acts emanating from the Parliament under the Government procedure for responding to the Parliament's initiatives**.

Article 36 stipulates that the CLA must draft the declaration of compatibility, and describes the elements to be covered by the declaration (in paragraph 4). The expert compatibility review of the EU legislation must:

a) establish the degree of compatibility of the draft normative act with the EU legislation;
b) identify the missing provisions of the EU legislation, and prevent their inadequate transposition;
c) ensure the correspondence of the draft with the standards and legislation of the EU.

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[100] This means all acts which were developed to harmonise the national legislation with that of the EU.

[101] "*Avizare*" in Romanian (a written opinion, not necessarily a positive one).

[102] Article 58 of the current RoP of the Parliament also prescribes mandatory submission to the Government of draft legislative acts submitted to the Parliament by the President of the Republic of Moldova, by MPs, or by the People's Assembly of the autonomous territorial entity of Gagauzia.

The drafters of the act must amend the draft of normative acts in order to incorporate remarks and recommendations made by the CLA in its declaration of compatibility. Before sending the act for endorsement, the drafters must amend the Explanatory Note to reflect the information from the findings of the CLA's compatibility review, and if necessary, will include the CLA's objections and proposals in their synthesis.

Article 39 prescribes that drafters must take into consideration the proposals and recommendations of other institutions when finalising the final version of a draft normative act. **The draft must be finalised without affecting its consistency with the EU legislation.** The drafters should be aware that changes made in response to comments from other institutions might affect the level of approximation achieved.

Article 44 defines the use and substance of the harmonisation clauses of normative acts. A harmonisation clause indicates the type, number and official name of the EU acts transposed in the normative act, including the series, number and date of the Official Journal of the EU which published these respective EU acts, as well as the measure where these are being transposed. This is compulsory for all draft normative acts that bear the EU logo.

The text of the harmonisation clause is defined by Annex 2 to GD No. 1171/2018.

4.2 Governmental Decision 1171/2018 for the approval of the Regulation on harmonisation of the legislation of the Republic of Moldova with the legislation of the EU

GD No. 1171/2018 thoroughly regulates the organization and functioning of the approximation process of Moldova's legislation with EU legal acts, and repeals Government Decision No. 1345/2006 on the harmonisation of the legislation of the Republic of Moldova with the Community legislation.

It applies to all draft normative acts **which have the purpose of approximating the national legislation with EU legislation (bearing the EU logo),** and establishes the principles, criteria, conditions, stages, methods and instruments of legislative harmonisation (e.g. Explanatory Note and Tables of Concordance), as well as the national-level coordination and monitoring of the harmonisation process.

Article 3 of this GD defines the following principles of the approximation process:

progressive approximation (achieved through the gradual harmonisation of national legislation)	**dynamic approximation** (considering the evolution of the EU legislation), and	**irreversibility** (maintaining the achieved level of harmonisation)

Prescribing the irreversibility principle is particularly important. In this way, any future draft legislation that would lower the achieved level of EU approximation cannot be adopted in line with this GD. However, this is only applicable to the level of the bylaws and activities of the Government, line ministries and other central bodies, since this GD cannot prevent the Parliament from adopting legislation that might lower the achieved level of approximation.

This GD prescribes that the progressive approximation must be achieved through the gradual approximation of national legislation with the EU legislation, in accordance with the approximation obligations and deadlines set out in bilateral agreements with the EU.

Article 10 of the GD defines the way in which the approximation will be implemented, including the negative approximation. Specifically, it will involve the elimination of any of Moldova's rules, procedures, practices or other measures which are incompatible with EU legislation or other approximated legislation of Moldova. This is highly important, since the identification and elimination of such rules, procedures, practices or other measures which are incompatible with EU acquis is a particularly demanding task. It is usually carried out when a practical problem arises, such as when some of these elements impede the proper implementation of legislation. This article also includes the efficient implementation and enforcement of approximated legislation as elements of the process.

Additionally, this GD provides practical guidance and explanations for practitioners regarding the approximation process, and is directly linked to Law No. 100/2017 (GD 1171/2018, Articles 11 and 12). The basis for the approximation process will be (Article 11):

- obligations arising out of the AA and other bilateral agreements with the EU;
- the Government's action plans, and
- the Parliament's legislative programmes (in accordance with set deadlines).

Article 12 prescribes the requirements of the process of approximation in the following manner:

1. the draft normative act must be drafted in accordance with the requirements of the national legislative technique;
2. when elaborating the draft normative act, the terminology of the EU legislation must be observed, using concepts and notions identical or compatible with those used in EU legislation. If it is necessary to translate new terms and phrases from other languages, the corresponding equivalent in Romanian should be indicated;
3. when elaborating the draft normative act, the jurisprudence of the Court of Justice of the European Union is to be taken into account, especially those decisions that interpret the terms of the European Union legislation, or complete or clarify the objectives and purpose of the European Union act;
4. a draft normative act that is intended to harmonise the legislation of the Republic of Moldova with the legislation of the European Union:
   - must contain a harmonisation clause indicating the degree of the transposition of the EU legislation;
   - must be marked with the EU logo;
   - must be accompanied by an informative note and the concordance table indicating the degree of compatibility of the draft with the legislation of the EU
   - is subject to an expert compatibility review of its correspondence with the legislation of the EU; this will be carried out by the CLA.

Article 13 defines the stages of the process of the approximation of legislation:

1. determination of the approximation obligations arising from the provisions of bilateral agreements concluded with the EU, as well as the approximation activities planned based on the Government's action plans and the Parliament's legislative programmes;
2. identification of the EU legislation to be transposed;
3. rigorous analysis of the objectives, principles, requirements and standards of the EU legislation to be transposed;
4. determination of the provisions of the legislation of the Republic of Moldova in the field and establishing the degree of compliance with the legislation of the European Union;
5. identification of national normative acts to be amended or repealed to approximate the legislation and ensure the compatibility of national legislation with the EU legislation;

6. determination of the need to elaborate new draft normative acts for the regulation of those fields in which there are no corresponding provisions at national level;
7. identification of methods for transposing the provisions of the EU legislation into the legislation of the Republic of Moldova;
8. elaboration of the initial version of a draft normative act that is intended to achieve legislative approximation;
9. drawing up of the concordance table **simultaneously** with the elaboration of the initial version of the draft normative act;
10. determining the degree of compatibility with the European Union legislation transposed by the author of the draft normative act, based on the concordance table, and its indication in the harmonisation clause of the draft;
11. performing the compatibility expertise by the CLA and issuing the declaration of compatibility of the draft;
12. finalizing the draft normative act and updating the ToC based on the opinions, expertise and the declaration of compatibility;
13. updating the ToC after the approval of the final adoption of the draft normative act, to correctly reflect the degree of accomplishment of the legislative harmonisation obligations;
14. transmission to the CLA of the updated ToC, to be included in the database of the approximated national legislation.

As we can see from the above, this article prescribes that the ToC should be updated after the approval and final adoption of the draft normative act so that it correctly reflects the degree of accomplishment of the approximation obligations. It is especially important that this requirement is followed for draft laws, since they can be significantly altered during the parliamentary procedure. Article 53 stipulates that within 20 days from the moment of final approval/adoption of the draft normative act, the responsible authority must send to the State Chancellery the electronic version of the ToC, updated in accordance with the text of the approved/adopted draft, so that it can be included in the database of approximated national legislation that is maintained by the CLA.

Article 15 prescribes that draft normative acts that are intended to approximate Moldova's legislation with EU legislation, but which do not comply with the formal requirements of the accompanying documents, in particular the Explanatory Note and the ToC, must not be registered and should be returned to the author in accordance with the provisions of point 185 of GD No. 610/2018.

Article 21 defines the methods of approximation that can be used by drafters. For a more detailed elaboration, **Article 23 of the GD refers to the Methodology for the approximation of legislation** that you are now reading.

4.3 Determination of international obligations and national priorities

As has been stated above, Article 13 of the GD 1171 defines the stages of the process required for the approximation of legislation. As the first stage in the process, it establishes the **need to determine the approximation obligations** arising from the provisions of bilateral agreements concluded with the EU, as well as the approximation activities planned which are based on the Government's action plans and the Parliament's legislative programmes.

Hence there are three sources of the approximation obligation:

- **Bilateral agreements** with the EU (AA, ECAA, Energy community treaty or some other politically obligatory document like the Association Agenda or the document defining EU macro-financial assistance (MFA) to Moldova, or the conditions arising from the EU Budget Support). **The results of the accession negotiations will become the priority source once negotiations begin;**
- The **Government's** plans of its activities, e.g. NAPIAA or the Government Action Plan, etc;
- The **Parliament's** legislative programme.

Obligations in these documents should be aligned and synchronised, particularly as regards deadlines and the scope of the approximation. In any case, the starting point should be bilateral agreements with the EU while the national documents should arise from these documents.

> **Guiding questions:**
>
> Is approximation with an EU legal act planned in one of the key documents (Association Agreement, AA, ECAA, Energy Community) and/or references to their implementing documents, such as a national legal approximation plan?

Are deadlines, the types of act used for transposition, and the responsibilities distributed among the institutions for approximation, clearly defined?

The transposition of the EU directives and regulations, for instance in the area of the environment, will lead to profound reforms and significantly impact economic

actors in different sectors, such as agriculture, energy or transport, at both the national and the local levels. Moldova cannot meet all the EU standards overnight via a transposition exercise. Approximation with the EU acquis is therefore not merely a technical law-making exercise, but a cumbersome planning process triggering reviews of national development plans and the involvement of a large range of planning actors.

4.4 Identification of the EU legal acts that must be transposed

Regarding the identification of EU legal acts to be transposed into Moldova's legal system, the annexes to the AA give a precise indication as to how the approximation should be performed. The first step is to consult the annexes of the AA and their requirements.

Since the EU law is continuously evolving, drafters should check if the legislation listed in the annex has been amended or repealed by new EU legislation. In this case, the new legislation should be taken as the source of approximation.

In the case that the annex has not been officially revised through AA bodies, which would imply that the deadlines for approximation have also been revised and agreed between EU and Moldova, drafters should consult with their superiors. In such a case, the line ministry preparing the draft should consult with the CLA, as the main institution responsible for approximation, and with the MFAEI, as the main institution responsible for EU affairs. The result of these consultations should be the new approximation deadline that the drafters should have as their target.

