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Few Remarks on the Duty to Notify National Law Drafts to a European Institution

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Abstract

Since the establishment of the European Union, Member States do not have complete free reign over their legislative activity. The influence of the EU institutions on new national laws has become stronger with the passage of time. Over the years, the Contracting States and the Union legislature have established an increasing number of obligations for national legislatures. The most common practice is the well-known duty 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. A similar but far more complicated tool constitute procedural obligations to consult EU institutions on national draft laws. These obligations provide EU institutions with extraordinary powers to exercise their influence over national legal orders. Recently EU legislature established with Two-Pack *ex ante* control of national budgetary laws, a further obligation to notify Member States' law to the Commission. A judicial review of these procedural duties runs also in an extraordinary way. While the Court of Justice of the EU introduced the *terminus technicus* "substantial procedural defect", I would like to coin the term general preliminary ruling and principle of accessory division of competences.

Keywords

Substantial Procedural Defect, The General Preliminary Ruling, The Principle of Accessory Division of Competences

1. Introduction

The transfer of participation rights to institutions known by European Union (EU) law started with the signing of the Treaties. The Contracting States expressed the will to confer rights onto the EU institutions. Meanwhile, similar provisions enshrined in secondary EU law require Member States to consult the EU institutions during national legislative procedures. This means that the EU legislature – and not the Contracting States – is the one who establishes the right of EU institutions to participate in national legislative procedures.

At the beginning, solely the Contracting States established some obligations to consult EU institutions on national drafts in the Treaties. Examples may be articles 108 or 117 Treaty on the Functioning of the European Union [1] (the Treaty or TFEU). Over time, also the EU legislature included further provisions in secondary law acts. The EU legislature rules here on the participation of EU institutions during national legislative processes. The Information Directive (the Information Directive or the Directive) contains the most well-known secondary law duty to consult EU institution during national legislative procedure [2].

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2. The Information-Directive as an Example for an Obligation to Consult EU Institution on National Draft Law

In my previous research I examined the category of obligations to consult EU institutions on national law drafts. The duty to consult anchored in the Information Directive is one example and it could thus be an example for a comparative analysis I conducted. Different duties are spread all over the EU law. Since this category was missing there was no clear line of jurisprudence to determine. This ran to different jurisprudence lines of the CJEU. In the previously published research, I analyzed possible consequences of a Member State's violations of an obligation to consult.

In the present paper I focus on the Information Directive, one example of an obligation to consult EU institutions on national draft laws. The research deals with the question connected to an omission to follow an obligation to consult from the Information Directive. First, it presents characteristics of obligations in question (Part 2.1.). Second, it examines consequences of failures to put these duties into force in order to determine if a transposition into national law is needed or not. The EU law refers to national law. That is why it is crucial to now, what does national law say in regard of duties to follow. In case of an omission to follow an obligation to consult, the judicial review of the Court speaks about "substantial procedural defect". I will determine this reference (Part 2.2.). In order to determine the consequences of violating the provisions of the Directive, the research deals with issues of the implementation of this Directive into Member States' legal orders (Part 2.3.). The author focuses on Austria, Germany and the Netherlands, with Great Britain, France, Luxemburg and Poland being mentioned. Is there a consistent approach among Member States or not? Does invalidity in case of omission to follow notification as foreseen in Articles 5 and 6 of the Information Directive come into question? The formal nature of obligations to consult EU institutions and the close connection between the national and EU legal orders allow us to examine the solutions of other Member States in this respect.

2.1. Few Remarks on the Characteristics of Information Directive

2.1.1. Member State as Initiator

First, the creation of the Member State's obligation should be discussed. The duty to transpose a "classic" directive into national law arises once a directive is in force. Member States are provided with a deadline known as the transposition period. The duty to follow an obligation to consult also arises with the Directive coming into force. This duty, however, does not constitute an obligation to act immediately or within a foreseen deadline. Moreover, the Member State decides on its own about the time period in which it will issue the national law as it has the right to initiate national provisions [3]. This is why the duty to follow the obligation to act is not activated with the EU directive coming into force, but rather with the beginning of the national legislative procedure.

