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Obligations to Consult EU Institutions on National Draft Laws: A Dogmatic Analysis

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Since the establishment of the European Union, Member States do not have true free reign over their legislative activity. The influence from 'Brussels' on new national laws has become stronger with the passage of time. Over the years, the Contracting States and the Union legislature have established more and more obligations referring to national legislatures. The most common are the well-known duties to transpose directives into national law. These EU legal acts contain substantive law, rights and/or obligations for individuals, and thus encompass material provisions that can be subject to a transposition process. However, this is not the only way to influence national legal orders. There are also procedural obligations in EU law that do not contain any substantive requirements that national laws ought to foresee. This article deals with the kind of formal obligations that compel Member States to consult EU institutions on draft laws during their national legislative procedures (hereinafter: obligations to consult). These obligations are of a procedural nature, with the outcome of the consultation procedure resulting in substantive law. EU law has always contained provisions like the obligations of Member States to consult EU institutions on their own national legislative procedures. In this regard, EU law shapes national legislative procedures, and the EU institutions influence substantive national law. EU institutions have expertise concerning the impact of new national laws on the internal market, which they can estimate on a Europe-wide scale. A single Member State or its institutions cannot examine the effects of national law on other Member States' legal orders or on Europe as a whole. That is why it is dependent on the know-how of EU institutions. Their expertise and ability to assess the Europe-wide effect of national law makes up the background of the great impact of those institutions on national draft laws. This article analyses the impact and possible consequences of a Member State's violations of obligations to consult. It introduces new terms, such as obligations to consult EU institutions on national draft laws and the consultation act, that are necessary in order to reflect the great importance of this category. General comments on obligations to consult refer also to the new mechanism introduced by the Two-Pack Regulation.

1. Introduction

This article deals with the formal duties of Member States to consult the EU institutions on draft bills during their national legislative procedures. These obligations are of a procedural nature, they do not contain any substantive requirements that national laws ought to foresee. The outcome of the consultation procedure results in substantive law (consultation act). The purpose of the consultation acts regarding national legislative drafts is similar to other legal acts, since their aim is to ensure that national law is compatible with EU law.

In the last decades, legal scholars focused mostly on some of the provisions and described them in a detailed way. Their research thus focused on single Member States' duties. Few scholars compared some of the obligations, their scope of application or their impact on national legislature (Ossenbühl 1998, 811–818; Bernhard and Madner 1998, 87–110; Vorbach 1997, 65–76; Abele 1998, 569–571). However, a few years have passed since then, and this subject area now seems all but forgotten. With the establishment of new mechanisms for the monitoring of national budget laws by the Commission, the obligations to consult have tremendously increased in practical and political importance.

The current research introduces a new approach (and is based on Skowron-Kadayer 2018). By drawing up an extensive list of different duties, this article establishes a new category, and coins the term of 'obligations to consult' (French: *obligation de consultation*, German: *Pflichten der Mitgliedstaaten, die EU-Organe an der nationalen Rechtsetzung zu beteiligen*, or simply *Beteiligungspflichten*, Spanish: *obligación de consulta*).

The article is divided into three main sections. First, the category of obligations to consult EU institutions on national laws is presented (Section 2). The various obligations are outlined and divided into further categories. Based on this categorization of the duties, I determine defects that may occur at any stage of the law-making process. These defects and thus violations of the obligations to consult are the focus of the article. This research thus analyses the settled case law of the Court of Justice of the European Union (the Court or CJEU) (Section 3).

Furthermore, discrepancies in referred judgments will be presented. Different judgments from the Court will be compared (Section 4) to show the inaccuracies that resulted over the years due to the lack of a single category of obligations to consult EU institutions on national draft laws.

2. Obligations to Consult EU Institutions on National Draft Laws

A careful study of the Treaty on the Functioning of the European Union[1] (the Treaty or TFEU) and numerous secondary law acts reveals the existence of a variety of

1. Treaty on the Functioning of the European Union, OJ [2012] C 326/1. (Footnotes to the current article contain solely references to the judgments of the CJEU and to the *Official Journal*.)

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Member State obligations requiring States to consult EU institutions during legislative procedures.

