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Memo/Guidance note on prioritization of law harmonization

Towards a smart harmonization: on the prioritization of law harmonization and the use of RIAs

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This note addresses the logic of regulatory approximation with the EU acquis. It will look into different attempts to conceptualize regulatory convergence and the logic of prioritization. It will also analyse different logics used to prioritize legal harmonization. A developmental cost-benefit analysis-based approach towards law harmonization is proposed. Thus, the use of RIAs and broader sectoral assessments and their sources is explored.

1. Introduction. EU acquis as developmental framework: compliance versus development

The discussion about legal harmonization is usually dominated by the technicalities and organization of the transposition process. Seldom questions as to why harmonize and how to prioritize it are asked. So why harmonize?

The answer for any Western Balkan country might seem obvious, as adoption of the acquis is a clear obligation for EU accession track countries. This is usually political and legal obligation for the EU neighbouring countries to take over some of the acquis contained in the association and even trade agreements. It is also based on a presumption that the EU *acquis* is a good regulation *per se*, that it is not just an instrument in seeking EU membership or closer relations with the EU, but a good thing in itself for regulating different aspects of life. Thus, the EU accession (Copenhagen) criteria and the EU *acquis* are presented as blueprints for reforms in pre-accession and neighbourhood countries, as proxies for modernization.

Before the EU's enlargement to Central and Eastern Europe the EU acquis has never been intended to serve as a developmental framework. And it would be surprising why it should serve this role. By its nature, the acquis is a result of long years of negotiations between the EU member states over externalities of cross border cooperation, first of all trade, from shallow to deep integration.

The success of the CEE accession to the EU has clearly contributed to the understanding of the *acquis* as the best blueprint for reform. However, it is usually mixed up with the EU conditions for accession. The CEE accession process was based on the Copenhagen criteria comprising targets of functioning democracy, market, and state administrative capacity. The adoption and implementation of the *acquis* was just one of the four membership criteria.

Success of the CEE's accession to the EU as well as the impact of the EU seems to be a bit overstated (Mungiu-Pippidi, 2014). Many reforms took place well before the accession process. Success of certain reforms could be also ascribed to a set of quite peculiar circumstances of these countries during transition, first of all, to an existence of an overwhelming coalition for reform comprising substantial elites' groups and enjoying support of population at large (Dimitrova, 2015).

So what are the implications of the adoption of the EU acquis? What kind of change does it imply? The CEE accession process has brought forward the question about the meaning and sense of an entire acquis. It was analysed in the framework of ex-ante assessments of the membership impact. Some argued that acquis and accession conditions brought an **extension of public policy into more areas**, so that the state had acquired more functions, to the **creation of regulatory state** with a preference to use law as the main instrument in dealing with market in particular, and to the **proliferation of non-majoritarian institutions**, such as independent regulators, agencies and the like (Maniokas, 2003). EU acquis also took away possibility for protectionist trade policies or discriminatory state subsidies, while strengthening regulatory state functions, general administrative capacities as well as fostering market-friendly developmental interventions such as horizontal state aid schemes or investment projects financed through the Structural Funds (Bruszt and Vukov, 2017).

Acquis could be perceived as a market making tool. This logic of market making has very important developmental connotations and thus could be prioritized in the process of law harmonization. **Creation of particular markets could be prioritized**, for example in the production of electricity, telecommunications, railways, etc.

One of the most substantial elements of the EU's *acquis* is **product and process standards** developed at the EU level as a response to the need to tackle non-tariff barriers to trade. While at a certain point the principle of mutual recognition has been developed, it was preceded by harmonization of certain standards at the EU level and followed later on, driven by the desire to avoid a socially undesirable race to the bottom and activism of the European Commission and European Court of Justice (Majone, 2014).

