THE EU AND MALTESE LEGAL ORDERS: WHAT KIND OF MARRIAGE BETWEEN THEM?

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1. Introduction

I start by introducing the Maltese legal order at the cross-roads of civil law and common law. Malta has a long legal history tied to continental Europe, and this very strong connection strengthened during the period of the Knights from 1530 to 1798 and continued well beyond the arrival of the British in 1800. When the Maltese Civil Code was first enacted in 1868\(^1\), the major source was the Code de Napoleon. As a result, Maltese substantive private law is based on the Roman/Civil law system. The British period, which lasted more than a century and a half, left a very strong impact on the Maltese legal order. In fact, British influence is mostly found in procedural and administrative law wherein the Maltese system is much closer to the British common law system than to the continental civil system. Nevertheless, the Maltese legal system, unlike the common law system, is a codified system so that even though the administrative and procedural law is based on common law, it is yet codified. The Maltese Code of Organisation and Civil Procedure (COCP) dates back to 1865\(^2\). Although the Laws of Malta include codes as their continental counterpart, common law influence can still be seen as codification is not complete. While a good part of private law is found in the Civil Code and Commercial Code, other laws of a private law nature are scattered across various chapters of the almost 500 chapters of laws that make up Maltese law similar to the laws of England. While the courts adopt the adversarial system similar to common law, yet the doctrine of precedent, essential for a ‘pure’ common law system is absent from Malta. From a constitutional point, the Maltese Constitution follows the British model with one major difference. Under the British system Parliament is supreme and a Parliament can never bind a future Parliament. Under the Maltese Constitution, Parliamentary sovereignty is limited by the supremacy clause of the Maltese Constitution\(^3\).

Thus Maltese law belongs to a ‘mixed’ legal family where concepts from the two major legal families exist side by side. European law is also evolving on a ‘mixed family’ line. While as a system it originated on civil law grounds, given the fact that the original six Member States were civil law jurisdictions, common law principles started leaving their mark following the UK’s accession. An example would be the Second Company Directive\(^4\). In a way the Maltese legal system could serve as a laboratory to prove how EU law could evolve bearing in mind certain obvious variables such as that the Maltese legal order is a national legal order while the EU legal order is a *sui generis* kind of legal order that exists side by side with the national legal order.

This paper seeks to examine how the Maltese and EU legal order can integrate together given their differences and similarities. The kick-off point is a brief analysis of the constitutional implications of Malta’s EU accession drawing upon the inspiration of our major source of Maltese public law - the British Constitutional and Administrative law. Following a constitutional analysis, the paper examines how the two legal orders effectively work side by side in day-to-day matters. The substantial part examines the Maltese legal system as a mixed legal family and shows how certain new legal concepts have been integrated into Maltese law as a result of either the *acquis* directly (such as in company law) as well as through the comparative exercise (such as in trust law). The examples chosen are indicative of how other legal concepts can be integrated and the study is by no means an exhaustive exercise. It also helps to analyse how far the Maltese legal system is ready to face new challenges such as that presented by the DCFR (Draft Common Frame of Reference). The second part examines the impact of certain EU requirements on procedure, in

\(^1\) Laws of Malta, Chapter 16.
\(^2\) Laws of Malta, Chapter 12.
\(^3\) Article 6 of the Maltese Constitution.
\(^4\) Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.
particular preliminary references and enforcement of foreign judgments (Regulation 44/2001/EC) as examples. The paper also examines the effect of the doctrine of direct effect on the Maltese legal system and gives some examples through ECJ and local case-law. The paper then deals with the Commission’s infringement actions against Malta. Finally it examines whether the ‘marriage’ between EU and Maltese law have been successful from the public perspective.

2. The EU Legal Order and its Constitutional Implications for Maltese Law

National law derives its validity from the fact that the State that enacts the law is sovereign and is capable of enforcing it in its national territory. Maltese law derives its validity from the Maltese Constitution as the basis of Maltese sovereignty which was recognised internationally when Malta achieved independence in 1964. National law is separate from any other national or international system. A sovereign country is free to sign international treaties. Treaty obligations must be respected but this merely means that the state could not invoke national law as an excuse for failing to perform its obligations under the Treaties which it has signed. States are left to their own devices for finding the most appropriate domestic arrangements for fulfilling their international obligations. So one can say there is *internal supremacy* as opposed to *international supremacy* of treaties and other aspects of their domestic status are a matter of national law. As a result, two theories evolved to demonstrate the relationship between domestic law and international treaties. The monist view as expressed for instance by Kelsen is that national legal orders are ‘creatures’ of international law. The dualist view, as exposed by Treipel and Anzilotti is rather more convincing; they show that national legal orders were separate legal orders, able to resist the penetration of international norms.

Monism and dualism become alternative doctrines when taken in a narrow sense of comparing the actual attitude taken towards international law within each constitutional system. Dualist countries are those countries where the attitude taken is that international treaties cannot as such display legal effects in the municipal sphere. This means that their norms must be ‘transplanted’ into national law before they become operational there. Malta and the United Kingdom are such countries. A good example is the transposition of the European Convention on Human Rights into Maltese Law. For it to be enforceable in the Maltese courts Parliament had to enact the European Convention Act and therefore one can plead the provisions of the said Convention as part of Maltese law. Monist countries then are those where the view prevails that international norms are, upon their ratification and publication, ‘received’ within the national legal orders while preserving their nature of international law.

What now are the consequences of these two different views vis-à-vis European Law? Is European Union law a branch of International law? It makes sense to answer first the latter question as opposed to the former. The answer is not found in the Treaties but in the landmark judgment of the European Court of Justice (ECJ) of *Van Gen en Loos*. The Court said:

> The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is the direct concern to the interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between contracting states . . .

> It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights . . .

> The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.

