

---

# Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65

---

MORTEN RASMUSSEN

## Abstract

*The origins of the constitutional practice of European law clearly lie in the two famous rulings of the European Court of Justice (ECJ) *Van Gend en Loos* (1963) and *Costa v. E.N.E.L* (1964). Despite this, very little is known for sure about the genesis of the ECJ's interpretation or the dynamics within the Court at the time. Most accounts focus on the role of the ECJ in revolutionising European law. Using recently disclosed archival material, this article traces the role of the Legal Service of the European executive in the development of the constitutional practice. It demonstrates that the Legal Service played a crucial role both in terms of devising the legal philosophy behind the two rulings and in the establishing of a professional and academic field of European law, which would underpin the constitutional practice. At the same time it shows that the ECJ – although it adopted the legal philosophy recommended by the Legal Service – did this in a cautious and restricted manner to minimise national resistance.*

In 1963 and 1964 the European Court of Justice (ECJ) issued its two famous rulings, *Van Gend en Loos* and *Costa v. E.N.E.L*, significantly widening the direct effect of European law and declaring its primacy vis-à-vis conflicting national law. Introducing these two federally inspired doctrines, the ECJ established a constitutional practice in its case law. Most analyses of these rulings have perhaps quite naturally focused on the

Saxo Institute, University of Copenhagen, Njalsgade 80, 2300 København S., Denmark; mortenra@hum.ku.dk

I would like to thank the two anonymous peer reviewers, Bill Davies, Francesca Bignami, Peter Lindseth, Wolfram Kaiser, Anne Boerger-De Smedt and Piers Ludlow, the CEH editor, for comments that greatly helped improve this article.

centrality of the ECJ.<sup>1</sup> While legal research has emphasised how the ECJ defended European integration against the destructive forces of the member states, political scientists saw and described a self-empowering court. Combinations of these insights still dominate legal textbooks on European law today.<sup>2</sup>

An important exception to the standard account came from the famous American legal scholar Eric Stein. In a ground-breaking article in 1981, he argued that the Legal Service of the European Commission was instrumental to the *Van Gend en Loos* ruling because it fashioned the core argument used by the ECJ in the ruling – that the European Communities (EC) constituted a special legal order fundamentally different from classic international law, thereby justifying the direct effect and primacy of European law.<sup>3</sup> Recent historical research has tried to document Stein's claim and has traced the ideational roots of the *Van Gend en Loos* ruling back to a constitutional legal discourse of European integration, born in the European federalist movement of the 1950s, and influential among central actors both inside and outside of the European institutions.<sup>4</sup> However, due to a lack of documentary evidence these preliminary analyses have been less precise as to who actually promoted this legal thinking and how. On the basis of recently released archival sources, this article will trace the role of the Legal Service much more precisely than has been possible before.<sup>5</sup> By doing so it will explore the historical roots of the constitutional practice that in significant ways would shape the development of European law in subsequent decades.

### Towards a constitutional practice, 1952–8

Until now historians have almost completely ignored the role played by the Legal Service of the European executive in the history of European integration.<sup>6</sup> This is in many ways a remarkable omission. Both Jean Monnet, the first president of the High Authority (HA) (1952–5), and Walter Hallstein, first president of the European Economic Community (EEC) Commission (1958–67), placed important emphasis on the role of law in uniting Europe. Monnet had originally been reluctant to see the establishment of a European supreme court during the negotiations of the Treaty

<sup>1</sup> For example Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policy-Making* (Dordrecht: Martinus Nijhoff Publishers, 1986) and Joseph H. H. Weiler, 'The Transformation of Europe', *Yale Law Journal*, 100 (1991), 2403–83.

<sup>2</sup> For example Renaud Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (London: Macmillan, 1998).

<sup>3</sup> Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', *The American Journal of International Law*, 1 (1981), 1–27, 24.

<sup>4</sup> Morten Rasmussen, 'The Origins of a Legal Revolution: The Early History of the European Court of Justice', *Journal of European Integration History*, 2 (2008), 77–98 and Antonin Cohen, 'Constitutionalism without Constitution: Transnational Elites Between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s–1960s)', *Law & Social Inquiry*, 32 (2007), 109–35.

<sup>5</sup> New evidence has mainly been drawn from the recently opened Archives of Michel Gaudet at the Fondation Jean Monnet pour l'Europe, Lausanne (AJM).

<sup>6</sup> The Legal Service is treated briefly in Antonio Grilli, *Le origine dell diritto dell'Unione europea* (Milan: Il Mulino, 2009), 215–22 and Michel Dumoulin, ed., *The European Commission 1958–1972: History and Memories* (Brussels: Office for Official Publications of the European Communities, 2007), 224–6.

of Paris, as he believed it would undermine the crucial role of the HA.<sup>7</sup> But when he became president of the HA, he came around to the idea and promoted a federalist understanding of the ECSC institutions.<sup>8</sup> To Hallstein, who had been professor of international, private and civil law before he was enrolled by the German foreign ministry to lead the negotiations on the Treaty of Paris, a federal Europe could hardly be conceived without the establishing of a federal legal order.<sup>9</sup> Under Hallstein's active leadership the German delegation had consequently promoted the establishment of a European supreme court during the negotiations on the Treaty of Paris, and although unsuccessful in this respect nevertheless ensured the establishment of a legal system and a court that in some respects broke with classical international public law, for example by securing a right to recourse to the ECJ for private enterprises and their associations.<sup>10</sup>

The Legal Service was founded in 1952 with only a handful of jurists to perform what would quickly become a wide range of tasks. After 1958, the three European Communities would each have a legal service, the activities of which were co-ordinated at the director level. The tasks increased and by the time of the 1967 Merger Treaty, there were thirty-five jurists employed in the new unified Legal Service.<sup>11</sup> Among them was Michel Gaudet, hired by Monnet from the Conseil d'État – the French administrative court of last instance – on the recommendation Maurice Lagrange, his legal advisor during the Treaty of Paris negotiations.<sup>12</sup> Although the Legal Service of the ECSC had collegial leadership, Gaudet quickly emerged as its leading personality. From 1958 to 1967, he would become director of the Legal Service of the EEC and then from 1967–70 director of the Legal Service of the now merged EC. Where legal advisors in most European state administrations would play a relatively restricted role,<sup>13</sup> Monnet used the Legal Service not only as a last instance legal control of important documents and decisions, but also as leading participants in all major internal meetings and discussions inside the HA.<sup>14</sup> This central role continued in the EEC Commission, where Gaudet was quickly nicknamed the eleventh commissioner, his influence allegedly similar to the famous secretary general Emile Noël, at least in the first half of the 1960s.<sup>15</sup>

<sup>7</sup> See Anne Boerger-De Smedt's article in this special issue.

<sup>8</sup> Europe Goes to Court, High Authority, Information Service, 16 Oct. 1954. Historical Archives of the Commission (HAC).CEAB.1026.

<sup>9</sup> Frank Bärenbrinker, 'Hallstein's Conception of Europe before Assuming Office in the Commission', in Wilfried Loth, William Wallace and Wolfgang Wessels, eds, *Walter Hallstein: The Forgotten European?* (London: Macmillan, 1998), 82–94, 85.

<sup>10</sup> See Anne Boerger-De Smedt's article in this special issue.

<sup>11</sup> Projet. Répartition des affaires. Service Juridique, 24 Jan. 1956, HAC.CEAB.1.000970 and Annuaire de la Commission de la Communauté Économique Européenne 1968.