Drafting a national legal act and transposing the requirements of the EU legislation requires the teamwork of lawyers and sector policy experts for the individual policy areas, including economists, engineers and other non-lawyers. To draft a law that is harmonised with the EU legislation, it is crucial to be familiar with the relevant EU law. Before starting the approximation process for a particular EU legal act, it is recommended to drafters to familiarise themselves with the adoption history of that act. Special attention should be given to the proposals of the EU Commission and the opinions of the European Parliament and Council during the EU legislative procedures, as well as the different Green and White papers ("soft law") drafted as preparatory documents prior to the adoption of the legislation by the EU.

A drafter should also analyse the regulatory framework of the EU legal acts and development trends in the field regulated by that act to make sure they understand which domestic legislation should be adopted or amended.

During the legislation drafting process the primary and secondary EU legislation from the field should be considered, as well as relevant judgments from the ECJ.

Guiding questions:

What is the purpose of the EU legal act?

What is the legal basis for the adoption of the EU legal act?

What aspects of its content, definitions, terminologies and other factors might affect the approximation?

What are the connections with the provisions of the TFEU or the TEU?

Are there any judgments of the European Court of Justice that interpret the EU legal act?

What is the adoption history of the EU act (e.g. White and Green papers, opinions of EU institutions during the EU legislative procedure, opinions of international organisations, commentaries from independent academics, EU law practitioners and think tanks...?).

Before starting with legal approximation, make sure to carefully read the EU legal act and its history. The type of EU legal act (i.e. regulation, directive, decision etc.) will affect the type of the law approximation methods and techniques which the legal drafter should use.

4.5 Analyse the national legislation

Before the legal drafters embark on the transposition of an EU legal act, they must also analyse and properly understand the relevant domestic legislation. It might already be partially in line with the EU's requirements, or some elements of the EU legal act could already be transposed, etc. Such information will suggest the right decision about how to approach the legal drafting.

Guiding questions:

How should we proceed: by amending an existing legal act or adopting a new national act? Should we use a law or secondary legislation?

What similar legislation already exists in the domestic legal system?

Has legal approximation already been conducted previously in the area? Is the current domestic legislation in line with EU legislation? If so, to what extent?

If it is not fully in line, to what extent is the existing national legislation compatible with the EU directive in the given field?

> Does any other national act already transpose this EU legal act, or parts of it?
>
> How many transposition activities are required to transpose the obligatory requirements of the directive in a manner that is compatible with national legal traditions?

There can be no accurate transposition if you are not familiar with domestic legislation in the area, considering that legal approximation is concerned with drafting domestic legislation and including the requirements of the EU acquis in it.

> Avoid "double-banking" (creating overlaps between existing national laws and the transposed directive) or "gold-plating" (exceeding the requirements of the directive).

Check whether similar provisions already exist, and do not repeat the same requirements several times in different regulations, thereby contributing to the legal uncertainty. If you adopt a new domestic legal act, make sure to repeal the old one from the same field which deals with the same issues and sets out to solve the same problems.

The use of "gold plating" often means unnecessarily overburdening industries and/or economic operators. However, reasons such as public health protection, national security or similar considerations could justify it.

Check the compliance of the draft legal act with the Constitution and other related national legislation, international agreements, the EU Treaty, other secondary EU legislation, the general principles of EU law, and the case law of the ECJ, if relevant.

4.6 Perform a regulatory impact assessment (RIA)

Article 25 of Law 100/2017 states that the development of draft normative acts must be preceded (depending on the importance and complexity of the respective drafts) by research studies which justify the need for initiating its drafting, or the lack thereof.

Ex-ante analysis and RIA is performed for individual normative acts during the drafting process, but solely for:

- **draft normative acts that have an impact on the budget** (subject to an *ex-ante* analysis);
- **draft normative acts that provide for structural and/or institutional reorganisations and reforms** (subject to an *ex-ante* analysis); and

– **draft normative acts that impact business activities** (subject to an RIA).[103]

The research study must be conducted by the institution proposing the initiation of a draft normative act.

An RIA is further developed through Government Decision No. 23/2019 on the approval of the Methodology for Impact Analysis in the Process of Substantiation of Draft Normative Acts. GD 23/2019 established a single impact assessment methodology (merging the previous *ex-ante*, RIA and policy impact assessments) under the State Chancellery. It also sets forth the procedures for completing each chapter using the standardised RIA template, and expanded the scope of the draft normative acts which will require this impact analysis.

The transposition of EU legal acts without first analysing the effects and options of such acts might easily result in Moldovan legislation that is fully harmonised but inapplicable. When it comes to impact assessment, the only option that is not possible for Moldova is not to approximate its system with the identified EU *acquis* in a sector, as defined in the AA. However, how Moldova decides to implement these obligations is up to the national authorities. Impact assessments of the measures required for the implementation of the AA/Association Agenda can help to identify the different options in the process that will lead to the same goal, and can also show whether Moldova needs more time for implementation and/or needs to further postpone implementation after its entry into force. The more that Moldova's transposition efforts are tailored to match Moldova's legal, institutional and financial situation, the likelier it is that they will be more applicable in practice, that the necessary transformations will be easier, and that the reforms will achieve wider legitimacy among the public.

The conducting of RIAs will be imperative during the accession negotiations for the (financially) most demanding chapters, such as environment, transport, energy and agriculture. If the negotiation position is to be realistic and implementable, they will have to be defined in line with Moldova's capabilities for implementing the EU acquis. These capabilities cannot be assessed without developing a proper (and sometimes in-depth) RIA.

When developing impact assessments, as a starting point Moldova's legal drafters should use the impact assessments developed by the European Commission when that EU act was being developed by the EU itself. It would be a useful guide as to what impacts might be expected in Moldova. The list of impact assessments developed by the European

[103] The Law on Regulating Business Activity No. 235 of 20.7.2006. (Art. 4) defines RIA as one of the basic regulatory principles of legislation regulating business activities.

Commission and the accompanying opinions of the Regulatory Scrutiny Board are publicly accessible on the European Commission's website[104]

A basic/initial *ex-ante* assessment should be performed during the early phase of preparing the EU planning document to indicate which EU legal acts would require a fully-fledged regulatory impact analysis. Such a fully-fledged, in-depth impact analysis would probably require outside (technical) assistance, especially for AA measures in the environmental sector.

4.7 Select the appropriate type of national legal act

The legal instrument identified for the implementation of the EU legislation into national law needs to be binding and effective. Nevertheless, the choice of the appropriate instrument is left to the legal drafters of Moldova, depending on the nature and scope of the EU policy included in the provisions that are the subject of the approximation.

Generally, laws should mainly be used for approximation with EU regulations (which in EU Member States are directly applicable without transposition) and with directives which include general principles for the particular area or horizontal directives. Laws could also be used for directives which confer the rights and obligations on natural and legal persons, and for all legal acts whose transposition is intended to amend existing laws or which have political implications.

On the other hand, bylaws should mainly be used for the approximation of technical legislation and other legislation when new institutions, new rights and obligations or penalty provisions are not needed.

At the same time, regardless of the type of normative act chosen for the transposition of EU legislation, the mandatory condition for all harmonized normative acts is their publication in the State Register of Legal Acts, as well as in the Official Journal (Monitorul Oficial) of the Republic of Moldova or, as the case may be, in the official journals of raions (regions), municipalities and autonomous territorial units with special legal status or in the Register of Local Acts (art. 56 of Law no. 100/2017). Otherwise, they are not considered entered into force and do not have binding legal force for the legal subjects.

New obligations, new institutions and penalty provisions cannot be introduced using a bylaw!

[104] Available at https://ec.europa.eu/transparency/regdoc/?fuseaction=ia

Guiding questions:

What type of domestic legal act should be used when transposing a particular EU legal act: a law, a governmental decision, or an act adopted by a ministry or implementing agency?

Does the transposition of an EU legal act require new rights and obligations, penalty provisions, or new institutions?

If you choose a Governmental decision or an act adopted by a ministry or implementing agency, make sure that the proper transposition of EU law provisions can actually be ensured by means of the bylaw. Such a choice for the transposition must not create any obstacles for the effective implementation and enforcement of the provisions of the EU law in the future. **Ensure that the bylaw has a proper legal basis for adoption in the law.**

For example, the relevant laws of Moldova must provide for the proper delegation of responsibility to the Government to legislate certain issues using bylaws. The bylaw format allows a more detailed description of certain issues, but it cannot create new institutions and other obligations or prescribe penalties, because such matters can only be regulated by a law.

4.8 Legal drafting and legal transposition

Everything described in this chapter in relation to directives will, *mutatis mutandis,* apply to regulations as well. In most cases it is line ministries that are tasked with transposition in the sense of doing the practical incorporation work of drafting the transposing legislation/provisions. A civil servant, a law drafter who is assigned with the task of transposing a particular directive, carries out this task from the start.

As an aid, before starting the normative drafting process a law drafter should draw up and use a **checklist** to answer some preliminary questions:[105]

1) *To what extent is the existing national legislation compatible with the EU directive in that field?*
2) *Is a full approximation possible, or should it be only partial?*
3) *When would a full approximation be applicable, either now or at some future point?*

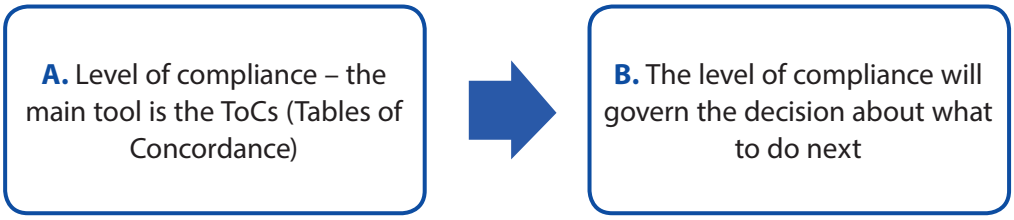
[105] Primoz Vehar and Jasna Marin, Steps to transposition. Guide to development of the national legislation aligned with the EU acquis, Belgrade, 2016, pages 45/46

4) *Which parts of the directive should not be transposed within national law (i.e. are unnecessary)?*
5) *How detailed does the national legislation incorporating the other necessary parts of the directive have to be?*
6) *Should any parts of the directive be incorporated into national legislation word for word?*
7) *Are there any reasons why the wording of the provisions should deviate from the directive's wording and terminology?*
8) *How much reformulation is required to structure and present the substance of the directive in a manner that is compatible with national legal traditions?*
9) *Is there anything unclear in the directive which needs to be further explained in national legislation or by some other means?*

Depending on the answers, the next task will be to organise the drafting accordingly. This stage of (practical) transposition would be better dealt with if divided into steps.