What could be the general characteristic of those standards? Standards of the EU are usually discussed in procedural terms, it is how they are being established, what kind of inter-institutional, member states and interests' dynamics is behind it. Content of these standards at the EU level reflects a good balance between concentrated interests of producers and dispersed interests of consumers, workers and environmentalist groups (Hix, 2005). Positive integration seems to reflect special interests more, while diffused interests are better served by negative integration (Majone, 2014). In relation to the international trade, standards are also presented as means to facilitate global market domination and as barriers to entry to the market. They also reflect differences in risk assessment, health and safety objectives and other societal values (Egan, 2001).

It is difficult to define the common denominator of the EU standards, but a recurrent feature of many of them is a **focus on a reduction of different kind of risks posed by certain products and processes, such as food, cars, lifts, pressure vessels, electric equipment and similar**. The tendency to multiply standards as a way to reduce risks reflects the preferences of rich consumers' societies, which are willing to pay for high protection from health, safety, environmental and other risks. This protection is costly, and so are costly environmental, consumer safety and other standards contained in the acquis.

While detailed analysis of all *acquis* is impossible, we would like to draw attention to the substantial part of the *acquis* related to risk reducing products and process standards[1]. First and foremost, it is about the **industrial product standards and food safety rules**. In terms of process standards, environment stands out as a major source of costly regulations lowering pollution and risks associated with it. But this is only one among many other sectors. Employment and social acquis contain a number of EU legal acts related to health and safety at work legislation. Consumer policy address risks to the consumers. The content of rules in certain sectors, such as transport, is largely about reducing risks in different kinds of transport. Standards and rules reducing the risk of transactions and protecting consumers make a substantial part of the financial services, telecommunications and postal services, and energy acquis.

Despite the reasonable suspicion that such risk reducing standards might be costly, there was surprisingly little invested into estimation of costs and benefits of the adoption of these standards and rules (Wolcsuk and all, 2017). One possible reason why this cost and benefit approach was not applied is the power asymmetry between the EU and the neighbouring countries. Cost and benefit calculations undertaken by the CEE countries then indicated substantial short-term costs, but also short-term benefits related to the EU market access, but mainly substantial long-term benefits related to the EU membership. The biggest challenge therefore was not about the ratio of cost and benefit, but about the strategy of accession.

Limitations of the *acquis* as a blueprint for development have been quite obvious already during the last wave of EU enlargement in late 1990s. Therefore, as a response, **there was an increasing emphasis on *quasi-acquis*, fundamental rules and institutions (rule of law, access to justice, property rights etc).** This trend has been just accelerating even since, in particular with regard to the process of accession of Western Balkan (WB) countries.

Quasi-acquis is about the rules only indirectly implied by the acquis, which relate to the content of the broader public policy context and institutional arrangements related to it. Quasi-acquis is based on the Copenhagen criteria, recommendations of other international organizations (Council of Europe in particular) and best practices of MS usually interpreted by the European Commission. Quasi-acquis has become more important during the integration of Western Balkans and in the EU's relations with its other neighbours. Currently quasi-acquis has turned into the programme fundamentals first emphasising rule of law and development matters.

2. Law harmonization logic and its sources

Despite many calls to the EU and European Commission in particular to offer a certain logic of prioritization, only little has been done until today to establish the core tenet of the acquis with a clear developmental value, and **providing advice on the sequencing of change for the aspirants who start approximation from significantly lower levels of development than those in the EU**. While the EU has gradually made rule of law and economic and social development a central tenet of the process of integration of Western Balkans, the compliance logic still plays a dominant role, especially in the phase leading to accession negotiations.

[1] It should also be noted however, that risk-reduction and trade facilitation are hardly only reasons for the rules contained in the acquis. Libersalization of markets and fostering competition are direct objectives and consequensences of the acquis as well. Indirect consenquence of the transfer of the EU rules beyond the EU borders is an increase in the transparency of regulations and more active engagement of interest groups and civil society (Shimmelfennig, 2014)

There have been several approaches developed. The list below is an attempt to conceptualise them:

1. The first and probably the last serious attempt to offer a certain logic of legal harmonization was the White Book on law harmonization of 1995. It has offered **the basic legal logic: let's take primary legislation and framework acts first**. So let's start from the rules, which are necessary for other rules to function.
2. **Developmental, economic or cost-benefit logic** is the logic guiding this note. It is saying: let's take only those rules which are beneficial to development objectives. Recently is has been formulated by SIGMA in one of its policy papers: "Accession countries need first to transpose the EU regulations expected to deliver best results for their economies and citizens at minimal cost" (SIGMA, 2021, 21). Partially this is the logic behind the current EU's approach to the Western Balkans, fundamentals first rule. However, this logic of fundaments is very formal and, in the light of the new EU enlargement methodology comprises just certain chapters of the acquis. It could be applied more widely, with respect to all chapters and all accession criteria.
3. However, it is quite difficult to establish exact costs and benefits, and calculate them, because of the lack of information or capabilities, or motivation, or all three. Thus there has been a search for a more substantial logic facilitating legal harmonization according to one economic rationale. One possible definition of this logic was offered at the beginning of 90ies and has been ascribed to the Sussex political economy professor Jim Rollo: this is the logic **to move from product to process related harmonization** (Sussex approach). This was motivated by the logic that product standards are more important for trade, and fostering trade was considered the best way towards prosperity. Process standards, has been argued, are costly, and can come later. Another example of similar logic could be **prioritization of competition and market making acquis, as well as fundamentals underpinning it, like property rights, equal access to justice etc.**
4. Finally, recently there has been a major emphasis on implementation and on necessary institutional environment enabling functioning of EU norms. This could be called an **institutional logic of law harmonization**.

Based on one or several logics, some of the law harmonization guides have been developed. Still, despite the fact that there has been substantial change since 1995, nothing probably compares to the **White Book on law harmonization** of 1995. It provided a certain logic of harmonization and inspired first national programs for the adoption of the acquis.

There were also guides developed for the institutional implications of law harmonization, such as the **Guide for the main administrative structures required by the acquis**. These guides are probably the closest to the needs of prioritization. There is no official version of this guide, and it is being constantly updated[2] and adjusted, also individually during the screening process as part of the opening, intermediate or closing benchmarks.

Many benchmarks set by the EU extends beyond the acquis and relate to the core functions of the state, such as functioning democracy and market, rule of law, and other institutions. It is also true to the guide on administrative structures. In taxation, for example, the EU is rightly concerned not so much about a rather thin acquis, but about the state's capacity to raise taxes. In social policy, the EU conditions are not so much about direct acquis related to the coordination of social security systems, but, rightly, about employment

[2] We have a version updated in February 2013, and it will be available to the experts. We know that DG NEAR started an update of it in 2018, but it seems not yet finished.

trends, capacities of employment offices to retrain, and capacities of labor inspectorates to deal with an informal economy. The clearest example of this development of indirect conditions is chapter 23 about the rule of law and fundamental rights. In some other chapters there is a narrower focus on the acquis related matters, such as in free movement of workers and similar.

This guide is adapted for the context of a specific country during the process of negotiations. List of administrative requirements in all negotiating chapters and benchmarks for opening and closing chapters.

There were some sectoral guides, especially in the most complex sectors, such as an environment (such as the first guide to the environmental law harmonization of 1997, last updated in 2019[3], and others. Many technical assistance projects in various EU neighboring countries have been developing sectoral law harmonization guides. However, as there is no single data base for the products of those TA projects, it is difficult make an overview of these efforts[4].

Acquis in the areas of agriculture, energy, transport (and environment) is very comprehensive. In energy the scope of harmonization and its sectoral logic is quite determined by the **scope of the European Energy Community**, which comprises substantial part of the EU's energy legislation and important part of the environmental acquis as well[5]. European Energy Community Secretariat developed a number of guidelines on different aspects of acquis in the relevant area of energy, which could be used in the process of prioritization.