<sup>12</sup> Michel Gaudet, 'Un regard de Jean Monnet', in *Témoignages à la mémoire de Jean Monnet* (Lausanne: Fondation Jean Monnet pour l'Europe, 1989), 233–41, 235–6.

<sup>13</sup> Interview Gérard Olivier. INT714. The European Commission memories collection. Historical Archive of the European Union (HAEU).

<sup>14</sup> Note sur l'organisation du Service Juridique, 15 May 1953. HAC.CEAB.1.000969.

<sup>15</sup> Dumoulin, *European Commission*, 224. This influence allegedly diminished as a result of the Empty Chair crisis where Gaudet advised Hallstein to adopt a more cautious approach towards France. Interview Claus-Dieter Ehlermann, Feb. 2012.

One of the most important tasks of the Legal Service was to facilitate the construction of a European legal order solid enough to constitute the foundation for European co-operation and policy-making. As the legal representative of the HA and the Commission of the EEC before the ECJ, the Legal Service had a unique platform from which to influence the direction of European laws. Before 1958, the HA was the defendant in most cases and after 1958, regardless of whether the Commission was a party, court procedures permitted the Commission (and the member states as well as the Council) to give its legal opinion in every case brought before the ECJ.<sup>16</sup> When the HA or the Commission was not directly involved in the case, for example in the preliminary references on the interpretation of European law sent by national courts to Luxembourg under the new Article 177 in the EEC Treaty, the Legal Service took upon itself to act as a kind of *amicus curiae* – legal councillor – to the ECJ.

What kind of legal thinking would guide the Legal Service in the first decade of European law? We now know the Legal Service adopted a federal and consequently a constitutional understanding of the nature of European law as early as the first case before the ECJ in December 1954.<sup>17</sup> Several influences seemed to have shaped the thinking of the Legal Service. First, Monnet's embrace of federalism when he became president of the HA almost certainly played an important role in how the Legal Service would interpret the relatively ambiguous Treaty of Paris.<sup>18</sup> Second, several of the first jurists employed in the Legal Service held federalist persuasions, such as, for example, Italian jurist and later judge of the ECJ (1958–62) Nicola Catalano.<sup>19</sup> Finally, the Legal Service had first-hand experience in the negotiations on the Treaty of Paris through Walter Much, who had been part of the German delegation that had pushed for a federal and constitutional understanding of the ECSC. In *Die Amtshaftung im Recht der E.G.K.S.*, published in 1952, Much argued that the Treaty of Paris had a constitutional nature and he considered the ECSC to be the first step towards a federal state.<sup>20</sup>

A federal and constitutional understanding of European law must initially have felt relatively foreign to Gaudet, coming from the Conseil d'État, which had little

<sup>16</sup> See Article 20 and 37 of the Protocol on the Statute of the Court of Justice to the EEC.

<sup>17</sup> We have two revealing sources that document this. Eisenberg to Stein 18 Apr. 1955, Eric Stein Papers, Bentley Historical Library, Ann Arbor, Michigan (ESP), Box 18. Here Eisenberg not only mentions that Gaudet was disappointed in the judgments of the Court of Justice in cases 1–4/54, but also that he wanted the new Court to assume a role similar to the US Supreme Court. The second source is: Gaudet to Swatland, 31 Dec. 1957, AJM.

<sup>18</sup> See Jean Monnet, *Mémoires* (Paris: Fayard, 1976), 450, for a reference to what Monnet describes as the constructivist approach of the Legal Service. See also Monnet's correspondence with leading legal personalities in the AJM C3/31/3 Cour de Justice, C3/22 Robert Lecourt, C16/11. Maurice Rolland and C30/3. Michel Gaudet.

<sup>19</sup> Catalano became one of the leading proponents of a constitutional interpretation of European law in academic writing in the late 1950s and 1960s. See, for example, Nicola Catalano, *La Comunità Economica Europea e l'Euratom* (Milan: Giuffrè, 1957).

<sup>20</sup> Walter Much, *Die Amtshaftung im Recht der E.G.K.S.* (Frankfurt: Klostermann, 1952), 9–30.

tradition of acting as a constitutional court.<sup>21</sup> But like his friend Lagrange, who ironically had helped Monnet curb German ambitions during the negotiations on the Treaty of Paris, Gaudet quickly came out as a champion of a federal Europe.<sup>22</sup> In a letter in December 1956 to Donald Swatland, an influential American Wall Street lawyer and close friend to Monnet, Gaudet explained that he wanted the ECJ to assume a constitutional role similar to that of the US Supreme Court. This should be done by a teleological methodology of interpretation. Instead of relying on narrow textual interpretation in the tradition of international law, the ECJ should interpret the single treaty stipulations in the light of the supposedly federal aims and spirit of the Treaty of Paris. This amounted to interpreting the treaty as if it were a constitution. To Gaudet, winning single cases was less important than convincing the ECJ to adopt this approach.<sup>23</sup> However, at the same time a constitutional interpretation along the lines proposed by Gaudet would allow the HA the widest possible selection of legal means to pursue the objectives of the treaty. This was a strategy of self-empowerment as much for the HA as it would be for the ECJ.<sup>24</sup> Unfortunately for the aspirations of the Legal Service, after the fall of the Treaty for a European Defence Community (EDC) in the French National Assembly in 1954 and consequently of a constitutionally based European Political Community (EPC), there were few supporters either at national or at European level for the idea of a federal and constitutional understanding of the ECSC. Even the German foreign ministry under the leadership of Hallstein had to reconsider the feasibility of creating strong supranational institutions on a constitutional basis in the aftermath of the 1954 defeat.<sup>25</sup>

The Legal Service would find a partial ally in Lagrange, who became Advocate-General of the ECJ in 1952. In his scholarly writings from 1953 onwards and in his legal advice before the ECJ, Lagrange promoted a constitutional understanding of the Treaty of Paris and the role of the ECJ. In his view the constitutional nature of the ECJ was, however, not a result of a teleological assumption. Instead it was rooted in the character of the ECJ as an administrative court, responsible for securing the rights and freedom of citizens in the face of administrative power.<sup>26</sup> Lagrange would, together with his German colleague Karl Roemer, promote a methodology

<sup>21</sup> For a general analysis of the French legal system in relation to European integration, see Jens Plotner, 'Report on France', in Anne-Marie Slaughter, Alec Stone Sweet and J. H. H. Weiler, eds, *The European Court and National Courts – Doctrines and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998), 41–76.

<sup>22</sup> Anne Boerger-De Smedt's article in this special issue. With regard to Lagrange's promotion of a constitutional understanding, see, for example, Maurice Lagrange, 'L'ordre juridique de la C.E.C.A. vu à travers la jurisprudence de sa Cour de Justice', *Revue du Droit et de la Science politique en France et à l'Étranger*, Sep.–Oct. (1958), 841–65.

<sup>23</sup> Gaudet to Swatland, 31 Dec. 1957, AJM, AMK 30/3.

<sup>24</sup> Consider for example case 1–4/54 which dealt exactly with the question as to whether the HA in its understanding of Article 66 could chose a non-textual reading, rather than one that would promote the objectives of Article 66. Gerhard Bebr, 'The Development of a Community Law by the Court of the European Coal and Steel Community', *Minnesota Law Review*, 42, 5 (1958), 845–78, 855.

<sup>25</sup> Hanns Jürgen Kürsters, 'Walter Hallstein and the Negotiations on the Treaties of Rome 1955–57', in Loth et al., *Walter Hallstein*, 60–81.