As soon as a Member State starts a legislative procedure, it must follow the obligations to consult, notify the Commission and submit to it a national draft law. National legislatures are bound to inform the relevant EU institution about the draft law in question. National legislatures are also obliged to wait for the end of the consultation procedure before they continue with the law-making procedure.

The Member State should not only - primarily - inform the EU institutions, but also secondarily - take its statements at the end of the consultation procedure into account [4]. Both elements serve the purpose of protecting the internal market from disruptions [5].

2.1.2. Singular or Repeated Duties of a Member State

If we compare procedural obligations to consult from the Directive with the (material) transposition of directives into national law, one of the main differences between the two comes into mind. In case of directive transposition, every directive is supposed to be transposed only once into national law. Thus, a Member State needs to follow its wording once and implement substantive requirements once.

In contrast to the obligation to transpose a directive, the duties to consult EU institutions following from the Directive will be activated repeatedly. In each case of a national legislative procedure that falls into scope of this Directive, the Member State will be obliged to notify the Commission of the draft. The obligation to consult will be activated in many cases, while the obligation to transpose a directive into national law will expire once the Member State has properly transposed a given directive.[1]

2.1.3. Personal Scope of Application of the Duties

An important quality of the Directive is the range of its addressees. It is addressed to the Member States (Article 12). Each Member State becomes an active addressee of the duty to notify the Commission of the draft in Article 5 and the duty to halt the national legislative procedure and then continue with it after the prescribed time passed as laid out in Article 6 [6]. This Directive has also passive addressees, namely the Commission and other Member States. They are supposed to receive the notified draft and may issue a statement (comment or a detailed opinion) according to Articles 5 and 6. Every Member State is thus an active and passive addressee (the active communication of the draft and passive receipt of the draft of another Member State). The *Commission* is, by contrast, the only passive addressee.[2]

1 A defect transposition does not mean that these duties expiry.

2 However, in cases where the Commission is supposed to issue a detailed opinion or a comment, it is an active addressee of the Directive.

If the Commission or another Member State issues a comment or a detailed opinion on the notified draft, the Member State is now passive addressee, as it is supposed to receive a statement regarding the notified law. Since this statement is supposed to be considered in the draft national law, the state is again an active addressee of the duty to follow the statement. In other words, the notifying Member State can be an active or passive addressee depending on the duty in question following from an obligation to consult.

2.2. The Importance of Obligations to Consult for National Legislatures

In the case of the Directive, valid EU law does not foresee national law, as is in the case of normal directives. When Member States submit new drafts, there is either no EU law or a harmonising EU law exists and a Member State would like to differ from it. Comparing the Directive with a "classic" directive shows that the EU does not issue a directive harmonising Member States' legal orders *uno tempore* or another legal act with a similar purpose in this case. Moreover, every Member State can decide on its own when it starts its national legislative procedure. It should then notify the Commission and submit to it a national draft law.

2.2.1. About a Procedural Duty in a Directive

Both a "classic" directive and the Directive contain procedural duties. The difference between the (respectively) two kinds of procedural obligations – the implementation duty and the obligation to consult EU institutions – is that there is substantive guideline in case of an implementation at the time this obligation arises. Similar guideline is missing in case of obligation to consult when the EU legal act containing this procedural duty is being issued and when a Member State starts a legislative procedure during which it is supposed to follow this obligation.

What happens in case of an omission to follow procedural duties (to implement a directive or to notify national draft)? The jurisprudence in respect of typical directives rules on direct applicability of directive provisions [7-9]. Existing law, as foreseen by the EU legislature, should be applicable in all Member States even without implementation [10, 11].

It may be different in case of procedural obligations to consult. Errors by a Member State resulting from EU legal obligations can have some further consequences in a different legal order — that of the Member State itself. The CJEU speaks about the unlawful adoption of a national law in the relevant cases [12, 13]. It also refers to the revocation [13, 14], invalidity or illegality of an unnotified national law [12, 13]. This is why the legal question arises of whether the unnotified national law is void and, if yes, how so.

