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Effet utile du contrôle préventif by Hybrid Legislative Procedures

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EU law has known coordination since its beginnings. A careful study of the Treaty on the Functioning of the European Union (in the following: Treaty or TFEU; see *Official Journal* No C 326 from 26 October 2012, pp. 0001– 0390) and numerous secondary law acts results in a variety of Member States' obligations in connection with coordination. Through the years, relevant secondary legislation has been issued. In recent years, EU legislature has established new rules in sensitive – from Member States' point of view – areas of national budget law. The coordination of budgetary policies constitutes both a new and a crucial instrument. Over the years, first the Contracting States and then EU legislature established tens of obligations to consult EU institutions on national draft laws. These mechanisms assume increasing importance. This very remarkable and at the same time under-discussed category deserves its own legal terms and definitions. The current article reviews legal uncertainties resulting from the application of procedural rules, suggests solutions, and coins new terms such as hybrid legislative procedures (Section 2) and *effet utile du contrôle préventif* (Section 3) that are crucial for a new dogmatic approach regarding the obligations to consult. Because national and EU legislative procedures overlap in the case of obligations to consult, many mistakes may occur at any stage. Current research tries to determine the consequences of violations of obligations to consult EU institutions on national legislative procedures (Section 4). In this respect, it deals with the settled case law of the Court of Justice of the European Union (hereinafter: Court or CJEU). The current article argues that the control of EU institutions over national law drafts is preventive and that the violation of a procedural obligation to consult can thus have only an indicative effect with regard to internal market disruption. New barriers to the internal market should not arise with the coming into force of a new law. This article introduces a new dogmatic approach towards obligations to consult, with the aim of avoiding legal uncertainty for national legislatures and practitioners.

1. Introduction

Distortion of competition or disruption to the functioning of the internal market are meant to be avoided by a preventive ex ante review of Member States' draft laws. Unlike the individual Member States, EU institutions have the expertise to determine

the impact a new national law may have on the internal market. They can estimate this impact by taking the entire European context into consideration. This illustrates one of the ways Member States are dependent on the know-how of EU institutions (Jans 1998, 25–58), whether this be the European Commission (the Commission) or the European Central Bank (Article 127 TFEU).

The current research constitutes a new approach as it suggests respecting the characteristics of this remarkable category (for further comments on the topic see Skowron-Kadayer 2018). I introduce the notion of 'hybrid legislative procedure' – a new form of legislative activity, where national and EU procedures overlap (see Section 2). I then define what I call the *effet utile du contrôle préventif* (Section 3). This new method helps avoid regulatory gaps and legal uncertainty for national legislature and practitioners. I seek to determine what the appropriate consequences for procedural defects should be. A new dogmatic approach (Section 4) needs to take into account which duties every obligation to consult bears for the notifying Member State. The division of every obligation to consult into separate duties helps to determine the appropriate consequences of certain procedural defects. The EU has gained an increasing amount of competences concerning national legislative procedures. A well-founded dogmatic analysis should follow this trend.

2. Hybrid Legislative Procedures

Obligations to consult foresee participation of EU institutions during national legislative procedures. A Union institution can give its approval or confirmation or issue a resolution[1] with respect to national law.[2] In general, the competent EU institution may propose content to, postpone, or even prevent the enforcement (by exercising a veto right) of a national law that would disturb the internal market. In some cases, the national legislative procedure may only be continued if the competent EU institution does not issue a statement or a negative opinion in due time.[3]

The national legislative procedure influenced by an obligation to consult is an example of a hybrid legislative process. While Member States have the privilege of proposing a new law, they are bound to consult the competent EU institution