4.8.1 Checking and listing the priorities for transposition

The first step is to check and list the priorities for transposition assigned to a ministry. The prioritisation should have been completed through the NAPIAA or other programming document. The first **internal screening** should have taken place earlier via a rough comparison of the legislation against the EU *acquis*. From this, a compatibility check should be made to establish the main facts:



One of the main tools for the compatibility check outlined above is the Table of Concordance (ToC). The format and procedure for creating a Table of Concordance are defined by Annex 3 of GD 1171. The Tables of Concordance enable the relevant provisions in national legislation to be compared with the relevant obligations included within the directive. This way, a provision-by-provision comparison is conducted between the EU requirements set out in the directive, and national law. This process should be highly prioritised at the beginning, but also throughout the approximation process. It is necessary to properly assess the gaps between national legislation and the EU requirements. This exercise assists officials to

determine which provisions of national legislation need to be changed, and how such changes should be made in the most efficient manner.

It must be borne in mind that the comparison with a directive's provisions is comprehensive. **In many cases the comparison must be made against the entire national legislation, and not only against a single legal act.** Therefore, the principle that the transposition of a directive must be viewed in the context of the entirety of the national legation and not that of a single legal act or provision, is fully reflected in this exercise.

It is the duty of the civil servant to produce an accurate analysis of the state of approximation in the ToC. Decision-makers can make a political decision to adopt or not adopt approximated legislation, or to adopt legislation that is not in line with EU acquis; they must make an informed decision that is based on the accurate analysis of the level of approximation of the national legislation. However, such situations should be avoided as much as possible, as the adoption of non-compliant national normative acts might jeopardize the aim of proper implementation of the EU legislation into the legislation of the Republic of Moldova.

Tables of Concordance are an essential part of the transposition process. It is recommended that they be used as a basis for developing realistic legislative programmes, and for the drafting of the legislation that needs to be adopted. Interpretation of the EU legislation requires a detailed analysis and comparison with the available national legislation, which should lead to one of the following conclusions:

1. national legislation already covers the field of intervention and is compatible with EU law;

2. national legislation regulates the area concerned, but it is not compatible with EU law;

3. national legislation does not regulate the area concerned.

1. In cases where the answer to the first question is yes, it is quite clear that this means that the amendments to the existing or new national legislation are not necessary. The legislation is adequate and harmonises with that of the EU. Such cases may occur, but are quite rare.

2. If the legislation does deal with the area covered by the directive, the next step is to establish how many discrepancies exist, and to eliminate them by approximation. The ToC should be used for this purpose. Therefore the ToCs must be developed at the early stage of the process,

when they are a very useful tool for the drafters. Inserting the provisions of the directive alongside the provisions of national laws within the table gives a better overview and understanding of the directive, and what the next step will be – either amendments to the existing laws, or the drafting of new laws, or a mix of both approaches.

ToCs are very useful for identifying unintentional mistakes, like errors in transposing the numerical values in an act (e.g. putting 0.01% into a national act instead of the required 0.1%), or omitting a significant word or a part of a long and complicated definition used by the EU act.

3. In the third case the area is not regulated nationally at all, and relevant legal drafts have to be developed to harmonise it with the directive. Sometimes this is the easiest situation because you are starting from a blank page, and it is up to you to determine all the parameters of the process.

4.8.2 Transposing Directives and Regulations

Following the earlier description of the legal characteristics of directives versus regulations and their differences, a set of relevant practical issues is presented below.

It is advisable to approach EU regulations that are directly applicable in EU Member States (but not in Moldova) in the same way as directives. Anyhow, it is recommended not to change the main text of a regulation as far as is reasonably possible.

Since regulations do not always prescribe all the rules, supplementary national measures are often required. The authorities must provide for measures for the implementation of a regulation or impose penalties for non-compliance in the national legislation, or define a national implementation body, and so on. After the accession, domestic legislation which transposed regulations or some provisions of regulation should be repealed, although the implementing and penalty provisions will have to stay in force.

Examine the Directive's provisions thoroughly: after the priority directive for transposition has been assigned, the first step is always to understand the directive as thoroughly as possible before beginning to design a harmonisation plan. Reading the preamble of the legal instrument is always a good start. This is the formal part of the legal act that sets out the legal basis, lists the documents prepared by the European institutions during the legal procedure, and summarises the main objectives and elements of each article. The preamble acts as a kind of executive summary of the legal act and therefore gives the reader a good overview.

The first sentences of the preamble are crucial to understanding the legal act, as the table below explains.

Table 3. *Understanding the preamble* [106]

Preamble text	Position	Purpose
Having regard to the Treaty establishing the European Community, and in particular Article 175(1) thereof,	Sentence 1	This is the legal basis, which depends on the purpose of the directive. The legal basis establishes some of the criteria for the review of Member State legislation by the courts.
Having regard to the proposal from the Commission (1)	Sentence 2	Only the European Commission is empowered to propose legislation; each proposal is accompanied by a lengthy explanatory memorandum. Both are published in the Official Journal "C" (communication) series. *Footnote (1) gives the reference.*
Having regard to the opinion of the European Parliament (2)	Sentence 3	The EP opinion provides information about the different priorities in society and the Member States, and often contains proposals that either tighten or loosen certain requirements. *Footnote (2) gives the reference in the Official Journal C series.*
Having regard to the opinion of the Economic and Social Committee (3)	Sentence 4	This committee represents public and private interests in the legislative process. *Footnote (3) gives the reference in the Official Journal C series.*
Having regard to the opinion of the Committee of Regions (4)	Sentence 5	This committee brings the viewpoints of the regional levels of government formally into the legislative process. *Footnote (4) gives the reference in the Official Journal C series.*
Acting in accordance with the procedure laid down in Article 251 of the Treaty (5) in the light of the joint text approved by the Conciliation Committee on 8 November 2002	Sentence 6	This is the legal basis for the procedure and notes the date on which a final text was agreed between the EU institutions.

[106] Primož Vehar and Jasna Marin, Steps to transposition. Guide to development of the national legislation aligned with the EU acquis, Belgrade, 2016, pages 54/55

Preamble text	Position	Purpose
Whereas: (1) Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.	Sentence 7	This sentence is the first "whereas" of the series of remaining paragraphs in the preamble. They describe the justification for the legal act and the purpose and regulatory approach of each article. This is the place to find a description of the relationship between the legal act and other EU legislation.

In addition, read the explanatory memorandum submitted by the European Commission when it proposed the directive. The key to understanding the often complex EU legislation is to comprehend the need to define an adequate legal structure solving an EU-wide problem while still considering the different needs and circumstances of the EU states. The Commission's proposal and the explanatory memorandum are usually referenced in the first footnote in the preamble. It is important, if possible, to look at the problems and actions in the Member States that gave rise to the need to legislate at the EU level, and to compare them with the situation in Moldova. In addition to EU secondary legislation, the EU primary law and judgments of the ECJ should also be considered to get a more accurate interpretation of the provisions of the EU act in question.

> This is an important task prior to choosing the instrument for adoption. It will require a good knowledge of the EU's and Moldova's legal systems and legislation in the specific sector. The involvement of lawyers and technical staff in the departments is crucial.

It is essential to thoroughly examine all the provisions of the directive. Not all of them have the same relevance and character. Some are strict and need to be transposed in a certain manner, some offer alternatives, some are discretionary, and for some there is no need for transposition. Understanding the nature of the requirement is very important.

The table on the next page provides an overview over how to interpret, for transposition purposes, the provisions of various directives; which provisions to transpose (minimum harmonisation, alternatives, derogations, etc.); and how to transpose them.

Table 4: *Overview over how to interpret, for transposition purposes, the provisions of various directives; which provisions to transpose (minimal harmonisation, alternatives, derogations, etc.); and how to transpose them.*[107]

Provision/Obligation	Nature	Comments
No veterinary medicinal product may be placed on the market of a Member State unless a marketing authorisation has been issued by the competent authorities of that Member State in accordance with this Directive or a marketing authorization has been granted in accordance with Regulation (EEC) No 2309/93.	Obligatory, a ban	It is obligatory to transpose this using similar wording that is as close to the original wording as possible. The veterinary product may be distributed only if authorization has been granted. The authorization procedure is also regulated, and the Competent Authority must conform to the authorization requirements in the Directive, or alternatively follow the authorization procedure in accordance with the Regulation.
Member States shall adopt all measures necessary to ensure that….	Obligatory	The usual language in directives – it is precise as to objective and general as to the means. The MSs are to decide what measures are adequate for achieving the objective. Please note that wording of the transposing provision like: "…Moldova adopts the measures…" are not appropriate or adequate. "The ministry will adopt the measures…" would be acceptable only if it is a part of the approximation plan which provides the legal basis in a law for the adoption of subsequent legislation containing the concrete measures. *The type of measure is limited only by the scope and meaning of the directive. The entire directive has to be read before it is possible to decide what kinds of measures are to be taken.*

[107] Primoz Vehar and Jasna Marin, Steps to transposition. Guide to development of the national legislation aligned with the EU acquis, Belgrade, 2016, pages 55-61

Provision/Obligation	Nature	Comments
1. To guarantee the independence of national administrative competition authorities when applying Articles 101 and 102 TFEU, Member States shall ensure that such authorities perform their duties and exercise their powers ***impartially*** *and in the interests of the* ***effective*** *and uniform application of those provisions, subject to proportionate accountability requirements and without prejudice to close cooperation between competition authorities in the European Competition Network.* *2. In particular, Member States shall at a minimum ensure that the staff and persons who take decisions exercising the powers in Articles 10 to 13 and Article 16 of this Directive in national administrative competition authorities:* *(a) are able to perform their duties and to exercise their powers for the application of Articles 101 and 102 TFEU independently from political and other external influence;* *(b) neither seek nor take any instructions from government or any other public or private entity when carrying out their duties and exercising their powers for the application of Articles 101 and 102 TFEU, without prejudice to the right of a government of a Member State, where applicable, to issue general policy rules that are not related to sector inquiries or specific enforcement proceedings; and* *(c) refrain from taking any action which is incompatible with the performance of their duties and/or with the exercise of their powers for the application of Articles 101 and 102 TFEU and are subject to procedures that ensure that, for a reasonable period after leaving office, they refrain from dealing with enforcement proceedings that could give rise to conflicts of interest. 14.1.2019 L 11/18 Official Journal of the European Union EN*	Discretionary with conditions and obligatory elements	This article prescribes the obligation of the Member States to grant independence to the Competition authority, particularly in relation to the Government as the lead political institution and executive branch. How this will be done is up to the Member State. The practical work of the competition authority and its results will be assessed, and this independence must be demonstrated in practice. National legal and administrative traditions should be followed unless they prevent the achievement of the goal, namely the independence of the competition authority. If such a conflict exists, innovative solutions should be found to fulfil the Directive's requirement. The recruitment process of the decision-making body of the competition authority must be defined by a law (and not by a bylaw that can easily be changed).

