



Universiteit  
Leiden  
The Netherlands

## **The implementation of international law in the national legal order : a legislative perspective**

Beenakker, E.B.

### **Citation**

Beenakker, E. B. (2018, June 5). *The implementation of international law in the national legal order : a legislative perspective*. Meijers-reeks. s.n., S.l. Retrieved from <https://hdl.handle.net/1887/63079>

Version: Not Applicable (or Unknown)

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/63079>

**Note:** To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The following handle holds various files of this Leiden University dissertation:

<http://hdl.handle.net/1887/63079>

**Author:** Beenakker, E.B.

**Title:** The implementation of international law in the national legal order : a legislative perspective

**Issue Date:** 2018-06-05

## 5.1 IMPLEMENTATION OF DIRECTIVES OF THE EUROPEAN UNION

### 5.1.1 General

In section 3.4.2 it was argued that the source of obligation to implement EU directives may be traced back to legislative instrument itself, the treaties and in the so-called principle of effectiveness. In addition to this general obligation of the European Union's member states to give effect to EU law in their respective legal orders, EU law more specifically prescribes *how* implementation by member states should be performed. The largest part of the normative framework that is applicable to the implementation of the EU's legislative instruments, can be derived from case law pertaining to the implementation of directives in the sense of article 288 TFEU. This may be explained by the nature of the instrument, which 'shall leave to the national authorities the choice of form and methods'.<sup>461</sup>

On various occasions, however, the CJEU has made clear this freedom of choice is not unlimited. Prechal suggests that the question of correct implementation comprises 'three closely related but nevertheless distinguishable issues': requirements regarding the content of the measures, requirements regarding the nature of the measures and requirements regarding their effective application and enforcement in practice.<sup>462</sup> This categorisation, which is still accurate more than a decade after the publication of the first edition of Prechal's monograph on directives adopted in the framework of the EU, will be followed below. It will be complemented, however, by the obligation to ensure the implementation in due time.

The legislative standards that will be discussed below are related to directives as *instruments*, irrespective of the *content* of the many directives that have been adopted in the framework of the European Union. Contrary to other legal regimes discussed in Part II, therefore, this chapter will not include a section on the 'content of the regime'. In section 5.2, we will continue our discussion of the EU's legislative instruments and focus on EU regulations in particular.<sup>463</sup>

---

461 It may be recalled that regulations, on the contrary, have general application and are directly applicable in all member states.

462 S. Prechal, *Directives in EC law* (2<sup>nd</sup> edition; OUP 2005) 32.

463 Since the number of cases on the implementation of directives is larger than the number of cases on the implementation of regulations, we will start our discussion with that category of legislative instruments.

## 5.1.2 Legislative standards

### 5.1.2.1 Timely implementation

An obvious limitation can be found in the norm that implementation has to be accomplished in due time.<sup>464</sup> What amounts to 'in due time' in this respect, is determined by the EU's legislative instrument at hand, which prescribes a date on which the transposition period expires. This period is used by states to amend their national laws in order to bring them in conformity with the adopted EU legislation.<sup>465</sup> In order to meet the criterion of timely transposition, the piece of national implementing legislation should enter into force no later than the implementation deadline.<sup>466</sup>

This also means that, prior to the date on which the transposition period elapses, as prescribed in the relevant instrument, states are under no obligation to comply with the newly established EU regime.<sup>467</sup> Nevertheless, during the period of time between the entry into force of a directive and the implementation deadline, states are under the duty to refrain from acts that could seriously compromise a directive's objectives.<sup>468</sup> Given this limitation, the national authorities have to assess whether the adoption of measures prior to the implementing deadline is lawful. As the CJEU has explained in *Inter-Environnement Wallonie ASBL*:

'[i]n making that assessment, the national court must consider, in particular, whether the provisions in issue purport to constitute full transposition of the directive, as well as the effects in practice of applying those incompatible provisions and of their duration in time.'<sup>469</sup>

464 Prechal, *Directives in EC law* (n 462) 16-28 and case law cited.

465 CJEU, *Inter-Environnement Wallonie*, case C-129/96, judgment of 18 December 1997, ECLI:EU:C:1997:628, par. 44.

466 CJEU, *SETAR*, case C-551/13, judgment of 18 December 2014, ECLI:EU:C:2014:2467, par. 40 and 51.

467 CJEU, *Commission v Belgium*, case C-422/05, judgment of 14 June 2007, ECLI:EU:C:2007:342, par. 62.

468 D. Chalmers, G. Davies and G. Monti, *European Union law. Text and materials* (3<sup>rd</sup> edition; CUP 2014) 214. See also CJEU, *Inter-Environnement Wallonie* (n 465) par. 45; CJEU, *Stichting Zuid-Hollandse Milieufederatie*, case C-316/04, judgment of 10 November 2005, ECLI:EU:C:2005:678, par. 42; CJEU, *Adeneler and others* (n 297) par. 91; CJEU, *Commission v Belgium* (n 467) par. 59; CJEU, *Azienda Agro-Zootecnica Franchini Sarl and Eolica di Altamura Srl*, case C-2/10, judgment of 21 July 2011, ECLI:EU:C:2011:502, par. 71 and case law cited; CJEU, *Jetair*, case C-599/12, judgment of 13 March 2014, ECLI:EU:C:2014:144, par. 35; CJEU, *Federconsorzi*, case C-104/14, judgment of 26 February 2015, ECLI:EU:C:2015:125, par. 32.

469 The Court continues by stating that '[f]or example, if the provisions in issue are intended to constitute full and definitive transposition of the directive, their incompatibility with the directive might give rise to the presumption that the result prescribed by the directive will not be achieved within the period prescribed if it is impossible to amend them in time. Conversely, the national court could take into account the right of a Member State to adopt transitional measures or to implement the directive in stages. In such cases, the incompatibility of the transitional national measures with the directive, or the non-transposition of certain of its provisions, would not necessarily compromise the result prescribed'. CJEU, *Inter-Environnement Wallonie* (n 465) par. 47-49. Also Prechal, *Directives in EC law* (n 462) 20.

In *Jetair* the CJEU was requested to render judgment on the question whether a Belgian tax measure could pass the test that it had formulated in *Inter-Environnement Wallonie ASBL*. Jetair is a Belgian travel agent which organises holiday journeys outside the European Union, for which it had paid value added tax to the Belgian tax authorities. While the said journeys organised by Jetair had been exempted from taxation, this exemption was withdrawn by the Belgian legislature with effect from 1 December 1977, when the amended national tax code entered into force. This was only one month before the transposition period, prescribed by the applicable directive, expired. This directive provided for an exemption for the taxation of the journeys outside the EU, including those organised by Jetair. Nevertheless, the relevant rules also expressly authorised member states to continue to tax the relevant transactions, if they had already taxed those services on 1 January 1978. Did the contested measure that had been imposed upon Jetair by the Belgian tax authorities constitute a violation of EU law? The CJEU answered this question in the negative, and held that:

‘if Member States taxed the transactions at issue on 1 January 1978, they could continue to do so after that date. As the [directive] expressly set the date of 1 January 1978 as the starting point for the possible retention of a tax measure, it cannot be considered that a law providing for taxation of such transactions adopted before that date, during the period for transposition of that directive, was liable seriously to compromise the attainment of the result prescribed by that directive’.<sup>470</sup>

Apparently, in this case, the fact that the relevant directive itself had expressly and deliberately provided for a transitional regime pertaining to the taxation of the claimant’s business activities, had persuaded the CJEU that the ‘result prescribed by the directive’ included the measures that were enacted by the Belgian legislature.