1. Articles 114 and 108 Treaty on the Functioning of the European Union, OJ [2012] C 326/1.
2. The old version of Article 114 TFEU foresaw 'approval' (until 1 May 1999); Council Directive (EEC) 91/671 on the approximation of the laws of the Member States relating to the compulsory use of safety belts in vehicles of less than 3.5 tonnes [1991] OJ L 373/26; Directive (EC) 2006/126 of the European Parliament and of the Council on driving licences (Recast) [2006] OJ L 403/18; Directive of the European Parliament and of the Council laying down technical requirements for inland waterway vessels and repealing Council Directive 82/714 (EEC) [2006] OJ L 389/1; European Parliament and Council Directive 94/62 on packaging and packaging waste (EC) [1994] OJ L 365/10 foresee approval; Council Regulation (EC) No 2013/2006 amending Regulations (EEC) No. 404/93, (EC) No. 1782/2003 and (EC) No. 247/2006 with regards to the banana sector [2006] OJ L 384/13; Council Regulation (EC) No. 247/2006 laying down specific measures for agriculture in the outermost regions of the EU [2006] OJ L 42/1 foresee confirmation.
3. Commission Regulation (EC) 423/2008 on laying down certain detailed rules for implementing Council Regulation (EC) No. 1493/1999 and establishing a Community code of oenological practices and processes [2008] OJ L 127/13; Decision of the Council [1983] OJ L 347/48–49.

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during the law-making process. EU law, specifically the obligations to consult I examine, does not prescribe at which stage of the national legislative procedure this consultation or notification should take place. Rather, Member States make this decision according to their own legislative autonomy. Moreover, national legislative procedures and their deadlines differ from state to state.

Once a Member State starts a consultation procedure and notifies the relevant EU institution of its draft, the European part of the national legislative process begins. EU law governs this stage. The various obligations to consult foresee different processes of participation during the national legislative procedure in this regard. The examples discussed in this article – Articles 108 and 117 TFEU, and Articles 5 and 6 of the Information Directive (the Directive)[4] – prove this point: the acts issued at the end of each consultation procedure (the consultation acts) differ from each other. That is why only general observations can be made about the stages of this hybrid legislative process. The submitted national draft thus must comply with both the Member States' and the European Union legislative procedures. The procedural legality of the legislative process can and should be assessed according to these two legal orders. It is worth mentioning that the consultation process at the EU level constitutes an administrative procedure.[5] However, it occurs during the national legislative procedure.

3. The Background of *Effet Utile du Contrôle Préventif*

In the last decades, the Court has had a few opportunities to rule on the obligations to consult. The best-known cases in this area include *CIA Security International* (*CIA*),[6] *Unilever*,[7] and *Lemmens*.[8] In the first two cases, CJEU decided that the national law is not applicable due to the omitted notification according to Information Directive. In the *Lemmens* case, the national law was ruled applicable in spite of the violation of the same obligation to consult as in case *CIA*. In all of these cases, the Court examined the breach of the obligation to notify from the Information Directive, particularly if the criterion constituting a 'substantial procedural defect' renders such technical regulations inapplicable so that they may not be enforced against individuals.[9] However, in the case *Costa/E.N.E.L.*[10] the Court ruled on

4. 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.
5. Case C-3/00 Kingdom of Denmark v Commission of the European Communities ECLI:EU:C:2003:167, para 44.
6. (1996) ECR I-02201.
7. (2000) ECR I-07535.
8. (1998) ECR I-3711.
9. Case C-194/94 *CIA Security International v Signalson and Securitel* (1996) ECR I-2201 (2246 (para. 45)); Case C-303/04, *Lidl Italia* (2005) ECR I-7865 (7877 (para. 23)); Case C-159/00 *Sapod Audic* (2002) ECR I-5031 (5077 (para. 49)); Case C-443/98 *Unilever* (2000) ECR I-7565 (7583 (para. 44)); Case C-226/97 *Lemmens* (1998) I-3711 (3735 (para. 33)); Dougan (2001, 1503–1517).
10. (1964) ECR 1254.

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applicability of national law, even in case of a procedural duty (Skowron-Kadayer 2020, 1–14).

3.1. The Uniform Understanding of an Obligation to Consult in Settled Case Law

The differences in the judgments aside (Skowron-Kadayer 2020, 1–14), the starting point in the discussion about a new dogmatic approach should be the definition of obligations to consult, provided by the Court. The understanding of the obligations to consult EU institutions on national draft laws is the same in both the line of jurisprudence established with *CIA*, *Unilever*, *Lemmens* on one hand and *Costa/E.N.E.L.* on the other. The Advocates General, the Commission[11] and representatives of the doctrine – just as the Court – understand obligations to consult as formalities and procedural rules (Dougan 2001, 1503–1517; European Commission 2005, 1–96).[12] All these opinions understand obligations to consult as provisions related to competences. Article 108, like Article 117 TFEU, contains – according to the Court – procedural provisions that have an organizational character (Grabitz 1971, 1–15; Hailbronner 1989, 101–122). The Court underlined that the Member States had entered into an obligation with the Union, which bound them as States, but created no individual rights, except in the case of the final provision of Article 108 TFEU.[13]

