The Relationship between Maltese Law and European Union Law

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1. The EU Legal Order

National law derives its validity from the fact that the State that enacts it, is sovereign and is capable of enforcing it in its national territory. It is independent 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 treaty obligations towards other contracting parties. 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.[261] 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 views, as exposed by Triepel[262] and Anzilotti[263] are rather more convincing where 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

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[261] See Jacobs F. G. & Roberts S. (eds) The Effect of Treaties in Domestic Law, Sweet & Maxwell, 1987.

[262] Treipel H., Les rapports entre le droit interne et le droit international' (1923) Hague Recueil 77;

[263] Anzilotti D. Il diritto internazionale nei giudizi interni (1905).

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.[264] 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 are now, the consequences of these two different worlds 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**.[265] 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 compromise not only Member States but also their nationals.
The ECJ explained that EU law is a separate legal order from that of the Member States. Also, EU law is derived from international

[264] Act XIV of 1987.
[265] Case 26/62 NV Algemene Transportem Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1.

law. In this case the relevant international law is found in the form of the EC Treaty and following Maastricht also in the form of the EU Treaty. From this and subsequent judgements 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 overrule 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 implications 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 regards 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. Treaties, in order to take preference over national administrative practices, 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 the application and not the interpretation of the EC Treaty is a matter for the ECJ to deal with and not a 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.[266] In their view, the State Parties to the EEC Treaty had not

[266] See footnote 265.

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 is not the discovery that European law could have direct effect. This is because in the case of regulation, as an example, it is stated in Article 249EC that this legal instrument is capable of having direct effect. 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 judgement was rather; the question if specific provisions of the Treaty (and later also secondary legislation) had direct effect and 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 judgement is that the EEC Treaty, now renamed the EC Treaty, is capable of conferring rights upon individuals who become part of their legal heritage and therefore they 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 up by the referring Dutch Court. The close link has been examined in a subsequent judgement of the ECJ in **Costa v ENEL**.[267] In the Netherlands, whose juridical system is more monist than dualist, 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

[267] Case 6/64 Faminio Costa v ENEL [1964] ECR 585,593.

problematic than that of direct effect.[268] The second occasion for the ECJ to reaffirm the principle of supremacy of Community law came from 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 has 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 front of the ECJ 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.

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 interpretational 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.[269] However the issue in **Costa v ENEL** is about internal supremacy of EU law. It 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 international 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'.[270] 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

[268] Article 66 of the Dutch Constitution. Following a renumbering this Article is now Article 94.
[269] See the case of Greek and Bulgarian Communities, of the International Court of Justice, PCIJ. Series B, No. 17.32.
[270] Wyatt D, 'New Legal Order, or Old?' (1982) ELRev. 147, 153.

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 supreme doctrine and to request national courts to follow suit. In the ECJ's own words:[271]

"*It follows from all these observations 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 complement to a national legal order that is the national legal order of each particular Member State for its enforcement.

2. The doctrine of supremacy and of direct effect as viewed from Maltese law.

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 supranationality of its Constitution. Article 6 of the Maltese Constitution provides that:

[271] See footnote 267.

"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 or directive were to conflict with ordinary Maltese law it could somehow be accepted but what if it conflicts with the Constitution?

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 more difficult to conceive amending the Constitution. The main problem is that Parliament is deemed to be supreme. This means that Parliament has the power to do anything except bind itself in 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[272] which came into force on accession on 1st May 2004. The aim of this Act is that it incorporates into Maltese law, the *acquis communautaire* which is the body of laws of the European Union. This means that by the power of the Act the *acquis* would have the power of law as British and Maltese law respectively. This solves the dualistic approach. 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 before by Malta was incorporated into Maltese law by means of Act XIV of 1987.

[272] Chapter 460 of the Laws of Malta.

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 a 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 happens 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 have 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 sanctions could range from a simple Article 226 EC procedure to political sanctions and to eventual exclusion from the Union. However such a conflict is unlikely ever to happen in good faith. Membership of the Union is voluntary and although not contemplated in the present Treaties as it is in the draft Constitution, a country could in theory withdraw from the Union.[273] The draft European Constitution contemplates for such potential withdrawal.[274]

In practice it is highly unlikely that a Member State would ever be in a position where its basic law would conflict with the principles enshrined in EC law. In fact in **Hauer v. Land Rheinland-Pfatz**, 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

[273] Greenland which became part of the then EEC as part of Denmark in 1973 withdraw from the Community in 1985 after obtaining autonomy from Denmark and negotiated a withdrawal.
[274] Article I-60 of the Draft Constitutional Treaty.