According to the Information Directive[2] (the Directive), Articles 108, 117 and 114 TFEU and the duties to notify national drafts fall into the category of obligations to consult EU institutions during the national legislative process (compare also for more provisions to Jans 1998). These obligations foresee when the competent EU institution must be consulted. During its participation, the competent institution is obligated to examine the notified legislative draft and may, in some cases, issue an opinion or deliver a statement. The content of the new law depends on the upstream consultation with the EU institution. Obligations to consult deal with the influence of EU law on national legislative procedures and EU institutions on substantive national law.

A Member State may have to fulfil an obligation to consult multiple times. Every time it issues a new law that falls within the scope of a given obligation to consult, it is bound to consult the competent EU institution. An obligation to consult can thus be relevant with respect to many law-making procedures: a Member State will issue many technical rules or several state aid measures and for each one it needs to notify the Commission.

2.1. Simple and Qualified Obligations

The main category of obligations to consult can be divided into two subcategories: simple and qualified obligations. Article 117 TFEU constitutes a simple obligation to consult – an obligation to notify the European Commission – and foresees a consultation procedure. Article 108 TFEU and Articles 5 and 6 of the Directive constitute qualified obligations to consult – they not only contain a duty to notify and conduct a consultation procedure, but also contain a standstill clause, as a qualifying element. Even if these obligations have the element of a standstill clause that other duties do not possess, they are nevertheless comparable, which justifies their belonging to the same main category of obligations to consult EU institutions on national draft laws.

Both the CJEU and the relevant literature on the subject (Prasch 1967, 120)[3] have drawn comparisons between simple and qualified obligations (Articles 117 and 108 TFEU). The context of Articles 116 and 117 TFEU, just like of Articles 107 and 108 TFEU, supports the same goal of eliminating disruptions of the internal market.[4] Article 108 TFEU is, 'by virtue of the specific nature of the intervention instrument', to be viewed as *lex specialis* to the rules contained in Articles 116 and 117 TFEU.[5]

2. Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Text with EEA relevance) OJ L 241, pp. 1–15.
3. Joined Cases C-72/91 and C-73/91, ECLI:EU:C:1992:130, Opinion of AG Darmon, para 72.
4. Case 308/01, ECLI:EU:C:2003:481, Opinion of AG Geelhoed, paras 54 and 65.
5. Case 308/01, ECLI:EU:C:2003:481, Opinion of AG Geelhoed para 67.

The comparability of another set of simple and qualified obligations to consult – Article 117 TFEU and Article 5 of the Directive, respectively – can be justified by the wording of both provisions.[6] They constitute unconditional obligations that address the law-making Member State. This consultation procedure, according to Article 117 TFEU, serves similar purposes to those prescribed in the Directive: prevention of a disruption of competition. Hence, both primary (Article 117 TFEU) and secondary law (the Directive) take a preventive, rather than harmonizing approach.

Summing up, neither Article 117 TFEU, nor Articles 5 and 6 of the Directive aim at harmonization. Rather, they refer to a preliminary stage of harmonization. Both provisions follow the same aim: to avoid disruptions to the internal market through preventive consultation. This conclusion should be relevant for any other ruling on EU law constituting an obligation to consult.

2.2. Primary and Secondary Obligations

One can distinguish between the primary and secondary elements of an obligation to consult. This is relevant for a discussion about appropriate consequences, which aims to avoid the blanket inapplicability of national law. One can divide whole provisions into single obligations, and decide based on the legal situation, adjusting the consequences of the exact violation in response to the danger or threat it creates for the internal market.

A primary obligation constitutes a duty to communicate, inform (Article 5(1) of the Directive), or notify, and to stand still (Article 6(1) of the Directive). A Member State may not issue the draft; it thus needs to stand still until three months have passed since the Commission was notified. Primary duties of this kind are part of every obligation to consult and are thus anchored in the relevant primary- or secondary-law legal acts.

The duty to take the detailed opinion of the Commission or other Member States into account (Article 6(2) of the Directive), or to follow the Commission's recommendation (Article 117 TFEU), both constitute secondary duties. A secondary duty is activated by the issuing of a recommendation or a detailed opinion by the Commission. Before this moment, there is no legal act that contains substantive provisions that a Member State must respect and follow in the draft and thus no legal obligation. A secondary duty can arise only after the Member State has fulfilled its primary duty, and only if the national draft has not been approved by the Commission.