The primacy of EU law can no longer be justified by the principle of *effet utile* – the uniform effect of material Union law in all Member States. Obligations to consult contain formal duties and are indifferent in substantive matters.[14] Their violation can only have an indicative effect with regard to the disturbances of the internal market that they may cause. A new principle – the *effet utile du contrôle préventif* – is needed because the issue here is not the effectiveness of EU law, but rather of the preventive control exercised by competent EU institutions. *Effet utile* can still be applicable to the substantive consultation acts only, acts issued at the end of a consultation procedure that contain guidelines for Member States on how the notified national legal draft should be.

Applied to the case of preventive control, as the Court seems to do it now, *effet utile* has the effect of establishing new competences 'through the backdoor'. Because the direct applicability of procedural obligations has an impact in undermining the existence of the rule of (national) law. It creates a legal situation as if the EU would have also exercised competence with regard to making national law invalid: a regulatory gap is the result of inapplicability of national law.

11. See remarks of the Commission in referred cases, for example in Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* ECLI:EU:C:1996:172.
12. Case 6/64 *Flaminio Costa v E.N.E.L.* ECLI:EU:C:1964:51, Opinion of AG Lagrange, p. 1297.
13. Case C-6/64 *Flaminio Costa v E.N.E.L.* ECLI:EU:C:1964:66.
14. Similar: Case C-443/98 *Unilever Italia SpA v Central Food SpA* ECLI:EU:C:2000:57, Opinion of AG Jacobs, para 84, C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* ECLI:EU:C:1995:346, Opinion of AG Elmer, para 65: 'The likelihood that a non-notified regulation is substantively in breach of Community law is thus no less than the likelihood that a notified regulation would be, rather the contrary').

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The CJEU interprets a formal obligation to consult and refers to the free movement of goods to protect the internal market from any dangers resulting from non-notification. For practitioners who cannot determine the law applicable in the case of non-notification, the jurisprudence leads to legal uncertainty. If we take into account that most cases refer to the internal market, it is possible that the rulings are the *raison d'être* for entrepreneurs. Commercial trade should not tolerate legal uncertainty, especially not with respect to applicable law.

If the Court ruled according to the competences[15] the EU exercised in the case of obligations to consult, it would determine a violation of the obligation to consult and require the Member State to follow the relevant procedural duty (according to the wording of an obligation to consult). The written target of all obligations to consult is the examination of a national draft by an EU institution, as shown by Article 117(2) TFEU. The wording of obligations to consult does not foresee that national law does not exist in the case of non-notification. This conclusion will be relevant for the discussion about the solutions I suggest in Section 4.

3.2. Some Remarks Regarding Collisions in Case of Procedural Duties

The Court rules a national law applicable or inapplicable depending on the concrete case at hand and its implications for the internal market, and particularly for the free movement of goods. It does not definitively stipulate whether the obligation to consult constitutes a substantial procedural requirement for national law or not. Moreover, this decision depends on the factual circumstances of the case over which the legal dispute is taking place, as well as on the goals of the consultation procedure. That is why an obligation to consult can – under some circumstances (a constellation with reference to internal market) – constitute a substantial procedural requirement of national law. Under different factual circumstances, such as an area not related to the internal market (criminal law – explicitly excluded from the applicability of the Directive – as in *Lemmens*) the same obligation to consult does *not* constitute a substantial procedural requirement for the national law.

An examination of the jurisprudence of the Court regarding the Directive leads to the conclusion that the same obligation to consult can simultaneously be a substantial and insubstantial procedural requirement for national draft, depending on the factual circumstances of a particular case. There are thus different outcomes possible with regard to the same obligation to consult and the same unnotified law, depending on the factual circumstances of the case in question. That is why the same national provision can be applicable and inapplicable, depending on the case.