Provision/Obligation	Nature	Comments
3. The persons who take decisions exercising the powers in Articles 10 to 13 and Article 16 of this Directive in national administrative competition authorities shall not be dismissed from such authorities for reasons related to the proper performance of their duties or to the proper exercise of their powers for the application of Articles 101 and 102 TFEU, as referred to in Article 5(2) of this Directive. They may be dismissed only if they no longer fulfil the conditions required for the performance of their duties or if they have been found guilty of serious misconduct under national law. The conditions required for the performance of their duties, and what constitutes serious misconduct, shall be laid down in advance in national law, taking into account the need to ensure effective enforcement. *4. Member States shall ensure that the members of the decision-making body of national administrative competition authorities are selected, recruited or appointed according to clear and transparent procedures laid down in advance in national law.* *5. National administrative competition authorities shall have the power to set their priorities for carrying out the tasks for the application of Articles 101 and 102 TFEU as referred to in Article 5(2) of this Directive. To the extent that national administrative competition authorities are obliged to consider formal complaints, those authorities shall have the power to reject such complaints on the grounds that they do not consider such complaints to be an enforcement priority. This is without prejudice to the power of national administrative competition authorities to reject complaints on other grounds defined by national law.*		
Member States may provide for a single procedure in order to fulfil the requirements of this Directive …	Discretionary	This sentence clarifies that Member States are not required to adopt separate procedures (e.g. under Directive on IE[108] replacing the IPPC Directive).

[108] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control)

Provision/Obligation	Nature	Comments
Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive. In this event, the Member States shall: *(a) consider whether another form of assessment would be appropriate;* *(b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the exemption decision and the reasons for granting it;* *(c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where applicable, to their own nationals.*	Discretionary with conditions and obligatory elements	This sentence gives the Member States the power to exempt certain projects from the environmental impact assessment procedure. If it decides to exempt a project, it must comply with certain obligations – the exemption must be specific and exceptional, and the Member State must comply with certain conditions and take actions to inform the public and the Commission. Moldova has the discretionary right of exemption, and if chooses to exercise it the other conditions MUST be met. At this point, Moldova has no reporting obligations. This point must be left out.
The information to be provided by the developer in accordance with paragraph 1 shall include at least: …	Minimum Obligation	The minimum content of the information is listed. The Member States may require more detailed information.
The following particulars and documents shall accompany an application in accordance with Annex I:	Obligatory	The choice of transposition is limited: – all the conditions/particulars listed in the annex have to be met and transposed into domestic legislation – the transposition instrument must be chosen that matches the obligations placed on the legal and natural persons. If the application is regulated under the law, then two possibilities emerge: either the law also regulates the particulars, or the law gives powers to the ministry to develop the legislation by which it must be transposed.

Provision/Obligation	Nature	Comments
The provisions of this Directive shall not affect the obligation on the competent authorities (CA) to respect the limitations imposed by national regulations and administrative provisions and accepted legal practices with regard to commercial and industrial confidentiality, including intellectual property, and the safeguarding of the public interest.	Clarification	The EU is explaining that the directive does not intend to modify national laws or practices regarding certain non-sectoral issues. This part is not transposed. Nevertheless, if needed, the clarification underlining the national CA's obligations under other regulations/laws could be added. One should make sure to avoid double regulation.
This Regulation shall apply to all stages of production, processing and distribution of food and feed. It shall not apply to primary production for private domestic use or to the domestic preparation, handling or storage of food for private domestic consumption.	Obligatory	This paragraph describes the scope of the Regulation (General Food Law), the type of operations covered, and the type of food and feed operators in the food chain which are obliged to fulfil the requirements. It does not oblige the Member States to adopt a law with exactly the same scope, since the regulations are directly applicable. Candidate and associated countries must find a way to transpose regulations in a legally acceptable manner. Exemption from the scope means that the Member States can decide for themselves how to regulate this aspect, or leave it uncontrolled.
"Greenhouse gases" means the gases listed in Annex II; *'Food' includes drink, chewing gum and any substance, including water, intentionally incorporated into the food during its manufacture, preparation or treatment. It includes water after the point of compliance as defined in Article 6 of Directive 98/83/EC and without prejudice to the requirements of Directives 80/778/EEC and 98/83/EC*	Obligatory	It is obligatory to transpose definitions literally/verbatim/ by copying-out. The MSs have no discretion regarding the transposition of the definitions. The same applies to the candidate/associated countries. This is crucial in order to make sure that the definition of "waste", for example, is understood and

Provision/Obligation	Nature	Comments
		transposed in the same manner throughout the MSs – a uniform application of definitions which ensures legal certainty as well as the purpose of the directive. If some terms do not exist in the national legal order, the introduction of novel terms is advised (as defined in a particular directive).
The competent authority shall issue a greenhouse gas emissions permit granting authorisation to emit greenhouse gases from all or part of an installation if it is satisfied that the operator is capable of monitoring and reporting emissions.	Obligatory	This paragraph establishes the condition for issuing a permit. If this condition is met, the competent authority is obliged to issue the permit. No discretion is allowed in this case besides the conditional satisfactory checks of the operators' capability.
Member States shall take all necessary steps to ensure that as from 1 January 2003 within their territory heavy fuel oils are not used if their sulphur content exceeds 1.00% by mass.	Obligatory	A straightforward technical standard. For Moldova, the deadlines will be established in accordance with the Association Agreement or some other bilateral agreement.
The following rules shall be observed when using sludge: — the sludge shall be used in such a way that account is taken of the nutrient needs of the plants and that the quality of the soil and of the surface and ground water is not impaired.	Obligatory + Discretionary	This is a very general obligation that allows the Member States to decide their own rules, as long as the rules (1) take account of the nutrient needs of the plants and (2) do not impair the quality of soil, surface and groundwater. The second requirement is clearly stronger than the first, but both have to be met. The "way" is to be prescribed by rules/legislation.
Directive 1999/22/EC relating to the keeping of wild animals in zoos, where a country may choose to license zoos pursuant to Article 4 or, alternatively, it may establish a system of regulation and registration pursuant to Article 5.	Obligatory – one of the alternatives	Provisions that allow options for transposing or/and implementing the directive. In such cases, a country may decide to transpose (and implement) either one option or the other.

Provision/Obligation	Nature	Comments
List of exemptions from Directive's requirements	Important information	Provisions that do not establish a legal obligation but are important for understanding what is outside the scope of the Directive. This could be transposed, but not necessarily. It clearly depends on the legal system. Although listing the exemptions is useful, their transposition should not impair domestic legislation in other fields nor breach the national legal drafting rules.
Reporting requirements provisions[109]	Not legally obligatory until the date of accession	Not relevant for Moldova as an associated country. Nonetheless, candidate countries will have to take them into consideration, because the administrative and data management systems that will be needed for reporting have to be in place before accession; these provisions are to be implemented (and usually regulated) and should be included in the tables of concordance (and also in the implementation questionnaire).
Directive 2012/19/EU on waste electrical and electronic equipment (WEEE).	Alternatives/ options to be regulated	The directive that provides the competent authorities with implementation options. The Member States must make a decision regarding the implementation options: – introduce full producer liability (EPR), *or* – establish shared liability involving public funding.

[109] Ludwig Krämer, EC Environmental Law, Fourth edition, 2000, section 11-08, p. 280, lists the measures that should be taken to prepare for reporting obligations a.er accession,

Provision/Obligation	Nature	Comments
Annexes to Directives, including the technical annexes	Usually contain precise and legally binding obligations	These obligations often need to be transposed verbatim.

4.8.3 Priorities and timing

Discuss ways of prioritising the implementation tasks that are based on the legal, institutional, economic and financial aspects. Assess which tasks are most likely to affect the implementation programme, e.g. due to the need for planning, institutional strengthening, and the design and construction of new facilities. Where the process of implementation is likely to be complex and involve many actors, a timetable for action by the State must be set out (see, for example, the Water Framework Directive, 2000/60/EC, Annex V)[110].

4.8.4 Identify the key stakeholders

Identify the key stakeholders affected by the legislation and their role in the implementation, and discuss the role of the competent authorities and government at the national, regional and local level. Discuss solutions based on an assessment that takes into consideration public versus private involvement, communication and consultations. Also consult with other stakeholders. In particular, industrial operators and other entities on which the provisions of directives will have a major effect and impact should be informed in a timely manner about the plan for the regulations. This will enable the affected stakeholders to actively participate in the consultation process and to obtain in the later stage their feedback on the results of the application of the regulation. Consequently, acceptance of the new regulations by those mostly affected by them will be increased. The same consideration applies to the efficiency and cost-effectiveness not only of the legislative process, but also of the implementation measures proposed by the legislation.

4.8.5 Address technical issues in the legislation

These issues may require expertise and specialised knowledge, for example to set guideline emission standards, monitor emissions and prepare technical guidance notes. Collaboration with experts in the specific technical field is recommended

[110] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy - OJ L 327, 22.12.2000, p. 1–73

already at the stage of drafting a legal act. In addition, inclusion of consultation procedure should be initiated, ensuring the participation of the relevant stakeholders in the legal drafting working group, as mentioned above.

