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Methods of Accomplishing Compatibility of the Western Balkan States Law with the European Law

ABSTRACT

In 2004, the EU started the process of CARDS States acquiring the EU membership by introducing the aviation Law, in order to provide for air traffic safety and security. Paradoxical as it was, it proved to become a good introduction for the incoming process of organizing full EU membership for the CARDS States. At that time compatibility of CARDS States with the European Union Aviation Law was very complex but too important to achieve. It required creating a sustainable organizational and methodological framework for the purpose. At the time, all the CARDS States (Bosnia & Herzegovina, Serbia & Montenegro, Albania, Macedonia), with the exception of Croatia, were far from the European standards and legislature in the field of the Aviation Law. On the other hand, given the security and safety specifics of the aviation law and the specifics of the Western Balkans States at that time, two major issues were to be resolved: first, to provide for organizational and methodological framework for drafting amendments to what was missing in the CARDS States Aviation Law compared to the EU Aviation Law, and second, which turned to be much more complex, to induce the political will of the countries concerned to firmly cooperate with each other.

Introduction

At present the process of Western Balkan States acquiring the EU memberships is pretty much under way. Some of the States have already harmonized their own law with the EU law, have passed the negotiation process and have become the EU members, some have started the negotiation with the EU, and some are still in the stage of achieving their legislation compatibility with the EU law.

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The European Community developed the Program for Community Assistance for Reconstruction, Development and Stabilization (CARDS) in the Western Balkans for the period from 2000 to 2006. One of the projects within the Program was Air Safety and Air Traffic Control Project.

In the end of 2004, the author of this article was kindly asked by EUROCONTROL authorities to prepare a paper on the CARDS project proceedings based on the EUROCONTROL Work Package 2, for its expeditious completion; As a result, *A Proposed Road Map*, an academic approach to the proceedings, and *A Proposed Concept*, an operational approach to the proceedings, i.e. the appropriate Study were prepared. The Study was comprehensive and instrumental in taking practical steps in achieving simultaneous harmonization of Aviation Laws of all the Western Balkans States with the European Aviation Law. This article has summed up the above mentioned Study in order to explain the proposed methods to be applied there, regardless whether or not the Study was strictly followed later on, so that it might be of use as a model in the process of achieving the Western Balkans compatibility with European standards in any other fields of Law. This is the main objective of this article.

The Issue of Cooperation between the CARDS States

The CARDS project was designed to ensure a high level of standards in the domain of air traffic safety and security and to establish cooperation in the field by improving the existing aviation law and the institutional framework of cooperation between the countries in this sensitive and complex region. There were a couple of dilemmas as to how to achieve those objectives, as the Western Balkans characteristics in general, and during that period in particular, required a specific approach.

There was a legal issue originated from the fact that not all of CARDS States were participating in the Stabilization Association Agreement (SAA) at the time, which posed the question whether the EU had proper jurisdiction to prescribe, i. e. to impose, its aviation law upon the CARDS counties that were not participating in SAA, and, therefore, whether a unilateral attempt by the EU to impose safety standards higher than the present national law allowed might be regarded as being beyond its jurisdiction.

A real issue was that the countries concerned might not inclined to cooperate in the domain where they might seem to give up part of their own sovereignty to each other, generally simply because they, as newly established states, valued their newly acquired sovereignty, and, particularly due to their past history, did not like any kind of cooperation that might lead to be seen as formal reintegration. But it was clear that the countries concerned would not feel that

way if any apparent loss of sovereignty were caused by integrating into the EU, as opposed to regional reintegration in terms of cooperation. On the other hand, the EU approach at the time was that of regional harmonization (it might be viewed as a precondition at the moment; later on the EU took the approach of “regatta”) as a step in the process of these States becoming the EU members.

In other words, the CARDS States did not favor cooperation, which they saw as reintegration, but it was also uncertain if they wanted to cooperate on the basis of a formal treaty, despite the fact that it underlines their own sovereignty. As far as aviation safety was concerned, the project required true cooperation, not just nominal one. Hence, the CARDS project had to overcome this impediment.