The CJEU came to the opposite conclusion in *Commission v. Belgium*, in which the Commission had challenged the adoption by Belgium of measures aimed at the reduction of noise produced at European airports. The measures comprised night-time operating restrictions at all Belgian airports for certain types of civil subsonic jet aeroplanes and entered into force on 1 July 2003. This date had fallen within the transposition period prescribed by directive 2002/30/EEC, which introduced operating restrictions at airport level in order to diminish the production of noise by airplanes to the detriment of the environment and of people living in the vicinity of airports. This directive also repealed a regulation which contained similar rules for certain types of civil subsonic jet aeroplanes, to which the new Belgian national law had expressly referred. The European Commission (EC) complained that, in particular, the Belgian law contained an approach that had also appeared in the regulation, even though when the national law was adopted that regulation had already been repealed

---

470 CJEU, *Jetair* (n 468) par. 34-38.

and that approach had not been retained in the directive. Did the Belgian law seriously compromise the result prescribed by directive 2002/30/EC? In the view of the CJEU, the Belgian law:

‘gave rise to unduly unfavourable treatment for certain categories of aeroplanes and had a lasting impact on the conditions of transposition and implementation of the directive in the Community. By reason of the ban on the operation of various aeroplanes resulting from the application of that [law], the assessment of the noise impact provided for in the directive cannot take into account the noise produced by all aeroplanes in accordance with the [prescribed rules] and, therefore, the optimum improvement in noise management cannot be achieved in accordance with the provisions set out in the directive.’<sup>471</sup>

Therefore, Belgium had failed to observe its obligations during the transposition period.

These examples demonstrate that member states enjoy a certain measure of freedom during the transposition period. Only after the transposition deadline states have to comply fully with the adopted EU legislation.

#### 5.1.2.2 The nature of the implementing measures

In addition to the requirement that the implementation of EU directives has to be completed in due time, EU law prescribes the method of transposition. According to established case law of the CJEU, ‘provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty’.<sup>472</sup> This statement by the court contains several elements which all serve the purpose of legal certainty. The first one, the ‘unquestionable binding force’ will be discussed in the present section, while the remaining requirements will be explored in section 5.1.2.3.

The national implementing measures should have binding force and, in other words, should be laid down in law. This means that in the view of CJEU:

<sup>471</sup> CJEU, *Commission v Belgium* (n 467) par. 62-69.

<sup>472</sup> CJEU, *Commission v Germany*, case C-59/89, judgment 30 May 1991, ECLI:EU:C:1991:225, par. 24; CJEU, *Commission v France*, case C-225/97, judgment of 19 May 1999, ECLI:EU:C:1999:252, par. 37; CJEU, *Commission v Italy*, case C-159/99, judgment of 17 May 2001, ECLI:EU:C:2001:278, par. 32; CJEU, *Commission v France*, case C-296/01, judgment of 20 November 2003, ECLI:EU:C:2003:626, par. 54; CJEU, *Commission v Germany*, case C-441/02, judgment of 27 April 2006, ECLI:EU:C:2006:253, par. 73; CJEU, *Commission v Portugal*, case C-61/05, judgment of 13 July 2006, ECLI:EU:C:2006:467, par. 37; CJEU, *Commission v Ireland*, case C-427/07, judgment of 16 July 2009, ECLI:EU:C:2009:457, par. 55; CJEU, *Commission v Ireland*, case C-50/09, judgment of 3 March 2011, ECLI:EU:C:2011:109, par. 46; CJEU, *Commission v Spain*, case C-151/12, judgment of 24 October 2013, ECLI:EU:C:2013:690, par. 26; CJEU, *Commission v Poland*, case C-281/11, judgment of 19 December 2013, ECLI:EU:C:2013:855, par. 101; CJEU, *Commission v Portugal*, case C-277/13, judgment of 11 September 2014, ECLI:EU:C:2014:2208, par. 43; CJEU, *Commission v Poland*, case C-29/14, judgment of 11 June 2015, ECLI:EU:C:2015:379, par. 37.

'[m]ere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty.'<sup>473</sup>

In the same vein, implementing measures that consist of 'guidelines' or 'recommendations' will not be considered adequate implementation, as they lack binding character.<sup>474</sup> In *Commission v. Greece*, the issue was raised whether statements expressed by member states in court could compensate for the failure to transpose a directive. In this case it was claimed that Greece had failed to fulfil several of its obligations under directive 98/48/EEC on the recognition of higher-education diplomas. One specific claim related to the alleged failure by the Greek authorities to recognise diplomas of persons recruited in the public sector, as a result of which some persons had been recruited at a level lower than that to which they would have been entitled if their diplomas had been recognised by the competent authority in accordance with the directive.<sup>475</sup> At the hearing the representative of Greece, probably aware of its omissions, stated that Greece was prepared to 'regularise with retroactive effect the situation of the persons' who had suffered from the belated transposition of the directive.<sup>476</sup> The CJEU referred to the applicable domestic Civil Service Code, which contained the provisions that contravened the norms laid down in the directive, and dryly noted:

'[i]n this respect, mere statements, such as those made by the Hellenic Republic at the hearing, which, in the continued existence of express provisions of the Civil Service Code, maintain, for the persons concerned, a state of uncertainty as regards the extent of their rights in an area governed by Community law are not sufficient.'<sup>477</sup>

The requirement that directives should be transposed with 'unquestionable binding force' is particularly relevant for provisions that intend to create rights for individuals, because it enables the beneficiaries of those rights to

---

473 CJEU, *Commission v Italy*, case C-168/85, judgment of 15 October 1986, ECLI:EU:C:1986:381, par. 13; CJEU, *Commission v Ireland*, case C-236/91, judgment of 17 November 1992, ECLI:EU:C:1992:444, par. 6; CJEU, *Commission v Ireland*, case C-381/92, judgment of 26 January 1994, ECLI:EU:C:1994:22, par. 7; CJEU, *Commission v Spain*, case C-242/94, judgment of 12 October 1995, ECLI:EU:C:1995:317, par. 6; CJEU, *Commission v Greece*, case C-311/95, judgment of 2 May 1996, ECLI:EU:C:1996:189, par. 7; CJEU, *Commission v Italy*, case C-316/96, judgment of 16 December 1997, ECLI:EU:C:1997:614, par. 16; CJEU, *Commission v Italy*, case C-315/98, judgment of 11 November 1999, ECLI:EU:C:1999:551, par. 10; CJEU, *Commission v Italy* (n 472) par. 32; CJEU, *Commission v Ireland*, case C-455/08, judgment of 23 December 2009, ECLI:EU:C:2009:809, par. 38.

