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THE PROBLEM OF TRANSPOSING COMMUNITARIAN  
ACQUIS IN THE INTERNAL LAW OF EU MEMBER STATES

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*Summary*

*Elaborating the tasks of the European Union represents a task of considerably bigger difficulty than the one that devolves the internal legislation of member states. In general, the directives are elaborated by the committee in French or English, and the texts in other languages, although having equal juridical value, are translations. The directives should be done in neutral terms, although this sort of activity would prove itself difficult in certain cases.*

**Keywords:** *communitarian acquis, directives, rules, procedures, juridical system*

Elaborating the tasks of the European Union represents a task of considerably bigger difficulty than the one that devolves the internal legislation of member states. Besides the inherent difficulty of the effective process of decision making, it is necessary the reconciliation of diverse juridical systems, of different attitudes towards law and different national interests and objectives followed by member states. [1]

All selected member states for Robin Bells [2] study registered problems in the domain of transposing EU legislation that were comparable in some situations. These states mentioned concept and foreign terms in directives, especially in the hypotheses in which the committee elaborated a proposal for a directive or another juridical instrument by referring to a certain juridical system from a certain member states or certain members. According to this report, the directives should be done in neutral terms, although this sort of activity would prove itself difficult in certain cases.

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*Detailed directives.* The opposition between precise and vague terms is not identical to the one between precise and detailed terms that can be in an equal

way vague and imprecise. In his report Robin Bellis offers as an example two directives that although are detailed, have certain imprecise formulations. In principle, the directives must be elaborated in general terms, mentioning the formulation of article 249 from the Treaty, "the result to be done", but "leaving local national authorities the choosing of forms and methods". For the directives there was the tendency to become even more detailed, that they could be regulations, and in contrary, regulations could turn into directives. [3] According to R. Bellis' Report, "in case of a detailed disposition, that follows the instituting of a degree of uniformity in the EU, without leaving member states a freedom in transposing, the best choice would be the regulation". [2]

*Transposing trough referencing.* As a consequence of the tendency for many details, some member states have decided to incorporate in internal law directives, so that they have direct juridical effect. This situation is possible only if the certain directive is detailed and its application uniformly is followed, without member states have the prerogative of appreciating the possibilities of transposing (in Finland, Denmark, Holland and Ireland). Also France has done the same in the situation of the directive regarding labeling foods. [4]

*Foreword of the directive.* A rising tendency is referring to the foreword of the directives, of which abuse the committee, but also the member states so that they occupy a third of the decisional process. The foreword to state the objectives of the directive and the description of every main dispositions of the directive, not being normative, although some times they are used by member states to insert normative dispositions on which no agreement could be made. These practices are contraire to the inter-institutional agreement regarding elaborating the communitarian legislations (R. Bellis quotes in the report the situation of a directive that has approximately 16 articles, but had 64 point in the foreword) and are considered problematic for those preoccupied with the purpose and effect of the directive, especially by those whose task is to transpose it to internal law.

*Re-elaborating directives.* The re-elaborating of directives, that trough their nature follows a direct effect, is useless and leads in error. This situation creates a false thrust to those affected, when elaboration can be infirmed by instances in appreciating the direct effect of a disposition of the directive.

Although this practice exists in some member states, in which it is followed the re-elaboration of these sort of dispositions, it is also found in the tendency to take as given through copying, leaving instances orientated to the Court of Luxemburg, if the situation turns up, to decide the application of such dispositions in particular situations.

*Cascade agreements.* In what regards legislation, the traditional approach in states that are under the influence of the Napoleonic Code was to entrust the legislation the declaration of principles. Robin Bellis defines the cascade agreement "as the situation in which primary legislation adopted by the National Assembly and by the Senate, after obtaining some opinions from the States Council over the text, defines the principles and general frame, delegating the ministries the prerogatives to adopt the decrees, through the State Council, or of the resolutions, autonomously to state the details". For example, the directive of electronic signature was transposed through a short amendment to the French civil code, inserted in the new article 1316-4, but was completed. Because of necessary details, imposed by the certain directive, through subordinated legislation, under the form of two decrees and a resolution.

*Indicating the derivation from the communitarian source of transposing dispositions.* In the present there is no coherent and containing way of clearly indicating in transposed legislation of the implemented directive. R. Bellis suggests that "the explanatory notes that accompany the legislation must be even more in detail" and "must have a greater degree of information regarding the transposed directive and over the effect in situations as the possibility to induce in error". [2] The directive request the legislation that transposes it in national law to make a reference to it in the text or in a document published together with it.

*The rules of interpreting the transposing legislation.* In the situation in which it is given a greater importance to the transposing method to a directive (by copying it), supposing also that the elaboration procedure of the Union's legislation is not improving, the situation can turn up where, as in the case of the UK, to intent an action in front of the High Court to a resolution of interpreting the transposing legislation, through a reference, where necessary. That action can be intended by physical or juridical persons or by their representatives.

According to the Bellis' Report this can be "the case for recognizing a right of taking to notice the instance for a resolution of interpreting"

*The approach of the interpretation.* For the juridical instances in the UK, the traditional approach is that of interpreting the legislation as to the literal meaning of the words, being thus presumed the authors intentions. Such an interpretation can be facilitated through declarations of the government at the moment of depositing the legislation, but also through official reports that lead to a recognition from the moment of adhering to the European Community.