The ECJ established that EU law is a separate legal order from that of the Member States. Also EU law is derived from international law. In this case, the relevant international law is found in the EC Treaty and

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6 Treipel H., ‘Les rapports entre le droit interne et le droit international’ (1923) *Hague Recueil* 77.
following Maastricht also in the EU Treaty. From this and subsequent judgments of the ECJ, the doctrines of direct effect and supremacy of EC law have developed. Direct effect can be defined as the capacity of a norm of Community law to be applied in domestic court proceedings. Supremacy or primacy of EU law implies the capacity of that norm of Community law to displace inconsistent norms of national law in domestic court proceedings. These two principles are closely linked and could be considered as in conjunction with each other. However, it could be argued that the principle of supremacy has much wider implication than direct effect as it could mean the setting aside of national laws to give way to EU law.

Back to the first question posed earlier on, with regard to countries adhering to a monist doctrine, the above does not pose any major problems. As far as the attitude of the dualist doctrine is concerned, it is likely to be more problematic towards EU law particularly with the issue of supremacy. The relationship between a norm of international origin and a purely national norm becomes, through the transformation of the former, a matter pertaining to the internal cohesion of the domestic legal order, and conflicts are to be solved according to the ordinary conflict rules applying within that order. In order for treaties to take preference over national administrative practices they have to be transformed by an act of the legislator and, in case of conflict, the *lex posterior derogate priori* rule would prevail.

The position as to the extent to which the application as opposed to the interpretation, of the EC Treaty is a matter for the ECJ or the national court has been an issue of controversy especially in the early years of European Union law. In fact this was the main reason why the Governments of Belgium and the Netherlands intervened in the *Van Gend en Loos* proceedings in front of the ECJ. In their view, the State Parties to the EEC Treaty had not intended to lay down any obligations concerning the domestic effect of its provisions, so that this matter was left for determination by national authorities and courts according to their respective constitutional rules or judicial traditions. The Advocate General concurred with the three governments and advised the Court to declare the question inadmissible. However, in spite of the impressive barrage of opinions, the ECJ decided that this matter could not be left to the national legal systems themselves but that the EC Treaty had direct effect and is therefore applicable in the national courts.

The novelty of this case was not the discovery that European law could have direct effect. This is because in the case of a Regulation, as an example, it is stated in Article 249EC that a Regulation is capable of direct application. As for the provisions of the EC Treaty itself, they could be perfectly suitable for judicial enforcement in the same way as other international agreements. The crucial contribution of the judgment was rather that the question that specific provisions of the Treaty (and later also secondary legislation) had direct effect was to be decided centrally by the ECJ, rather than by the various national courts each in their own way and style. The result of this judgment is that the EEC Treaty, later renamed the EC Treaty, is capable of conferring rights upon individuals which become part of their legal heritage and therefore would be able to be raised in domestic proceedings before the domestic court.

In spite of the very close link between direct effect and supremacy, the issue was not dealt with in *Van Gend en Loos* as the issue was not raised by the referring Dutch Court. The close link was examined in a subsequent judgment of the ECJ in *Costa v ENEL*. In the Netherlands, whose juridical system is monist under Dutch Constitutional law, an International Treaty is self-executing and it would prevail over conflicting national law, thus the issue of supremacy was less problematic than that of direct effect. The second occasion for the ECJ to reaffirm the principle of supremacy of Community law was presented by a Member State that adopts the dualistic approach vis-à-vis international law - Italy. The case concerned the payment of electricity bills to the state company ENEL that had been nationalised contrary to the provisions of the EC Treaty. The national court was asked to set aside a national law (that nationalised the electricity company) as a result of breaching the EC Treaty. The Italian Government intervened in the case arguing that the reference by the national court was ‘absolutely inadmissible’, as the national court which made the reference had no power, under EEC law and under national law, to set aside the Italian municipal law. The Government argued that a question on interpretation could not serve a valid purpose.

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12 Article 66 of the Dutch Constitution. Following a renumbering this Article is now Article 94.
The ECJ’s task in the latter case is much more delicate than the former. Whereas the definition of the conditions of direct effect may easily be considered, under the canons of international law, as an inherent part of the interpretation function of the ECJ, the same cannot be said about supremacy. It is true that it is an established principle of international law that international treaties prevail over domestic law when it is applied to relations between powers. However, the issue in *Costa v ENEL* is about internal supremacy of EU law. This is the duty of national courts to enforce an international treaty when it conflicts with national legislation. Such a duty has never been considered as part of international law, although the failure of national courts could be a contributory factor in the establishment of State responsibility under international law. Wyatt D. in the *European Law Review* explains that in *Costa* the preliminary reference mechanism allowed the ECJ to ‘stop the clock’. Instead of letting national judges commit what would be a breach of EU law to be sanctioned under Article 226 of the EC Treaty, the ECJ seized the opportunity provided by Article 234 of the EC Treaty and decided to make Community law prevail over conflicting national norms. The special feature of the EC Treaty under Article 234 is that it, unlike other treaties, provided for the ingenious judicial mechanism which allowed the ECJ to state its supremacy doctrine and to request national courts to follow suit. In the ECJ’s own words:

> ‘It follows from all these observation that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.’

Therefore European law is a separate legal order which has to be distinguished from international law and from national law. However, unlike a national legal order, it does not exist independently but its existence is complementary to the national legal orders of the Member States, being also dependent on the latter for its application. The acceptance of the above vis-à-vis Maltese law could appear to be problematic. First of all because Malta adopts the dualistic approach and secondly, more important than this for Malta is the issue of supremacy of its Constitution. Article 6 of the Maltese Constitution provides that:

> Subject to the provisions of sub-articles (7) and (9) of Article 47 and of Article 66 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

One can get the impression that as a result of this clause, the doctrine of supremacy as explained in *Costa* could prove to be problematic. If an EU Treaty or an EU Regulation were to conflict with ordinary Maltese law it could somehow be accepted, but what if it conflicted with the Constitution itself? Malta was not alone in facing such problems at the time of Accession. The acceptance of supremacy in the United Kingdom has been even more problematic. Since the British Constitution is largely unwritten, it is even difficult to conceive amending the Constitution. The main problem is that Parliament is deemed to be supreme. This means that the Parliament has the power to do anything except bind itself for the future. Such a position clearly would make it difficult to transfer power on a permanent basis to the European Union as is the spirit in *Costa*. The UK also adopts the dualistic approach.