Member States, or even a majority of them.[275] 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 one Member State. If the right would be 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:

"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 recognised and available in Law, and be enforced, allowed and followed accordingly."

This is merely a reproduction of article 2(1) of the British European Community Act which proves that Malta attempts to adopt the British approach as regards the legal framework of the adoption of the *acquis*. Article 2(2) of the British 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 Section 3 provides that from 1st May 2004, the Treaty and existing and future acts adopted by the European Union shall be binding in 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

[275] Case 44/79, [1979] ECR 3727.

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 Section 3 of the said Act. To what extent this would apply if there is a potential conflict with the provisions of the Constitution is debatable. Parallelism can be drawn to the theoretical[276] scenario of having the European Convention of Human Right as enacted were to conflict with the Maltese Constitution. The same weight 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 it 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-outs 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 Section 3 of the European Union Act, 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 obligations to be implemented, and any rights enjoyed or to be enjoyed by Malta under or by virtue of the Treaty to be exercised. The same authorities shall also provide to implement any legislation necessary 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.

[276] Theoretical because in practice this is difficult if not impossible to happen.

Section 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 there under, are directed by this Article to enforce any directly effective EC measures. 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 Section 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 proceedings 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 there from or there under, shall be treated as a question of law and if not referred to the Court of Justice of the European Communities, be for determination as such in accordance with the principles laid down by, and any relevant decision of the Court of Justice of the European Communities or any court attached thereto.

This makes possible 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 Court of Justice of the European Communities 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 by any institution of the European Union.

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 hints as to how the Maltese courts should view the above. Initially British courts were hesitant in applying the above principles.[277] However Lord Denning in **Shields v E Coomes (Holdings) Ltd** seemed willing to accept the principle of supremacy of Community law, declaring that Parliament clearly intended, when it enacted the European Community Act on 1972, to abide by the principles of direct effect and supremacy.[278] 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

[277] See Felixstowe Dock and Railway Company v British Transport and Docks Board [1976] 2 CMLR 655.
[278] Shields v E Coomes (Holdings) Ltd. [1979] 1 ALL ER 456, 461.

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 think that it would be the duty of our courts to follow the statute of our Parliament.[279]

Here one can see the judicial reconciliation of Parliamentary 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 national courts should give effect to the doctrine of direct effect of 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 Community Act should prevail in case of conflicting legislation. If it is clear that a domestic law should prevail, then it must do so.[280]

Lord Denning's overview gives a good idea of how EC law became accepted as a legal order working side by side the English legal order. While his explanation is far from being harmoniously interpreted and there are several arguments that one can visit, Lord Denning's explanation explains the position in a nutshell and any further analysis on this point is beyond the scope of this article.[281]

Naturally Lord Denning's explanation can 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 the EU obligations, Maltese

[279] [1979] 23 All ER 325, 329.
[280] For a more detailed debate on this issue see Allan T., 'Parliamentary Sovereignty: Lord Denning's Dexterous Revolution' (1983} 3 OJLS 22.
[281] Allan T. op cites p. 22.

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 even further and it has been now Community practice for some time, 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 then 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 then the EU 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; 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.[282] 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

[282] See footnote 275.

new human rights legislation is likely to be further protection rather than a threat to the basic rights as enshrined in our Constitution.

Foreseeable problems could be envisaged if 'new human rights' are introduced at European level which could conflict with principles of the majority of the Maltese; such as the right for abortion or the 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.[283] 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 Constitution of its Member States.[284] Thus conflict between the European Union Act and the Maltese Constitution is unlikely to exist both in theory and in practice.

Naturally Malta can amend its Constitution in a way 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. EU Law in Maltese Legal Practice

Malta has started aligning itself with the *acquis* years before actual accession took place. However following Accession and therefore the coming into force of the European Union Act, Maltese law is supposed to be in line with EU obligations. 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. Article 249EC provides as follows:

"In order to carry out their task and in accordance with the provisions of the Treaty, the European Parliament acting jointly

[283] See Article 62 of the Protocol to the Draft Constitutional Treaty.
[284] See case SPUC v. Grogan C-159/90, [1991] ECR I-4685.

with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force."