2.2.2. The "Substantial Procedural Defect" During National Legislative Procedure

The Court examines a breach of the obligation to notify from the Information Directive, particularly if the "substantial procedural defect" criterion renders such technical regulations inapplicable so that they may not be enforced against individuals [7-9, 14-16]. It does not specify if it means substantial procedural defects during EU or national legislative procedures. It would be competent to judge defects this kind with regards to EU law. The Court's judicial competence does not, however, include procedural defects in national law. National courts are competent in this area.

The Court cannot mean the legislative procedure of the European Union because the obligation to consult is already valid EU law at the time of notification and thus constitutes the legal basis for this notification.

Another procedure that could suffer under the "substantial procedural defect" can be the notification process itself. However, the Court also mentions "procedural defects" as a reason for the inapplicability of national law when the Member State did not even give notification of a draft [9]. In this case, the EU notification process according to Articles 5 and 6 of the Information Directive did not even start. That is why the Court cannot rule on the defects of a procedure that did not begin.

Moreover, the Court rules on "substantial procedural defects" with regard to Articles 5 and 6 of the Information Directive. Because these provisions regulate the notification procedure itself, they cannot simultaneously be the laws that need to be followed during this time. Moreover, their consideration has to have meaning for a different procedure.

If Articles 5 and 6 of the Information Directive constitute substantial procedural provisions, they have to have importance during another procedure of which they constitute a substantial part. This third process consists of substantial and unsubstantial provisions. The Court thus has to refer to the national legislative procedure when it decides on the omission of the notification process. From this point of view, the EU provisions — the obligation to consult — constitute a substantial part of the national legislative process. This follows from the *Schwibbert* case where the Court expressly stated that a procedural defect occurred while putting a national law into force [17].

This defect thus refers to the participation of EU institutions in the national legislative procedure, of which the notification is a part. The Court decides on procedural defects during the national process. The omission of notification procedure is a defect of national law that results in the inapplicability of the Member State's law. An obligation to consult that foresees the participation of EU on national legislative process constitutes a substantial provision for a national law to come into force. However, the national consequences for a violation depend on the implementation of obligations to consult in national law.

2.3. A Conceivable Transposition of Obligations to Consult into National Legal Orders

The Directive has been issued as a directive, meaning that it could be transposed. If one would like to transpose the duty

to consult from Information Directive, how can this be done? At first glance, it seems easy. The Member State drafting a new law has no discretion regarding consultation with the Commission on national legislative proceedings. The national law transposing Articles 5 and 6 of the Information Directive would have to contain the exact same wording as those provisions. The Member State would have to oblige itself to consult the EU institution on the law-making procedure. The question regarding the sense of this law comes to mind.

Because of the formal legal nature of obligations to consult, the only way to transpose it would be to reproduce the obligations in a legal act of a Member State. The Member State would then be obligated to consult EU institutions on national draft laws. This is how Austria transposed this Directive. In Germany, similar rules exist, but they do not have the scope of a parliamentary law but rather are inter-administrative provisions. The formal requirements resulting from this legal act must be followed.

2.3.1. Obligations to Consult in the Austrian Legal System

There is a debate among Austrian scholars on the obligations to consult from the Information Directive. In addition, national courts decide these duties since the Information Directive has been transposed. The Austrian parliamentary law implementing the Information Directive, a "Notifikationsgesetz" (Notifikationsgesetz or NotifG) [18], is a legal act under the constitution and ranks above legislative decrees in the legal hierarchy. It thus can constitute a standard of review for national legislative decrees. The Information Directive itself is no reference for the examination of national statutory law.

However, there is no standard of review for parliamentary laws since the transposition of this Directive did not occur by virtue of the constitution. The implementation of the Information Directive by virtue of parliamentary law raises further doctrinal question, including one regarding the relation between EU inapplicability and national illegality of an unnotified decree.