Interpreting the EU regulations, directly applicable, also the internal legislation that transposes the objectives imposes a different approach meaning the one adopted by the Court of Luxemburg regarding the interpretation of communitarian law. This interpretation is named teleological, meaning the interpretation of structure and purpose of the legislation, together with literal interpretation of the words used.

In the case of the UK, the teleological interpretation of the transposing legislation was adopted by the higher instances, by the Juridical Committee from the Lords Chamber, by the Appeal Court and by the Divisional Court, existing the tendency in the future to adapt in the lower instances also and in other public organs with the role of interpreting the legislation, if it is clearly seen that the legislation in discussions has communitarian origin.

The transition situation between the two approaches contrasts with the situation in France, Spain and Sweden. In these states, the traditional approach is the teleological one. Thus, the interpretation states the literal meaning of the words, but the juridical instances also have in sight the purpose followed by the law maker, meaning the actual purpose; this is why the precursory papers are watched (followed) as being parliament or ministerial documents

The recommendations formulated in the Bellis' Report aim at:

- *The experience needed for redacting the normative document at the EU level*

Because of the difficulties that must be brought together and the quality system of those communitarian normative documents, many of the problems referring to

the transposing the *acquis* come from the redacting mode's quality of the communitarian legislation.

Member states have diverse systems and legislative internal law expertise institutions. In the case of UK, there is a hierarchy system in which projects are elaborated by the parliamentary council or by governmental counselor, in the basis of instructions received from the department responsible with the politics in case the councilors are accountable for the redacting the text and of its integrity in the course of the procedure, also the form of the normative document (law or settlement).

In the states with continental tradition, every member states has a system trough which the department responsible elaborates the initial project, formulating a decision regarding the form, after being forwarded to a mechanism that can decide over the eventual modifications regarding the form. In France, the respective mechanism can decide the forwarding of the text to be adopted under the form of a decree of State Council and not trough a law adopted by the parliament. In the situation in which the project has amendments during the legislative procedure, it comes back to that mechanism for approval. In France and Spain that mechanism is the State Council and in Sweden it is the Legislative Council.

At the EU level there is no equivalent to those systems, meaning a specialized organ in redacting law texts that is accountable for the integrity of the text for the whole length of the procedure, until it is adopted.

- *Copying directives*

The directives' dispositions that aim at an uniform application in all member states, that utilizes the formulations of the respective normative document, does not leave any margin of appreciation, having a form of EU regulation. These dispositions must be copied, indifferent if they are clear or not. A member state risk of braking the obligations imposed by the treaty in the case when that state was following of obtaining a higher level of precision, because it endangers the uniformity of dispositions, besides the purpose followed by the directive.

Because the communitarian regulations are directly applicable, but are elaborated the same way as directives, R. Bellis appreciates that "it would not be justified a higher degree in the directives' formulations, in the situation in which

this thing is not realized through regulations, directly applicable". In consequence, the first task imposed to those that redact the legislation of transposing is that of identifying this sort of dispositions "with form of regulation", to distinguish the dispositions that leave member states appreciation prerogatives (as for example art.6 - a disposition regarding accountability - from the electronic signature directive)

In the situation of defining "work time", from the directive regarding the organization of working time, the UK simply copied it, although its dispositions were not clear. An instance from Spain forwarded the court an action of interpreting regarding this definition. The court, responding to this action, clarified the sense of "working time", and the UK was in the situation of not being obliged to modify the national legislation of transposing the directive. The resolution of the court was applied directly only in Spain and defined the sphere of "working time". [2]

*- The information disposition*

To ensure the fact that juridical instances and other responsible mechanisms with applying the legislation through which directives are transposed adopt a teleological interpretation, sooner than literal, the disposition must be included in all explicative notes, mentioning the directive or the part of the directive that was transposed, specifying more information about the transposed dispositions of the directive, prerogatives of the treaty in the basis of which it is adopted and the resolutions of the Luxemburg court of interpreting communitarian legislation.

The internal law disposition is accompanied by a table, that mentions the particular disposition of the directive in a column and those of the transposing the legislation in another. Robin Bellis suggest including every disposition of the directive, as Sweden does, or how it was done by the department of Commerce and Industry in the UK for the postal services directive. This situation involves the particular articles that don't need transposing in internal law that obliges to a justification this situation. The Bellis' Report quotes the situations that can be met; the communitarian disposition is found already at a level of general norm in internal law; it was not transposed; it will be transposed; there is an international obligation that does not impose transposing in internal law. This table must not be part of the text of the normative document, but is an orientating note,

published with the normative document, being at the disposition of juridical instances and all interested by applying the legislation.

In the situation in which there can be settled a certain national disposition deriving from a directive, the juridical instances in the UK, together with other interested parts of it's interpretation, they can recognize the special statute of the words used, adopting for them a more teleological than literal interpretation.

In the case of a section from a law that, together with the transposing in internal law of a stipulation from a directive, solves and certain options from a national policy, instances must not have a difficulty regarding their interpretation, with the condition of utilizing some formulations conveniently specified in the transposing note, that must indicate including in the certain juridical norm and other aspects.

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3. <http://www.fco.gov.uk/Files/Kfile/EUBellis.pdf>, p.12-18 and 28-29
4. CJCE accepted the validation of uniform and detailed disposition in directives, with the condition of justified their necessity in the perspective of followed settlement objectives: Cause 38.77 ENKA, In ECR [1977]2203, in special paragraph 11. Member states keep the possibility of choosing in what regards the measures and methods that can utilize in applying the directive by the national authorities; these depend of the result that the Council or the Commission want to reach.
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