The Court rules on the inapplicability of national law when the latter suffers from a substantial procedural defect and has come into force (in the Court's understanding) in an unlawful way – under the omission to follow the notification procedure prescribed by an obligation to consult.[16] CJEU affirms a collision in a case

15. According to the extent of the competences the EU has exercised with issuing formal obligation
16. (n 42), Cases *CIA Security International* (n 29) and *Unilever* (n 30).

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in which the law in question cannot – according to the Court's understanding – exist, since it requires two valid provisions, one from the EU and one from national law. If an obligation to consult that constitutes a substantial condition for a national law to come into force is ignored, there can be no effective national law coming into force due to a procedural defect during the legislative procedure. At the same time, the Court decides on the applicability of national laws and rejects collisions when they could exist,[17] since national law came into force lawfully (the obligation to consult was not considered to be a substantial requirement of national law). In general, the jurisdiction of the Court in these cases implies several systemic contradictions.

This means that one could redefine the collision and also apply it to cases in which one of the provisions (the national law) suffers from substantial procedural defects and is 'hobbling'.[18] Otherwise, the collision must be denied or re-defined if the condition of two effective and conflicting provisions is upheld.

3.3. Two Laws of a Member State on One Technical Rule

We do not need to re-define 'collision' if we could find a different way to solve the ambiguity. A different possibility could be the obligation for a Member State to issue two laws – two different technical rules for example (putting the Directive into force). A law that is supposed to be applicable to internal market matters should be notified while a law applicable to cases excluded from the scope of the Directive, like criminal law, should not be notified to the Commission. This solution could help to avoid the danger of a regulatory gap due to the inapplicability of unnotified national law and thus the legal uncertainty for practitioners.

However, the wording of obligations to consult is unconditional. Every national technical provision is supposed to be notified. Moreover, it could cause difficulties for national legislature to determine which national draft to notify or not. One simply cannot foresee all the relevant cases in which an obligation to consult may be relevant. However, the obligations to consult are unconditional and must be followed in every law-making procedure, which makes it is impossible to issue two laws. That is why the Court tries to diminish the ambiguity through interpretation of the obligations to consult according to their defined purposes. This observation constitutes a further step to finding a suitable solution for violations of obligations to consult and their respective elements.

4. New Dogmatic Solutions: The Consequences Doctrine

A crucial question is whether the inapplicability of national law is generally suitable for formal obligations and, if so, to what extent. The protection of the internal market demands tailor-made solutions. The nucleus of the current research is thus a new

17. Ibid, Case *Lemmens* (n 31).
18. If an EU provision is a substantial requirement of a national law, this national law cannot come into force if this condition is not complied with.

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dogmatic concept for the uniform handling of obligations to consult that I would like to introduce. This would support, rather than distort, the internal market.

The direct applicability of an obligation to consult and of formal EU law is different from the well-known primacy of application that is directed towards a national law in force. This time, the primacy of EU law does not affect the content of national law that does not satisfy EU law. Moreover, it refers to faults occurring during the legislative process. A national provision may suffer from defects that can make it inapplicable in a variety of cases. The primacy of EU law, thus, has an abstract impact in cases of obligations to consult.

The Court seems to refer to procedural defects and decides on the substantive defect in the case of formal errors. It refers to the legal instrument of inapplicability and does not make any difference between the impact of the new national law on the internal market, and the question whether a threat to the internal market has occurred, may occur, or is about to occur.

Different obligations to consult bear different duties for Member States and thus differ in essence. Based on the wording and the goal of obligations to consult, one needs to look for a solution that helps to avoid the effect of establishing new competences and a blanket unenforceability of a national law that creates legal uncertainty – effects which the CJEU judgments have now.

The current discussion is based on the similarities in the judgments: the Court understands the consultation procedure as a rule of law that deals with 'relations between the Member States and the Commission but that ... [does] not afford individuals any right capable of being infringed'.[19] The consultation procedure is the same with respect to both primary and secondary law. The Court describes the obligation to consult in both lines of jurisprudence as substantial procedural requirements.[20] According to its understanding, obligations to consult, regardless of their location, have the same meaning for national legislatures. Thus, obligations to consult are of a uniform legal nature. This justifies the applicability of consistent criteria with respect to EU provisions once the Court reviews the direct applicability of the law.