According to the Austrian constitutional court [German: Verfassungsgerichtshof] and doctrine [19-23], it can decide on the inapplicability of an unnotified law if the implementation of a directive was incorrect [24]. Since the Information Directive was implemented properly into national law (NotifG), there is no room for the consequences of EU inapplicability [25-27]. A new national law that is adopted without the required notification cannot be inapplicable [22, 28]. *Öhlinger* and *Potacs* follow the jurisprudence, but reject the reasoning. In the light of jurisprudence of the Court [21], the question of correct implementation would be obsolete. According to *Ranacher* and *Frischhut*, the pure national consequence of unlawfulness exists next to the EU consequence of inapplicability [29]. These authors reject the jurisprudence of the Austrian constitutional court, which understands the relationship between national and EU law as "either-or".

It is different in a case in which the unnotified national law has the scope of a parliamentary law. The implementation of the Information Directive did not occur by virtue of the Austrian constitution. Therefore, there is no higher-ranking law than parliamentary law in Austria, and thus the legal situation is similar to that in Germany.3 From the point of view of the Austrian constitutional court and doctrine, the omission of the notification procedure means that national parliamentary law is compatible with the constitution [20, 25, 26, 30]. The national law comes into force correctly and the omission of the following EU procedural law solely constitutes a violation of EU law [26].

A different legal situation exists concerning the obligation to notify about national state aid according to Article 108(3) TFEU. Unlike the Information Directive described above, this provision has not been transposed into national law. The obligation to consult the Commission on parliamentary laws of the NotifG refers solely to the Information Directive and cannot be applied to Article 108(3) TFEU [31]. Some authors suggest applying the obligation to consult from the NotifG to this case as well [26, 27]. However, one cannot generalise this specific law.

In case of state aid, the omission to notify of a national draft has thus no national consequences for parliamentary or statutory law. It comes into force in a constitutionally correct way [26, 29, 30]. The omission to follow an obligation resulting from EU law cannot result in the invalidation of a national parliamentary law [26, 29, 31].[4] Both the obligation to notify and the prohibition to put measures into force according to Article 108 TFEU have an impact on the national legislative procedure [32, 33].

In spite of the fact that both obligations to consult from Articles 8 and 9 of the Information Directive and Article 108(3) TFEU have a similar impact, only one of them was part of the national transformation process. Legislative measures that would transpose Article 108(3) TFEU into national law are missing in the respective legal orders.

That is why there are some evaluative contradictions. In the case of the Information Directive, national statutory law can be examined according to parliamentary law, the NotifiG, while national state aid measures as statutory law have no reference in national parliamentary law. In the first case, the national court may rule on a law's invalidity, while in the second case it can decide on its inapplicability.

3 The lack of implementation of the Information Directive qua constitutional law. The legal situation regarding parliamentary law is equal to that in Germany — implementation qua constitutional law is missing. However, the legal situation regarding statutory law [German: Rechtsverordnung] in Austria and Germany is different.

4 The national constitutional court has decided similarly: ruling from 24.02.1999, VfGH B 1625/98, Report of cases 15427/1999. See also ruling by the VfGH from 11.12.2008, G 85/08-8, and from 28.11.2003, Report of cases 17.065; ruling from 13.12.2001, B 2251/97-45.

Austria did not put all obligations to consult into force as it did with the Information Directive. This is why one can expect different results depending on the obligation to consult in question. An unnotified statutory law that puts measures into force according to the Information Directive can be illegal while a statutory law based on Article 108(3) TFEU would be inapplicable. This punctual transposing of one of the obligations to consult does not support legal certainty and the clarity of law.

Additionally, in the case of the Information Directive it is surprising that despite the fact that the obligation to implement the formal duty is overseen by national legislatures, the Directive has been transposed solely as parliamentary law and not law with constitutional range. National courts thus have two standards of review: the Information Directive itself (to review parliamentary law) and the NotifG (to review statutory law).

2.3.2. Doctrinal Problems Resulting from Transposing Formal Obligations to Consult

Austrian national courts may decide on the illegality of a national statutory law with the parliamentary NotifG solely because of the omission to follow the formal duty to consult the Commission. A preliminary ruling according to Article 267 TFEU is obsolete. The possible case that an unnotified statutory law can be in line with substantive EU law has been waived. It is thus possible that the national court will rule a provision that is actually in line with substantive EU law invalid solely because of the omission of notifying the draft during the national legislative process.