Both duties are contained in many obligations to consult. A primary duty contains different obligations for Member States than does a secondary duty. The diverse legal nature of these duties speaks for the difference between them. A primary duty has an abstract character. It obliges every Member State from the moment the EU legal act,

6. Article 5 of the Directive is broader than Article 117 TFEU. It does not refer to cases in which there is a reason to fear that national draft can cause a disruption of competition. It refers to issuing of drafts in general.

foreseeing an obligation to consult, is issued. On the contrary, a secondary duty has a concrete nature, and it only addresses the notifying Member State.

3. Different Consequences of Violations of the Obligations to Consult

The variety of obligations to consult lets us assume that there are also different possibilities for their violations. Refraining from participation[7] or the belated provision of information can constitute such a violation. Possible errors can also include the violation of the duty of notification, of the standstill clause,[8] or of the enforcement of a national law during the standstill period, without consideration of the Commission's remarks.[9] The Section refers the jurisprudence of the Court and distinguishes between settled case law on obligations to consult resulting from secondary and primary law.

3.1. Case Law on Breaches of Obligations to Consult under Secondary Law

Several judgments deal with the consequences of a Member State violating the obligation to consult under Articles 5 and 6 of the Directive during the national law-making process. The CJEU has ruled in some cases that a Member State's law issued without prior consultation of an EU institution is inapplicable. On the contrary, in other cases national law was applicable. The most well-known cases in this area include *CIA Security International (CIA)*,[10] *Unilever*[11] and *Lemmens*,[12] which will be discussed briefly.

The company *CIA Security International* started a procedure against a group of entrepreneurs before a Belgian commercial court. Asking to stop unfair trading practices, CIA argued that Signalson SA and Securitel SPRL, two of its competitors, marketed an alarm system that did not carry the approval required by Belgian legislation. However, Belgian legislation was in breach of the free movement of goods and had not been notified according to the Directive. The national court asked the Court of Justice if the Directive was sufficiently clear and precise to be directly effective, and whether the national court should refuse to apply the unnotified national measures. The Court ruled that Articles 5 and 6 of the Directive should

7. Case C-65/05 *Commission of the European Communities v Hellenic Republic* ECLI:EU:C:2006:673, para 58.
8. Case C-303/04 *Lidl Italia Srl v Comune di Stradella* ECLI:EU:C:2005:528; Case C-226/97 *Criminal proceedings against Johannes Martinus Lemmens* ECLI:EU:C:1998:296, para 37. See also Case C-443/98 *Unilever Italia SpA v Central Food SpA* ECLI:EU:C:2000:57,Opinion of AG Jacobs para 71.
9. Case C-443/98 *Unilever Italia SpA v Central Food SpA* ECLI:EU:C:2000:496, para 34.
10. Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* ECLI:EU:C:1996:172.
11. Case C-443/98 *Unilever Italia SpA v Central Food SpA* ECLI:EU:C:2000:496.
12. Case C-226/97 *Criminal proceedings against Johannes Martinus Lemmens* ECLI:EU:C:1998:296.

be interpreted as meaning that individuals may rely on them before the national court, which must decline to apply a national technical regulation that has not been notified.

While in *CIA* the omission to notify the national draft was the reason for the procedure, in *Unilever* it was the breach of the standstill obligation contained in Article 6 of the Directive. In *Unilever*, two parties agreed on the delivery of olive oil. However, the delivered product was labelled in a way that, whilst complying with EU law, did not comply with Italian law. The parties argued about the applicability of the national labelling legislation. The relevant national law had been notified, but it had been adopted in breach of the standstill clause. One party argued that the Directive would disapply national law. The Court of Justice ruled that the national court could 'refuse to apply a national technical regulation which was adopted during the period of postponement'.

Analogous to *CIA Security International*, in *Lemmens*, the national law in question had not been notified. Nevertheless, in contrast to the *CIA* judgment, the Court ruled that the national law was applicable. This case, contrary to the cases previously mentioned, did not concern civil law, nor the obligations arising from a civil-law contract. Rather, it concerned a matter of criminal law and questions surrounding the criminal liability of a citizen. The accused was driving under the influence of alcohol. In the criminal proceedings, he stated that the evidence against him was invalid since his breath had been checked with an alcoholometer according to a new law that had not been notified to the Commission.

In the first two cases *CIA Security International* and *Unilever*, the Court decided that the national law was not applicable due to certain failures during the consultation procedure. In *Lemmens*, the national law was ruled applicable, despite the Court finding a breach of the same obligation to consult as in *CIA*. In both *CIA* and *Lemmens*, the duty to notify the national draft was violated, while in *Unilever*, the duty to stand still with the national legislative procedure was not respected.