474 CJEU, *Commission v Poland* (n 472) par. 46.

475 CJEU, *Commission v Greece*, case C-274/05, judgment of 23 October 2008, ECLI:EU:C:2008:585, par. 50-59.

476 Ibid, par. 57.

477 Ibid, par. 58.

ascertain their full extent.<sup>478</sup> To this end, states are also obliged to promulgate the adopted national implementing measures in order to ensure the existence of 'appropriate publicity' for those measures.<sup>479</sup>

### 5.1.2.3 The content of the implementing measures

Furthermore, as was already stated above, implementation has to be performed with 'specificity, precision and clarity'. Again, these demands must be seen as an elaboration of the principle of legal certainty, to which the CJEU has consistently referred.<sup>480</sup> In its case law, these three criteria do not seem to possess an autonomous substance; as a *trias*, however, they constitute the standards that the content of the implementing measures should meet. Similar to the purpose served by the binding character of the implementing measures, the application of the elements of specificity, precision and clarity should ensure that 'individuals can ascertain the full extent of their rights and obligations and, where appropriate, rely on those rights before the national courts.'<sup>481</sup> It may be added that the fact that an activity referred to in a directive does not yet exist in a member state cannot release that state from its obligation to adopt laws or regulations in order to ensure that all the provisions of the directive are properly transposed.<sup>482</sup>

In accordance with this case law, the principle of legal certainty does not demand the express implementation of a directive's provision if that provision concerns only the relations between member states and the EC.<sup>483</sup> A typical provision of this kind is an obligation imposed upon member states to provide information to the EC, such as the presentation of a report. Generally, such a provision does not affect an individuals' rights and obligations, as a result of which the rationale for implementation may be considered to have disappeared.

Moreover, the criteria of specificity, precision and clarity do not necessarily entail the obligation to reproduce a directive verbatim in a specific, express law or regulation, since a 'general legal context' may be sufficient,

478 CJEU, *Commission v Ireland*, case C-455/08 (n 473) par. 23. Also CJEU, *Commission v Italy*, case C-207/96, judgment of 4 December 1997, ECLI:EU:C:1997:583, par. 26.

479 CJEU, *Commission v Belgium*, case C-415/01, judgment of 27 February 2003, ECLI:EU:C:2003:118, par. 21; CJEU, *Commission v Poland* (n 472) par. 37.

480 CJEU, *Commission v Poland* (n 472) par. 37; Also CJEU, *Commission v France*, case C-296/01 (n 472) par. 54; CJEU, *Commission v Italy*, case C-82/06, judgment of 14 June 2007, ECLI:EU:C:2007:349, par. 19; CJEU, *Commission v Greece*, case C-81/07, judgment of 13 March 2008, ECLI:EU:C:2008:172, par. 19.

481 CJEU, *Commission v France*, case C-177/04, judgment of 14 March 2006, ECLI:EU:C:2006:173, par. 48.

482 CJEU, *Commission v Belgium* (n 467) par. 59.

483 CJEU, *Commission v Portugal*, case C-72/02, judgment of 24 June 2003, ECLI:EU:C:2003:369, par. 19-20; CJEU, *Commission v France*, case C-296/01 (n 472) par. 92; CJEU, *Commission v Luxembourg*, case C-32/05, judgment of 30 November 2006, ECLI:EU:C:2006:749, par. 35.



depending on its content.<sup>484</sup> As the CJEU has explained on several occasions,

‘[i]n particular, the existence of general principles of constitutional or administrative law may render superfluous transposition by specific legislative or regulatory measures, provided, however, that those principles actually ensure the full application of the directive by the national administrative authorities and that, where the relevant provision of the directive seeks to create rights for individuals, the legal situation arising from those principles is sufficiently precise and clear and that the persons concerned are placed in a position to know the full extent of their rights and obligations and, where appropriate, to be able to invoke them before the national courts’.<sup>485</sup>

When may the general legal context that consists of national principles of constitutional or administrative law be sufficient for the correct implementation of a directive’s provisions? A scarce example can be found in *Commission v. France*, in which the transposition of article 3, third paragraph, of directive 90/313/EEC on the freedom of access to information on the environment, was discussed. Pursuant to this provision, ‘[a] request for information [submitted by any natural person or legal person] may be refused where it would involve the supply of unfinished documents or data or internal communications, or where the request is manifestly unreasonable or formulated in too general a manner’.<sup>486</sup> The EC had maintained that France was under the obligation to transpose the mentioned ground for refusal, as embodied in article 3, third paragraph, of the directive, into French national law. ‘In the absence of express transposition’, the EC held, ‘individuals are not able to know with the requisite clarity the extent of their rights under the directive in that regard’.<sup>487</sup> The French government, however, referred to domestic legislation that was currently in place and argued that the aforementioned provision of the directive had already been implemented in a certain law in the way it was applied by the Conseil d’État. In other words, ‘[the said provision] simply confers on public authorities

484 CJEU, *Commission v Germany*, case C-29/84, judgment of 23 May 1985, ECLI:EU:C:1985:229, par. 23; CJEU, *Commission v Italy*, case C-363/85, judgment of 9 April 1987, ECLI:EU:C:1987:196, par. 7; CJEU, *Commission v Germany*, case C-131/88, judgment 28 February 1991, ECLI:EU:C:1991:87, par. 6; CJEU, *Commission v Germany* (n 472) par. 18; CJEU, *Commission v Portugal*, case C-392/99, judgment of 10 April 2003, ECLI:EU:C:2003:216, par. 80; CJEU, *Commission v Ireland*, case C-50/09 (n 472) par. 46; CJEU, *Commission v Poland* (n 472) par. 38.

485 CJEU, *Commission v Poland* (n 472) par. 38. Also CJEU, *Commission v Spain* (n 472) par. 28; CJEU, *Commission v Belgium*, case C-475/08, judgment of 3 December 2009, ECLI:EU:C:2009:751, par. 41; CJEU, *Commission v Luxembourg* (n 483) par. 34; CJEU, *Commission v Italy*, case C-456/03, judgment of 16 June 2005, ECLI:EU:C:2005:388, par. 51; CJEU, *Commission v France*, case C-296/01 (n 472) par. 55; CJEU, *Commission v Austria*, case C-194/01, judgment of 29 April 2004, ECLI:EU:C:2004:248, par. 39; CJEU, *Commission v France*, case C-233/00, judgment of 26 June 2003, ECLI:EU:C:2003:371, par. 76.

486 Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (OJ 1990, L 158) art 3, third paragraph.