Drafting legislation is not a task only for lawyers, who lack specific technical knowledge but cannot be left to economists, engineers and non-lawyers that do not have the knowledge of the legal system. **It is a joint endeavour.**

4.8.6 Economic and financial issues

Discuss the types of costs arising from the implementation of the legislation, identify the subjects who would bear them, define economic and financial tools for recovering costs and estimate the cost of implementing legislation, provided that they are available from other studies. In this respect see the part of the Regulatory Impact Assessment, above.

4.8.7 Enforcememt (ensuring implementation of harmonised legislation in practice)

Describe some of the key issues arising from checking and controlling the implementation of the legislation. This covers licensing and permitting procedures, monitoring, inspection, enforcement, data collection and reporting. The importance of enforcement for ensuring practical compliance with the legislation should not be underestimated, and should be highlighted where relevant. Adequate sanctions (when relevant) must be defined and prescribed. Usually, directives leave the form of sanction to the discretion of Member States. Moldova needs to adopt penalty provisions which are effective, proportionate and dissuasive. The form of the chosen national sanction must be effective in ensuring that the aims of the directive are achieved. ECJ has held that there *"must be no discrimination between the sanctions adopted for measures implementing directives and sanctions laid down under related national legislation"*. For example, an offence under national law should not have less severe sanctions than an offence under a national law which transposes a comparable requirement under an EU directive.

Example: an environmental offence under national law should not have unduly severe sanctions compared to an offence under a national law which transposes a comparable requirement under an EU directive. For example, a penalty for the violation of emission limits on discharges into water should be comparable, whether or not those discharge limits are covered by an EU directive[111].

[111] http://ec.europa.eu/environment/archives/guide/part1.htm

Example: criminal sanctions should be the same for counterfeiting a national currency (e.g. Lei) as for counterfeiting the Euro.

4.8.8 Transposition of annexes

Because annexes comprise an official component of EU legal acts, they can sometimes represent a problem during the transposition process. This may concern the form of the transposition as well as its content. In most cases, annexes contain particular formulas, tables, comparative overviews, etc. Each annex should be assessed from the perspective of its relevance for Moldova at the moment of transposition. Annexes may be relevant only or exclusively for Member States.

In many cases, the content of an annex could be included in the main body text of a national act. In other cases, the format whereby an annex is appended to a main body of text cannot be avoided, especially with "technical" legislation for certain sectors (Free movement of goods, Health, Agriculture, Environment, etc.). It is desirable that any necessary annexes should, as far as possible, only be included in bylaws, and that their inclusion during the drafting of laws adopted in the parliament should be avoided; however, the rules for drafting national legislation should still be observed.

4.8.9 Transitional periods

When using the regulatory impact assessment tool during the legislation drafting process, the option of "doing nothing" or avoiding the adoption of new legislation with the purpose of transposing the EU acquis, is usually not applicable, due to the international obligations accepted by Moldova in the AA. Some EU acquis solutions are written exclusively for EU Member States or are not an appropriate solution for Moldova and/or its economic operators at the pre-accession stage. In this case, the only options are either partial approximation or full approximation with transitional periods, meaning that certain parts of the national legal act would enter into force later, but within a reasonable time.

If the deadline for implementation is set by the AA or other bilateral agreements with the EU or by a political document, such as the Association Agenda, those timeframes must be honoured in the legislation. Target dates for implementation defined by the AA, Association Agenda or other bilateral agreement that are not met by Moldova will be included in the accession negotiations, and will most likely become the benchmark in a relevant chapter that will have to be fulfilled in order to open a cluster/chapter in the negotiations.

When Moldova is planning the transposition of EU legislation outside the framework of target dates already agreed in the AA, Association Agenda or some other bilateral agreement (which must be honoured), Moldova is free to set its own targets. This should be done in a strategic manner in the context of the imminent accession negotiations, namely through an overall National Programme for the Adoption of the Acquis (NPAA) that will cover the entirety of the EU legislation (see chapter 3.3.).

Setting such targets is a matter of public policy that Moldova will take in the context of its financial and administrative implementation capacities.

When the date of entry into force is not a part of an international obligation, the best option would be to leave certain solutions to be regulated at a later stage when the timing is in line with Moldova's interests, via amendments or via forthcoming new legislation in the same area, and without specifying any transitional periods.

Alternatively, transitional periods can be set that have a reasonable timeframe. Excessively long transitional periods (e.g. 10 years) leave too much time before the relevant subjects begin to adapt to a new and future obligation and change their behaviour, which makes such lengthy periods ineffective.

During their accession negotiations, some countries set the day of their accession to the EU as the target date, since many obligations arising from membership will become a reality from that date. However, this should be done in the final stages of accession, when the date of accession is known with at least some certainty (after closing the final chapter). Using such transitional periods without a high level of certainty regarding the accession date could raise a question mark over the constitutionality of such provisions.

Example from Slovenia:

"The Law will enter into force eight days after publication in the Official Gazette with the exception of Chapter V (or article XY), which enters into force on the day of accession of the Republic of Slovenia to the EU".[112]

This method was used, once the accession date was known, for the short period between the conclusion of negotiations in December 2002 and 1 May 2004, when Slovenia joined the EU.

[112] Used, for example, in the General Product Safety Law of 2002

4.8.10 Internal coherence with the national legal system

Internal coherence with the national legal system needs to be ensured during the transposition process. This means that during the drafting of the legislation, special attention must be given to the requirements of the domestic legal system and the applied legal tradition.

> **Example:** although there are several different EU directives to be transposed, their transposition might be performed within the framework of a single national legal act if they pertain to the same area, or vice versa.

4.9 Explanatory note and approximation clause

Articles 25-28 of the GD 1171 define the elements of the **Explanatory Note** (as defined by Article 30 of Law 100 and its Annex 1, as explained above) tackling the approximation process and the ToC, and the assessment qualifiers for assessing the compatibility of the draft act.

The information provided in the Explanatory Note regarding the description of the degree of compatibility must indicate (article 26):

1	*whether the intervention results from the commitments assumed by the Republic of Moldova in the bilateral agreements with the EU.* In this case, the following must be briefly indicated: the relevant provisions of the agreement; to what extent the draft contributes to the fulfilment of the assumed commitments and to the implementation of the relevant provisions of the agreement; in the event of a partial implementation or non-implementation, the reasons for it;
2	*the list of acts of the EU with which harmonisation has been achieved, the deadlines established in bilateral agreements with the EU for their full transposition, the purpose of full or partial harmonisation, and the degree of compatibility with each EU act to be transposed*. In the event of partial compatibility or incompatibility, the underlying reasons, the list of the drafts of planned normative acts, and the deadline for the full transposition must be briefly indicated;
3	*a statement regarding the elaboration of the ToC of the draft normative act with each act of the EU that is being transposed, and the updating of concordance table for the finalized version of the draft.*

The Explanatory Note is a good tool for monitoring approximation progress.[113] Among other things, it describes the degree of compatibility with the draft normative act. It also indicates the intervention results from the commitments assumed by Moldova which arise from the bilateral agreements with the EU; the list of EU legislation to be transposed; a notification regarding the ToC that has been developed; and at the final stage, the findings of the compatibility review performed by the CLA.

The **approximation clause** is an additional tool for ensuring better monitoring of the transposition process. Law 100/2017[114] prescribes that draft normative acts, having the purpose to harmonise the national legislation with EU legislation, must be marked with the EU logo and must contain an approximation clause, thereby providing transparency regarding the approximation process. Such a referral informs natural and legal persons that a particular EU act has been transposed into the domestic legal set-up, and enables the national courts to become familiar with the EU legislation. This clause also increases the level of transparency of the approximation process in Moldova.

4.10 Tables of Concordance (development, use and finalisation)

GD 1171 defines the use of ToCs, how they are completed, and when they are required. Annex 2 to the GD defines two models/templates for the ToC:

MODEL 1	
1	Title of the act of the European Union, including the most recent amendments comprised
2	The title of the draft national normative act
3	General degree of compatibility

Act of the European Union	Draft national legislation	Degree of compatibility	Differences	Comments	Authority / Responsible person
4	5	6	7	8	9

Model 1 is used for interinstitutional communication, and for the Governmental procedure for adopting the draft normative act.

[113] See article 30 and annex 1 of the Law 100/2017
[114] See article 31 of the Law 100/2017

MODEL 2				
1	Title of the act of the European Union, including the most recent amendments comprised			
2	The title of the national normative act			
3	General degree of compatibility			
Act of the European Union	National Normative act	Degree of compatibility	Comments of the Republic of Moldova	Comments of the European Union
4	5	6	7	8

Model 2 is used for communicating with the European Commission after the draft act is adopted.

The chief differences between the two models are established by the diversity of purposes for which they are created, but the substance of both is the same.

The compatibility assessment based on the ToCs is not performed properly if it does not meet all the criteria set out in the GD. In such a case, the CLA must return the draft normative act, together with the materials annexed to it, to the author, for modification or completion of the ToC (Article 43, GD 1171).

Tables of Concordance are used to facilitate the monitoring of the transposition of EU law into national laws by the Member States. They show in technical terms precisely how the provisions of EC legal act were transposed at national level. The ToCs should clearly indicate the level of compliance for each EU legal act, as well as the plans for full approximation, where possible.[115]

ToCs are not used by EU Member States on a regular basis, but only when they must be submitted to the European Commission in order to prove a consistent transposition. They *are* used on a regular basis by EU (potential) candidate countries during the accession process, and by associated countries. This is mainly for internal reasons; it allows them to properly follow the progress of legal approximation, and to help the legal drafters during the transposition process.

Additionally, they will serve as the main tools for demonstrating the degree of transposition and implementation of EU legislation in national legislation, being presented to the European Commission, at its request, within the evaluations carried out. Also, ToCs will be used in the internal screening process of national legislation, in order to identify its degree of compliance with the EU acquis with all its up-to-date amendments.

[115] See Government Decision for the Approval of the Regulation on harmonisation of the legislation of the Republic of Moldova with the legislation of the European Union, 1171/2018

It is important for legal drafters to see these tools as assisting the process, and not as yet another administrative requirement or burden. These instruments are created to help them by posing questions that need to be answered. If these are answered properly and thoughtfully, the quality of the end product – the new normative act – will be better, and the monitoring of the progress and quality of the approximation process will also be improved.