I will briefly refer to the substantive character of consultation acts and the legal nature of obligations to consult as 'neutral' provisions – in order to present *de lege lata* possibilities. My explanations regarding *de lege ferenda* will show that obligations to consult affect the division of competences between EU and Member States and that a suitable solution should consider this fact.

4.1. Direct Applicability of Consultation Acts

The primacy of EU law has to be adjusted to the special category of obligations to consult in order to satisfy its goals. The goal of EU legislature or the Contracting

19. See only CJEU, Case 194/94 *CIA Security International* [1996] ECR 2230, para 49.
20. Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* ECLI:EU:C:1996:172, para 45, 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; C-226/97 *Criminal proceedings against Johannes Martinus Lemmens* ECLI:EU:C:1998:296, para 33.

States to let EU institutions participate in national law-making processes should be defined so that it can be fulfilled in case of procedural defects. The result of inapplicability as a consequence of the primacy of Union law in those cases is a regulatory gap: actually no national law exists. However, EU legislature did not pursue this target.[21] EU legislature pursued the aim that national law comes into force only after consultation with an EU institution.

The omitted participation of EU institutions in national legislative procedures can only yield indicative effects concerning material conformity with EU law.[22] The procedural, formal defect of the omitted notification alone should thus not lead to the inapplicability of the national law. As Article 117 TFEU shows, the danger of the disruption of competition is not enough. The disruption has to actually occur.

However, legal acts issued during the consultation procedure (consultation acts; opinion or statement to a national draft) contain substantive law and thus constitute the exercise of substantive competences – just like typical directives that contain material rights and obligations in their wording. Consultation acts are supposed to be implemented into the national legal order. These legal acts, not the procedural obligations to consult, contain material guidelines on how new national substantive law can be brought in line with EU law. Their only purpose is to mould the national law of the notifying Member State in line with EU law.

The consultation acts contain substantive specifications that can be directly applicable if a Member State makes a national law in a procedure that breaks EU formal law and is thus incorrect.[23] A detailed opinion that is issued on the basis of the Directive can and should be directly applicable. In the event where a consultation act has been issued and the standstill clause has been violated (as in the Case *Unilever*), the consultation acts – and not the formal obligation to consult – can constitute the substantive and directly applicable EU law, making the unnotified national law inapplicable. Moreover, the consultation act can be directly applicable where the Commission issued a statement to the national draft and the Member State omitted to implement its content in the notified draft. Thus, in such a case, there is not only a procedural obligation according to EU law. The act of the Commission contains material guidelines towards the national draft. The national practitioner can apply this act directly. This solution could help to alleviate the legal uncertainty that results from rulings of the Court.

4.2. Consequences According to the Threat to the Internal Market Caused by Unnotified National Law

An analysis of the Directive and legal acts issued on its basis – the consultation acts – results in further statements that can be useful for the proposed solution. The possibility that a national law, even if it has not been notified, does not disturb the internal

21. Here, the regulatory gap and legal uncertainty are key. Which law is applicable in the event of a collision between formal EU law and an unnotified, and thus inapplicable, national law?
22. See Section 5, below.
23. See Table 1, below.

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market is covered by the text of the Directive. EU legislation explicitly allows this case. If an unnotified national law is in line with substantive EU law, the Commission issues a comment according to Article 5(2) and no detailed opinion according to Article 6(1) of the Directive.[24] The form of the obligation to consult from the Directive states that obligations to consult constitute *prima facie* neutral provisions that do not contain substantive rules and that substantive content can only be inherent in the participation of EU institutions in the national procedure. The possibility that a draft national law is in line with EU law is thus equal to the possibility that it disturbs the internal market.

The EU did not exercise any substantive competences. The EU's right to issue substantive consultation acts can be activated by a Member State's notification only. There are possible cases in which a Member State issues a national law compatible with EU law and the EU institution can refrain from issuing an opinion on the national draft. In such a case, the EU will not exercise any substantive competence and the Member State will.