487 CJEU, *Commission v France*, case C-233/00 (n 485) par. 71.

an option which has already been acknowledged by the Conseil d'État, and the mere codification of that option cannot protect any right of individuals'.<sup>488</sup> The CJEU agreed and stated:

'[T]he requirement for specific transposition would be of very little practical use since that provision is drafted in very general terms and sets out rules which are in the nature of general principles common to the legal systems of the Member States. [...] Compliance with a provision of a directive which exhibits those characteristics must thus be essentially ensured when it is applied in practice to a specific situation, regardless of whether it is transposed into national law in precisely the same words. [...] In those circumstances, a general legal context, which finds expression in the present case in the existence of concepts whose content is clear and precise and which are applied in the framework of settled case law of the Conseil d'État, must be held to be sufficient for the purpose of properly transposing Article 3(3) of Directive 90/313.'<sup>489</sup>

On another occasion, the CJEU reached the opposite conclusion. In *Commission v. Poland*, the EC challenged the implementation by the Polish authorities of directive 2004/23/EC on standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells, and related (implementing) directives. According to the EC, Poland had failed to respect its obligations by excluding reproductive cells and foetal and embryonic tissue from the scope of the national implementing instruments. This alleged failure was contested by Poland, which referred to approximately twenty domestic laws in order to substantiate the claim that, despite its exclusion from the national implementing act, the implementation of the directives was sufficiently provided for by the 'legislation in force in the [Polish] internal legal order'.<sup>490</sup> The CJEU investigated whether this general legal context could, as Poland had argued, be considered to constitute an implementation in conformity with Poland's obligations under the directives. Here, it emphasised the fact that the directive imposed specific obligations on persons and establishments which use human tissues and cells, and concluded:

'It is apparent from the pleadings lodged by the Republic of Poland before the Court that the acts relied upon by that Member State in order to claim that it duly transposed the directives at issue vary in their legal nature and include both non-binding acts and provisions of general application in the fields of criminal and civil law. In the light of the specific scope of the obligations imposed by the directives at issue and the objective of protecting public health which they pursue, the transposition of those directives by a multitude of acts combined with the exclusion of certain types of tissues and cells from the scope of the principal transposing act, even though those tissues and cells are covered by those directives, fails to satisfy the requirements of specificity, precision and clarity [...] In those circumstances, the individuals concerned by the unified framework provided for by the directives at issue are not in a position, on the basis of those acts alone, to know the full extent of their rights and obligations with the legal certainty required by the Court's case law.'<sup>491</sup>

488 Ibid, par. 73.

489 Ibid, par. 80-83.

490 CJEU, *Commission v Poland* (n 472) par. 24.

491 Ibid, par. 47.

From these examples it seems impossible to draw general conclusions about when a ‘general legal context’ existent in a EU member state will be viewed as a sufficient implementation of the relevant legislative instrument. Instead, it will depend on the objectives and level of specificity of that instrument and, of course, the legislation in place in the member state. In most cases by far, however, the general legal context already in place in a member state will be insufficient for a correct implementation of a given directive, or any other instrument for that matter. Therefore, in those cases an additional implementing act will be necessary in order to meet the standards of specificity, precision and clarity as required by the principle of legal certainty.

#### 5.1.2.4 *Effective application and enforcement in practice*

Once the national implementing legislation has entered into force, the member states have taken a significant step towards ‘full application’ of the applicable EU legislation. Nevertheless, an additional task has to be completed: the domestic implementing legislation should be effectively applied and enforced in practice. This obligation is binding upon all state authorities, including those bodies under the control of the state that have been given responsibility for a public-interest service and, to that end, have been entrusted with special powers.<sup>492</sup>

The task to effectively apply and enforce in practice includes the imposition of penalties in those instances where the provisions of the EU directive, or, more accurately, its national implementing instrument, have been transgressed. Again, states enjoy considerable discretion in shaping the application and enforcement in their domestic jurisdictions. However, this freedom is not unlimited. In the view of the CJEU,

‘[...] in the absence of harmonisation of European Union legislation in the field of penalties applicable in cases where conditions laid down by arrangements under that legislation are not complied with, Member States are empowered to choose the penalties which seem to them to be appropriate. They must, however, exercise that power in accordance with European Union law and its general principles, and consequently with the principle of proportionality.’<sup>493</sup>

The regime to which is referred here (‘European Union law and its general principles’), encompasses several elements. Member states are under the duty to provide for sanctions that are ‘effective, proportionate and dissuasive’. These sanctions should not only be available to the authorities, but

---

492 CJEU, *Portgás*, case C-425/12, judgment of 12 December 2013, ECLI:EU:C:2013:829, par. 34.

493 CJEU, *Chmielewski*, case C-255/14, judgment of 16 July 2015, ECLI:EU:C:2015:475, par. 21; CJEU, *Rēdlihs*, case C-263/11, judgment of 19 July 2012, ECLI:EU:C:2012:497, par. 44; CJEU, *Ntíonik and Pikoulas*, case C-430/05, judgment of 5 July 2007, ECLI:EU:C:2007:410, par. 53.

also be imposed in practice in cases where transgressions of EU legislation, or domestic implementing acts thereof, occur. Furthermore, the punishment of violations of EU law should be equal to the sanctioning of similar provisions of purely national origin.<sup>494</sup>

How should the terms 'effective, proportionate and dissuasive' be interpreted? In *Asociația Accept*, the CJEU was requested to decide whether a penalty that was imposed in response to a violation of implementing legislation in the field of equal treatment in employment satisfied these requirements.<sup>495</sup> Directive 2000/78/EC contained the obligation to provide for 'sanctions, which may comprise the payment of compensation to the victim, [that are] effective, proportionate and dissuasive'.<sup>496</sup> A Romanian non-governmental organisation whose aim is to promote and protect lesbian, gay, bi-sexual and transsexual rights, lodged a complaint for an alleged breach of the national legislation that implemented the aforementioned directive. According to the non-governmental organisation, a soccer club had discriminated against a professional football-player who was homosexual, because the club's representative had made public statements to the effect that the football-player was not offered a contract because of his sexual orientation. The National Council for Combatting Discrimination, before which proceedings had been brought, had decided that the statements that were expressed indeed constituted discrimination and issued a warning. The warning was the only available penalty, since the 'limitation period' of six months for the imposition of a fine had already expired. In reply to the request submitted to the CJEU, it established that although the imposition of a fine under Romanian law was not impossible, it had to be considered very difficult at the least, due to the brief limitation period. The CJEU expressed the view that 'a purely symbolic sanction cannot be regarded as being compatible with the correct and effective implementation of Directive 2000/78'. It added, however, that:

---

494 These criteria may be derived from *Commission v Greece*, in which the Court held: 'For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive'. CJEU, *Commission v Greece*, case C-68/88, judgment of 21 September 1989, ECLI:EU:C:1989:339, par. 24. See also CJEU, *Åkerberg Fransson*, case C-617/10, judgment of 26 February 2013, ECLI:EU:C:2013:105, par. 36; CJEU, *Paquay*, case C-460/06, judgment of 11 October 2007, ECLI:EU:C:2007:601, par. 52; CJEU, *Mulliez*, joined cases C-23/03, C-52/03, C-133/03, C-337/03 and C-473/03, order of the Court of 4 May 2006, ECLI:EU:C:2006:285, par. 27; CJEU, *Berlusconi*, joined cases C-387/02, C-391/02 and C-403/02, judgment of 3 May 2005, ECLI:EU:C:2005:270, par. 36; CJEU, *Adeneler and others* (n 297) par. 94; CJEU, *Boehringer Ingelheim* (n 297) par. 59; CJEU, *Gallotti* (n 297) par. 14.