4.10.1 Finalisation of the ToC

Article 13 of the GD 1171 defines when the ToCs must be finalised. After receiving the Declaration of Compatibility issued by the CLA, drafters are obliged to finalise the draft of the normative act and to update the ToC accordingly.

After the normative act is adopted (either by the Parliament or by the Government), the drafters are obliged to update the ToC to correspond to the text of the adopted version, and to correctly reflect the actual degree of approximation achieved.

The drafters must submit the final version of the ToC to the CLA in order for it to be included in the database of the approximated national legislation.

***Examples** of properly developed ToCs are available in Romanian language within the electronic version of this Handbook, available on the website of the State Chancellery of the Government of the Republic of Moldova.*

4.11 Declaration of Compatibility and the role of the CLA

As has been previously explained, Article 36, paragraph 4, of Law No. 100/2017 defines the scope of the Declaration of Compatibility issued by the CLA. It prescribes that the compatibility expert's review of the EU legislation must:

a) establish the compatibility degree of the draft normative act with the EU legislation;
b) identify the missing provisions of the EU legislation, and must prevent their inadequate transposition;
c) ensure the correspondence of the draft with the standards and legislation of the EU.

The compatibility assessment is performed on the basis of the ToCs, and the draft act must be sent back to the proposing institution if the ToCs are not submitted or are not properly completed.

Declarations of compatibility (or the opinion) issued by the CLA are quite elaborate documents that cover all the angles of the proposed normative act. The CLA's opinion includes the following information:

1. **Analysis of the object of the draft**.
2. **An assessment regarding the compatibility of the draft with EU law**, including the AA commitments; assessing the compliance with the deadlines defined in the AA; explaining the substance of the draft; stating objections regarding the level and correctness of transposition; and commenting on the information provided by the ToC (in the case observed, commenting on the reasons for not transposing or only partially transposing EU norms, and for not honouring prescribed deadlines).

Additionally, the CLA provides objections regarding:

- legislative technique,
- the Approximation Clause, and
- the Explanatory Note.

The Declaration ends with the Conclusion stating whether the draft has met the set target of approximation, and listing items that need to be improved.

Declarations of the CLA, even though consultative in nature, should be followed by the ministries, and the drafts should be modified accordingly.

Drafters of the normative act transposing the EU legislation must obtain the Declaration of Compatibility from the CLA to be able to proceed with the formal procedure of the adoption of the act.

Conclusions stated by the CLA in the Declaration of Compatibility must be included in the final synthesis accompanying the draft normative act when it is submitted to the Governmental procedure for adoption.

Once the proposed normative act is adopted and published in the Official Gazette, the drafters should prepare the final version of the ToC, corresponding to the published version of the act, and submit it to the CLA, in order for it to be included in the CLA's database of approximated national legislation.

4.12 Submission to the Government

While the draft normative act is being prepared, it is submitted to the official procedure for receiving the opinions of other Governmental institutions.

When the opinions of other institutions are received and their relevant recommendations are incorporated into the draft, it is important to bear in

mind that such changes might affect the level of approximation achieved by the initial version of the draft. Therefore all alterations to the text that are based on comments from other institutions must be checked against the ToC. Changes that would reduce the level of approximation should be avoided as much as possible.

In the synthesis accompanying the final version of draft normative act submitted to the Governmental procedure for adoption, any changes that reduce the level of approximation should be clearly pointed out and further elaborated in order to enable the Government to make a consistent decision.

4.13 Submission to the Parliament

The proposal of the Law submitted by the Government to the Parliament should be accompanied by the Explanatory Note and the ToC. All these documents are crucial for enabling the Parliament's Legal Department to assess, once again, the entire approximation process. The better the quality of these documents is, the more efficient the Parliament's Legal department will be when performing its task.

The amendments submitted by members of the parliament (MPs) can significantly affect the level of approximation of the submitted proposal. All amendments must therefore be verified and checked against the ToC, and against the entire purpose of the law.

> Sometimes a single word can alter the entire essence of the proposed law, making it completely incompatible with the EU legislation.

When amendments made by MPs are assessed by the institution proposing the law, their effect should be checked against the targeted level of approximation. If such amendments reduce the level of approximation already achieved, or the level targeted by the proposed law, they should be rejected by the Government.

Once the proposed law is adopted and published in the Official Gazette, the drafters should compile the final version of the ToC, corresponding to the published version of the law, and submit it to the CLA, so that it can be included in the CLA's database of approximated national legislation.

PART IV

NEXT STEPS FOR THE REPUBLIC OF MOLDOVA – ACCESSION NEGOTIATIONS

CHAPTER 5. Basic information regarding the main steps in the accession negotiations

The Republic of Moldova applied for EU membership on 3 March 2022, in line with Article 49 and Article 2 of the Treaty on the European Union. This historic moment marked a fundamental change in EU-Moldova relations. Besides being a country associated to the EU, Moldova is now also an applicant country.

During the informal meeting held in Versailles on 10 and 11 March 2022, the Heads of State or Government of the EU discussed the applications of Ukraine, Moldova and Georgia, and adopted the Versailles Declaration. As point 5 of the Conclusions states, the Council invited the Commission to submit its opinions on the application of Moldova.[116]

After successfully responding to the Questionnaire in May, the Republic of Moldova was granted the status of EU candidate country on 23 June 2022.

The application for membership, followed by the European Council Conclusions on giving Moldova candidate status, represent the first important step in the EU accession process.

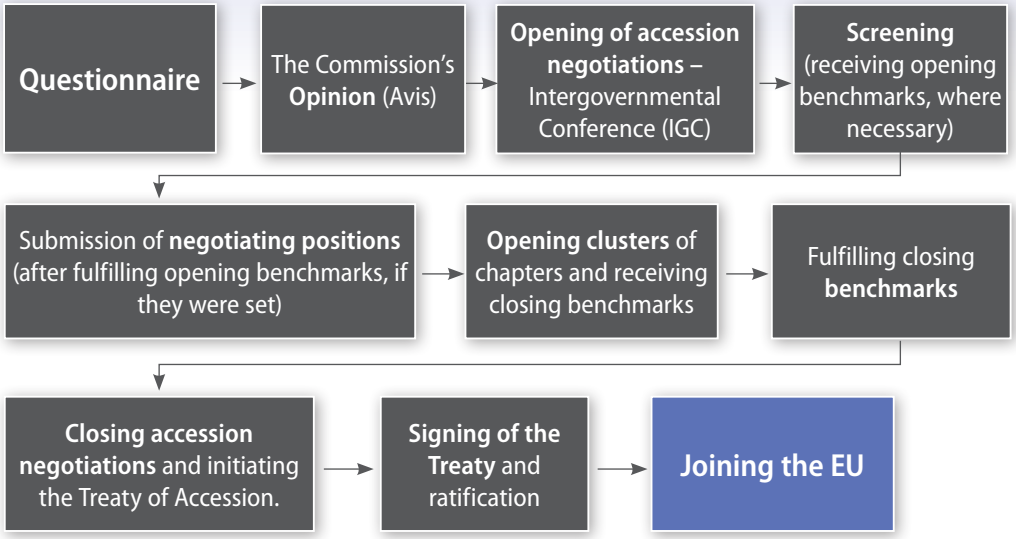
After becoming a candidate country, Moldova is preparing for its accession negotiations. This represents a new phase in its relations with the EU that will place the harmonisation of legislation at the centre of the process.

> It should be underlined that there are no fixed time limits for conducting the phases of the accession process. Some technically demanding steps, such as the screening exercise, which due to the complexity and volume of the EU acquis cannot be performed in less than 18 months, require more time. Other steps depend on the capacity and readiness of both sides for the accession negotiations. All timeframes are given as indicative values, not fixed values.

[116] The applications of Ukraine and Georgia will also be assessed by the Commission. The Council's conclusions can be found at https://presidence-francaise.consilium.europa.eu/media/qphpn2e3/20220311-versailles-declaration-en.pdf

Below, we will briefly explain what the main steps in the EU accession process involve.

Graphic No. 3: *Sequence of the main steps in accession negotiations*



5.1 Questionnaire

The first step after submitting the application for EU membership is the preparation of the Opinion (or *Avis* in French) of the European Commission. This is what the Council asked the Commission to do. In order to be able to present an opinion, the Commission submitted the Questionnaire to the Government of Moldova.

In April 2022, Moldova received the Questionnaire from the Commission, which contained 2,191 questions (369 questions regarding the Political and Economic criteria (Part I of the Questionnaire) and 1,822 questions pertaining to the 33[117] Chapters of the EU acquis (Part II of the Questionnaire)).

The complete set of responses submitted by Moldova in May 2022 provided the Commission with a clear view regarding the readiness of Moldova, and especially of its public administration, to conduct accession negotiations.

The Questionnaire was structured in line with the accession negotiations format, which is organised in accordance with the Copenhagen accession criteria defined in 1993.

[117] Chapter 34, *Institutions,* and Chapter 35, *Other issues,* were not covered by the Questionnaire.

Specifically, the Copenhagen accession criteria are:

1. **political criteria**: *stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and the protection of minorities*;
2. **economic criteria**: *a functioning market economy and the capacity to cope with competition and market forces*;
3. **ability to take on the obligations of membership** *including the administrative and institutional capacity to effectively implement the EU acquis.*[118]

Therefore, the Questionnaire covered the following:

Political criteria	Economic criteria	35 chapters of the EU *acquis*

The accession negotiations are conducted in the format of 35 negotiation chapters. The Political and Economic criteria are allocated to separate chapters. According to the new methodology for accession negotiations adopted by the EU in February 2020[119], the chapters are organised into **six main thematic clusters**:

Thematic clusters	Chapters
1. Fundamentals	23 – Judiciary and fundamental rights 24 – Justice, Freedom and Security Economic criteria Functioning of democratic institutions Public administration reform 5 – Public procurement 18 – Statistics 32 – Financial control
2. Internal Market	1 – Free movement of goods 2 – Freedom of movement for workers 3 – Right of establishment and freedom to provide services 4 – Free movement of capital 6 – Company law 7 – Intellectual property law 8 – Competition policy 9 – Financial services 28 – Consumer and health protection

[118] https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/glossary/accession-criteria_en

[119] New accession negotiation methodology is available at the following link https://ec.europa.eu/neighbourhood-enlargement/enhancing-accession-process-credible-eu-perspective-western-balkans_en

Thematic clusters	Chapters
3. Competitiveness and inclusive growth	10 – Information society and media 16 – Taxation 17 – Economic and monetary policy 19 – Social policy and employment 20 – Enterprise and industrial policy 25 – Science and research 26 – Education and culture 29 – Customs union
4. Green agenda and sustainable connectivity	14 – Transport policy 15 – Energy 21 – Trans-European networks 27 – Environment and climate change
5. Resources, agriculture and cohesion	11 – Agriculture and rural development 12 – Food safety, veterinary and phytosanitary policy 13 – Fisheries 22 – Regional policy & coordination of structural instruments 33 – Financial & budgetary provisions
6. External relations	30 – External relations 31 – Foreign, security & defence policy

Chapters 34, *Institutions*, and Chapter 35, *Other issues*, do not form part of any of the clusters and will be negotiated individually in the later stages of the accession negotiations. They are also not part of the screening exercise that is performed at the beginning of the negotiations.