These cases show that with regard to the Directive, the Court applies different criteria of inapplicability than it does for 'typical' harmonizing directives. The Court examines the breach of the obligation to notify under the Directive, particularly if the criterion constituting a 'substantial procedural defect' renders such technical rules inapplicable so that they may not be enforced against individuals.[13] It refers to the character of Articles 5 and 6 of the Directive and to the goals of the procedural duty to consult in a particular case. If Articles 5 and 6 of the Directive aim to protect the internal market from disruptions, the unnotified national law under review is inapplicable. However, if the factual circumstances of the case are not related to matters covered by the Directive, such as criminal law matters, as seen in the *Lemmens* case, then the national law is applicable.

13. Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* ECLI:EU:C:1996:172, para 45; Case C-303/04, para 23; Case C-159/00 *Sapod Audic v Eco-Emballages SA* ECLI:EU:C:2002:343, para 49; Case C-443/98 *Unilever Italia SpA v Central Food SpA* ECLI:EU:C:2000:496, para 44; Case C-226/97 *Criminal proceedings against Johannes Martinus Lemmens* ECLI:EU:C:1998:296, para 33 (Michael Dougan 2001, 1503–1517).

A further problem of this jurisprudence is that the Court rules on the inapplicability of unnotified national law, which is thus unenforceable in some cases. However, since obligations to consult (EU law) are of a solely procedural nature and thus do not have any substantive content, one could argue that the unenforceability of national law causes legal uncertainty (Scherzberg 1993, 225–232).[14] The unnotified national law would contain substantive provisions (agreed upon during the consultation process) that practitioners could apply. If the unnotified law is unenforceable, then none of the legal orders contains substantive provisions. Practitioners, therefore, find themselves missing a provision that they could apply when reviewing the rights or obligations in question.

What is certain in the case law discussed above is that the formal consultation procedure is not an end in itself for the Court. It is not merely a formal requirement, but it actually serves the protection of the internal market. A negative aspect of the referred jurisprudence is, however, the ambiguity of the judgments. For national legislatures, this jurisprudence creates legal uncertainty. An answer to the question as to whether a provision of EU law is a substantial procedural requirement for national law cannot be given in advance and thus cannot be defined in an abstract way. A substantial defect would require that, in a particular case, a fundamental freedom is protected, and that the drafted law of the notifying Member State threatens the uniformity of EU law. Moreover, the meaning of the obligation can change depending on the circumstances of a case. National legal orders do not know this kind of reasoning, which can raise doubts regarding the handling of obligations to consult during legislative procedures.

3.2. Case Law on Breaches of Obligations to Consult under Primary Law

The Court seems to be inconsistent in its jurisprudence, and the aforementioned inaccuracies are not the only instances worth mentioning. In *Costa v E.N.E.L.*,[15] the CJEU ruled on an Italian law that nationalized the production and distribution of electricity and created an organization (ENEL). Mr Costa requested the national court to apply Article 267 TFEU[16] and asked the Court for a preliminary ruling on (amongst others) Articles 108 and 117 TFEU.[17] Costa argued that the nationalization of the electricity industry violated the EEC Treaty.

Here, in contrast to the judgments regarding secondary law referred to previously, the Court did not rule on the direct applicability of formal obligations to consult – Articles 108 and 117 TFEU – as a whole. Moreover, it stated that because of the formal nature of the consultation procedure, national provisions that were not notified could still be applicable.

14. Case C-443/98 *Unilever Italia SpA v Central Food SpA* ECLI:EU:C:2000:57, Opinion of AG Jacobs (paras 83 and 84).
15. Case 6/64 *Flaminio Costa v E.N.E.L.* ECLI:EU:C:1964:51.
16. Article 177 EEC Treaty.
17. Articles 93 and 102 EEC Treaty.

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The CJEU divided primary-law obligations to consult into elements[18] and held that only the standstill clause (the prohibition under Article 108 TFEU to put measures into effect) is directly applicable and thus makes conflicting national law inapplicable. This is a contradiction to the aforementioned judgments regarding secondary law, where all elements of an obligation to consult under the Directive are directly applicable.