The proposed solution should address the danger that the various elements of an obligation to consult pose for the internal market. In *Costa v E.N.E.L.*, the Court divided a given obligation to consult into three different elements (the obligation to notify, to have EU institution participate, and to stand still) and reviewed the direct applicability of each element. The obligations to consult can thus be divided into separate parts. A particular obligation to consult does not have to constitute a homogeneous unit. Individual elements may have different meanings for legislatures during a hybrid legislative process. A given obligation to consult can contain elements that are directly applicable and elements that are not directly applicable. This also helps to regulate the consequences of the threat that the national law poses for the internal market. This should be the basis of the search for suitable consequences to violations of procedural duties.

Because of the variety of the provisions in question and the obligations following from them, the question as to the consequences of possible violations of these duties arises. Consequences may differ. This is why a general assessment of all obligations could be replaced by an assessment in which each provision is divided into its elements, so that the consequences of a violation could be examined separately for each element. Since the obligations to consult consist of several elements, depending on which element was violated, the relevant consequences could be employed. This would be in line with the impact of each single element on the internal market. If individual elements of the duty to consult have independent meaning, the consequences of violating an element may differ depending on the element in question, as well as the legal situation. The subject of the current research is, therefore, to also explore whether this approach is expedient from a legal viewpoint. Perhaps,

24. In the case of other obligations to consult, an opinion is issued only when the national draft is substantively in line with EU law. In cases where the Member State drafted a national law in line with EU law, the EU institution does not issue any opinion.

a uniform assessment of the respective duty to consult is necessary and a single sanction on the concrete element of a duty should be independently applied.

4.3. De lege ferenda

In general, competence rules that obligations to consult constitute should differ from provisions that confer rights on individuals. Obligations to consult are procedural requirements, referring to the competences of the EU and national legislatures. Direct applicability is suitable for substantive violations of EU law, but not for those having procedural impact. The Court developed the inapplicability of national law being contrary to EU law concerning the rights of individuals. It has proven its effectiveness as an instrument that supports substantive EU law (*effet utile*). However, this consequence is not suitable and not conducive if competences are considered as in the case of obligations to consult.

Differentiated defect consequences should be contained in procedural EU obligations. The EU should be allowed to foresee the consequences of Member States' violations of EU law in the scope in which the EU exercises competences through differentiated laws (in case of procedural duties, the EU exercises solely a formal competence; once it issues a consultation act, is also exercises a material competence). In this respect, the EU should have the competence to foresee consequences that, on the one hand, support *effet utile* and have no effect of establishing new competences on the other. The EU legislature should initiate further or new obligations to consult in a measured way (similar to Jans 1998, 25–58). If it does not do so, different instruments other than the direct applicability of a formal obligation to consult should be applied (for different solutions compare, for example, Bernhard and Madner 1998, 87–110; Vorbach 1997, 110–120).[25]

A solution *de lege ferenda* covers a more detailed regulation of an obligation to consult.[26] The EU legislature should – by enforcing new obligations to consult – make appropriate rules of law in cases of the violation of an obligation. This modality should be part of the exercised will of EU legislature. Alternatively, the Contracting States could issue a new Treaty provision that would name the consequences for violations of all obligations to consult or their respected elements. This would also constitute the exercise of EU competence and thus the inapplicability would not result in establishing new competences. In addition – as in the case of Article 117 TFEU – EU legislature should foresee the kinds of sanctions necessary in the possibility that a Member State would not follow the opinion of an EU institution issued during the consultation procedures (the consultation act). This should support the procedural *effet utile du contrôle préventif*.

25. Case C-443/98 *Unilever Italia SpA v Central Food SpA* ECLI:EU:C:2000:57, Opinion of AG Jacobs (para 106: 'I have argued above that the only consideration justifying the unenforceability of an unnotified technical regulation on procedural grounds is the potential undermining of the effectiveness of Community control. However, while compliance with the duty to notify a draft technical regulation is crucial for the effectiveness of that control, compliance with the standstill period is less important.')
26. See Table 2, below.

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Table 1. De lege lata.

Case			Collision between
1	Obligation to notify (–)	Omission to follow the obligation to notify	Obligation to consult
2	Stand-still clause (–)	Omission to follow the stand-still clause	
3	Detailed opinion (–)	Omission to follow detailed opinion	Obligation to consult
4	Detailed opinion (+)	Detailed opinion followed (+)	Detailed opinion

In cases 1 and 2, the legal situation is the same: *de lege lata* the procedural obligation to consult collides with unnotified national law. In case 3, the legal situation is different: *de lege lata* the detailed opinion that has substantive content can collide with national law and be directly applicable.The proposed solution is: the substantive detailed opinion (and *not* the procedural obligation to consult) should collide with unnotified national law. This solution avoids legal uncertainty and regulatory gaps.