At the same time, transposing the provisions of the Directive *qua* the *Notifikationsgesetz* means that the Court does not have jurisdiction over national law regarding its conformity with substantive EU law. If not notified, the national provision is part of a procedure in front of a national court, which can decide on its (formal) invalidity without dealing with its substantive conformity with EU law. This is because national courts cannot decide on matters regarding the internal market like competent EU institutions could. National measures transferring obligations to consult into national law can thus mean negative consequences for *effet utile* and the protection of internal market.[5]

2.3.3. Obligations to Consult in the Legal Orders of Germany and the Netherlands

There is no statutory or parliamentary law that would transpose the Directive in German national law. The German Federal Ministry of Economy issued solely inter-administrative laws that rule the conduct of the consultation procedure [34]. German Federal Ministry of Economy is the "central contact point", and the administrative agreement describes the procedure between federal ministries. It deals with the deviation of competences between them. It does not constitute a constitutional duty of the state to consult EU institution on national legislative procedure. There is also § 42(7) of the Common Rules of Procedure of Federal Ministries [German: *Gemeinsame Geschäftsordnung der Bundesministerien*] in German national law, which foresees the participation of EU institutions in the national legislative process. These provisions in German law secure the putting into force of the above-mentioned obligations to consult. However, there are no provisions that would complement the national legislative process with content of obligations to consult resulting from EU law in the German constitution. That is why a national standard of review is missing.

Jans discusses the putting of the Information Directive into force in the law of the Netherlands, as reaction to the judgment in the CIA Security International case [35]. He suggests an obligation in national law that would oblige national legislature to submit a draft and to stand still. It should also foresee who notifies the draft and to whom. In this respect, he speaks about an "arrangement". This could have similar legal nature like the way Germany has chosen to transpose the Information Directive (*qua* an administrative law known as "Verwaltungsvereinbarung" [administrative arrangement]).

2.3.4. Comparative Law Summary

A decision regarding the transposing of a procedural Directive demands a debate regarding the consequences of the formal defects. The example of Austria shows that a single law transposing the obligation to consult from the Information Directive can raise further dogmatic problems instead of solving existing ones. The legal situation in Austria shows that the transposition of formal duties results in further problems, such as the relationship between EU and national consequences. A Member State willing to put the Information Directive into

5 The transposition of obligations to consult into national law causes further problems. The question is whether the unnotified law could collide with the obligation to consult resulting from EU law. This is because — in the case of the "implementation" of obligations to consult — the national law transforming EU obligation to consult could collide with the EU obligation to consult. The unnotified national draft could not take part in a direct collision with the obligation to consult EU institutions. It does not contain provisions opposing the ruling of the obligation to consult. One could thus suggest a collision of three legal acts: the obligation to consult, national law putting this obligation into force (repeating the wording of the EU obligation to consult) (cf. JH Jans, 'National Legislative Autonomy? The Procedural Constraints of European Law', (1998) LIEI 25), and the national law coming into force whilst violating the obligation to consult. Instances where the obligation to consult would collide with the unnotified national law could be considered to be an indirect collision. National laws putting the obligation to consult into force in the national legal order would not be a part of this collision.
The implementation of obligations to consult qua constitutional law would solve many problems. However, it would create different legal questions. As long as the law putting into force the obligation to consult would be valid and would "implement" the directive properly into national law, the review of national draft would not be possible. According to the settled case law of CJEU, national courts may review national laws implementing a directive if this EU legal act (here the directive) could be annulled. Until annulment, Member States' courts may not examine the national law.
A further question would be if the Member States' violation of EU obligations to notify would automatically constitute a violation of national law putting this obligation into force.

force should foresee this question and first decide if it needs a further, national consequence and what range it should have next to EU consequences of inapplicability.

An interesting result of the research is that that the legal situation in Germany is similar to that of the Netherlands. The Information Directive was not transposed in either country. While the Netherlands follow monism, Germany follows dualism. In the Netherlands, the constitution foresees the inapplicability of national law opposing international law, while inapplicability in Germany constitutes a consequence resulting from EU law and is accepted by the German constitutional court. In spite of these very different foundations, the result of omission to follow formal duties is similar.