495 CJEU, *Asociația Accept*, case C-81/12, judgment of 25 April 2013, ECLI:EU:C:2013:275.

496 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000, L 303) art 17.

‘the mere fact that a specific sanction is not pecuniary in nature does not necessarily mean that it is purely symbolic, particularly if it is accompanied by a sufficient degree of publicity and if it assists in establishing discrimination within the meaning of that directive in a possible action for damages’.

In the present case, nonetheless, the CJEU concluded that the short limitation period, as a result of which the imposition of a warning would, in most cases, be the only possible penalty to address violations of the Romanian implementing legislation, could not be considered an effective, proportionate and dissuasive punishment.<sup>497</sup>

Moreover, the CJEU has held that the criterion of dissuasiveness means that the imposed penalties should have a ‘genuinely dissuasive effect’, although this clarification is hardly more revealing.<sup>498</sup> It was put to the test in *Le Crédit Lyonnais*. Pursuant to article 23 of directive 2008/48/EC, which laid down rules on credit agreements for consumers, the member states were under the obligation to provide for effective, proportionate and dissuasive penalties to ensure compliance with the directive’s provisions. These provisions included the norm that ‘before the conclusion of a credit agreement the creditor must assess the consumer’s creditworthiness, where necessary on the basis of a consultation of the relevant database’.<sup>499</sup> The dispute which had given rise to the request for this preliminary ruling centered around a contract between Mr. Kalhan and LCL for a personal loan to be obtained by Mr. Kalhan from LCL. The next year, the monthly repayments ceased. Subsequently, LCL requested the French court order Mr Kalhan to pay to it the remaining sum with interest. LCL, however, in contravention of French law, had failed to consult the national register to assess Mr. Kalhan’s creditworthiness. Under the French Consumer Code, this failure was punished by the forfeiture of the entitlement to interest. However, this only applied to contractual interest; in accordance with the French Civil Code, the interest remained payable at a statutory rate. Moreover, French case law had established that the statutory rate had to be increased by five percentage points if the borrower would not repay his debt in full within a period of two months after the decision of the court would have become enforceable. As the statutory interest rate, increased by five percentage points, was higher than the contractual interest, the application of the French legal provisions on the forfeiture of entitlement to interest seemed to be advantageous to the creditor who would disregard, as in the present case, his obligation to establish the consumer’s creditworthiness by consulting the national register.<sup>500</sup> Thus, the question was whether article 23

---

497 CJEU, *Asociația Accept* (n 495) par. 62-73.

498 CJEU, *Chmielewski* (n 493) par. 23; CJEU, *LCL Le Crédit Lyonnais*, case C-565/12, judgment of 27 March 2014, ECLI:EU:C:2014:190, par. 45; CJEU, *Asociația Accept* (n 495) par. 63.

499 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008, L 133) artt 23 and 8, first paragraph.

500 CJEU, *LCL Le Crédit Lyonnais* (n 498) par. 14-24.

of the directive precluded the existence of the punitive regime for a creditor's failure to ascertain the creditworthiness of the consumer, prescribed by French law.<sup>501</sup>

In the view of the CJEU, in order to investigate the genuinely dissuasive nature of the penalty, the referring French judge should make a comparison between the amounts which the creditor would have received by way of repayment of the loan if it had complied with its obligation to assess, the consumer's creditworthiness, and the amounts which it would receive if the penalty for the breach were applied. In making this comparison, the CJEU should take into consideration all the circumstances and all the consequences that flow from the breach.<sup>502</sup> It held:

'If, after carrying out the abovementioned comparison, the referring court were to conclude that, in the dispute before it, the application of the penalty of forfeiture of entitlement to contractual interest is liable to confer an advantage on the creditor, since the amounts which it forfeits are less than those resulting from the application of interest at the increased statutory rate, it would follow that, clearly, the system of penalties at issue in the main proceedings does not ensure that the penalty incurred is genuinely dissuasive. Moreover, the penalty of forfeiture of entitlement to contractual interest cannot be regarded, more generally, as being genuinely deterrent if the referring court were to find that the amounts which the creditor is likely to receive following the application of that penalty are not significantly less than those which that creditor could have received had it complied with that obligation. If the penalty of forfeiture of entitlement to interest is weakened, or even entirely undermined, by reason of the fact that the application of interest at the increased statutory rate is liable to offset the effects of such a penalty, it necessarily follows that that penalty is not genuinely dissuasive.'<sup>503</sup>

As may be derived from the CJEU's decision, the assessment of the genuinely dissuasive character of a penalty will consist of two steps. First, a comparison has to be made between the benefits that the breaching party would enjoy, had it complied with its obligation, and the benefits for the breaching party that arise out of the established violation. Second, the outcome of this comparison has to be evaluated. If it appears that the breaching party suffers only a minor disadvantage from its actions, or, as in *Le Crédit Lyonnais*, if the violation is even beneficial to the violating party, the imposed penalty does not meet the criterion of dissuasiveness. In other words, for a penalty to be considered genuinely dissuasive, it must inflict significant harm to the non-compliant party.

The requirement of proportionality of sanctions demands that penalties do not go further than is necessary for the attainment of the legislation's pursued objective.<sup>504</sup> In order to determine whether the available sanctions

---

501 Ibid, par. 30.

502 Ibid, par. 50.

503 Ibid, par. 51-53.

504 CJEU, *Ecotrade*, joined cases C-95/07 and C-96/07, judgment of 8 May 2008, ECLI:EU:C:2008:267, par. 65-67; CJEU, *EMS-Bulgaria Transport*, case C-284/11, judgment of 12 July 2012, ECLI:EU:C:2012:458, par. 67; CJEU, *Rēdlihs* (n 493) par. 45-47.

meet the standard of proportionality, the nature and the degree of seriousness of the infringement which that penalty seeks to sanction, have to be taken into account.<sup>505</sup> Moreover, when there is a choice between several appropriate measures recourse must be had to the least onerous.<sup>506</sup>

In the case law of the CJEU, the reference to the principle of proportionality seems to be closely connected to the protection of the free movement of goods, services and persons with the common European market, as it has held that:

[a]dministrative or punitive measures must not go beyond what is necessary for the objectives pursued and a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the [treaties].<sup>507</sup>

While this reference may serve as a reminder that the effective enforcement of national implementing legislation may not pose threat to the legitimate free movement of goods, services and persons, the CJEU has until now not engaged in a separate application of this test. Thus, it seems to hold the view that enforcement of a disproportionate nature will automatically create an ‘obstacle to the freedoms enshrined in the treaties’.