The UK, after signing and ratifying its Accession Treaty in 1972, decided to give internal legal effect to Community Law by means of an Act of Parliament: The European Community Act 1972. Malta followed the UK example by enacting the European Union Act which came into force on accession on 1st May 2004. The aim of this Act was to incorporate into Maltese law the *acquis communautaire*. This means that by the power of the Act the *acquis* would have the power of law as Maltese law. This solves the dualistic approach.

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13 See the case of *Greek and Bulgarian Communities*, of the International Court of Justice, *PCIJ*. Serious B, No 17.32
15 Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585, 593.
16 Chapter 460 of the Laws of Malta.
In fact, as far as Maltese law is concerned, a similar instance occurred in 1987 when the European Convention on Human Rights of the Council of Europe, which has been signed and ratified earlier by Malta, was incorporated into Maltese law by means of Act XIV of 1987.

As far as supremacy is concerned the issue remains more problematic. In the UK, Parliament is sovereign and the traditional constitutional principle is that it could never be bound by previous law. This means that if Westminster were to enact legislation which conflicts with the EC Treaty after 1972, that law would prevail in terms of British law. According to the doctrine of implied repeal, the courts would be obliged to give effect to the latest expression of Parliament’s legislative will and to treat the earlier act as having been implicitly repealed. As far as Malta is concerned, the problem would appear to be similar though more limited to the provisions of the Constitution.

So what would happen if a British Act of Parliament or the Maltese Constitution were to conflict with European Union law? When the UK and Malta signed their accession Treaty they accepted an international obligation to comply with EU law. If national legislation were to conflict with EU law, this would mean that the respective Member State would be in breach of the Treaty obligations. If this were to happen theoretically sanctions could range from a simple Article 226 EC procedure to political sanctions and to eventual exclusion from the Union. However this is unlikely ever to happen in good faith. Membership of the Union is voluntary and although not contemplated in the present Treaties a country could in theory withdraw from the Union\(^\text{17}\). The failed European Constitution even contemplated such potential withdrawal\(^\text{18}\).

In practice it is highly unlikely that a Member State would ever be in a position where its basic law was to conflict with the principles enshrined in EC law. In fact in Hauer v. Land Rheinland-Pfalz, the European Court of Justice argued that there is no rule of law that a particular right will be accepted as fundamental by the European Court if it is protected in the constitutions of some of the Member States, or even a majority of them\(^\text{19}\). If the right in question would be generally accepted throughout the Union and does not prejudice fundamental Community aims, it is probable that the ECJ would, as a matter of policy, accept it as a fundamental right under European Union law, even if it is constitutionally protected in only one Member State. If the right were a controversial one, it would probably be unlikely that the ECJ would seek to impose the will of the majority on those Member States who would consider such a right to be fundamental.

Going back to the European Union Act, the main provision, Article 4(1) provides that:

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\text{All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaty, and all such remedies and procedures from time to time provided for by or under the Treaty, that in accordance with the Treaty are without further enactment to be given legal effect or used in Malta, shall be recognized and available in Law, and be enforced, allowed and followed accordingly.}
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This is merely a reproduction of Section 2(1) of the U.K. European Communities Act which proves that Malta attempts to adopt the British approach as regards the legal framework of the adoption of the \textit{acquis}. Section 2(2) of the U.K. Act provides for the implementation of Community obligations even when they are intended to replace national legislation and Acts of Parliament by means of Order in Council or statutory instrument rather than by primary legislation.

The Maltese Act in Article 3 provides that from 1\(^{\text{st}}\) May 2004, the Treaty and existing and future acts adopted by the European Union shall be binding on Malta and shall be part of the domestic law thereof under the conditions laid down in the Treaty. Any provision of any law which from the said date is incompatible with Malta’s obligations under the Treaty or which derogates from any right, given to any person by or under the Treaty shall to the extent that such law is incompatible with such obligations or to the extent that it derogates from such rights be without effect and unenforceable. From here it emerges that the supremacy of EU law over Maltese law emanated from Article 3 of the said Act. To what extent this would apply if there

\(^{\text{17}}\) Greenland which became part of the then EEC as part of Denmark in 1973 withdrew from the Community in 1985 after obtaining autonomy from Denmark and negotiated a withdrawal.

\(^{\text{18}}\) Article I-60 of the Draft Constitutional Treaty.

is a potential conflict with the provisions of Constitution is debatable. Parallelism can be drawn to the theoretical\textsuperscript{20} scenario of having the European Convention of Human Right as enacted in conflict with the Maltese Constitution. The same clout afforded to the European Convention by the Maltese Court would probably be afforded to the European Union Act. However given the unique nature of EU law and the rights and obligations that entails, the fact that Malta voluntarily accepted to join the club should be enough to convince any Maltese Court that should this theoretical scenario happen in reality, as long as Malta wants to be part of the Union, EU law is supreme and should prevail even if there were to be a conflict with the Constitution. The sharing of sovereignty is voluntary and unlike a federation, if a country feels that it should no longer share its sovereignty with other Member States, then legally speaking either opt-out or a withdrawal from the Union should be negotiated. Unlike a federation, the EU does not compel Member States to stay in the union by force and in theory a Member State does not give up any sovereignty, but simply shares it with the rest of the Member States.