<sup>26</sup> Lagrange, 'L'ordre juridique', 862.

of comparative law in order to ensure that the creation of a European legal order was drawn from national legal orders and practice.<sup>27</sup> Gaudet however did not find this approach helpful. As he would confide to Swatland: ‘in order to mark out the rule of law to be applied in the Communities, the Court must usually start from the treaties, their spirit and common sense, and not from an honest blend of the various national statutes of the member states’.<sup>28</sup>

However, while Lagrange at least shared the federal objective, the early case law of the ECJ said little on the legal nature of the Treaty of Paris and the ECSC. A chronological analysis reveals, strikingly, that the ECJ’s initial judicial line was very cautious, with regard to both the concrete rulings and the interpretative methodology adopted. Gradually, however, the ECJ gained courage and established itself as an internal, administrative court with a very modest constitutional dimension. It adopted a number of interpretative methods drawn from comparative law, as recommended by Lagrange and Roemer. Only rarely did the Court apply the teleological methodology promoted by the Legal Service.<sup>29</sup>

Without access to the archive of the ECJ, we can only speculate about the reasons for the Court’s conservative stance.<sup>30</sup> Obviously as a new court, one taking part in a unique and highly technical experiment of international co-operation, caution could be expected. The defeat of the EDC in 1954 could hardly have helped. For Gaudet, however, there was no doubt that the conservative nature of the Court first and foremost reflected the judges on the bench.<sup>31</sup> The sparse evidence we have seems to confirm Gaudet’s view. Inside the ECJ, Otto Riese, Jacques Rueff and Adrianus van Kleffens were the dominant personalities, according to oral testimony.<sup>32</sup> Considering Riese’s adherence to textual interpretations based on international law<sup>33</sup> and the administrative and diplomatic experiences of Van Kleffens and Rueff, it is unsurprising that the Court did not adopt a teleological methodology or a federal understanding of European law.<sup>34</sup>

The Legal Service’s limited success in shaping the case law of the ECJ was matched by a similar disinterest among national judiciaries and academics. National courts

<sup>27</sup> For example the position of Lagrange in case 8/55. *Recueil de la Jurisprudence de la Cour* (Luxembourg: Cour de Justice, 1955–1956) vol. II, 231–90.

<sup>28</sup> Gaudet to Swatland, 31 Dec. 1957, AJM, AMK 30/3.

<sup>29</sup> Christian Pennera, ‘The Beginnings of the Court of Justice and its Role as a Driving Force in European Integration’, *Journal of European Integration History*, 1, 1 (1995), 111–27, and Pierre Pescatore, ‘La Cour en tant que juridiction fédérale et constitutionnelle’, *Zehn Jahre Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften* (Cologne: Carl Heymanns Verlag, 1965), 520–54.

<sup>30</sup> Unfortunately, the ECJ has not opened its historical archive to the public.

<sup>31</sup> Gaudet to Swatland, 31 Dec. 1957, AJM, AMK 30/3.

<sup>32</sup> The following is based on Werner Feld, *The Court of the European Communities: New Dimensions in International Adjudication* (The Hague: Martinus Nijhoff, 1964); Nicole Condorelli Braun, *Commissaires et juges dans les Communautés européennes* (Paris: Librairie Générale de Droit et de Jurisprudence, 1972); and interviews with Jean-Pierre Delahousse (Lagrange’s clerk) and Pierre Mathijssen (Ven Kleffens’ clerk) in Jan. 2009.

<sup>33</sup> Rasmussen, *On Law and Policy*, 218.

<sup>34</sup> Dutch judge Petrus Serrarens and Belgian judge Louis Delvaux were federal-minded but apparently exercised little influence.

largely ignored the new Community and European law. The sectors of coal and steel were relatively restricted and the policies of the ECSC had an uneven impact at best. As a result, very few cases concerning European law turned up in national courts and when they did the case law of the ECJ was often ignored.<sup>35</sup> In academic debate about the legal nature of the ECSC, a small group of scholars, most often with institutional ties to either the European institutions or the German foreign ministry, promoted different types of federal and constitutional approaches to analysing European law.<sup>36</sup> However, in general the sentiment among national legal scholars was opposed to such far-reaching interpretations of the Treaty of Paris, which was instead considered to belong to international law.<sup>37</sup> Not even in the important legal debate taking place at the large-scale Stresa congress in July 1957, supposed to promote the achievements of the ECSC, could the Legal Service impose its view.<sup>38</sup> Before the congress, Gaudet sought the backing of a committee of prestigious scholars of international law in favour of an interpretation of the ECSC as autonomous, in the sense that the European institutions by the means of national delegation were to be considered sovereign with independent competences.<sup>39</sup> 'Autonomous' had replaced the word 'federal', which was out of vogue after the failure of the EDC. Much to the disappointment of Gaudet, the committee led by Belgian professor Paul de Visscher rejected the thinking of the Legal Service and argued that the ECSC was merely an international organisation although of a unique kind, undermining the claim by the HA that the ECSC was a first step towards a united Europe.<sup>40</sup> De Visscher and the other prominent professors of international law were all caught by the paradigms of the international law, which did not allow for the establishment of a genuinely new legal category separate from international law.<sup>41</sup> Privately, Gaudet would later describe the discussions at Stresa as a battle between the federalists and internationalists,<sup>42</sup> and although the former view did not enter the de Visscher report, Gaudet found the vocal protests of a young

<sup>35</sup> Gerhard Bebr, 'The Relation of the European Coal and Steel Community Law to the Law of the Member States: A Peculiar Legal Symbiosis', *Columbia Law Review*, 58, 6 (1958), 767–97.

<sup>36</sup> For an analysis of the legal debates of the 1950s see Morten Rasmussen, 'The First Advocate Generals and the Making of European law, 1950–1958' (European University Institute, LAW Working Papers, forthcoming).

<sup>37</sup> This was, for example, the case at the meeting of the Deutsche Staatsrechtslehrer congress in 1953. See Begriff und Wesen des sozialen Rechtsstaates: Die auswärtige Gewalt der Bundesrepublik Berichte und Aussprache zu den Berichten in den Verhandlungen der Tagung der Vereinigung der Deutschen Staatsrechtslehrer zu Bonn am 15. und 16. Oktober 1953, 129–75; and a major international conference on the ECSC in Naples in 1955: Eugenio Greppi, 'A propos du caractère supranational de la C.E.C.A. – Récentes contributions scientifiques', *Les cahiers du Bruges: Recherches européennes*, Quarterly 1 (1956), 25–39.

<sup>38</sup> Julie Bailleux, 'Comment l'Europe vint au droit: Le premier congrès international d'études de la CECA (Milan-Stresa 1957)', *Revue française de science politique*, 60, 2 (2010), 295–318.

<sup>39</sup> Rapport de Visscher. With handwritten commentary by Michel Gaudet. HAC.CEAB.1031.

<sup>40</sup> Paul de Visscher, 'Rapport: La Communauté européenne du charbon et de l'acier et les états membres', in Actes officiels du congrès international d'études sur la communauté européenne du charbon et de l'acier. Milan-Stresa – 31. mai– 9 juin (Milan: Giuffrè, 1957), 9–85.

<sup>41</sup> See Jean-Michel Guieu's article in this special issue.