In transport area the acquis comprises road, maritime and railway transport legislation, and is particularly comprehensive in the air transport area (the Civil Aviation Area Agreement requires harmonization of 54 EU regulations and directives; and it is regularly amended as the body of the EU law in this area grew and in 2015 comprised 81 regulations and directives). In parrallel to the energy, the Transport Community[6] also serves as a hub of accumulated knowledge and guidance in this sector for the accession countries. However, quite rigthly, it recent work deals mostly with the coordination of infrastructure plans rather than with law harmonization, but it is also clear that the connectivity needs should drive harmonization then.

There are sectoral logics in other areas as well. For example, **in the chapter 32 (financial control)**[7] just a part of the whole exercise (protection of EU financial interests and protection of the euro against counterfeiting) relates to transposition of acquis. The rest, Public Internal Financial Control (PIFC) and external audit making the bulk of this chapter, is based on good (internationally accepted) practices.

For PIFC these practices consit of:

(1) COSO Framework for internal control, risk management, governance and fraud deterrence.

[3] https://ec.europa.eu/environment/archives/guide/part1.htm, viewed on May 11, 2021. Google search on EU law harmonization guide made on the same day clearly point to just this only sectoral guide.
[4] https://balkangreenenergynews.com/white-paper-on-chapters-15-and-27-presented-at-the-assembly-of-the-republic-of-macedonia/ provides an example of specific roadmaps develped for specific countries, but these documents are seldom made available on-line.
[5] EEC acquis comprises 40 legal acts and two recommendations in the area of climate change. https://www.energy-community.org/legal/acquis.html accessed on May 18, 2018.
[6] https://www.transport-community.org/
[7] This is based on an input of the SEI financial control expert Marita Salgrave.

(2) INTOSAI Guidelines for Internal Control Standards for the Public Sector (9100) (endorsed as INTOSAI GOV, under review); INTOSAI Guidance for Reporting on the Effectiveness of Internal Controls: SAI Experiences In Implementing and Evaluating Internal Controls (9110) (endorsed as INTOSAI GOV, under review); INTOSAI

Guidelines for Internal Control: Providing a Foundation for Accountability in Government (9120) (endorsed as INTOSAI GOV, under review); INTOSAI Guidelines for Internal Control Standards for the Public Sector – Further Information on Entity Risk Management (9130) (endorsed as INTOSAI GOV, under review); INTOSAI Guidance on Internal Audit Independence in the Public Sector (9140) (endorsed as INTOSAI GOV, under review); INTOSAI Guidance on Coordination and Cooperation between SAIs and Internal Auditors in the Public Sector (9150) (endorsed as INTOSAI GOV, under review)*.
* Negotiations are currently ongoing on the status of former INTOSAI GOVs and their 'matching' with the revised INTOSAI Framework for Professional Pronouncements (IFPP).

(3) International Standards for the Professional Practice of Internal Auditing (issued by IIA).

For external audit:

The INTOSAI Framework of Professional Pronouncements (IFPP) - include formal and authoritative announcements or declarations of the INTOSAI Community. They draw on the collective professional expertise of INTOSAI's members and provide INTOSAI's official statements on audit-related matters. The IFPP contains three categories of professional pronouncements:

- The INTOSAI Principles (INTOSAI-P): the founding principles specify the role and functions, which SAIs should aspire to; these principles may be informative to Governments and Parliaments, as well as SAIs and the wider public and may be used as reference in establishing national mandates for SAI; the core principles support the founding principles for an SAI, clarifying the SAI's role in society as well as high level prerequisites for its proper functioning and professional conduct.

- The International Standards of Supreme Audit Institutions (ISSAI) - authoritative international standards on public sector auditing. The purpose of the ISSAIs is to:

- ensure the quality of the audits conducted
- strengthen the credibility of the audit reports for users
- enhance transparency of the audit process
- specify the auditor's responsibility in relation to the other parties involved
- define the different types of audit engagements and the related set of concepts that provides a common language for public sector auditing.

- The INTOSAI Guidance (GUID) - the guidance is developed by INTOSAI in order to support the SAI and individual auditors in:

- How to apply the ISSAIs in practice in the financial, performance or compliance audit processes
- How to apply the ISSAIs in practice in other engagements

- Understanding a specific subject matter and the application of the relevant ISSAIs.