3.3. Comparison of both Jurisprudence Lines

Both lines of jurisprudence should be compared with respect to the criterion of inapplicability and the assessment of a single element of the duty to consult. The first review of the obligation to consult occurred in the well-known case *Costa v E.N.E.L.* Later, in another case regarding the Directive and thus secondary law, the Court changed the course of its review and started to examine a further condition for inapplicability – the goal of the notification procedure.[19] Concerning provisions of primary law, the CJEU continues to apply different conditions of inapplicability: it does not mention the purpose of the consultation provision here. In *Costa v E.N.E.L.*, the Court also attached different values to the same elements of the obligation to consult as compared to its case law on secondary law. In its judgments on secondary law, it directly applies all elements of the obligation to consult. With respect to primary law, only the standstill clause is directly applicable. Considering that the provisions have a similar legal nature, this contradiction cannot be explained or justified, especially because the Court even issued some of the judgments in parallel.[20]

Summing up, there are two lines of jurisprudence in which the CJEU contradicts itself with respect to the assessment of elements of obligations to consult, the criterion of inapplicability and the consequence of inapplicability itself. The comparison of both lines of jurisprudence shows that the standstill clause is always directly applicable. However, the aforementioned contradiction is only relevant in the case of simple obligations to consult. Article 117 TFEU constitutes such an obligation: it contains a duty to consult and a procedure of consultation, but not the standstill clause.

Table 1 shows how jurisprudence varies concerning the direct applicability of simple obligations to consult. Obligations, such as the ex-ante control of national budgetary laws, which (for now) do not contain a standstill clause, could in some cases be directly applicable, and in others not. The direct applicability of a national budgetary law would depend on the Court and the line of case law it would choose to apply.

18. According to the terms coined in this article (Section 2.2), they would be primarily and secondarily duties.
19. See above Section 3.1.
20. A ruling in C-134/94 *Esso Española v Comunidad Autónoma de Canarias* ECLI:EU:C:1995:414, [1995] ECR I-4223 (p. 22), repeating the findings of *Costa/E.N.E.L.* was issued parallel to the previously-mentioned ruling in case C-194/94.

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Table 1. Jurisprudence concerning the direct applicability of obligations to consult EU institutions on national draft laws.

Obligation to consult consisting of:	Information Directive jurisprudence	*Costa v E.N.E.L.* jurisprudence
Primary duty – duty to notify	direct applicability	no direct applicability
Primary duty – duty to conduct the consultation procedure	direct applicability	no direct applicability
Primary duty – duty to stand-still	direct applicability	direct applicability

4. Comparability of Concrete Obligations to Consult

Bearing in mind the different judgments of the Court in cases concerning obligations to consult, a question arises regarding the reasons or possible justifications for this divergence. Could it be that referred obligations to consult originate from primary or secondary law, and the source of an obligation to consult leads to a different ruling? Or, rather, do the provisions in question have the same legal nature, since they all constitute obligations to consult, and thus demand to be handled in the same way? I will apply the assessment made by the Court regarding the direct applicability of Articles 5 and 6 of the Directive to elements of an obligation to consult derived from Article 108(3) TFEU, which is directly applicable in settled case law. Both qualified obligations to consult can and thus will be compared.[21]

4.1. Deviation According to a Single Element of a Qualified Obligation to Consult

Despite the similar character of the obligations, the CJEU decides differently in respect to each provision. If we compare the *Costa v E.N.E.L.* line of jurisprudence with judgments regarding the Directive, the Court seems to be inconsistent. We can compare both lines of jurisprudence, since the Court reviews the obligations from the Directive and provisions of primary law by applying the same criteria of inapplicability.

When the Court examines the provisions of the Directive, it states that both the obligation to notify and the procedure of consultation, together with the standstill clause, are directly applicable.[22] It does not differentiate between the elements of an obligation to consult in secondary law jurisprudence line: it reads Articles 5 and 6 of the Directive as constituting one obligation. The criteria of the Court regarding the obligation to consult from the Directive can be applied to Article 108(3) TFEU. The first two sentences of Article 108(3) TFEU are directly applicable

21. See remarks of the Commission in Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* ECLI:EU:C:1996:172, para 49; see regarding comparison of Directive and Article 108 TFEU: Franz Sutter (2005, 32–35; Zuzanna Chojnacka 2003, 47).
22. As in case *CIA Security International*. In case *Unilever* the CJEU ruled solely Article 9 (now Article 6) of the Directive as directly applicable.