<sup>42</sup> Gaudet to Stein, 18 Mar. 1958, ESP, Box 6.

generation of federalist-inclined scholars during the debates at Stresa promising for the future.<sup>43</sup>

When the congress of Stresa took place in July 1957, the seeds for future development had already been sown. From June 1956 to March 1957 the governments of the six member states of the ECSC had negotiated two new treaties on nuclear energy co-operation, EURATOM, and on the establishment of a universal common market, the EEC. After the failure of the EDC, the constitutional and supranational dimension of European integration had to be toned down, if the new treaties were to stand any chance of ratification in France. In line with this tendency, and due to pressure from the Ministry of Economics led by Ludwig Erhard, the German foreign ministry and Hallstein had to approach the institutional question in a more pragmatic way. This time the institutional and legal dimension of European integration took second place in order to ensure a pragmatic, functional step forward towards deeper co-operation and consequently closer political ties between West Germany and France.<sup>44</sup>

It was under these significant political constraints, and frankly, bleak prospects for any strengthening of the constitutional and federal dimension of the two new communities that Gaudet was called upon by Paul Henri Spaak, leader of the intergovernmental conference and Belgian foreign minister, to participate in the so-called *Groupe de rédaction* to work out the legal and institutional shape and details of the two new communities. According to the testimony of one of the participants, Pierre Pescatore, Gaudet played a crucial role in promoting a constitutional conception of the new treaties, together with the Italian representative and former colleague from the Legal Service, Catalano, who since 1956 had been employed in the *Avvocatura dello Stato* and was now part of the Italian delegation.<sup>45</sup> As a result, the committee managed discreetly to insert a number of constitutional elements in the EEC Treaty, which was otherwise characterised by the strengthening of the Council of Ministers vis-à-vis what was now to be termed the Commission. Among these constitutional elements the most important was proposed by Catalano, namely a system of preliminary references through which national courts could send questions about the interpretation (and validity) of European law to the ECJ (Article 177).<sup>46</sup> When writing to Jean Monnet from the Hôtel de Ville hours after the

<sup>43</sup> Note à Messieurs les membres de la Haute Autorité. Objet: Débat juridique au Congrès de Stresa. 3 juillet 1957. HAC.CEAB.1030.

<sup>44</sup> Gemeinsamer Markt/institutionen, 8 August 1956. Politisches Archiv des Auswärtigen Amtes, Abt.2, 225–30–04, 929. The Dutch delegation wanting to maintain a supranational structure for the new two Communities could not understand what had happened to usual constitutional discourse of German delegation leader, Ophiüs. Anjo G. Harryvan, *In Pursuit of Influence: The Netherlands' European Policy During the Formative Years of the European Union, 1952–1973* (Brussels: P. I. E. Peter Lang, 2009), 133.

<sup>45</sup> Maria Grazia Mechionni and Roberto Ducci, eds, *La genèse des traités de Rome: Entretiens inédits avec 18 acteurs et témoins de la négociation* (Paris: Economica, 2007), 80.

<sup>46</sup> Groupe de rédaction. Projet de rédaction d'articles relatifs aux institutions de la Communauté pour le Marché Commun (suite), Bruxelles le 13 décembre 1956. Archive of the Council of Ministers, NEGO.CM.3.258.



signing ceremony on 25 March, Gaudet was optimistic about the future of European integration – but added, ‘there is still much work to do’.<sup>47</sup>

To conclude, the Legal Service early on developed a clear notion of the objectives to achieve in the construction of a European legal order. By the means of a teleological methodology, which emphasised the federal nature of the Treaty of Paris, the ECJ should, in its case law, establish itself as a constitutional court and build a legal order of a proto-federal nature. Before 1958 the Legal Service was quite isolated in holding this particular view on the future of European law, which beyond a narrow circle in the German foreign ministry, a few academics and to some extent Lagrange, did not achieve any breakthrough in the ECJ or in the wider national academic or professional legal elites. Perhaps the most important success before 1958 was the contribution of Gaudet and Catalano to the design of the new Treaties of Rome. In the EEC Treaty in particular, constitutional seeds were sown that would blossom if cultivated by a more progressive ECJ.

### Breakthrough, 1958–65

The objective of the new EEC Treaty – the common market – was significantly more far-reaching than the Treaty of Paris, requiring sweeping measures adopted by the Council of Ministers and a well-functioning legal system to become a success. With the backing of Hallstein, now president of the EEC Commission, Gaudet and the Legal Service continued to work for a breakthrough for the constitutional interpretation of European law after 1958. Personally, Gaudet felt optimistic due to the new composition of the ECJ, which now included Catalano and a new young Dutch president of the Court, André M. Donner. The latter left a positive impression on Gaudet, leading him to believe that, like himself, Donner recognised the ‘eminent role of the Court in the European construction’.<sup>48</sup>

Considering the failure before 1958 to promote its federal vision of European law, the Legal Service now adopted a new double strategy. The first element was the establishment of the professional and academic infrastructure of European law, which had been so sorely missing in the 1950s.<sup>49</sup> The purpose of such an infrastructure, as Gaudet clearly explained to Commissioner Jean Rey in January 1962, was to implant European law in the member states.<sup>50</sup> Given that, under the Treaties of Rome, national courts were competent in the first instance to apply European law in the domestic legal orders, this task was vital. The new mechanism of preliminary references, which required the active co-operation of national courts, only reinforced this necessity.

<sup>47</sup> Gaudet to Monnet, 25 Mar. 1957, AJM.AMK C 30/3.

<sup>48</sup> Gaudet to Monnet, 18 Dec. 1958, AJM.AMK C 30/3.

<sup>49</sup> The Legal Service had occasionally participated in academic conferences and had by 1958 an extensive list of academic and professional jurists with whom it was in contact. *Liste des juristes avec lesquels la Division CECA du Service juridique commun est en relation (Professeurs, Avocats, Experts)*, état 21–11–1958. HAC.CEAB.1023.

<sup>50</sup> Gaudet to Rey, 21 Jan. 1962, Archive of Michel Gaudet, Fondation Jean Monnet pour l’Europe, Lausanne (AMG), Chronos 1961.

The potential solution to this challenge came from below. A small French association of European law specialists, the Association des juristes européens (AJE), which had existed since 1954, found new vigour from 1958 onwards and took the initiative to create similar associations in all member states in order to establish a European umbrella organisation.<sup>51</sup> While the associations in Italy, Belgium and Luxembourg were set up in 1958 and 1959, it took the direct action of the Commission to bring Dutch and German jurists aboard in 1960 and 1961 respectively.<sup>52</sup> Finally, in October 1961, the Fédération internationale pour le droit européen (FIDE) would hold its founding conference in Brussels.<sup>53</sup> After a brief turf war with Directorate General IV for Competition (DG IV), the Legal Service became the sole reference point for FIDE in the Commission from December 1962.<sup>54</sup> However, as early as January 1962 an intimate relationship was established between the FIDE and the Commission at a meeting between Gaudet and the president of the Belgian association, Louis Hendrickx. The agreement was that the Commission could ask FIDE to author reports on various aspects of European law and in return the former would finance the basic costs of running FIDE.<sup>55</sup> Throughout the 1960s, Gaudet would continue to advise FIDE and the national associations on what academic topics should be discussed, as well as on the general co-ordination of their activities. While FIDE and the national European law associations did not quite achieve the impact on the inherently conservative national legal elites that Gaudet had initially hoped for,<sup>56</sup> they nevertheless contributed in important ways to the development of European law. As we shall see below, they facilitated test cases sent by the means of preliminary references, members legitimised the case law of the ECJ in academic commentary, and they organised numerous conferences and seminars to inform both national legal elites and European institutions about how European law was developing.<sup>57</sup>

The second element in the Legal Service's strategy was to continue to prod the ECJ towards a constitutional interpretation of the Treaties of Rome. At the outset of the 1960s, it was unclear which elements of the new treaties would drive the development

<sup>51</sup> See Alexandre Bernier in this special issue for more details.