The power to impose penalties in response to infringements of the implementing legislation should also, as appears from the above-cited statement of the CJEU, be exercised in accordance with European Union law and its general principles. What does this, in addition to the applicability of the principle of proportionality, entail?

It is evident under current EU law that the applicable human rights norms, as embodied in the Charter of Fundamental Rights of the EU (CFR) and the ECHR, should be observed by the EU member states.<sup>508</sup> Pursuant to article 51, first paragraph, CFR, its provisions are addressed to the [...] member states only when they are implementing Union law. In *Åkerberg Fransson*, it became clear how the CFR’s provisions could affect implementing measures adopted by member states.<sup>509</sup> Article 22 of directive 77/388/EEC on taxes provided that ‘Member States may impose other obli-

---

505 Ibid.

506 CJEU, *Fedesa*, case C-331/88, judgment of 13 November 1990, ECLI:EU:C:1990:391, par. 13; CJEU, *Crispoltoni*, joined cases C-133/93, C-300/93 and C-362/93, judgment of 5 October 1990, ECLI:EU:C:1994:364, par. 41; CJEU, *Azienda Agro-Zootecnica Franchini Srl and Eolica di Altamura Srl* (n 468) par. 73.

507 CJEU, *Ntioniik and Pikoulas* (n 493) par. 54; CJEU, *Commission v Greece*, case C-210/91, judgment of 16 December 1992, ECLI:EU:C:1992:525, par. 20; CJEU, *Casati*, case C-203/80, judgment of 11 November 1981, ECLI:EU:C:1981:261, par. 27.

508 Article 6, first paragraph, TEU, provides that ‘[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...] which shall have the same legal value as the Treaties’. Moreover, pursuant to article 6, third paragraph, ‘[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms shall constitute general principles of the Union’s law’.

509 CJEU, *Åkerberg Fransson* (n 494).

gations which they deem necessary for the correct collection of the tax and for the prevention of evasion', which had been implemented in Swedish law on tax evasion and tax assessment.<sup>510</sup> Mr. Åkerberg Fransson, a Swedish national, was accused of providing false information to the Swedish tax authority, which resulted in a loss of revenue linked to the levying of income tax and value added tax. He was also prosecuted for failing to declare employers' contributions, which exposed the social security bodies to a loss of revenue.<sup>511</sup> In response to these alleged violations of national law, the Swedish tax authority ordered Mr. Åkerberg Fransson to pay a surcharge, including interest, in addition to the tax sums that he, illegitimately, had withheld from the tax authority and the social security bodies. Two years later, criminal proceedings were instituted against Mr. Åkerberg Fransson as well. The Swedish judge, before whom the case was brought, was confronted with the question as to whether the charges brought against Mr. Åkerberg Fransson must be dismissed on the ground that a tax penalty has already been imposed upon him for the same acts of providing false information: the principle of *ne bis in idem*, as codified in article 50 CFR.<sup>512</sup> The application of this principle would indeed preclude the possibility of a criminal conviction for the acts committed by Mr. Åkerberg Fransson, the CJEU held, if the penalties imposed by the Swedish tax authority were of a criminal nature.<sup>513</sup> In the present case, this was a matter of the national authorities to decide. However, what is important here, is that national implementing legislation, including domestic laws that provide for penalties, should be applied in accordance with human rights and fundamental freedoms, included in the CFR and the ECHR.<sup>514</sup>

Furthermore, the 'principle of equivalence' has to be taken into account by member states during the enforcement of national implementing legislation. This principle prescribes that the domestic norms pertaining to the

510 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ 1977, L 145) art 22.

511 CJEU, *Åkerberg Fransson* (n 494) par. 12.

512 Article 50 of the Charter provides: 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.'

513 In the view of the Court, the penalties chosen by the member states may 'take the form of administrative penalties, criminal penalties or a combination of the two. It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person.' CJEU, *Åkerberg Fransson* (n 494) par. 34.

514 In other words, in *Åkerberg Fransson* the Court seemed to place human rights that flow from the Charter and the European Convention on Human Rights on an equal footing with 'other' general principles of European law, such as the proportionality principle. See B. van Bockel and P. Wattel, 'New wine into old wineskins: the scope of the Charter of Fundamental Rights of the EU after *Akerberg Fransson*' 38 *European law review* 6 (2013) 866-833, 881-882.



enforcement of a directive, where the adoption of those norms falls within the member states' freedom to choose the appropriate form and method of achieving the aims set out in a directive, must not be less favourable than those governing similar domestic situations.<sup>515</sup> In order to make an assessment of this similarity, it has to be ascertained whether the actions (based on EU law and on national law respectively) are 'similar as regards their purpose, cause of action and essential characteristics'.<sup>516</sup> Moreover, the determination as to whether a national procedural provision is less favourable, entails that the national court must take account of 'the role of that provision in the procedure, viewed as a whole, of the conduct of that procedure and of its special features'.<sup>517</sup>

In this way, the implementation of a directive may not only achieve the aim of harmonisation within Europe, but could also result in harmonisation of enforcement procedures within each member state. Of course, whether this internal harmonisation will indeed occur, depends on the willingness of the member state; it cannot be derived from the principle of equivalence itself as the principle cannot be applied in a situation which does not fall within the scope of EU law.<sup>518</sup>

An illustration of the application of the principle of equivalence in practice can be found in *VALE Építési*. VALE Costruzioni was an Italian construction firm which had moved its seat and business activities to Hungary, where it established VALE Építési and submitted a request for registration in the commercial register in accordance with Hungarian law. In the application, the representative stated that VALE Costruzioni was the predecessor in law to VALE Építési. The application was rejected on the basis of the argument that a company which was not Hungarian could not be listed as a predecessor in law. Neither could VALE Építési's intentions be regarded as a conversion under Hungarian law, as a result of which the firm would be considered Hungarian for the purpose of registration in the commercial register, since national law on conversions applied only to domestic situations.<sup>519</sup> In its decision on the legitimacy of the Hungarian authorities' decline of the request, the CJEU expressly referred to the principle of equivalence, and stated:

---

515 CJEU, *Adeneler and others* (n 297) par. 95; CJEU, *Peterbroeck*, case C-312/93, judgment of 14 December 1995, ECLI:EU:C:1995:437, par. 12; CJEU, *Rewe*, case C-33/76, judgment of 16 December 1976, ECLI:EU:C:1976:188, par. 5-6.

516 CJEU, *Érsekcsanádi Mezőgazdasági*, case C-56/13, judgment of 22 May 2014, ECLI:EU:C:2014:352, par. 67; CJEU, *Agrokonstulting-04*, case C-93/12, judgment of 27 June 2013, ECLI:EU:C:2013:432, par. 39.