If the issue is about the competences that obligations to consult constitute, a new, suitable legal basis should be established. The Commission has *de lege lata* no right to issue a statement on a national draft by itself.[27] It has to wait for notification from the Member State. The presented problems regarding obligations to consult are a plea for a detailed structuring *de lege ferenda* of the appropriate mechanisms. The Commission should be entitled to issue statements *ex officio* even without the notification of the Member States based on a legal requirement that should have been triggered. This would ensure the rights of EU institutions to participate in national legislative proceedings.

One could also rule for a new procedure in front of the Court, the context of which would be a lawsuit by the Commission that could sue its participation brought against a law-making Member State. The new lawsuit should allow for the effective exercise of rights that obligations to consult foresee and guarantee. At the same time, EU legislature should guarantee that this procedure will not be exploited by other (not notifying) Member States that are afraid of competitive disadvantages for their own market participants. The form of lawsuit in question should also ensure that Member States that fear disadvantages from the national draft law do not exercise influence on the Commission and the position of Member States that did not submit notification.

Remarks on why the proposed solution is more effective are given in Tables 1 and 2.

The proposed solution is more effective than a blanket unenforceability of national law, since it depends on the threat to or disruption of the internal market and is based on the wording of Article 117 TFEU that foresees the consequences of a

27. The EU legislature did not harmonize Member States' legal order in the case of obligations to consult. It solely exercised the competence to participate in legislative procedures should they refer to questions of the internal market. The right of the Commission to issue consultation acts needs to be activated by a previous notification. This right does not exist in the abstract.

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Table 2. De lege ferenda.

Case			Collision between
1	Notification (–) But the Commission may issue an opinion regarding national draft	Omission to follow the obligation to notify	The opinion of the Commission has material content and can be directly applicable
2	Stand-still clause (–)	Omission to follow the obligation to stand still	The opinion of the Commission has material content and can be directly applicable
3	The detailed opinion has been issued without prior notification	Omission to follow the detailed opinion	Detailed opinion is directly applicable

Here the legal situation could be created in which the Commission or ECB (in case of Article 127 TFEU) could start the consultation procedure even without the Member State's notification and issue a statement before the Member State would enforce a legal act that could disrupt the internal market.

violation in its wording. This is why this Treaty provision may indicate the will of the Contracting States regarding consequences of violations of obligations to consult. One needs to bear in mind that obligations to consult serve to exercise preventive control over national legislative drafts.

5. An Appeal to the Legislators of Hybrid Legislative Procedures

The current discussion about an appropriate solution for procedural failures is based on the similarities in the judgments – the Court understands the consultation procedure as a rule of law that deals with 'relations between the Member States and the Commission' but that does not 'afford individuals any right capable of being infringed'.[28] EU legislature and the Court should consider more appropriate solutions *de lege lata* or even *de lege ferenda*.

The obligations to consult constitute a significant masterpiece of EU legislature and – in case of some obligations – of Contracting States. The solution to coordinate Member States' legal orders instead of harmonizing them, is brilliant. In the noble goal of protecting the internal market, obligations to consult do not replace a missing dogmatic rationale of direct applicability of procedural rules. Obligations to consult demand special legal instruments that would consider their wording and goals. EU legislature could exercise competences in a detailed way and rule on the question of consequences with the rule of an obligation to consult itself. Alternatively, the Contracting States could rule on a provision in the Treaty that would name these consequences for all obligations to consult. A legal basis in the Treaty would also constitute the exercise of EU competences and thus inapplicability would not have the effect of establishing new competences.

28. See only CJEU, *CIA Security*, case 194/94 (1996) ECR 2230 (para 49).

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The consequences should be adjusted to the goals of coordination policy. Certainly, less legislation could be more. This liberal thesis by no means applies to obligations to consult. The areas in which I could identify obligations to consult are sensible and demand a clear demarcation of competences between the Member States and the European Union.

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