<sup>52</sup> For details Morten Rasmussen, 'Constructing and Deconstructing "Constitutional" European Law: Some reflections on how to study the history of European law', in Henning Koch, Karsten Hagel-Sørensen, Ulrich Haltern and Joseph H. H. Weiler, eds, *Europe: The New Legal Realism* (Århus: DJØF Publishing, 2010), 639–60, 645.

<sup>53</sup> Rapport au Colloque international de droit européen organisé par l'Association belge pour le droit européen, Bruxelles 12–14 Octobre (Brussels: Bruylant, 1962).

<sup>54</sup> Note à l'attention de Monsieur Rey, 14 Jan. 1961, AMG, Chronos 1961.

<sup>55</sup> Compte-rendu de la réunion du bureau de la Fédération internationale pour le droit européen, 13 Jan. 1962 in Paris, ESP, Box 12.

<sup>56</sup> See Alexandre Bernier in this special issue with regard to France and Bill Davies, *Resisting the ECJ: West Germany's Confrontation with European Law, 1949–1979* (Cambridge: Cambridge University Press, 2012) on the German case.

<sup>57</sup> Karen Alter, *The European Court's Political Power: Selected Essays* (Oxford: Oxford University Press, 2010), 63–92 and Antoine Vauchez, 'The Making of the European Union's Constitutional Foundations: The Brokering Role of Legal Entrepreneurs and Networks', in Wolfram Kaiser, Brigitte Leucht and Michael Gehler, eds, *Transnational Networks in Regional Integration: Governing Europe 1945–1983* (London: Palgrave Macmillan, 2010), 108–28, offer various examples of the activities of FIDE and the national European law associations.

of European law. Moreover, Gaudet did not seem certain about the means to pursue his objective. A number of vocal jurists in the early 1960s advocated far-reaching harmonisation of national legislation under Article 100 as part of the construction of the common market.<sup>58</sup> Gaudet believed in contrast, based on the American historical experience, that a genuinely integrated market would only emerge over the long term.<sup>59</sup> Moreover, the programme of harmonisation fell under the jurisdiction of DG IV, which for political reasons took a passive stance on this question until the mid-1960s. Gaudet did not have the competence to question this policy.<sup>60</sup> Supporting preliminary references under Article 177 held out significant potential in Gaudet's eyes, but this strategy depended on the co-operation of national courts, something that still had to be secured.<sup>61</sup> Moreover, it was still an open question how the preliminary mechanism would be used; in the ECJ there was significant disagreement about the extent to which it required national courts to send questions to Luxembourg, for example.<sup>62</sup> Even after the first preliminary reference was notified in September 1961, the Bosch case (13/61), Gaudet seemed to believe that infringement cases brought by the Commission against member states under Article 169 would provide the main impetus to the development of a European case law in the coming years.<sup>63</sup>

The shift in focus to preliminary references under Article 177 in the first half of the 1960s resulted in significant part from the unique constitutional context in the Netherlands. As a consequence of a series of constitutional amendments in the Netherlands in the 1950s, Dutch law would henceforth give provisions of international law, which were sufficiently clear to be binding on national citizens without prior legislative implementation, primacy vis-à-vis subsequently adopted national law. In late 1961 and during 1962, a network of Dutch lawyers and judges, all members of the Nederlandse Vereniging voor Europees Recht (NVER), recognised the opportunity that these unique constitutional provisions offered to facilitate the application of European law in the national legal order.<sup>64</sup> There could be no doubt

<sup>58</sup> For example Robert Lecourt and Roger-Michel Chevallier, 'Chances et malchances de l'harmonisation des législations européennes', *Recueil Dalloz* (1963), 273–81.

<sup>59</sup> 'Les problèmes juridiques. Conférence tenue par M. le Dr. Michel Gaudet. Directeur Général du Service Juridique des Communautés Européennes, 13 juillet 1959', in *La Comunità Economica Europea*, Centro internazionale di studi e documentazione sulle Comunità europee, Università degli studi di Ferrara. Library of the Court of Justice, Luxembourg.

<sup>60</sup> Hans von der Groeben, *The European Community: The Formative Years: The Struggle to Establish the Common Market and the Political Union, 1958–1966* (Brussels: European Communities, 1987), 65 and Gaudet to Lecourt 23 and 25 Nov. 1963, AMG, Chronos 1963.

<sup>61</sup> Gaudet, Les problèmes juridiques.

<sup>62</sup> Open disagreement broke out between Lagrange and Catalano over the nature of Article 177 in a meeting with Dutch Ministry of Justice officials in June 1959. While Lagrange did not find any need for national courts to use the mechanism much, Catalano recommended the opposite. 'Procès-verbal de la réunion tenue à La Haye le 11 juin 1959, à 15h30, entre la Cour de Justice des Communautés Européennes et les représentants du Gouvernement Néerlandais'. Ministerie van Buitenlandse Zaken 1955–64. 913.1.Europa.913.10.Algemeen.19970.

<sup>63</sup> Gaudet to Rey, 21 Jan. 1962, AMG, Chronos 1961.

<sup>64</sup> Antoine Vauchez was the first to discover these networks. Antoine Vauchez, 'The Transnational Politics of Judicialization: Van Gend en Loos and the Making of EU polity', *European Law Journal*, 16, 1 (2010), 1–28, 10–11.

that under the EEC Treaty (Article 189), European regulations were by their terms directly applicable in national law. The more difficult question was to what extent certain treaty articles or European legal norms in general could also be considered as binding on national citizens, and as creating legal rights for them, in the sense mentioned in the Dutch constitution.

To explore this question an important obstacle had to be overcome: Dutch courts had been to this point extremely reticent in granting international law the required status to obtain primacy.<sup>65</sup> However, on 18 May 1962, the Dutch High Court, the Hoge Raad, in an important and controversial ruling, decided that with regard to the Treaties of Rome, the competence to decide on this crucial question fell within the competence of the ECJ.<sup>66</sup> Members of the NVER were critical in helping the court reach this result, including an advocate of one of the parties, C. R. C. Wijckerheld Bisdom (who also functioned as general secretary of the NVER), and two judges of the Court itself, C. J. J. M. Petit and G. Wiarda (the latter of whom drafted the ruling).<sup>67</sup> The first important case to address the potential directly binding nature of European legal norms, *Van Gend en Loos*, was argued by another member of the NVER, L. F. D. Ter Keule,<sup>68</sup> and by another pro-European lawyer, Hans Stibbe.<sup>69</sup> The action was before the Tariefcommissie, a Dutch customs court, which in June 1962, prompted by the two advocates, sent a preliminary reference to Luxembourg. Here it inquired whether Article 12 of the EEC Treaty, which imposed a tariff standstill on all member states during the transitional period of establishment of the common market, had internal effect and created rights for individuals before national courts, and whether the Dutch government had breached Article 12 in this particular case.<sup>70</sup>

When the *Van Gend en Loos* case reached the offices of the Legal Service, it was recognised that this was the defining moment. Now the time had finally come to pursue the full constitutional interpretation of the Treaties of Rome. In a unique move Gaudet prepared a policy paper to the Commission *collegium* outlining three different interpretations of the case at hand.<sup>71</sup> The first two were based on an international law

<sup>65</sup> Jonkheer H. F. Panhuys, 'The Netherlands Constitution and International Law: A decade of experience', *The American Journal of International Law*, 58, 1 (1964), 88–108, 101–6.