In order to give effect to the provisions of Article 3, the Prime Minister or/and, any designated Minister or Authority may by order provide for the implementation of any obligation of Malta, or enable any such obligation to be implemented, and any right enjoyed or to be enjoyed in Malta under or by virtue of the Treaty to be exercised. The same authorities shall also provide for the implementation of any necessary legislation for the purpose of dealing with matters arising out of or related to any such obligation or right or the coming into force, or the operation from time to time.

Article 4(1) of the European Union Act aims to make the concept of direct effect part of the Maltese legal system. It deems law which under the EC Treaties is to be given immediate legal effect, to be directly enforceable in Malta. Accordingly Maltese courts, which on the orthodox domestic approach to international law may not directly enforce a provision of an international treaty or a measure passed thereunder, are directed by this Article to enforce any directly effective EC measure. There is no need for a fresh act of incorporation to enable Malta to enforce each EC Treaty provision, regulation or directive which according to EC law has direct effect. Just as in the cases of France, Germany and Italy, the supremacy of EC law is recognized in Malta by virtue of a domestic legal process and legal theory - by means of an Act of Parliament

The European Union Act also provides for any international treaty concluded by the European Union through its external relations powers. The procedure laid down in Article 4 provides that with regard to treaties and international conventions which Malta may accede to as Member State of the European Union, and treaties and international conventions which Malta is bound to ratify in its own name or on behalf of the European Community by virtue of its membership within the European Union, these shall come into force one month following their being submitted in order to be discussed by the Standing Committee on Foreign and European Affairs. Also any financial obligations arising out of the Treaty obligations are to be a charge against the consolidated fund.

As for the relationship between the Maltese courts and those of the European Union, the European Union Act provides that for the purposes of any proceeding before any court or other adjudicating authority in Malta, any question as to the meaning or effect of the Treaty, or as to the validity, meaning or effect of any instruments arising therefrom or thereunder, shall be treated as a question of law. If the issue is not referred to the ECJ, it must be determined as such in accordance with the principles laid down by, and any relevant decision of, the ECJ or any court attached thereto. This allows the preliminary reference procedure under Article 234 EC from the point of view of Maltese law. As for the judgments handed down by the EC Courts, judicial notice is taken of the Treaty, of the Official Journal of the European Union and of any decision of, or expression of opinion by, the ECJ or any court attached thereto on any such question as aforesaid, and the Official Journal shall be admissible as evidence of any instrument or any other act thereby communicated by any of the Communities or of any institution of the European Union.

In order to facilitate the implementation to the European Union Act, Act V of 2003 amended Article 65(1) of the Maltese Constitution as follows:

\textsuperscript{20} ‘Theoretical’ because in practice it is difficult, if not impossible, for it to happen.
Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta’s international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003.

In the above provision, the Constitution is complementing the European Union Act in ensuring that all legislation passed in Malta is in line with the EU legal order. The inclusion of this provision ensures that even in the fundamental law of the land it is provided that all legislation enacted in Malta has to be in line with EU legislation. This makes it easier for the Maltese courts to give priority to EU law in case of conflicting legislation. However it is worth mentioning that Article 65(1) is not entrenched by Article 66 of the said Constitution. Article 66 provides for special procedures such as a two-thirds majority of the House of Representatives to amend certain parts of the Constitution. Article 65(1) is not included and thus it can be amended like any other provision of the law. This makes it constitutionally possible for a government to amend the Constitution and to ensure that national law would be supreme over EU law in terms of the Maltese Constitution. However the very fact that a Constitutional amendment would be necessary would make it clear politically that the government of the day would like to withdraw from the Union and therefore national law cannot overrule EU accidentally. Withdrawal from the Union is technically possible as Malta is sharing its sovereignty with the other Member States and it has not lost it.

Maltese courts have not yet had enough opportunities to rule on how the EU legal order has been incorporated into the Maltese legal order. However a look at some British cases could offer some hint as to how the Malta courts might view the above. Initially British courts were hesitant in applying the above principles. However, in Shields v E Coomes (Holdings) Ltd Lord Denning seemed willing to accept the principle of supremacy of Community law, declaring that Parliament clearly intended, when it enacted the European Communities Act on 1972, to abide by the principles of direct effect and supremacy. As a consequence, in his view, national courts should resolve any ambiguity or inconsistency with EU law in national statutes so as to give primacy to EU law. He avoided the problem of implied repeal by giving such weight to the 1972 Act, and to Parliament’s presumed intention in enacting it. He argued that a UK court should not enforce a later conflicting act of Parliament if the domestic statute is ambiguous or if it is inconsistent with EU law. However he did not expressly state that EC law should be given primacy. In Lord Denning’s own words:

In construing our statute, we are entitled to look to the EC Treaty as an aid to its construction; but not only as an aid but as an overriding force. If on close investigation it should appear that our legislation is deficient or is inconsistent with Community law by some oversight of our draftsmen then it is our bounded duty to give priority to Community law ….

Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.

Here one can see the judicial reconciliation of Parliament any sovereignty with supremacy of EU law. If a domestic provision of law appears to contravene the EU Treaty or any EU subsidiary legislation, this is presumed to be an accidental contravention and in such circumstances the domestic courts should give effect to EU law if it is the case and so EU law would prevail over conflicting domestic law. Such overriding is to be viewed as fulfilment of a true parliamentary intention that the European Communities Act should prevail in case of conflicting legislation. If it is clear that a domestic law should prevail, then it must do so.