The annulment of the unnotified law, its invalidity, does not come into question not only in Germany, but also in France, Great Britain, Luxemburg and Poland. The incorrect law can be inapplicable. This means that national courts may rule a law invalid as the consequence of an omitted notification only in Austria, where the Directive has been transposed. Moreover, the omission to transpose obligations to consult means that Member States want to apply formally and materially incorrect laws and prefer them to be reviewed by EU courts rather than by national judiciary and face national consequences.

A homogeneous and coordinated approach among the Member States with respect to transposing or putting obligations to consult into force cannot be identified despite the formal character of obligations to consult. Because the *effet utile du contrôle préventif* serves selective harmonisation, a congruent handle would be advantageous, if not strongly recommended. The obligations to consult themselves do not harmonise national legal orders. However, the legal acts issued during the consultation procedure by EU institutions are supposed to harmonise Member States' legal orders. The Member States' legal orders — even if not *uno tempore* — are being harmonised. Every act of consultation makes the national legal orders more and more compatible. The substantive content of the specific and individual consultation acts becomes a part of national draft and general legal acts. A uniform and coordinated approach among the Member States would bring more legal certainty among economic operators in cross-border commerce. In this regard, the reference of an EU legislature would be useful.

The practice of the Member States[6] speaks for the understanding that Member States do not need to transpose this directive. The practice of EU institutions also supports it. For example, the Commission did not start the infringement procedure against Germany because of the lack of transposition [36].

2.4. Result

In fact the obligation to consult the European Commission on national draft law according to Information Directive runs to a general Preliminary Rulings under Article 267 TFEU. Because a loss of competence by the Member States inevitably leads to the national courts also losing their competence. In the past, only sovereign states were responsible for the legislative process from beginning to end. The transfer of law-making competences from Member States to EU institutions can and should also have consequences for the responsibilities of the courts. This raises the question of the division of competences between national and EU courts. Must the competence of the judiciary comply with executive powers or may courts make rulings notwithstanding of the above? The results of the research may be fruitful to answer this question.

The interlinking of Union and national consequences in legislative procedures suggests that the judicial control of breaches of EU law can also be atypical. Which court may decide on the validity of a national law issued in violation of the obligations to consult? As is the case with national legislatures, a national court cannot decide if the unnotified national law endangers the internal market, as they do not possess the necessary expertise to assess the impact of national law on the internal market [37].[7] That is why, every legal draft has to be notified to the Commission, that can decide based on its knowledge of the internal market. Similar, national courts can not have the understanding of the impact a national draft can have on the internal market, the Court of Justice has.

In cases where a Member State's law would suffer a procedural, but no substantive defect, this would not disrupt competition. If a national court was to rule this unnotified law to be invalid because of a formal defect, its ruling could cause internal market disruption. However, it is possible that the national law, even if unnotified, is substantively in line with EU law and thus serves the internal market more than lack of any regulation would (the regulatory gap is a result of inapplicability of unnotified national law [8, 38, 39]). A ruling about the formal defects of a national law that does not have any negative impact on the internal market, since it is substantively in line with Union law, could cause internal market disruption.

In addition, practitioners cannot know whether a specific provision has been notified or not by the national government, and whether it is applicable to the case. The substantive EU law that could be directly applicable does not exist: obligations to consult foresee only formal rules.

In all cases of procedural or substantive violations by Member States, national courts are thus bound to refer a preliminary ruling to the CJEU according to Article 267 TFEU. No national court can issue a judgment without cooperating with the EU institutions, which have the expertise regarding the impact of national law on the internal market. Thus, the obligations

6 See the list of national implementation measures: http://ec.europa.eu/enterprise/tris/transposition/nattrans_de.pdf

7 "… regarding direct applicability of formal duties: 'This would involve recognizing that national courts have the power to appraise the necessary 'fear' of disruption which the measure might cause within the meaning of Article 101, involving a more or less delicate value-judgment which cannot reasonably be made without the intervention of the organs of the Community, particularly the Commission. Without any doubt, I reject the idea that the Member State concerned is the sole judge of the matter and has a discretion whether or not to refer the matter to the Commission"'.

to consult also bear a general obligation to request a preliminary ruling under Article 267 TFEU in every single case.