The Study proposed for the impediment was to be resolved in the following way: 1. Because of all the reasons mentioned above it was suggested that the term “harmonization” had to be replaced by the term “Euro-compatibility”. 2. Whether or not the countries concerned would or wouldn’t like to cooperate with each other, formally or informally, a key way to make them cooperate was to incorporate Euro Packages into their national legislations. In fact, the Single European Sky (SES) package had to be the first one built into their national laws, because it contained mechanisms for cooperation. That way it was politically easier to introduce future cooperation between the CARDS States in the domain that contained elements the States might have never accepted in a treaty; it also left them with a feeling they could always change their own legislation, even though they would not ever think of doing it.

Methods

To simplify the procedures, there had to be special methods to be worked out. The process had to be started in each of the States simultaneously, because working with each State separately would require much more time than was allowed for by the project. Alternatively, the work could start either with one State, in order to create a pilot State and then proceed to work simultaneously with the four other States, or it could start in two States and then be expanded into the three remaining States. The preliminary review of the National Aviation Laws of the CARDS States allowed the conclusion that the Croatia Aviation Law could become the role model for the purpose.

How to determine the missing law elements

The most efficient method to determine which elements were missing in the existing laws of the CARDS countries, compared to the European Aviation Law, was to choose an existing aviation law of one of the EU member States that was

most compatible with the EU Aviation Law. Once the model law was chosen, it was to be compared, for example, with the Croatia Aviation Law, so that the missing provisions could be identified. There might be reasons for certain provisions to be missing. We might discover problems, difficulties, obstacles etc. Therefore, the Study was planned to avoid the impression we were trying to indoctrinate the national groups with which we were supposed to work with, and to make it clear we were listening to them (i.e. were open to their explanations and suggestions). In addition, the EU Aviation Law could always be used as a reference point in the process of determining the missing provisions in the national law we were expected to work upon. Once the missing provisions were identified, the process of drafting amendments (legislative drafting) could start. To draft amendments means to follow expert knowledge on legislative drafting. However, this process is not simply copying the missing law. In fact, it would be counterproductive to do so, as it might create problems in the implementation of the amended law. The law is like a live organism and has to be properly adapted to the specific environment. The process will be explained in the forthcoming chapters.

Amending the existing Aviation Law

A practical approach

Amending a law is a creative process. Basic interests have to be transformed into norms, so that their expression and applications couldn't be compromised. To draft amendments means to follow expert knowledge on legislative drafting, the State tradition and its existing socio-economic relations, economic and cultural development, and political needs and requirements. In other words, the process of amending the law is to be determined by a specific State environment. Reference State law provisions are not to be copied in the model State law provisions, but carefully analyzed instead, in order to clearly identify the European standard and, then that standard has to be put into proper wording, i.e. drafting, having in mind all the above mentioned specifics of the environment. Therefore, experts well acquainted with the region can achieve the best results in amending the existing law of the CARDS States.

The process of amending the law has also to be practiced with patience, informed knowledge, analytical skill, assessments of the future effect of the new legislation, and certain awareness that the new legislation will result in the desired goals and effects. It has to be organized, well planned and directed. This purpose could be accomplished by a programming process with the following goals: (i) to establish the diagnosis of the situation in the target domain; (ii) to show whether there was a need for such amendment; (iii) to determine the

requirements driving the needed changes; (vi) to identify the new needs and requirements; (v) to define who had to carry responsibility for the different parts of the project; (vi) to establish phases and types of amendments; (vii) to determine the time frame for its completion.

The process of amending the law further requires following up and analyzing the application of the new law, particularly by the legislative (parliament) and executive (ministry) bodies.

Specific methods

During the process of amending law, depending on the characteristics of the inter-relations intended to be regulated, the following specific methods can be used independently or in combination: (i) enumerative/taxonomic method, (ii) an abstract method. (iii) a principled method. (vi) use of precedents, and (v) best practice exemplification.

Legislative drafting and language

It is understood that language is very important in the process of legislative drafting. Language has to have a recognizable sense, clarity, precision and intent. Clarity has to be a constant preoccupation in drafting amendments, so that to ensure there is no room for ambiguities. To avoid clarity means to avoid responsibility and accountability. The text of the amendments has to be simple, it has to have integral logic, and the same names have to be used for the same concepts.

Proper use of language is thus important particularly when the legislation is intended to establish a new type of relations in a certain domain. The CARDS project was intended to improve civil aviation safety in the region by establishing the European standards, i.e. by creating new relations in that area. The respect for the authority of the legislation and the legal system has to be accomplished by proper usage of the language in the legislative drafting.