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22 Shields v E Coomes (Holdings) Ltd. [1979] 1 ALL ER 456, 461.
23 [1979] 23 All ER 325, 329.
Lord Denning’s overview gives a good idea of how EC law became accepted as a legal order working side by side the UK’s domestic legal order. While his explanation is far present, Lord Denning’s explanation explains the position in a nutshell and any further analysis on this point is beyond the scope of this paper.25

Lord Denning’s explanation might be extended to the Maltese legal order. If one were to apply his explanation to the Maltese system, it would mean as follows. If Parliament enacts any law that happens to conflict with EU obligations, Maltese courts should ensure that the EC Treaties would prevail. However given the fact that the ECJ has developed the doctrine of supremacy and of direct effect, I would dare to interpret European Union Act as prevailing over any Maltese legislation and the Maltese Constitution for two important reasons. The Act itself provides for the ECJ’s judgments to prevail in case of conflict. This would also mean that if the ECJ says that its ruling should prevail over the Constitution that will be the case. Secondly as long as there is the intention to remain in the Union, there is no place for any domestic legislation to conflict with the acquis. If a Maltese Act of Parliament were to be enacted with the intention of conflicting with the acquis then that cannot prevail as long as we are in the Union. Once a Community obligation has been legally implemented in terms of the acquis and Malta did not negotiate any derogations or opt-outs, Europe is not à la carte, and so EU law prevails over any Maltese law. Does this mean that Malta has lost its sovereignty? No it has not. It is sharing sovereignty with other States and in theory there is always the choice, to take all measures to be implemented or withdraw from the Union. Malta has pooled some of its sovereignty and as long as it remains pooled sovereignty is limited.

Could it be argued that the European Union Act amended the Constitution? The answer is no. First of all, nothing in the acquis is presumed to conflict with the Constitution. Secondly, the Treaties and also the draft Constitutional Treaty do not provide for any requirement whatsoever in the organisation of the State. A Member State is free to choose and maintain whatever form of government or legal system it prefers. Thirdly, as far as fundamental rights are concerned, the ECJ has said that it will also draw its inspiration from the constitutions of the Member States.26 Thus the European Union Act by making EU law supreme over Maltese law is in no way contravening the provisions of the Maltese Constitution. Any new human rights legislation is likely to be further protection, rather than a threat, to the basic rights as enshrined in our Constitution. Problems could be envisaged if ‘new human rights’ were introduced at European level which conflicted with principles of the majority of Maltese such as a right to abortion or a right to divorce. As for the first case, this could never affect Malta against its will as it is provided for in the Accession Treaty.27 As for the latter it is not a constitutional right in Malta so if it was introduced as a right, Malta may be bound. However if Malta were to provide ‘against’ such a right in its Constitution, it is likely that European law would not force such right upon Malta as it is a general principle of EU law not to conflict with the basic rights enshrined in the Constitutions of its Member States.28 Thus conflict between the European Union Act and the Maltese Constitution is unlikely to exist both in theory and in practice.

Naturally there remains the possibility that Malta can amend its Constitution in such a way as to conflict with EU law. In this case the Maltese courts should rule that EU law would prevail as long as the political intention is to stay within the Union. Malta can get back its full sovereignty if it chooses to withdraw from the EU.

3. Substantive Law

Mixed legal systems like the Maltese one owe their mixité mostly to legal transplants, that is, the borrowing of legal institutions and rules by one country from another, often initiated by the national courts. Reid and Zimmermann, in their Introduction to an important book on Scots law, state:29

“If, therefore, the establishment of an intellectual connection between civil law and common law is regarded as an important prerequisite for the emergence of a genuinely European legal scholarship, it should be of the greatest interest to see that such connection has already been

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25 Allan T., op cit. p. 22.
27 See Article 62 of the Protocol to the Draft Constitutional Treaty.
29 K. Reid & R. Zimmermann, the Development of Legal Doctrine in a Mixed System, in Reid and Zimmermann (eds), A History of Private Law in Scotland, op cit, Vol 1, 3.
established (…) in a number of ‘mixed legal systems. Such systems provide a wealth of experience of how civil law and common law may be accommodated within one legal system.’

This statement is closely related to the idea that Scots law and the other mixed jurisdictions are an optimal mix of the best that both civil law and the common law can offer. Mixed legal systems present a mix of national mentality and European uniformity. Thus Malta, with a mixed legal system is in a good position to adopt and integrate the workings of the EU legal order with that of the Maltese one. This reduces the possibility of legal irritants and therefore increases the success of the application of EU law.

Taking advantage of this mixed legal heritage, over the past years since independence Malta has in certain instances successfully adopted a comparative approach in its formulation of new legislation. Comparative law could give an insight on how and to what extent legal integration of private law could take place. Certainly legal families have their own similarities which may facilitate the adoption of legal principles from the other family. Watson controversially argues that a society’s laws do not usually develop from within, but are borrowed from other societies30. One could agree that comparative law would ease the borrowing from other societies. However it could also be argued that the Europeanization of private law is also an opportunity for European law to develop within. Strictly speaking Watson is referring to the adoption of legal principles from one national legal system to another. Referring to the subject under evaluation, European private law building goes a step beyond that. While a unifying private law at European level would encourage the borrowing from the national legal systems, because such a project may be supported by the needs of achieving the proper needs of an internal market, one should not rule out the creation of new rules at a European level from within the existing fragmented European private law.

The above places Maltese law in a good position to continue to adapt to the on-going developments in substantive European private law. The Maltese Trusts Act has been successfully integrated into Maltese law31. Trust law by its nature is a common law concept of private law which does not tally with the civil law concept of Maltese private law in general. The possibility of Legal Irritants in the Maltese legal system is very rare and thus it is easier for it to adopt reforms or new concepts. Following the Communication on European Contract Law32, the European Commission adopted a further Communication in February 2003 entitled “A More Coherent European Contract Law - An Action Plan”33. This is considered to be a further step in the ongoing discussion on developments in European Contract Law. One of the key measures proposed in the Action Plan is the elaboration of a CFR (Common Frame of Reference). In order to increase coherence in the contract law acquis, the CFR should provide a common terminology (e.g. contract, damages) and rules (e.g. non-performance of contracts). The CFR serves two different aims: (a) it should serve as a tool for the improvement of the acquis. The addressee of this tool is in the first place the European Institutions, above all the Commission, in order to increase the quality of drafting provisions; (b) it could be the basis for the so-called optional instrument on European Contract Law. In both scenarios, Maltese law would be able to adapt to the European developments and from a substantive point of view no serious problems can be envisaged in the relationship between Maltese and European law.