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 were 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 Community regulation. In case national law is not amended the regulation would prevail. In the **Variola** case,[285] the ECJ was asked by a national court whether the provisions of a regulation could be introduced into the legal order of a Member 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

[285] See Case 34/73, Variola v Amministrazione delle Finanze [1973] ECR 981.

obstruct the direct applicability inherent in Regulations and other rules of Community law.[286] The ECJ explains:

".... 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."[287]

This means that Malta should not attempt to introduce any EC regulations into Maltese legislation but should only amend existing legislation if it conflicts with EC regulations.

Directives differ from regulations in two important ways. They do not have to be addressed to all Member States and they are binding as to the end to be achieved while leaving some choice as to form and method open to the Member States. Directives are particularly useful when the aim is to harmonise the laws within a certain area or to introduce complex legislative changes. This is because the Member States have certain discretion to choose the way that a Directive is to be implemented. The Directive itself may also offer discretion on the actual substantive contents. Member States are free to act within the parameters of the Directive if it provides so. The force of Directives has been increased by the ECJ decisions. The Court held that directives have direct effect, enabling individuals to rely on them, at least in actions against the State.[288] This means if the state fails to transpose a right given by a directive to its citizens, then an individual can seek to enforce it in the national court. On the contrary if the Government has failed to transpose an obligation on the citizen in national law than the former cannot claim a right.[289] Thus for example the VAT

[286] See paragraph 10 of the judgement.
[287] See paragraph 11 of the judgement.
[288] See Marleasing Case C-106/89 , [1990] ECR I4135 and Von Colson and Kamann Case C-14/83, [1984] ECR 1891.
[289] See Marshall Case 152/84, [1986] ECR723.

Department cannot enforce VAT legislation unless the specific provision of the VAT directive has been properly transposed in the Maltese VAT Act. [290] If a government fails to implement EU law properly, then thanks to the doctrine of state liability, the state could be liable for damages.[291]

The majority of Directives are transposed into Maltese law by means of a Legal Notice. This provides an efficient and fast way of introducing new rules. Typical examples are the labour law directives that have been transposed by means of several legal notices. [292] Other directives are transposed by means of an Act of Parliament. A Legal notice is a more preferable way of transposing EU legislation where either there is little room for discretion or the discretion is of a technical nature. In reality there is no need for Parliament to hold lengthy debates on the subject matter of the directives as Malta's powers are limited by the parameters of the directives.

As from the litigation point of view, Maltese Courts now have all the power to make preliminary references if they are necessary. Maltese lawyers and judges have still to get more accustomed to the litigious channels provided for by the Treaties. While the cognisance of European law is improving, recourse to the preliminary reference procedure has been much lower than what one would expect and to date no preliminary reference has yet reached the ECJ.

The same can be said for direct litigation at the ECJ. However it is worth mentioning that although a Maltese citizen has yet to make use of the Article 230EC procedure, the possibility of having an Article 226EC infringement proceeding is very real and probably around the corner. There has been the commencement of infringement proceedings concerning various chapters of the *acquis*. While some have been publicised such as the case of

[290] Chapter 406 of the Laws of Malta.
[291] See Francovich v Italy Cases C-6, 9/90, [1991] ECR I-5357.
[292] See Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta and subsequent regulations enacted by means of a Legal Notice under the authority of the Act.

spring hunting, others have not. However all of the infringement proceedings against Malta are in the administrative stage and we may have to wait a few more months before the Commission opts to take the first case against Malta to the ECJ.

On the whole Malta is doing a good job in the process of integrating the EU legal order with the Maltese one. The fact that there are a number of infringement proceedings against Malta is not necessarily a bad sign. On the contrary this could be a sign that Malta knows how to make use of EU law to its advantage. Enforcement actions are common against other countries and one should examine the legal and political context of each individual action before coming to a conclusion that Malta is doing badly with the integration of the EU legal order. However not everything is plain sailing. Much more needs to be done from the educational point of view. While generally speaking most professionals in the legal profession dealing with EU issues are adequately prepared, much more needs to be done in the civil service, particularly in those services that deal directly with EU matters such as Customs and VAT. Very often the main problem is not human resources as such, but the bureaucratic structure in which the departments are set up hinders the best use of the available resources. If this is addressed, Malta stands to be a good example of how EU law is integrated in the national legal system.

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