3. Guidance from the SAA institutions

SAA institutions (sub-committees in particular) usually offer their own view on prioritization. While coverage and the level of detail of particular sub-committees differ, in some cases they provide a useful overview of priorities and go beyond the acquis into broader development related items. In Albanian case, for example, the minutes of the sub-committee on social affairs cover such broad areas as education, poverty, and health. One particular point of discussion was the level of coverage of population by health insurance[8].

SAA sub-committees provide a good coverage of current issues and priorities in the area of statistics and financial control. Energy and transport, by contrast, are covered in very broad terms.

Coverage of agriculture is detailed and provide a good overview of priorities as seen by the EC services. The minutes indicate the priority is given to certain basic preconditions of an effective law harmonization, such as establishment of property rights in agriculture, and proper registration of all kinds of capital, such as land and animals. The lack of it seems like the major impediment also to provide development assistance to farms via dedicated EU support schemes.

Prioritization in agriculture could serve a good example in other sectors providing a good example of a logic of prioritization based on creating pre-conditions for a meaningful law harmonization, like property rights regimes or infrastructure.

Coverage of chapter 23 and 24 is very detailed well indicating this area is of political priority for the EC.

Chapters 7 and 2 are covered in very light terms.

4. Use of regulatory impact assessments (RIAs): review of available RIAs

Smart harmonization implies wide use of RIAs in planning and implementing law harmonization. In Albania the RIA system is well established. There is a RIA unit in the PMO, and most important recent laws had RIAs. However, analysis of a sample of RIAs confirms conclusions of SIGMA that most of the assessments lack any figures on the monetization of impact and relevant conclusions thereof.

Summary of the developments of RIAs in Western Balkans, their evaluation and recommendations for further work have been provided in a recent SIGMA paper (SIGMA, 2021). This report notes good development towards creation of RIA based systems, but also admits that “practice of preparing “overaching RIAs <…> has not yet been established in the Western Balkans” (SIGMA, 2021, 72). Even more importantly, this report observes that “the RIA process and methodology does not appear to be used in any of the WB administrations

[8] This indicates an implicit benchmark of a welfare state standards.

to inform prioritization and updating of the annual EU transposition plan" (SIGMA, 2021, 70). This is exactly that the SEI project is trying to change, at least to a certain extent.

SIGMA's report also concludes that usually RIAs undertaken in WB countries do not offer systematic exploration of alternatives and non-regulatory options. This observation is important in the EU law harmonization process.

The report also offers it's own view on the prioritization of law harmonization. "Accession countries need first to transpose the EU regulations expected to deliver best results for their economies and citizens at minimal cost" (SIGMA, 2021, 21).

Thus, this paper suggest cost-benefit logic of legal harmonization. However, one should bear in mind that costing is a difficult and time-consuming exercise depending on many factors, including availability of data, analytical capacity, resources to undertake it etc. In the absence of specific legal acts-based cost-benefit calculations, broader evaluations could be based on **wider consultations and expert panels**.

RIAs are published alongside other documents on the public consultation website: https://www.konsultimipublik.gov.al/, as well on the website of the Parliament: https://www.parlament.al/Projektligje/IndexList
For example, the public procurement law: https://www.konsultimipublik.gov.al/Konsultime/Detaje/244 , which is relevant for the quality check exercise in chapter 5. https://www.parlament.al/ProjektLigje/ProjektLigjeDetails/52450 [9]
While this RIA does not provide almost any figures and does not cost different options, it lists the main problems in the current system of procurement, like the dominance of the negotiated procedures and the lowest price tenders, and links it to the law harmonization. It is not entirely clear how harmonization will solve the domestic problems of public procurement, but there is an effort to link the domestic development of EU integration and harmonization in particular.