EU Regulations and Directives are the most important legal instruments which would have to be examined to see the effect of EC law on Maltese law. Regulations are binding upon all Member States and are directly applicable within all such States. On accession all EU regulations became binding in Malta unless they are covered by a transitory provision or derogation in the Accession Treaty. Basically this means that EC Regulations are to be considered as primary law, and they should not be transposed. They are the law. Member States may need to modify their own law in order to comply with a regulation. This may be the case where a regulation has implications for different parts of national law. However this does not alter the fact that the regulation itself has legal effect in the Member States independently of any national law, and that the Member States should not pass measures that conceal the nature of a Community Regulation. In case national law is not amended the regulation would prevail. In the Variola case34, the ECJ was asked by a national court whether the provisions of a regulation could be introduced into the legal order of a Member

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31 Chapter 331 of the Laws of Malta.
State in such a way that the subject-matter is brought under national law. The ECJ explained that by virtue of the obligations arising from the Treaty and assumed on ratification, Member States are under a duty not to obstruct the direct applicability inherent in Regulations and other rules of Community law\(^{35}\). The ECJ explains:

\[\ldots\text{Member States are under an obligation not to introduce any measure which might affect the jurisdiction of the Court to pronounce on any question involving the interpretation of Community law or the validity of an act of the institutions of the Community, which means that no procedure is permissible whereby the Community nature of a legal rule is concealed from those subject to it}\(^{36}\).

As Regulations need no transposition there is no need to elaborate further. Analysis of the implementation of Directives proves to be a more effective way to gauge the effectiveness of the transposition of EU law into Maltese law. Directives have been generally transposed either by an Act of Parliament into primary legislation such as the Company Directives\(^{37}\) or the VAT Directives\(^{38}\), or by means of a Legal Notice such as most of the Labour Directives\(^{39}\), or by a combination of both primary and secondary legislation. The best method of implementation would depend on the objectives of the particular directive. An Act of Parliament is normally reserved for the implementation of a directive which is either a framework law on which subsidiary legislation can be enacted or is a matter of high national importance. Being transposed through an Act of Parliament would often mean that a national debate is held on the subject matter and the law would be better publicised. On the other hand, transposition by means of a legal notice is faster though less publicised. However, it may be a better way of transposing European law particularly if the directive is technical and needs to be transposed in a very short time. In practice it would be impossible to use Acts of Parliament every time, given the amount of directives that need to be transposed and the time needed to pass an Act through Parliament. By using a combination of primary and secondary legislation as a way of implementing EC Directives, a saving in parliamentary time is possible.

4. European Law in the Maltese Courts

Following Malta’s accession, EU law became directly applicable but this did not result in having a lot of cases dealing with issues of EU law on accession. Lawyers somehow needed time to get accustomed to the idea that now EU law is not foreign law but local law as well. As a result there were very few judgments dealing with issues of EU law in the first few months. However the trend is slowly changing. The number of judgments dealing with EU law has increased and will continue to increase in the future. A good number of the most relevant case law of the Maltese courts dealing with EU law concerns the application of Regulation No 44/2001 concerning the enforcement of judgments delivered by the courts of other Member States\(^{40}\).

One of the first cases in this regard is *Opateckan v Ciantar* decided by the First Hall of the Civil Court on 30 June 2005 and confirmed by the Court of Appeal on 27 June 2006\(^{41}\). The case concerned an order of maintenance made by a Polish court against a Maltese citizen resident in Malta. The courts of both instances accepted the direct applicability of the above regulation as part of Maltese law. This was one of the first opportunities for the Maltese courts to acknowledge the direct applicability of an EC Regulation. As a result the Maltese courts found no difficulties in enforcing the Polish judgment in Malta.

Another case in this regard is *Refalo v Garden of Eden Limited*\(^{42}\). This case is about the enforcement of a judgment delivered by the Central London County Court on 14 December 2005 concerning damages as a result of a traffic accident suffered by the plaintiffs while on holiday in Malta. The Court of Appeal confirmed the judgment of the lower court ordering the enforcement of the English judgment in Malta. The

\(^{35}\) See paragraph 10 of the judgment.

\(^{36}\) See paragraph 11 of the judgement.

\(^{37}\) Chapter 386 of the Laws of Malta.

\(^{38}\) Chapter 406 of the Laws of Malta.

\(^{39}\) Regulations 78 to 100 under Chapter 452 of the Laws of Malta.


\(^{41}\) Application number 303/2005 decided on 30/6/2005 and Civil Appeal 303/205/1 decided on 27/1/2006.

\(^{42}\) Civil Appeal 305/2006/1 decided by the Court of Appeal on 13/03/2007.
Court accepted that the English Court had jurisdiction over the case as the facts arose out of a package tour contract signed in England and on the basis of Article 6 of the said Regulation, ‘A person domiciled in a Member State may also be sued … where he is one of a number of defendants, in the courts of the place where any of them is domiciled, provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings’.

While the above case proves that the highest Maltese court is ready to enforce EU law and enforce judgments from other EU Member States, the Court of Appeal ensures that this is only done after careful analysis that the case falls under the Brussels Regulation. In GIE (PMU) v Zeturf Ltd the Court of Appeal revoked a judgment of the lower court enforcing a judgment of the Court of Appeal of Paris. The Maltese Court of Appeal refused to enforce the French judgment on the grounds that the French court based its judgment on the grounds of public policy as interpreted by French law. The Maltese Superior Court noted that the French provisions on which the judgment is based do not have an economic objective and are simply intended to protect French public policy. The Maltese Court rightly came to the conclusion that the French Court based its judgement on French public law rather than French private law in civil and commercial matters. The Brussels I Regulation specifically excludes the former so the Court concluded that the Regulation was not applicable to the facts of the case.