3. Discussion

The category of obligations to consult shows a shift of competences to EU institutions during the law-making process of the Member States. According to the principle of accessory division of competences, the competence of the courts has to be in conformance with the competence of the legislature. That is why the exercising of national judicial proceedings would also, if necessary, require an assessment from the EU. By putting obligations to consult into force, the EU legislature created a general obligation for national courts to refer preliminary rulings to the Court of Justice according to Article 267 TFEU. This also presents the extent of the concept of obligations to consult. In view of the variety of obligations to consult and possible violations, the requested preliminary rulings can be taken up by the CJEU.

To avoid the general preliminary ruling, the legislature should establish a right of EU institutions to act as experts in national courts. The competent EU institution that can decide on the impact of a national law on the internal market could issue statements. A similar possibility is already envisioned under Article 86 TFEU — the office of the European Public Prosecutor. The Commission acting as an expert in front of national courts would relieve European courts and speed up national proceedings. Possible violations would be handled in a flexible way.

The loss of competences by the national sovereign states is accompanied by a parallel loss by the national courts. Existing problems like regulatory gaps and legal uncertainty show that EU law, due to its on-going development, will need a permanent, clear demarcation of competences between the legal systems of the EU and of the Member States. In addition, a clear division between the competences of the courts and anchoring of rights of EU institutions in national legislative and judicial proceedings could be necessary.

EU law has contained provisions for the obligation of Member States to consult EU institutions on national legislative procedures since its beginnings. The transfer of participation rights to institutions known by EU law started with signing of the Treaties. The contracting Member States expressed the will to confer rights onto the EU institutions which national constitutions do not know. Meanwhile, there are also similar provisions that oblige sovereign Member States to consult EU institutions during national legislative procedure enshrined in secondary EU law. That means that the EU legislature and not the Contracting States is the one to decide on the right of EU institutions to participate in national legislative procedures.

4. Conclusions

The growing number of obligations to consult shows that fields of legislative activities that used to belong to the competences of the sovereign Member States are being increasingly 'europeanised'. For national legislatures, this means partial disempowerment. The participation of EU institutions in Member States' legislative procedures demotes sovereign states to executive bodies that are supposed to take statements of these institutions into account during legislative procedures. In the noble goal of protecting the internal market, obligations to consult do not replace missing dogmatic rationale.

The present piece made the effort to compare national legislative environments. Comments on comparative law show that some Member States such as Austria do consider the legal institute of obligations to consult. Other Member States, by contrast, do not. Differences can be determined. However, the duties in question are supposed to coordinate Member States' policies. A uniform approach could be advantageous. Obligations to consult may enjoy a greater meaning with the new Two-Pack mechanism. However, the area of national budget laws is so sensible that we had better have ready solutions in case there will be no time left for discussions. The lack of a deepened discussion in the literature across Europe over the past years could cause inconsistencies.

Abbreviations

EU	European Union
TFEU	Treaty on the Functioning of the European Union
VfGH	Verfassungsgerichtshof (Federal Constitutional Court)
AG	Advocate General

Author Contributions

Magdalena Katz: Conceptualization, Methodology, Resources

Conflicts of Interest

The author declares no conflicts of interest.

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[5] The consultation procedure of Article 108(3) TFEU serves the review if state aid is in line with substantive EU law: Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL*, ECLI: EU: C: 1995: 346, Opinion of AG Elmer, para 49.

[6] See Brenn, Ch. Auf dem Weg zur horizontalen Direktwirkung von EU-Richtlinien. Österreichische Juristenzeitung. 2005, 41 – 53.

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[8] Court of Justice of the European Union, Case C-443/98 *Unilever Italia SpA v Central Food SpA,* ECLI: EU: C: 2000: 496.

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