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to cases of a violation by a Member State. They contain both the duty to inform the Commission and to conduct a consultation procedure. If a concrete case was to be subsumed under this purpose, Article 108 TFEU would be directly applicable as a whole.[23] In contrast, in Costa/E.N.E.L. the Court has rejected the direct applicability of the first two sentences of Article 108(3) TFEU, a qualified obligation to consult, in settled case law and confirms it solely for the third sentence – the standstill clause. Applying case law from the Directive to the primary-law provision thus shows a further discrepancy within the case law regarding two qualified obligations to consult.

4.2. A Comparison of Simple and Qualified Obligations to Consult

Since Article 117 TFEU and Article 5 and 6 of the Directive are comparable in respect to their wording and purpose,[24] both lines of jurisprudence may be compared. This constitutes a further step to finding a suitable solution for violations of obligations to consult and their respective elements.

The primary-law provision of Article 117 TFEU fulfils the criteria that the Court established for Articles 5 and 6 of the Directive.[25] If we were to apply the criteria developed for secondary law (the Directive) to Article 117 TFEU, its procedure would constitute a substantial part of national legislation and any violation thereof would lead to a national draft being considered defective. Article 117 TFEU would be directly applicable. However, the Court has ruled that this provision cannot be directly applicable. The transfer of criteria from a secondary-law to a primary-law provision would thus run counter to the CJEU's understanding of Article 117 TFEU.[26]

These different results are astonishing, since the Court applies the same criteria once it has reviewed the secondary law – the Directive – and a provision of primary law. It does not refer to the legal act in which the provision in question is anchored. Moreover, it reviews the nature of the law. With respect to a provision of the same nature (procedural unconditional obligations to consult), the Court's rules still arrive at a different conclusion.

A comparison of the CJEU's jurisprudence regarding obligations to consult stemming from Article 117 TFEU and Articles 5 and 6 of the Directive demonstrates the existence of certain contradictions. The Court affirms the direct applicability of a procedural duty from secondary law. It denies, however, the direct applicability of a procedural obligation following from primary law. This contradiction in the

23. And not only sentence 3 of the third paragraph.
24. Section 2.1.
25. Both provisions consist of an obligation to notify and a consultation procedure. Both provisions serve the same purpose.
26. The result that the consultation procedure of article 117 TFEU – by applying of the jurisprudence line regarding the Directive – would be directly applicable, is meaningful since *Elmer* suggested the Court decide in this understanding (Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* ECLI:EU:C:1995:346, Opinion of AG Elmer, para 59). According to him, the procedure of effective control would have similar importance to the stand-still clause. The violation of the consultation procedure may cause similar disruptions of the internal market, just as in the violation of the stand-still clause. Both provisions would serve the protection of the freedom of trade (Case C-443/98 *Unilever Italia SpA v Central Food SpA* ECLI:EU:C:2000:57, Opinion of AG Jacobs, para 84).

interpretation of a procedural obligation to consult may have an important effect on the review of direct applicability of a simple obligation that does not have a standstill clause. Depending on the applicable line of jurisprudence, an obligation of this kind may or may not be directly applicable.

4.3. A Comparison Concerning Consequences of a Violation

A comparison between the consequences of the direct applicability of either category brings to light further contradictions. The Court rules differently depending on which element of an obligation to consult is in play.

Next, I will apply the consequences decided on by the Court in one case to the other. The current research compares the consequences decided upon with regards to Article 117 TFEU and Articles 5 and 6 of the Directive. This comparison is meaningful because Article 117 TFEU foresees the consequences of a failure to follow the recommendation in the wording. In contrast to this explicit regulation, the wording of the Directive does not refer to the consequences of a breach.

Both provisions contain similar duties. The present comparison will first deal with the jurisprudence regarding a primary duty (to notify), before turning to contradictions in relation to secondary duty (to take a detailed opinion into account or to follow a recommendation).

With regards to violations of a primary duty stemming from the Directive, the Court has ruled that the obligation to consult on national drafts is directly applicable. It rules differently regarding the obligation to notify under Article 117 TFEU. This is the first difference.

A review of the case law regarding secondary duties shows yet another difference. Both the recommendation contained in Article 117 TFEU and the detailed opinion based on the Directive are relevant as secondary duties. According to the Court, the secondary duty stemming from the Directive[27] is directly applicable. In contrast, a violation of Article 117 TFEU has no direct consequences, since it results in a possibility to start an infringement procedure. However, according to Article 117(2) TFEU, if the Member State which has ignored the recommendation of the Commission causes disruption of the internal market, a harmonizing measure may be issued.