Certain RIAs have been reviewed and commented by the EU TA project (Nov 2019 until Dec 2020):

1. Draft Law "For the Water Supply and Distribution Sector, Urban Wastewater Collection and Treatment" - prepared by the Ministry of Infrastructure and Energy
2. Draft Law "On foreigners" - prepared by the Ministry of Interior Affairs – relevant for chapter 24
3. Draft Law "On some additions and amendments to Law no. 74/2014 "On Weapons" - prepared by the Ministry of Interior Affairs
4. Draft Law "On some additions and amendments to law no. 9062, dated 08.05.2003 "Family Code", amended" - prepared by the Ministry of Justice, could be relevant for chapter 23
5. Draft Law 'For the privatization of facilities and functional land, in the inventory of the Ministry of Defence, given for housing to the military and former military' - prepared by the Ministry of Defence

[9] We have to look for RIA = Raporti i vlerësimit të ndikimit; *Shiko dokumentin* = view the document

6. Draft Law on 'Cultivation, consolidation, processing, and marketing of tobaccos and its products' - prepared by the Ministry of Agriculture and Rural Development – could be relevant for the chapter 11
7. Draft Law on Environmental Impact Assessment prepared by the Ministry of Tourism and Environment
8. Draft Law on Open Data and Re-Use of Public Sector Information – prepared by the Ministry of Infrastructure and Energy – could be relevant for data quality in general
9. Draft Law on Order of Social Workers – prepared by the Ministry of Health and Social Protection – could be relevant for chapter 19
10. Draft Law on Professional Orders – prepared by the Ministry of Infrastructure and Energy
11. Draft Law on some Amendments to the Law no. 64/2012 on Electronic Certificates of Judicial Status – prepared by the Ministry of Justice – could be relevant for chapter 23
12. Draft Law on some amendments to the Law No. 64/2012 on Fishing prepared by the Ministry of Agriculture and Rural Development
13. Draft Law on Some Amendments to the Law no.105/2016 'On Plant Protection' - prepared by the Ministry of Agriculture and Rural Development
14. Draft Law on Some Changes and Amendments to the Law on Safety and Health at Work – prepared by the Ministry of Finance and Economy – relevant for chapter 19
15. Draft Law on some changes in the Law no. 48/2014 'on Delay Payment in the Contractual and Commercial Obligations' - prepared by the Ministry of Finance and Economy
16. Draft Law on State Materials Reserves – prepared by the Ministry of Defence
17. Draft Law on the Agency of Internal Control- prepared by the Ministry of Interior Affairs – relevant for chapter 32
18. Draft Law on the Agency of Public Security Intelligence in the Ministry of Interior Affairs prepared by the Ministry of Interior Affairs – could be relevant for chapter 24
19. Draft Law on the Amendments to the Law on Copyright and Related Rights - prepared by the Ministry of Culture – relevant for chapter 7
20. Draft Law on the Launch and Supervision of Explosives for Civil Use – prepared by the Ministry of Defence
21. Draft Law on the Placing on the Market of Pyrotechnics and Fireworks – prepared by the Ministry of Defence
22. Draft Law on the Water Supply and Distribution Sector, Urban Wastewater Collection and Treatment - prepared by the Ministry of Infrastructure and Energy

23. Draft Law on Viticulture and Wine – prepared by the Ministry of Agriculture and Rural Development – relevant for chapter 11

24. Draft Laws of the Railway Legislative Package related to establishing a separate authority on monitoring the implementation of the Railway Policy – prepared by the Ministry of Infrastructure and Energy – relevant for chapter 15

Conclusions and follow up

Prioritization of the law harmonization is not an obvious and easy task. Linking harmonization and development means, first of all, asking how law harmonization might solve current or future developmental problems. This is a general line of thinking implying understanding of the current developmental issues of Albania and their possible solutions. It is thus easier in those areas where clear domestic policy exists. Compliance with the EU acquis could not replace such a policy, it can only inform it. EU advice via regular progress assessments and the SAA institutions is valuable, but can hardly be the only policy source. Political priorities, policy and regulatory impact assessments all could be used to define priorities. It is a gradual process based on the best-informed guesses, so it will not be perfect or full, but it is worth trying it out.

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