The administration of the applicant country must be properly organised, ensuring not only the capacity to respond to all the questions posed by the Commission in a coherent and organised manner, but also to run the accession negotiations professionally. Ideally, the country should "speak with a single voice".

To present its positions "with a single voice", Moldova must organise its administration in accordance with the structure of the Copenhagen criteria (Political criteria, Economic criteria and 35 negotiation chapters).

Moldova established a coordination system for accession negotiations based on Copenhagen criteria and 35 negotiation chapters in September 2022, with the adoption of the **Government Decision regarding the approval of the**

coordination mechanism of the accession process of the Republic of Moldova to the EU.

The Questions given to Moldova were the standard questions given to all previous applicants, with certain alterations to cover the national specificities of each of the applicant countries.

> Although Romanian is an official language of the EU, all communication with the Commission when responding to the Questionnaire and subsequently during the accession negotiations is conducted in English language. Responses to all the questions were prepared in English. On top of this, all the national legislation that supports the statements made in the responses and subsequently during the accession negotiations (as a rule, all the laws mentioned in the negotiations and sometimes even certain bylaws) will be provided to the Commission in the English language.
>
> This is a significant and costly requirement which must be budgeted for well in advance.

Therefore, the translation service in charge of coordinating this translation process must be organised within the Government.

It is essential for a candidate country to have a multiannual **National Programme for the Adoption of the Acquis** (NPAA) that will form the basis for explaining its current situation and its eventual plans for the future harmonisation of legislation.

5.2 The Commission's Opinion

After analysing the responses received from the Republic of Moldova, the Commission issued its Opinion on the application.[120] This was requested from the Commission by the Council. The Commission elaborated on Moldova's situation in relation to the Copenhagen accession criteria, and on the credibility of its application.

The Commission recommended that Moldova should be granted **candidate status** on the understanding that it will take the following steps:

- complete essential steps of the recently launched comprehensive justice system reform across all institutions in the justice and prosecution chains, to ensure their independence, integrity, efficiency,

[120] The Commission's *Avis* on Moldova is available at: https://neighbourhood-enlargement.ec.europa.eu/opinion-moldovas-application-membership-european-union_en

accountability and transparency, including through efficient use of asset verification and effective democratic oversight; in particular, fill all the remaining vacancies of the Supreme Council Magistracy and in its specialised bodies;

- across all these areas, address shortcomings identified by OSCE/ODIHR and the Council of Europe/the Venice Commission;
- deliver on the commitment to fight corruption at all levels by taking decisive steps towards proactive and efficient investigations, and a credible track record of prosecutions and convictions; substantially increase the take up of the recommendations of the National Anticorruption Centre;
- implement the commitment to "de-oligarchisation" by eliminating the excessive influence of vested interests in economic, political, and public life;
- strengthen the fight against organised crime, based on detailed threat assessments, increased cooperation with regional, EU and international partners and better coordination of law enforcement agencies; in particular, put in place a legislative package on asset recovery and a comprehensive framework for the fight against financial crime and money laundering, ensuring that anti-money laundering legislation is in compliance with the standards of the Financial Action Task Force (FATF);
- increase the capacity to deliver on reforms and provide quality public services including through stepping up implementation of public administration reform; assess and update the public administration reform strategy;
- complete the reform of public financial management including improving public procurement at all levels of government;
- enhance the involvement of civil society in decision-making processes at all levels.
- strengthen the protection of human rights, particularly of vulnerable groups, and sustain its commitments to enhance gender equality and fight violence against women.[121]

After the Commission issued its Opinion, the Council unanimously decided to grant candidate status to Moldova on 23 June 2022. [122]

[121] Conclusion of the Commission's *Avis*

[122] Council Conclusions are available at https://www.consilium.europa.eu/en/press/press-releases/2022/06/24/european-council-conclusions-23-24-june-2022/

The EU had established the practice of granting candidate status and only after some time and the fulfilment of additional criteria, opening accession negotiations. In certain cases, this is counted in years; North Macedonia, for example, received candidate status in 2005 and Albania in 2014, and their accession negotiations were opened in 2022. On the other hand, Montenegro received candidate status in 2010 and its accession negotiations were opened in 2012, while Serbia received candidate status in 2012 and its accession negotiations were opened in 2014. The list of conditions stated in the Commission's *Avis* will be an important (but not exclusive) element in the EU deciding to start accession negotiations with Moldova.

5.3 Opening the accession negotiations – the Intergovernmental Conference (IGC)

Accession negotiations are organised in the format of Intergovernmental Conferences. This means that the negotiations are undertaken with the Governments of **all 27 EU Member States**, unlike the Association Agreements, which were conducted with the European Commission. In this case, the Commission is representing the EU, but the decisions are made by the Member States. IGCs are called when some progress can be made. As a rule, they can be called four times a year (twice during each Council presidency).

The **opening IGC is organised to officially open the accession negotiations**. Later, an IGC will be called when a cluster is ready for opening or when a chapter is ready to be closed. The total number of IGCs during the negotiations is **not limited,** and is dependent on the dynamics of the negotiations.

According to the new methodology of accession negotiations, all chapters within a single cluster are opened simultaneously when the entire cluster is ready for opening. However, all the chapters are closed individually when they are ready for closure.

When the negotiations are completed, the closing IGC is called, and the Treaty of accession is initialled.

5.4 Screening

Screening represents the first step in the process, and is conducted on a chapter-by-chapter basis. It consists of an explanatory part, when the Commission explains the EU acquis to the candidate country, and a bilateral part, when the candidate country explains its legislation and its general plans about how it intends to attain full harmonisation with the EU standards set out in each chapter.

For a candidate country, it is essential to have a multiannual National Programme for the Adoption of the Acquis (NPAA) prepared before the screening. The NPAA then serves as the basis for presenting its plans for future harmonisation.

ToCs are an essential tool for the screening, and subsequently for the negotiations, to demonstrate the level of approximation achieved by Moldova's legislation.

The Screening exercise (explanatory and bilateral) can take approximately 18 months.

Arising from the screening, the Commission will issue its Screening report on each of the 33 chapters (chapters 34 and 35 are not considered in this step).

The Commission has two options – **assessing that the country's legislation**:

IS harmonised enough with the EU acquis for that level of the accession process, and proposes that the Council should invite the country to submit its Negotiation position for that chapter, or	**IS NOT** harmonised enough with the EU acquis for that level of accession, and proposes that the Council should set opening benchmarks that must be fulfilled before the country can be invited to submit its Negotiation position.

Opening benchmarks are conditions that must be met in order to be able to proceed further (preparation of action plans, adoption of certain legislation, establishment of a certain institution, etc).

After the opening benchmarks are met, the country is invited to submit a negotiation position for a given chapter.

5.5 Submitting negotiation positions (opening clusters of chapters)

In its negotiation position, the country explains how it plans to achieve the criteria for EU membership under each chapter. Developing negotiation positions is much easier with the NPAA on the table. Once the chapters are opened, any commitments undertaken during the negotiations are incorporated into the revised NPAA, to enable their proper monitoring and reporting to the Government.

Arising from the candidate country's negotiation position, the Council will use the proposal from the Commission to specify the **closing benchmarks** that must be

met to enable the country to close negotiations for that particular chapter. Closing benchmarks are mostly intended to demonstrate that the country is willing and ready to implement the EU acquis on its territory before accession.

All the negotiation positions will be developed individually on a chapter-by-chapter basis, and when all the chapters within a cluster are ready for opening, an IGC will be called and the entire cluster will be opened.

When the closing benchmarks for a chapter are fulfilled, the Commission will submit its report to the Council and propose the closure of that chapter. In that case, an IGC will be called and that/those chapter(s) will be closed.

All the chapters are closed provisionally until the final chapter is also closed. This means that chapters can be reopened. This happens only rarely, if the country takes significant backward steps in the process of harmonisation, or if new EU legislation is adopted after the chapter is closed that significantly changes the situation in that field.

Each chapter should be closed separately, on an individual basis.

5.6 Closing accession negotiations

When the final chapter is closed, the entire negotiations process is finished, and the Treaty of Accession is initialled. From that moment, chapters cannot be reopened. The target date of accession is set in the initialled Treaty.

The Treaty of Accession will specify the conditions and transitional arrangements under which accession will be implemented. These conditions and transitional arrangements will have been agreed during the negotiations by the EU Member States and the acceding country.

It takes approximately **six months** to prepare a Treaty for signing after it is initialled.

After this moment, a candidate country becomes **an acceding country** and starts to participate in the work of the EU bodies, but without voting rights.

Even though the Treaty is signed, the acceding country continues to harmonise its legislation with the EU acquis and provides regular reports to the Commission regarding this process.

5.7 Signing of the Treaty of Accession and its ratification

After the Treaty of Accession is signed, the ratification process begins. This process is performed in accordance with the constitutional procedures of each signatory country (27 EU Member States, the European Parliament and the acceding country). The process usually lasts for 18 months, though this depends on the internal procedures of each ratifying country. The ratification process must be completed before the targeted date of accession, so that the new member can join the EU on the agreed date.

> **It must be considered that there is a two-year gap between closing the accession negotiations (the initiation of the Treaty) and the date of accession. During this period the negotiation structure is dissolved (due to the end of the negotiations), but the obligation for further harmonisation remains.**

After finishing the ratification procedure, the country joins the EU on the date stipulated in the Treaty of Accession, under the conditions and transitional arrangements agreed in the Treaty.