The contradiction between the consequences of violations of different obligations to consult is particularly evident once we understand that Article 117 TFEU – as the only obligation to consult – regulates the question of a violation of a secondary duty in its wording. A harmonizing measure can be issued if a distortion of competition occurs. The omission to follow a recommendation does not have any direct consequences for the notifying Member State. The harmonizing measure takes a future-oriented concrete approach.

In the case of Article 117 TFEU, the harmonization measure foresees detailed requirements for new national laws. In addition, Article 117 TFEU grants the Commission the discretionary power to decide if and how a harmonizing measure

27. Section 3.1.

Table 2. Comparison of regulated and unregulated consequences of violations.

Article 117 TFEU	Information Directive
Wording foresees consequences of a violation of a secondary duty: the omission to follow a recommendation (issued in the consultation procedure)	Wording does not foresee any consequences
If a disruption of internal market occurs EU may issue a harmonizing directive	(*no additional conditions*) national law is inapplicable (due to direct applicability of formal obligation to consult)

should be issued. Only then may the notifying Member State be compelled to change its national law, so as to not further distort competition. To do so, the state has time until the end of the implementation period. Moreover, the harmonizing measure – a directive – grants discretion to Member States regarding its transformation into national law. The wording of Article 117 TFEU foresees the enforcement of the harmonizing measure as a sanction for the omission to follow a recommendation. This somewhat radical measure has its roots in the wording of the provision that foresees the violation of duties.

Conversely, Articles 5 and 6 of the Directive do not regulate the consequences of a failure to take a detailed opinion into account.[28] The Court applies the concept of the direct applicability of Union law provisions to these cases of unregulated consequences. This consequence does not refer to a future harmonization measure, as is the case in Article 117 TFEU. Moreover, the unnotified law itself is inapplicable. The national legislature does not have the discretion regarding the transposition of an objective, neither regarding the 'if' nor the 'how' of a harmonization measure, nor its transposition. The Court rules upon the grave consequence[29] of direct applicability without any further criterion – such as, for example, the disruption of competition.

The contradiction results here from the comparison between a regulated consequence and an unregulated one. The wording of Article 117 TFEU contains references regarding sanctions against Member States that violate Union law. In this case, a disruption of competition must take place, and only then may the EU issue a harmonization measure. That is why the consequences following from a violation of this element are not grave. However, when the consequences of a violation of an obligation to consult are not regulated in the wording of the provision, the Court rules the provision directly applicable – a harsh consequence. This contradiction may violate the principle of proportionality. If the wording does not cover the consequences of a violation, the Member State cannot know which consequences to expect.

28. See Table 2.
29. In this direction also Case C-443/98 *Unilever Italia SpA v Central Food SpA* ECLI:EU:C:2000:57, Opinion of AG Jacobs, para 107, who calls the unenforceability of the not notified national law as 'unproportioned hard sanction'.

The comparison in Table 2 shows how the direct applicability of procedural EU law can be disproportional, based on a comparison of regulated and unregulated consequences in the wording of obligations to consult.

5. Conclusions: Ex-ante Control of Member States' Budget Laws as an obligation to consult?

This article attempts to categorize duties scattered throughout primary and secondary EU law. In recent years, EU legislation has established new rules in the area of national budget law, a particularly sensitive topic (Stöbener 2013, 526, speaks about 'coordinated budgetary surveillance'). The (old) jurisprudence of the Court may be applied to the new mechanism of ex-ante control of national budgetary laws.

The Two-Pack Regulation[30] established the first obligation of its kind in EU law and thus extended the scope of application of obligations to consult from internal market issues to sensitive Eurozone matters. Theoretically, every duty to notify based on the EU, the duty to notify the Commission of a draft budget law, can be an obligation to consult, the violation of which leads to the inapplicability of the unnotified national law. Article 7 of Regulation No. 473/2013, which foresees an ex-ante control of national budgetary laws, is constructed in a similar way as Article 117 TFEU and thus constitutes a simple obligation to consult. Depending on the line of jurisprudence applied to the notification of a budget plan, any defects in the notification procedure could result in the inapplicability of a Member State's budget law. This possibility cannot be excluded. Therefore, Member States need to be aware of the possible consequences before they develop the instruments contained in the Two-Pack Regulation towards a veto right (Reuters staff 2014; Volkery and Lindsey 2012). The area of national budget laws is so sensitive that Member States better have solutions ready in case there will be no time for discussions.

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