517 CJEU, *Rosado Santana* (n 297) par. 90.

518 CJEU, *Érsekcsanádi Mezőgazdasági* (n 516) par. 63.

519 CJEU, *VALE Építési*, case C-378/10, judgment of 12 July 2012, ECLI:EU:C:2012:440, par. 9-15.

'[i]n the context of a domestic conversion, if the legislation of a Member State requires strict legal and economic continuity between the predecessor company which applied to be converted and the converted successor company, such a requirement may also be imposed in the context of a cross-border conversion. However, the refusal by the authorities of a Member State, in relation to a cross-border conversion, to record in the commercial register the company of the Member State of origin as the 'predecessor in law' to the converted company is not compatible with the principle of equivalence if, in relation to the registration of domestic conversions, such a record is made of the predecessor company. [...] Consequently, the refusal to record VALE Costruzioni in the Hungarian commercial register as the 'predecessor in law' is incompatible with the principle of equivalence'.<sup>520</sup>

Finally, we could refer to the 'principle of effectiveness' in the way it has been recognised in the CJEU's case law.<sup>521</sup> It is both a (complementary) source of the obligation of member states to adopt all measures necessary to ensure the full application of EU legislation, as we have seen in section 3.4.2, and a limitation on the fulfilment of that obligation. This limitation flows from the requirement that national implementing legislation should not 'render impossible in practice or excessively difficult the exercise of rights conferred by Community law'.<sup>522</sup> It must be emphasised that this principle concerns the effectiveness of *other* EU rights and obligations than the provisions flowing from the directive that is to be implemented. Therefore, the applicability of the principle of effectiveness may be viewed as a tool to ensure the internal coherence and the full application of EU law and of national law by which it has become part of the legal orders of the member states.

In order to determine whether a national procedural provision makes the application of EU law impossible or excessively difficult, it should be analysed:

'by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings'.<sup>523</sup>

---

520 Ibid, par. 55-57.

521 The principles of equivalence and effectiveness are often referred to simultaneously, to emphasise the rights of defence to which an individual is entitled under European law. See, for example, CJEU, *Kamino International Logistics BV and Datema Hellmann Worldwide Logistics*, joined cases C-129/13 and C-130/13, judgment of 3 July 2014, ECLI:EU:C:2014:2041, par. 82; CJEU, *Kušionová*, case C-34/13, judgment of 10 September 2014, ECLI:EU:C:2014:2189, par. 50; CJEU, *Boudjlida*, case C-249/13, judgment of 11 December 2014, ECLI:EU:C:2014:2431, par. 42; CJEU, *Mukarubega*, case C-166/13, judgment of 5 November 2014, ECLI:EU:C:2014:2336, par. 52.

522 CJEU, *Adeneler and others* (n 297) par. 95.

523 CJEU, *Pohotovost*, case C-470/12, judgment of 27 February 2014, ECLI:EU:C:2014:101, par. 51; CJEU, *Sánchez Morcillo and Abril García*, case C-169/14, judgment of 17 July 2014, ECLI:EU:C:2014:2099, par. 34; CJEU, *Surgicare*, case C-662/13, judgment of 12 February 2015, ECLI:EU:C:2015:89, par. 28; CJEU, *Agrokonsulting-04* (n 516) par. 48; CJEU, *Rosado Santana* (n 297) par. 92.

The application of this test has led the CJEU to conclude that, for instance, domestic legislation which lays down reasonable time-limits for bringing proceedings does not constitute a violation of the principle of effectiveness.<sup>524</sup>

### 5.1.3 Overview

The preceding sections provide a broad overview of the existing normative framework, derived from EU law, that is applicable to national legislation that implement EU directives. It has been argued that, although member states possess the freedom to choose ‘form and methods’ of implementation, this freedom is restricted in numerous ways. These restrictions, which relate to both the implementing legislation and its enforcement and application in practice, could be summarised as follows.

With regard to the transposition of the directive, states are under the obligation to perform this act in due time, i.e. before the expiration of the transposition period. Furthermore, to serve the purpose of legal certainty, domestic implementing legislation should not only have ‘unquestionable binding force’, but should also meet the criteria of ‘specificity, precision and clarity’. From the moment on which the adopted implementing legislation enters into force, member states have the duty to ‘effectively apply and enforce in practice’ the domestic implementing legislation. This entails the imposition of ‘effective, proportionate and dissuasive’ penalties in case of breaches of the national implementing legislation. Finally, member states should respect ‘European Union law and its general principles’, which comprises principles pertaining to human rights and fundamental freedoms, and the principles of equivalence and effectiveness. In order to respect these standards set out by the CJEU, member states will have to take measures in their domestic legal orders. These measures will often include the adoption of legislation. Thus, this section has demonstrated that, in most cases, not only will the act of transposition itself require the adoption of domestic legislation, but also the application and enforcement of that legislation in practice.

---

524 CJEU, *Deutsche Telekom*, case C-262/06, judgment of 22 November 2007, ECLI:EU:C:2007:703, par. 56; CJEU, *Starjakob*, case C-417/13, judgment of 28 January 2015, ECLI:EU:C:2015:38, par. 62; CJEU, *Specht*, joined cases C-501/12 to C-506/12, C-540/12 and C-541/12, judgment of 19 June 2014, ECLI:EU:C:2014:2005, par. 114; CJEU, *Pohl*, case C-429/12, judgment of 16 January 2014, ECLI:EU:C:2014:12, par. 29.

## 5.2 IMPLEMENTATION OF REGULATIONS OF THE EUROPEAN UNION

The legislative acts of the EU include another important instrument: regulations. Regulations and directives have a fundamentally different nature. Article 288, second paragraph, TFEU, provides that '[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States'. Thus in general regulations, in contrast to directives, do not require the adoption of domestic implementing legislation;<sup>525</sup> they can be applied from the moment they enter into force.<sup>526</sup> This raises the question why they should be discussed in a study on implementing legislation at all. The answer is that the CJEU has advanced some guidance as to how EU regulations and domestic legislation relate to each other and how they should be reconciled whenever they concur. The relevant case law contains some hints about the legislative standards that should be met by the EU member states. Therefore, EU regulations should be part of our analysis.

First of all, it must be emphasised that the norms that circumscribe the implementation of EU directives by member states to a certain extent also apply to EU regulations. For example, member states are under the duty to ensure a regulation's 'effective application and enforcement in practice', similar to the identical obligation in relation to directives, as was discussed in section 5.1.2.4. Although the CJEU has so far not made express statements to this effect, there seems to be no reason to assume that it will justifiably deviate from the case law it has produced on the implementation of directives.

There is, however, one additional standard that applies exclusively to regulations. This exclusivity can be explained by the direct applicability of the instrument, as we have seen above. According to the CJEU, the adoption of a regulation by the EU 'precludes in principle the Member States from adopting or maintaining national provisions in parallel'.<sup>527</sup> Similarly, the CJEU has stated that member states must not 'impede the direct effect of regulations'<sup>528</sup> or '[take] steps which are intended to alter the scope of

525 P. Craig and G. De Búrca, *EU Law. Text, cases, and materials* (6<sup>th</sup> edn OUP, Oxford 2015) 107.

526 There are exceptions to this general rule, as regulations often impose obligations upon member states to take action, which may include the adoption of legislative measures. For example, article 94, first paragraph, first sentence, of Regulation 536/2014/EU of the European Parliament and of the Council of 16 April 2014 on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC (Official Journal of the European Union 2014, L 158) provides: 'Member States shall lay down rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented'.