<sup>66</sup> Hoge Raad 18 May 1962, Robert Bosch GmbH et al. V. De Geus and Uittenboger. *Nederlandse Jurisprudentie* 1965, no. 114–15, 437–45.

<sup>67</sup> National Archive of The Hague, Hoge Raad Archive.2.09.65.Inventory no. 180.

<sup>68</sup> Ter Keule was legal advisor of the *Bank voor Handel en Scheepvaart* in Rotterdam.

<sup>69</sup> Stibbe was former president of the Amsterdam Bar. He had also been loosely involved in 1959 with the efforts to organise a European umbrella organisation for the European law associations. See 'Réunion de juristes européens', undated, HAC.BAC.371/1991.589. He was not a founding member of the NVER. See the list of founding members in Notulen oprichtingsvergadering, Archive of the Nederlandse Vereniging voor Europees Recht.

<sup>70</sup> 'Domanda di pronuncia pregiudiziale', Amsterdam 12 Aug. 1962. HAC.BAC.371/1991. The question was not phrased entirely in Dutch constitutional language even if it did touch upon the core issue. Monica Claes and Bruno de Witte, 'Report on the Netherlands', in Slaughter et al., *The European Courts*, 171–94, 178–9.

<sup>71</sup> Note à M. Jean Rey, Président du Groupe Juridique et à M. Caron, Président du Groupe du Marché Intérieur. Objet: Observations de la Commission devant la Cour de Justice au sujet

interpretation and rejected the internal effect of Article 12. The consequences would be bleak. The enforcement of European law would depend on national governments, to which the majority of the treaty stipulations were directed if interpreted through the paradigm of international law. The legal protection of citizens in the common market would be rudimentary and incomplete. The third interpretation proposed the establishment of a legal order where clearly formulated treaty stipulations, like Article 12, had internal effect in the legal orders of the member states and primacy vis-à-vis national legislation, whether antecedent or posterior. This would certainly create the most coherent and solid legal order to underpin the common market and protect the legal rights of national citizens. The way in which enforcement of European legal norms was solved, and the proposed hierarchy between national law and European law, were very close to a federal model. In a federal state all European legal norms would have internal effect so litigants would be able to invoke them before national courts, solely limited by how the latter used ordinary theories of statutory or constitutional interpretation with regard to the single European legal norm.<sup>72</sup> However, the Legal Service cautiously sidestepped this question by arguing that only the ECJ through the mechanism of preliminary reference had the competence to decide which European legal norms had internal effect. It was consequently left to the ECJ to decide the degree to which the European legal order would fully emulate the federal model.<sup>73</sup> The Commissioners chose this third, radical option.

On 9 November 1962 the legal representative of the Commission, Leendert van den Burg, presented the quite audacious position of the Legal Service to the ECJ. The Legal Service made clear that the present case was of great importance to the enforcement of the treaties. Employing a teleological reading of the treaties, the Legal Service argued that the legal nature of the Communities went beyond international law, with its understanding of treaties as mutual contracts between states, and instead constituted a proper *droit communautaire*. This assertion was based both on the special institutional and legal character of the Communities and the far-reaching nature of

des demandes préjudicielles de la 'Tariefcommissie' néerlandaise, HAC.BAC.371/1991.620, Affaire 26/62, Mémoire de la Commission de la Communauté Économique Européenne, Bruxelles 7 novembre 1962, HAC.BAC 371/1991, and Questions préjudicielles posées à la Cour de Justice par la 'Tariefcommissie' néerlandaise en vertu de l'article 177. Projet de P. V. 204ème réunion Commission. HAC.BAC.371/1991.620.

<sup>72</sup> This implied that although not all European legal norms could necessarily be invoked by litigants before national courts (some were too vague, for example, and required further implementation or decision), the norms they expressed could still be used by the courts to interpret a national statute or administrative act or hold them unlawful. Francesca Bignami, 'Comparative Law and the Rise of the European Court of Justice', paper presented at the biennial meeting of the European Union Studies Association, Boston, MA, 3–6 Mar. 2011, 27.

<sup>73</sup> Gaudet and the Legal Service were not particular clear with regard to which European legal norms should be directly applicable. Gaudet came close to suggesting a full federal model in a preliminary memo on the question of enforcement in April 1962, which would grant all European legal norms direct applicability. The argument that all European legal norms were part of national law on an equal footing from the moment of ratification, which was used in all the memos, potentially implied that they all had direct applicability. Application du droit communautaire dans les états membres, Apr. 1962, AMG, Chronos 1962, and Mémoire de la Commission de la Communauté Économique Européenne, Bruxelles, 7 novembre 1962. HAC.BAC 371/1991.620.

the common market. While the application of European law in the member states was the competence of national courts, the interpretation of how European legal norms were to be enforced was not a question of national constitutional law, as would be the case if analysed under the paradigm of international law; instead, it belonged within the competence of the ECJ. Due to the special nature of the Communities, Article 12 could not merely be considered a mutual obligation under international law addressed solely to the states. It was crucial for the legal security of the citizens that it was given an internal effect that they could draw upon before national courts. Finally, the Legal Service argued that the nature and objectives of the Communities implied that European law was given primacy vis-à-vis national law antecedent and posterior. With its presentation the Legal Service effectively offered the ECJ an entire legal philosophy of how to interpret the treaties and presented a new mechanism for enforcing European legal norms in the member states by the means of Article 177, which crucially would supplement the infringement procedures of articles 169–71.<sup>74</sup>

The Commission position was not well received by national governments. Of the three member states that intervened in the case, Belgium and the Netherlands explicitly argued that the ECJ did not have jurisdiction.<sup>75</sup> All member states – including the third participant, Germany – argued that Article 12 merely constituted an obligation under international law between the contracting parties and consequently did not have an internal effect.<sup>76</sup> That the German government joined this position may seem puzzling considering the traditional strength of the constitutional understanding of European integration in the leadership of the Ministry of Foreign Affairs. Apparently a young jurist from the Ministry of Economics, Ulrich Everling,<sup>77</sup> handled the case in co-operation with the legal department of the Ministry of Foreign Affairs and the whole affair eluded the director of the latter, Karl Carstens, who furiously discovered the mistake only after the ECJ ruling had been issued.<sup>78</sup> The Advocate-General Karl Roemer concurred with the position of the three member states on the status of Article 12, although he did not agree with their assessment of the ECJ's lack of jurisdiction.<sup>79</sup>

Given the vigour of national opposition, it was by no means certain that the ECJ would take the controversial step and follow the lead of the Legal Service. However, the nomination of two new judges – the Italian professor of private law Alberto Trabucchi and the French Christian Democrat politician Robert Lecourt – apparently

<sup>74</sup> Mémoire de la Commission de la Communauté Economique Européenne, Bruxelles, 7 novembre 1962. HAC.BAC.371/1991.620.

<sup>75</sup> The Belgian government found that the case concerned the constitutional law of the Netherlands while the Dutch government argued that Article 169 should be used instead of the mechanism of preliminary reference under Article 177 to deal with a potential violation of the EEC Treaty.