While the above case law centred on the application of EU law, there have also been instances where the Maltese Courts had to rule about which law should prevail in case of conflict between EU law and domestic law. In Sansone v Comptroller of Industrial Property, the Court of Appeal recognised the hierarchal superiority of a Regulation over domestic law in case of conflict. Therefore Maltese courts have no problem in accepting the supremacy of EU law. However, sometimes things do go wrong and the Maltese Courts do make mistakes in the application of EU law.

A typical example is the case of Izola Bank Ltd v Commissioner of VAT. This case concerned a discrepancy between the domestic VAT law, Chapter 406 of the Laws of Malta and the Schedule under Article 9 of the Sixth VAT Directive. Upon Membership the state had failed to introduce an item taxable under the Directive but not taxable under the Maltese VAT law as was implemented. In other words the state had failed to introduce the tax required under the Directive The Court of Appeal, quoting Marleasing, came to the conclusion that the concept of direct effect of directives as laid down by the ECJ in Marleasing is similar to that of a Regulation. Referring to the earlier Sansone judgment delivered by the same court, it ruled that the Directive is superior to the Maltese VAT law as stood. Therefore the tax payer had to pay tax on the basis of the non-implemented directive as opposed to the basis of the implementing legislation.

While the above is another proof that the Maltese Courts have no problem in enforcing EU law as such, mistakes are also made. In the above case the Maltese Court seems to be making the mistake that directives are identical to regulations. While directives could be capable of a direct effect, this does not mean that they are directly applicable. In this case the Maltese Court is treating a directive as if it is directly applicable. Another mistake made by the Maltese Court is that it ignored the difference between a case involving two private parties and one between the state and an individual. In Marleasing, it was an individual claiming a right against the state which the state has failed to implement. In this case it is the Maltese state that is claiming a right against an individual which the state had failed to implement. Thus the situation of Marleasing is inverted. The Maltese Court of Appeal ignored the Ratti judgment which is not referred to in its judgement, where the ECJ held that a Member State which has not adopted the implementing measures required by a directive at issue may not rely, vis-à-vis individuals, on its own failure to perform the implementation process if it was not otherwise bound to do so.

43 Civil Appeal 92/2006/1 decided by the Court of Appeal on 3/1/2007.
46 Marleasing SA v. La Commercial Internacionale de Alimetacion SA Case C-106/899 (1990) ECR I-4135: “In applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of article 189 of the Treaty.” See also Centrosteel v. Adipol Case C-456/98 (2000) ECR I-6007 & Océano Grupo Editorial v. Rocio Murciano Quintero Case C-240-244/98 ECR I-4491.
47 Case 148/78 (1979) ECR 1629.
obligation which the directive entails. It has been reiterated in other ECJ’s cases such as Faccini Dori\textsuperscript{48}, where the ECJ maintained that its case-law on direct effect of directives seeks to prevent the State from using its own failure to comply with Community law and thus depriving individuals of the benefit of the rights which directives may confer on them. Prechal argues that the so called principle of estoppel is the ultimate rationale of direct effect of directives\textsuperscript{49}. The Maltese Court of Appeal in the Izola Bank case has failed to recognise this. A preliminary reference would probably have been a more cautious approach to clarify matters.

Surprisingly there have been very few attempts where the Maltese Courts felt the need to explore the possibility of making a preliminary reference under Article 234 EC. In fact during the first five years of membership, no questions were referred to the ECJ under the said procedure. An important attempt which is worth mentioning is the judgement passed by the Court of Appeal on the 26\textsuperscript{th} June 2007 in GIE Pari Mutuel Urbain (PMU) v. Bell Med Ltd & Computer Aided Technologies Ltd\textsuperscript{50}. This case is about the enforcement of a judgment delivered by the French Tribunal de Grande Instance under the Brussels Regulation\textsuperscript{51}. The dispute was about the applicability of the Brussels I Regulation to the facts of the case. The Regulation applies to civil and commercial matters while the French court delivering the judgement was an Administrative Court\textsuperscript{52}.

In passing judgment, the Maltese Court of Appeal gave a well studied analysis of why it should decline making a reference. The national court clearly accepted that with regard to issues of interpretation of a Community law provision, the said Court is obliged to make a reference to the ECJ. Thus here the Maltese Court of Appeal is stating clearly that it accepts its duty to make a reference if the conditions of Article 234EC are satisfied. As regards the interpretation of ‘civil and commercial matters’, the Court said there is much jurisprudence of the ECJ dealing with this issue. The Court makes reference to authoritative text-books as proof\textsuperscript{53}. However the Court went on to say that the dispute before it was not an issue of interpretation but one of application. While referring to Craig and de Burca\textsuperscript{54}, the Court of Appeal acknowledged that the distinction between interpretation and application is meant to be one of the characteristic features of the division of authority between the ECJ and the national courts; the former interprets EC law while the latter apply it. In this case the national court felt that there was no need to seek a reference on this point.

5. Enforcement Actions against Malta

In exercising its function as guardian of the Treaties, the Commission ensures and monitors the uniform application of Community law by the Member States pursuant to Article 211 of the EC Treaty. Article 226 EC provides that the Commission can take action against a Member State which has failed to fulfill an obligation under the Treaty, for example adopts or maintains legislation or rules which are contrary to Community law. The primary objective of infringement proceedings is to encourage the Member States to comply voluntarily with Community law as quickly as possible. Furthermore, the Commission has aimed to improve cooperation with the Member States by means of complementary or alternative methods to resolve problems.