527 CJEU, *Stichting Al-Aqsa*, joined cases C-539/10 P and C-550/10, judgment of 15 November 2012, ECLI:EU:C:2012:711, par. 85.

528 CJEU, *Zerbone*, case C-94/77, judgment of 31 January 1978, ECLI:EU:C:1978:17, par. 24.

the regulation itself'<sup>529</sup>. This means that the adoption of national legislative measures is only permitted where such measures are expressly allowed or required under the applicable regulation, interpreted in the light of its objectives.<sup>530</sup>

In other words, situations in which domestic law and EU law concur or contradict each other should be avoided; where EU law advances, applicable domestic laws should be repealed. This is a direct consequence of the transfer of powers from the national level to the EU level, or, as the CJEU put it in *Bollmann* and *Waren-Import-Gesellschaft Krohn*: 'to the extent to which Member States have transferred legislative powers [to the EU] [...] they no longer have the powers to adopt legislative provisions in this field'.<sup>531</sup>

Why should the parallel existence of domestic legislation be avoided? Since *Costa v. Enel*, as we have seen above, EU law has intrinsic priority over the domestic laws of the member states. In relation to EU regulations, this point was emphasised in *Variola*, in which the Court stated that:

'the direct application of a regulation means that its entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law'.<sup>532</sup>

Arguably, the parallel existence of an EU regulation and domestic legislation is not problematic at all; due to the prevalence of EU law over domestic law, it is clear that any legal question that falls within the scope of the regulation, should be answered on the basis of that regulation. In such cases any relevant domestic law should remain without application. It is not relevant whether the domestic law at hand expressly reproduces, or deviates from the EU regulation, even though in the latter case an additional problem will often be found in the fact that member states are no longer competent to legislate on the subject matter at hand. Although in cases of concurrence of EU regulations and domestic legislation there may thus not be a problem in the sense that the application of the regulation will be jeopardised, the CJEU

529 CJEU, *Hauptzollamt Hamburg v Bollmann*, case C-40/69, judgment of 18 February 1970, ECLI:EU:C:1970:12, par. 4; CJEU, *Stichting Al-Aqsa* (n 527) par. 85.

530 For instance CJEU, *Danske Svineproducenter*, case C-316/10, judgment of 21 December 2011, ECLI:EU:C:2011:863, par. 43.

531 CJEU, *Hauptzollamt Hamburg v Bollmann* (n 529) par. 4; CJEU, *Hauptzollamt Bremen*, case C-74/69, judgment of 18 June 1970, ECLI:EU:C:1970:58, par. 4.

532 CJEU, *Variola*, case C-34/73, judgment of 10 October 1973, ECLI:EU:C:1973:101, par. 10. Similarly, the Court has stated that '[b]y virtue of the very nature of regulations and of their function in the sources of Community law, the provisions of those regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application.' CJEU, *Handlbauer*, case C-278/02, judgment of 24 June 2004, ECLI:EU:C:2004:388, par. 25; CJEU, *Danske Svineproducenter* (n 530) par. 39. See also CJEU, *Leonesio*, case C-93/71, judgment of 17 May 1972, ECLI:EU:C:1972:39, par. 5.

expressly prohibits the existence of parallel domestic legislation. This prohibition must, therefore, be based on other considerations than considerations of a strictly legal nature. On several occasions the CJEU has indicated what these considerations might be. As a further specification of the prohibition the enact parallel domestic legislation, which was discussed above, the CJEU has maintained the view that:

[...] Member States must not adopt or allow national institutions with legislative power to adopt a measure by which the Community nature of a legal rule and the consequences which arise from it are concealed from the persons concerned.<sup>533</sup>

This statement suggests that the CJEU considers it important that the persons concerned are aware of the origin, either EU or domestic, of the applicable norm. The relevance of the norm's origin was referred to by Advocate General Tizzano, who was confronted with the question whether member states in the particular case at hand were at liberty to assume international obligations with regard to subjects that fell within the scope of the EU's competences, even if those obligations were perfectly in accordance with the applicable EU legislation. Advocate General Tizzano answered this question in the negative and added that member states may not conclude international agreements, in matters covered by EU legislation, 'even if the texts of the agreements reproduce the common rules verbatim or incorporate them by reference'.<sup>534</sup> This view was based on the assessment that such incorporation of EU rules into international agreements which member states conclude with third countries would prejudice the uniform application of EU law, as it:

'would have the effect of distorting the nature and legal regime of the common rules, and entail a real and serious risk that they would be removed from review by the Court under the Treaty'.<sup>535</sup>

Of course, the incorporation of EU rules into international agreements with third countries on the one hand, and the adoption of domestic legislation in concurrence with an EU regulation on the other hand, are distinct situations. Nonetheless, Advocate General Tizzano identifies an element which is relevant in both situations: the jurisdiction of the CJEU. This point had been made by the CJEU itself in *Variola*, when it was recalled that 'the jurisdiction of the Court is unaffected by any provisions of national legislation which purport to convert a rule of Community law into national law'.<sup>536</sup>

---

533 CJEU, *Zerbone* (n 528) par. 26; CJEU, *Variola* (n 532) par. 11; CJEU, *Stichting Al-Aqsa* (n 527) par. 87.

534 CJEU, *Commission v United Kingdom*, case C-466/98, Opinion of Advocate General Tizzano of 31 January 2002, ECLI:EU:C:2002:63, par. 72.

535 Ibid.

536 CJEU, *Variola* (n 532) par. 11.

It is thus suggested that the existence of domestic legislation parallel to a regulation may conceal the origin, either EU or domestic, of the applicable norm. This contains the risk that the subjects to which the norm is addressed, will not be aware of the mechanisms that are in place to enforce the rights to which they are entitled under EU law. These mechanisms primarily entail the possibility to institute proceedings against a member state before national courts.<sup>537</sup> As part of the proceedings, national courts may request the CJEU to give a preliminary ruling on the interpretation of EU law pursuant to article 267 TFEU.

If we return to the CJEU's statement in *Zerbone*, cited above, it seems plausible to maintain that the simultaneous application of domestic legislation and an EU regulation should be avoided, since it may obfuscate the fact that ultimately any legal question that falls within the scope of the regulation is subject to the CJEU's review. Such ambiguity, in turn, may jeopardise the uniform application of EU law.

---

537 In addition to the enforcement through national courts, article 263, fourth paragraph, TFEU, provides that '[a]ny natural or legal person may [...] institute proceedings against [...] a regulatory act which is of direct concern to them and does not entail implementing measures'. However, the Court has ruled that the term 'regulatory act' does not encompass legislative acts such as regulations. CJEU, *Inuit Tapiriit Kanatami*, case C-583/11, judgment of 3 October 2013, ECLI:EU:C:2013:625, par. 61.