The Basic Structure of Euro-Compatible Legislation

In the process of drafting amendments to the existing national aviation law, the norms had to be systematically organized in a clear, coherent, and logical framework. Systematization of the norms had to be carried out in terms of both the content and the form. Thereby, the composition and formulation of legislation had to be precise. The norms had to represent logical notions, had to be systematically and clearly expressed, and had to regulate certain interactions

in accordance with the determined requirements, goals, and motives. In this way the new legislation stability and order were aimed to be accomplished.

The Structure of the Legislation Contents

The structure of the legislation contents has to include: (i) a name; (ii) basic, general provisions; (iii) specific provisions; (iv) transcending provisions; (v) concluding provisions; (vi) the date and the signature. It is important that a new legislation should start with an article of clear definitions of the basic terms and phraseology.

The Formal Structure of the Legislation

The formal structure of any legislation will contain: (i) parts; (ii) chapters;(iii) sections;(iv) articles;(v) specific provisions. It might be not always necessary to have all of the mentioned elements of the formal structure of any legislation. It may depend on the scope of various relationships that have to be regulated. When amendments are to be introduced, their drafting must follow the structure of the legislation contents and the legislation formal structure.

The Project Phases

The Study proposed to have four principle phases:

The first phase

The Study suggested to start the project with a seminar/workshop on the legal and institutional issues. The States concerned ensured that the same person (representatives/designated experts) attended all seminars for the reasons of continuity. The objective of the starting seminar was to get the stakeholders to know each other and to choose a model State.

The Second Phase

The Legal Expert/Coordinator of the project was supposed to organize: (i) a national consultation meeting with entities and authorities concerned, and (ii) a seminar with designated experts of the CARDS States on the legal, institutional issues and the issue of regional cooperation in order to ensure strong commitment of the respective States and the ability of designated experts to amend the existing national aviation law.

Under the supervision of Legal Expert/Coordinator of the project, designated experts in each country were expected to (i) identify shortcomings and draft amendments to the existing national aviation law; (ii) draft proposals for the enforcement of institutional and organizational frame work; and (iii) draft proposals for regional cooperation.

The Third Phase

In this phase of the project the legislation was supposed to be presented for passing through the respective national parliaments.

The Forth Phase

During this phase the legal expert/coordinator was supposed to support the process designed to set up legislative documentation on the amendments to the legislation; to develop implementing regulations; to set up institutional arrangements; to provide technical support in adopting the procedure of introducing the new legislation and exchanging the expertise of the local human recourses. He was also expected to support the development of integration/implementation proposals in accordance with the International and European Aviation Law.

Coordination

The required coordination role of the legal expert/coordinator: (i) at the national level among respective entities and authorities; (ii) at the regional level among the respective States; (iii) between the CARDS States and EUROCONTROL. It necessitated the establishment of connections among the various subjects involved and harmonization of the working process at all levels in order to meet the defined deadlines and to achieve the objectives stated in Working Package 2.

Deliverable

Work Package 2 should result in the following deliverables: (i) a report of workshop on institutional and legal issues, (ii) a report on the issue of regional cooperation; (iii) the list of the coordinated proposals for cooperation between the States concerned; (iv) a set of legislative and regulatory texts and amendments to the existing aviation law of the CARDS States that were Euro-compatible, and (v) a report on support actions rendered to the States concerned by the legal expert/coordinator and EUROCONTROL.

When the process of compatibility of the aviation law of each of the above States with the EU aviation law was supposed to be over, the differences among them were expected to gradually get narrowed or even disappear altogether. Hence, at that point it might be easier for them to establish cooperation in politically sensitive areas.

Concluding observations

The methods proposed in the Study were intended to maximally simplify Work Package 2 proceedings, given the complexity of the subject. It also intended to focus on the subject i. e. on how the objectives of Work Package 2 should be efficiently accomplished.

The project was complicated because of several reasons: on the one hand, the CARDS States were not fond of the idea of cooperating in terms of reintegration, which at that time was the EU approach to the region; on the other hand, it was necessary to achieve firm cooperation in introducing a new aviation law, considering its safety and securities specifics to be preserved. The difficulties in implementing cooperation were overcome by way of incorporating into the national legislations the European Aviation Law with its mechanism for cooperation.

The methods suggested in the Study were meant to result in the accomplishment of Euro-compatibility of the CARDS States law with the EU Aviation Law and in narrowing or even ironing out the differences in CARDS States aviation laws. It is viewed as an outline of the authors' contribution to the project.

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