PART V.

ROLE OF THE NATIONAL PARLIAMENT IN THE EU ACCESSION PROCESS

CHAPTER 6. Identifying the most relevant functions for the Parliament

During the accession process, the Parliament plays the same role as before the start of negotiations. Apart from the role of representing the people of Moldova, which remains absolutely the same as before, its legislative, oversight and informational roles will be adapted to the accession negotiations process, arising from a set of important political choices to be made by Moldova on the issues briefly presented in this chapter.

6.1 Legislative role

The legislative role is – and remains – the principal role of the Parliament, also in the context of the accession process. It should be underlined once again that it will not be the responsibility of the Parliament to prepare the entire set of legislation required for the approximation process. The role of the Parliament is to debate and adopt the proposals submitted by the Government.

The Government is the main organ conducting the accession negotiations, and prepares the legislation that results from the negotiation process. The role of the Parliament is to politically check and verify whether the legislation is being prepared consistently enough to fulfil the requirements of the accession process.

The Parliament has the additional role of monitoring whether the amendments submitted by MPs would hinder the level of harmonisation intended by the Government and the level of harmonisation already achieved through the proposal. Amendments can make a significant impact (and inflict damage) on the harmonisation effort and accession negotiations if the parliamentary monitoring is not rigorous.

Moldova already possesses all the technical tools for the harmonisation of legislation, namely Tables of Concordance, the Statement of Compatibility, the special marking of EU-related legislation (the EU logo), etc. From the technical perspective, Moldova will be unlikely to have to introduce novel tools.

As we have already explained, it is essential for Moldova to develop and then implement the National Programme for Adoption of the Acquis (NPAA). This is the multiannual programme for the adoption of national legislation harmonised with the EU acquis. It usually operates for a period of 4-5 years. The period can be longer if the need arises, such as when an Association Agenda extends over a longer period (e.g. 6-7 years). It is the role of the Government to develop the NPAA programme, and the task of the Parliament is to place the legislation planned through the NPAA at the top of its list of priorities.

Additionally, the Parliament has the role of monitoring whether the NPAA is being implemented by the Government as envisaged, mainly as regards the substance of the proposed legislation and the agreed deadlines. In this case the legislative and oversight functions overlap. However, it must be borne in mind that the NPAA is the most important programming document for the accession negotiations. The implementation process for all the obligations Moldova will undertake in its negotiation positions will be monitored via the NPAA, thereby forming the basis for the screening exercise during the opening stage of the negotiations.

6.2 The oversight role of the Parliament

The oversight role of the Parliament during the accession process will change significantly compared with the regular order of business.

Since the process represents a completely new stage in Moldova's relations with the EU, the country will have to establish its own procedures and define the role of the parliament in the process.

There is no one-size-fits-all model that Moldova must adopt and apply. Each country that is already involved in the process has developed a unique model corresponding to its political situation, size, and understanding of the role of the Parliament.

There are a few additional issues that a country must consider when defining the role of its Parliament during this process, as described below.

6.3 Relationship between the Parliament and the Government

In defining the relationship between the Parliament and the Government during this process, several questions require a corresponding answer:

- Will the representatives of the Parliament take part in the process of accession as a part of the negotiation structure or not?

- Will the Parliament control the Government during the process of developing the negotiation positions, i.e. the main politically binding documents that Moldova will submit during the negotiations for every negotiation chapter?
- In the event that the Parliament will be exercising a control function over the Government, will its position be binding on the Government, or consultative?
- How often (if at all) will the Government submit reports on the accession negotiations to the Parliament?
- Who will debate these reports? Will it be merely the standing committee responsible for European integration, or the plenary as well?
- Will the European Integration Committee be formed as a standing committee that is separate from Foreign Affairs?

Several different models have been developed by individual countries regarding the issues mentioned above. The common (minimal) denominator is that the Parliament will be consulted by the Government before it submits the national negotiation position to the EU. Since the party structure of the Parliament supports the Government, this consultation will not be conflictual but constructive. This would be a good opportunity for the Government to increase its legitimacy through its consultations with the Parliament, and demonstrate its transparency and democratic capacity. Since the process of accession to the EU almost always includes a national referendum, consulting the Parliament would increase the legitimacy of the final decision to join the EU, and would help to achieve a positive response in the referendum.

The responses to all these issues and the policy choices adopted are dependent solely on the political preferences of Moldova's political system and its political culture.

6.4 The relationship between the Parliament and civil society

Here, the main questions are:

- Will the Parliament take the role of a meeting place between the Government and civil society organisations (CSOs), and
- Will the Parliament take the role of building the national consensus concerning the issue of acceding to the EU?

Civil society in Moldova is strong and very active. Its activities must be taken into consideration during the accession negotiations. The way CSOs will be included in

the accession process is up to Moldova. In some countries CSOs are included in the negotiation structure (Montenegro), in others they play a monitoring, watchdog role, as in the case of Serbia, where the Parliament is the meeting place for CSOs and the Government; in other cases the CSOs have been part of the consensus-building bodies (National Council for EU integration), but were not officially part of the negotiation structure (Croatia). Again, the policy choice and the model for involving civil society in this process is up to Moldova and its national authorities.

6.5 Parliamentary diplomacy

As has already been mentioned, the accession negotiations are conducted with the 27 Member States of the EU, and the negotiations are therefore conducted using the format of the Inter-Governmental Conference (IGC).

Each EU Member State has its own internal procedures for preparing for such negotiations. In some cases, the MS parliaments play a very important role in the process of creating a "national" position for any negotiations at the EU level. It goes without saying that this also includes accession negotiations.

It is imperative that Moldova should develop focused parliamentary diplomacy and informational activities whose particular focus is on the parliaments of the existing Member States. The role of the national MPs will be to present Moldova's case for EU accession to the MPs representing these countries, since they will be in the position to strongly influence the dynamics of the accession negotiations. This type of support will be needed throughout the accession negotiations process.

When a specific issue with a particular EU Member State arises, the diplomatic efforts of the Parliament should be focused on that state to assist the activities of the Government in overcoming open issues. There have been cases where the negative or reluctant positions of individual national parliaments have brought association or accession negotiations to a halt for months or even years.

Particular attention should be paid to the European Parliament and the work of the Foreign Affairs Committee (AFET) of the EP. This Committee will be responsible for following the accession negotiations in the name of the EP. So far, the EP has been the strongest supporter of enlargement, and it can be a valuable ally in this process.

Since the EP consists of different parties, it is very important to focus on the party groups that provide majority to the European Commission. In the 2019-2024 period, the parties in the European Parliament that provide the majority for the Commission are:

- Group of the European People's Party (Christian Democrats) – (EPP), 179 MEPs,[123]
- Group of the Progressive Alliance of Socialists and Democrats in the European Parliament - Socialists and Democrats – (S&D), 146 MEPs,
- Renew Europe (former Liberals), 98 MEPs.

The European Commission also receives support from the group of the Greens/ European Free Alliance, comprising 73 MEPs, but they are not a part of the Commission. At the same time, these are the four largest party groups in the European Parliament.

All the parties are interested in accession negotiations, and each of them has nominated a party rapporteur for every (potential) candidate country. All (potential) candidate countries have their national rapporteur among MEPs. Parties that do not have the main rapporteur for that country, nominate their shadow-rapporteur. Arising from their reports, the EP adopts the annual resolution on the accession of any of (potential) candidate countries. It is highly important that all the parties in Moldova's parliament should establish links with the "sister" parties with similar political affiliation in the EP and use those party links to benefit Moldova's accession efforts. The dissemination of information to the MEPs is highly important.

6.6 The informational role of the Parliament

During the accession, it is very important to disseminate information regarding Moldova's activities during the process outside the official structures which will receive that information through official channels.

The parliament's informational role should be focused on the citizens of Moldova, helping them to understand what is being done and why, and what the benefits of accession to the EU will be. Conducting sessions of the EU affairs committee outside Chisinau and having publicly broadcast sessions would help with these activities.

As regards the media and think tanks, several activities should be performed by Moldova in Brussels and the capital cities of the EU Member States. The Ministry of Foreign Affairs and European Integration should take the lead in these public diplomacy activities. However, the Parliament can play an important role in this process by providing information about its legislative, oversight and diplomatic activities.

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[123] The European Parliament has 705 members in the period 2019-2024. The maximum number of MEPs is 751.

Annex: *List of clusters of chapters during accession negotiations*

Name of clusters	Chapters and criteria within the cluster
1. Fundamentals (5 chapters)	Ch. 23 – Judiciary and Fundamental Rights Ch. 24 – Justice, Freedom and Security Public administration reform Economic criteria Functioning of democratic institutions Ch. 5 – Public procurement Ch. 18 – Statistics Ch. 32 – Financial control
2. Internal Market (9 chapters)	Ch. 1 - Free movement of goods Ch. 2 – Freedom of movement for workers Ch. 3 – Right of establishment and freedom to provide services Ch. 4 – Free movement of capital Ch. 6 – Company law Ch. 7 – Intellectual property law Ch. 8 – Competition policy Ch. 9 – Financial services Ch. 28 – Consumer and health protection
3. Competitiveness and inclusive growth (8 chapters)	Ch. 10 – Information society and media Ch. 16 – Taxation Ch. 17 – Economic and monetary policy Ch. 19 – Social policy and employment Ch. 20 – Enterprise and industrial policy Ch. 25 – Science and research Ch. 26 – Education and culture Ch. 29 – Customs union

4. Green agenda and sustainable connectivity (4 chapters)	Ch. 14 – Transport policy Ch. 15 – Energy Ch. 21 – Trans-European networks Ch. 27 – Environment and climate change
5. Resources, agriculture and cohesion (5 chapters)	Ch. 11 – Agriculture and rural development Ch. 12 – Food safety, veterinary and phytosanitary policy Ch. 13 – Fisheries Ch. 22 – Regional policy and coordination of structural instruments Ch. 33 – Financial and budgetary provisions
6. External relations (2 chapters)	Ch. 30 – External relations Ch. 31 – Foreign, security and defence policy

*Note: Chapters **34 (Institutions)** and **35 (Other issues)** do not belong to any cluster.*

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English proofreader: Erik Kowal

Editura Arc, str. G. Meniuc nr. 3, Chișinău;
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