Like any other EU Member State, Malta receives a number of infringement notices per year. In 2004 Malta received 107 formal notices while in 2005, Malta received 55 formal notices and the number increased to 77 in 2006\textsuperscript{55}. In 2007 the number dropped to 69\textsuperscript{56}. The statistics shown below were obtained from the latest

\textsuperscript{48} Case C-91/92 [1994] ECR-3325.
\textsuperscript{49} Prechal Sandra Directives in EC Law, Oxford, 2004 p. 258.
\textsuperscript{50} Civil Appeal 224/2006/1 GIE Pari Mutuel Urbain (PMU) v. Bell Med Ltd & Computer Aided Technologies Ltd decided by the Court of Appeal on 26\textsuperscript{th} June 2007.
\textsuperscript{52} Article 1.1 of the Regulation establishes that: ‘This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters’.
Annual Report of the European Commission on the Application of Community law published in November 2008 and they show that Malta has an ‘average’ record where it comes to the number of infringement proceedings against it, Italy being the Member State with the most infringement proceedings and Denmark being the one with the least.

Table 1: Number of Article 226EC Actions against Malta and their Stages

<table>
<thead>
<tr>
<th></th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
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<tbody>
<tr>
<td>Formal Notice</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>107</td>
<td>55</td>
<td>77</td>
<td>69</td>
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<thead>
<tr>
<th></th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
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</thead>
<tbody>
<tr>
<td>Reasoned Opinion</td>
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<td>19</td>
<td>18</td>
<td>25</td>
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<table>
<thead>
<tr>
<th></th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Referral to Court</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>3</td>
</tr>
</tbody>
</table>

A good number of infringements against Malta concern the environment. Most of these, such as 2007/4325 about Fort Cambridge, concern the impact major development projects have on the environment while those such as 2006/2283 concern non-compliance with Article 9 of the Birds Directive. Other well-known infringements against Malta include 2005/4534 about car registration tax on second-hand cars infringing Article 90EC. Perhaps one of the most clear cases which is the subject of infringement proceedings against Malta is 2005/4778 concerning departure tax on all air passengers starting their itinerary in Malta. The discrimination is clear as the same departure tax is not levied on Maltese domestic flights.

Most of the infringement proceedings against Malta concern the Environment or the Area of Freedom Security & Justice. Transport comes up way behind as the third and only other area in which referral has been made to the ECJ. Below is a list of cases that have been referred to the ECJ. This list, obtained from the ECJ web-site, contains a list of cases that were initiated in 2008 against Malta and which will be included in the Annual Report for 2008 of the European Commission to be published in the second half of 2009; they have therefore been omitted from the preceding Table.

Table 2: List of Cases against Malta Referred to the ECJ up to February 2009

<table>
<thead>
<tr>
<th>Case</th>
<th>Date</th>
<th>Parties</th>
<th>Field</th>
</tr>
</thead>
<tbody>
<tr>
<td>C-508/08 Application (OJ) OJ C 32 of 07.02.2009, p.18</td>
<td>Commission v Malta</td>
<td>Transport</td>
<td></td>
</tr>
<tr>
<td>C-269/08 Order</td>
<td>Commission v Malta</td>
<td>Area of Freedom, Security and Justice</td>
<td></td>
</tr>
<tr>
<td>C-11/08 Removal (OJ) OJ C 6 of 10.01.2009, p.18</td>
<td>Commission v Malta</td>
<td>Transport</td>
<td></td>
</tr>
<tr>
<td>C-11/08 Order</td>
<td>Commission v Malta</td>
<td>Transport</td>
<td></td>
</tr>
<tr>
<td>C-563/07 Order</td>
<td>Commission v Malta</td>
<td>Environment and consumers</td>
<td></td>
</tr>
<tr>
<td>C-76/08 R Order</td>
<td>Commission v Malta</td>
<td>Environment and consumers</td>
<td></td>
</tr>
</tbody>
</table>

6. Conclusion

Like any other ‘marriage’, the one between the Maltese legal order and the EU legal order has its successes and failures. The above gives a snapshot of the results and therefore one can say that Malta has so far managed to adapt its legal regime to take on the *acquis communautaire* as other Member States have done before it; and its small size proved to be irrelevant. Having said this, it does not mean that there is no room for improvement. Improvement can come if the state invests more in legal resources for the civil service including the judiciary and the office of the Attorney General as well as the University. Maltese lawyers cannot keep up to date unless they have access to the various legal resources that are mushrooming in Europe and making the use of comparative law easier and more widespread. Also the utility of studying the development of Maltese law as a laboratory for European law mentioned earlier on in this paper is being lost as the lack of adequate legal material on Maltese law makes the Maltese legal order inaccessible to foreign jurists and as a result it remains unknown and without any influence in the European sphere. Certain problems highlighted in the previous sections can be avoided if experienced civil servants get the necessary EU training which despite Malta being a Member State for the past five years and being in full preparation for the preceding five years, is rather artificial in some cases.
Finally I believe that one of the major challenges still to be tackled seriously facing the ‘marriage’ between these two legal orders comes not from the legal sphere but from the public sphere. Educating the Maltese public about the proper meaning of this ‘marriage’ is essential as the public at large is its ultimate consumer. The vast majority of Maltese look towards the European Union as being a rebirth of the now defunct ‘Privy Council’ who will have the supreme authority to put right whatever happens to be wrong in the Republic of Malta. Unfortunately certain politicians and journalists do not help this cause by giving the wrong impressions such as that the European Court of Justice is a Court of Appeal which it is not, and that one can go to it whenever local redress is not obtained which is not the case. Putting matters into context and a proper information campaign could help save a future tragedy, for the confidence that the Maltese public have in the EU institutions could hit rock bottom if it is based on false pretences. If this is avoided, then the prospective of the ‘marriage’ is on course to be as successful as it has been in most other Member States.