<sup>76</sup> Stellungnahme der Regierung der Bundesrepublik Deutschland, Mémoire du Gouvernement du Royaume des Pays-Bas and Mémoire de l'Etat Belge. HAC.BAC.371/1991.621.

<sup>77</sup> He would later become ECJ judge from 1980 to 1988.

<sup>78</sup> Davies, 'Resisting the ECJ'.

<sup>79</sup> Schlussanträge des Generalanwalts Karl Roemer in der Rechtsache 26/62: N. V. Algemene Transport- en Expeditie Onderneming van Gend en Loos, Amsterdam gegen Niederländische Finanzverwaltung. HAC.BAC 371/1991.621.

changed the balance inside the ECJ in favour of the Legal Service.<sup>80</sup> Trabucchi was controversially nominated to replace Catalano in the middle of the latter's term, allegedly due to the influence of his brother Giuseppe Trabucchi, who was Minister of the Economy from 1960 to 1963.<sup>81</sup> Lecourt, who was a renowned member of Jean Monnet's Action Committee for a United Europe,<sup>82</sup> was curiously enough nominated by two of the strongest opponents of a federal Europe in France, the president Charles de Gaulle and his prime minister Michel Debré. The nomination was the clearly a personal favour to a friend of the centre right and former minister in the first Debré government, but also reflects how little influence the two French leaders believed the ECJ to have.<sup>83</sup>

During the case deliberations the seven judges were split, voting narrowly (4 against 3) in favour of granting Article 12 internal effects.<sup>84</sup> The *rapporteur* of the case, Charles-Léon Hammers, promoted a ruling along the lines of international law, emphasising the contractual nature of the treaty, a position apparently supported by Riese and Donner.<sup>85</sup> However, just when the ECJ seemed about to side with the member state position, the two new judges Trabucchi and Lecourt managed to turn the tide with two memoranda, which both favoured granting Article 12 internal effects. Trabucchi and Lecourt managed to bring Rino Rossi and the Louis Delvaux to their side.

<sup>80</sup> It was in particular the replacement of Rueff with the federalist-inclined Lecourt that shifted the balance inside the ECJ. However, according to oral testimony, Catalano, who certainly would have supported direct effect of Article 12 in the case, and the other Italian judge Rossi were mutually hostile. As a consequence, Rossi would most probably have voted the opposite of Catalano. As we shall see below, Trabucchi managed to secure Rossi's vote in favour of direct effect. Interview Paolo Gori (April 2008, together with Antoine Vauchez).

<sup>81</sup> The former attaché of both Catalano and Trabucchi, Paolo Gori did not want to deny or confirm this rumour. Interview Paolo Gori with Antoine Vauchez and this author, April 2008.

<sup>82</sup> AJM. C3/22 Robert Lecourt.

<sup>83</sup> Debré to de Gaulle, 1 Dec. 1961, and Debré to Lecourt, 1 Mar. 1962, Archives du Centre historique de Sciences Po, Archives of Michel Debré, 2 DE 11. Dossiers de personnes: Lecourt 1961–2.

<sup>84</sup> This narrow vote is documented by two independent oral testimonies given to the author by Gori (April 2008) and Pierre Pescatore (Jan. 2007). They agreed that the ruling was favoured by four judges – Alberto Trabucchi (I), Robert Lecourt (F), Rino Rossi (I) and Louis Delvaux (B), while three judges – André Donner, Otto Riese (G) and Charles-Léon Hammers (L) – opposed it. See also Paolo Gori, 'Quindici anni insieme ad Alberto Trabucchi alla Corte de Giustizia delle CE', in *La formazione del diritto europeo: Giornata di studio per Alberto Trabucchi nel centenario della nascita* (Padua: Casa Editrice Dott. Antonio Milani, 2008), 71–83.

<sup>85</sup> It is often assumed that Donner supported the Van Gend en Loos ruling. (See, for example, Claes and de Witte, 'Report', 171–94). Circumstantial evidence seems to suggest, however, that he might indeed have been opposed to the ruling as the two oral testimonies in the footnote above claim. In the 1950s, Donner had participated in both the Dutch constitutional committees concerned with the introduction of primacy of international law into the Dutch constitution. In both cases he had joined the minority view *against* the primacy of international law, defending the prerogatives of parliament. (See Karin van Leeuwen's article in this special issue with regard to the Van Schaik committee and the Report of the Kranenburg committee: Tweede Kammer, 1955–1956, 4133 (R19) ondernummer 4). See also his critique of a federal approach to European law in André Donner, *The Role of the Lawyer in the European Communities*, The Rosenthal Lectures 1966 (Edinburgh: Edinburgh University Press, 1968), 1–27.

One internal document has been published from the case, namely the memorandum by Trabucchi.<sup>86</sup> While it only gives us a most incomplete picture of the discussions between the judges, it does offer key insights into the argumentative logic of the majority behind the ruling. Trabucchi was primarily concerned with securing individual rights. He would – in contrast to the member states – not hesitate to grant self-executing status to Article 12 as an obligation directed towards the member states, since it constituted a negative obligation not to act. However, the key question was to what extent Article 12 also created rights for citizens applicable before national courts. Here Trabucchi did not believe that the doctrine of self-executing international law was sufficient. To secure individual rights, the ruling would instead have to be based on the legal system underlying the treaties and this system in turn would have to be interpreted as fully autonomous and crucially going beyond the doctrines of international law. Such a solution was, according to Trabucchi, most in line with the spirit of the treaty. To justify his argument, which shared the same teleological reading of the treaties as the position of the Legal Service, he did not refer to the latter but instead pointed to a standard work on international law, *Völkerrecht* by Alfred Verdross, and the supranational/federal position in the legal debate in general.<sup>87</sup> He was aware that the solution outlined would raise constitutional problems for Germany and Italy, which had both adopted so-called dualist constitutions in the post-war era, which only accepted the internal effect of international law in the national legal order by means of parliamentary implementation. Consequently, Trabucchi recommended ‘for now’ (*pour le moment*) that the Court respect the national jurisdiction with regard to primacy.

The ruling of the ECJ arguably had two core elements, both of which reflected the arguments of Trabucchi. The most important step was the teleological reading of the legal nature of the Treaties of Rome, similar to the one presented by the Legal Service, although the Court tried to underplay this by describing European law as a ‘new order of international law’ – a phrase that Gaudet did not particularly like.<sup>88</sup> This argument in turn was used – following similar logic to that of the Legal Service – to justify why Article 12 had direct effect, creating rights for national citizens applicable before national courts, despite the arguments by the three member states and the Advocate-General to the contrary.<sup>89</sup> At the same time the ECJ implicitly limited itself – at least at first – to an apparently narrow understanding of direct effect that included only treaty articles placing negative obligations on the member states. This was a cautious first step. Although the ECJ chose a federal doctrine to

<sup>86</sup> The analysis of the reasoning of the majority inside the ECJ below builds on this document. It is reproduced in *La formazione*, 213–23.

<sup>87</sup> Alfred Verdross, *Völkerrecht*, 4th edition (Vienna: Springer, 1959), 280.

<sup>88</sup> Gaudet to Pescatore, 16 May 1963. AMG, Chronos 1963.

<sup>89</sup> In this sense the ruling was not a modern version of the Danzig ruling by the Permanent Court of International Justice from 1926 (Vauchez, ‘Transnational Politics’, 12) nor was it merely a rhetorical change of style as recently suggested by Joseph Weiler (Joseph H. H. Weiler, ‘Rewriting Van Gend and Loos: Towards a Normative Theory of ECJ Hermeneutics’, in Ola Wiklund, ed., *Judicial Discretion in European Perspective*, The Hague: Kluwer Law International, 2003, 150–1.) Instead, the ruling represented a fundamental shift in interpretative strategy by the ECJ.



enforce the treaties, the narrow definition of which legal norms qualified limited the practical implications and consequently also the right of litigants to draw on European legal norms before national courts. Moreover, the ECJ remained silent on the question of primacy, apparently indicating that this belonged in the realm of national constitutional law outside the jurisdiction of the ECJ. To Trabucchi – and probably the majority behind the ruling with him – this caution with regard to the primacy of European law was clearly politically motivated and intended to be temporary.

There is little doubt, taking what we now know about the internal decision-making process into account, that the *Van Gend en Loos* ruling represented a breakthrough for the interpretation promoted by the Legal Service. This last had for long been the main and only actor pushing the ECJ towards accepting a teleological methodology to establish a constitutional practice in its case law. It presented the only position that demonstrated an alternative to the arguments of the three member states and the Advocate-General. The logic of Trabucchi's memorandum was similar to the interpretation of the Legal Service, even if he was careful to justify his argument with the academic opinion of a well recognised authority such as Verdross and not the Legal Service's position. However, at the same time the ECJ – apparently following Trabucchi's recommendation – adopted the Legal Service position in piecemeal and cautious fashion. In the aftermath of the *Van Gend en Loos* ruling, it was consequently not certain when and even if a doctrine of primacy of European law would be introduced in ECJ case law.<sup>90</sup> In its internal assessment of the ruling the Legal Service generally saw its position vindicated, but it was also noted that the question of primacy remained unsettled.<sup>91</sup>

In the statements by judges and clerks following the ruling, it was apparent that opinions inside the ECJ were still divided. The two key protagonists behind the ruling, Lecourt and Trabucchi, and their two clerks, Roger-Michel Chevallier and Paolo Gori, trumpeted the ruling as a landmark, creating what Trabucchi now called a 'new legal order',<sup>92</sup> whereas Hammers, Riese, Rossi and Delvaux were largely absent from the debate. The split also became apparent on the question of the primacy of European law. To the majority this was surely the next logical step, but neither Rossi's clerk, Sergio Neri, nor Donner were convinced that this would follow automatically.<sup>93</sup> The latter enigmatically hinted that had the Court been asked directly,

<sup>90</sup> Vauchez, 'Transnational Politics' argues that the doctrinal importance of *Van Gend en Loos* was 'manufactured' as revolutionary after the ruling by the investments of various legal actors from the ECJ, the Legal Service and FIDE. The ruling itself, he argues, remained ambiguous and unclear. This article argues on the contrary that *Van Gend en Loos* constituted a breakthrough for a new teleological methodology and overall interpretation of the nature of European law. If the ruling appeared open-ended this was mainly due to the political restraint of the majority behind the ruling and the evidence suggests that at least with regard to the question of primacy this was considered temporary.

<sup>91</sup> Affaire 26/62, Service juridique des exécutifs européens, Bruxelles, le 25 février 1963, Note à l'attention de MM. les membres de la Commission, HAC.BAC 371/1991.

<sup>92</sup> Alberto Trabucchi, 'Un nuovo diritto', *Rivista di diritto civile*, IX (1963), 259–72.

<sup>93</sup> Sergio Neri, 'Sulla natura giuridica della Comunità europea', *Rivista di diritto internazionale*, 47 (1964), 231–65, 235.

it (the majority) would presumably have ruled in favour of primacy. In the case in hand, Donner argued, the ECJ had not had the jurisdiction to rule on the primacy of European law. As a consequence he found a balance between the national courts and the EC now existed, which meant that the full federal form had not yet emerged.<sup>94</sup>

In the next year the Legal Service kept a close eye on developments in national law that could lead to the opportunity to address the question of primacy. To Gaudet it was not clear how this problem would be settled. With the non-committal position of the ECJ, it remained to be seen whether national courts would give primacy to European law.<sup>95</sup> A direct challenge to European law was, however, already under way. Two members of the Milan bar, a professor of constitutional law, Giangaleazzo Stendardi, and a lawyer, Flaminio Costa, were highly critical of the ongoing process of nationalisation of the Italian electricity company Ente Nazionale per l'Energia Elettrica (E.N.E.L), arguing that it was both unconstitutional and contrary to the EEC Treaty. In particular Stendardi had a long record of critical academic commentary about the lack of the rule of law in Italian society and believed that the new legal system of the EC could alleviate this by means of test cases through the system of preliminary references.<sup>96</sup> As a consequence, they asked a Milanese Justice of the Peace (*guidice conciliatore*) for a preliminary ruling on the nationalisation of E.N.E.L to both the Italian constitutional court and the ECJ. On 7 March 1964, the Italian constitutional court not only deemed the nationalisation law of E.N.E.L constitutional, it also most controversially denied the primacy of European law, giving instead primacy to national law by following the principle of *lex posterior derogate legi priori*. It argued that Article 11 of the Italian constitution, on the basis of which Italian membership of the EC had been enacted by parliament, was merely an ordinary act and therefore could be overruled by subsequent acts by parliament. At the time of accession the required two-thirds majority in the Italian parliament could not be mustered to implement the Treaties of Rome on the basis of a constitutional statute (*legge costituzionale*) that would automatically have ensured that European law overrode national statutes.<sup>97</sup>

To the Legal Service, this ruling represented a direct attack on the EC. The judgment of the Italian constitutional court potentially undermined the reciprocity between the member states, a vital precondition for French EC membership due to the formulation of Article 55 of the French Constitution of 1958, and this at the very moment when French threats of exit from the EEC were the order of the day due to the stalling of negotiations over agricultural prices. It also threatened to create a permanent imbalance between the countries that had constitutionally accepted the primacy of international law, and those, such as Germany and Italy, that constitutionally required national parliaments to enact European law in the national

<sup>94</sup> André M. Donner, 'National Law and the case law of the Court of Justice of the European Communities', *Common Market Law Review*, 1, 1 (1963), 8–16, 14.

<sup>95</sup> Note à l'attention de M. Jean Rey, Président du Groupe Juridique. Objet: Arrêt de la Cour d'Appel d'Amiens, 18 jul. 1963. AMG, Chronos 1963.

<sup>96</sup> Vauchez, 'Transnational Politics', 17–18.

<sup>97</sup> P. Ruggeri Laderchi, 'Report on Italy', in Slaughter et al., *The European Courts*, 147–70, 157–60.

realm. It was therefore deemed crucial that the Commission use all means available to put pressure on the Italian government and the constitutional court to have this position reversed.<sup>98</sup> This advice was taken up by Hallstein who used an important address before the European Parliament on 18 June 1964 to argue in favour of the primacy of European law.<sup>99</sup> He thereby supported the memorandum just submitted by the Legal Service before the ECJ in the *Costa* case a week earlier, which had argued that the ruling by the Italian constitutional court posed grave dangers to the future of the Community. The Commission did not, however, find any wrongdoing in the Italian nationalisation of E.N.E.L.<sup>100</sup>

Advocate-General Lagrange supported the necessity of granting European law primacy in his own presentation. By the means of his usual comparative methodology he argued that the Dutch constitutional model, which gave primacy to self-executing international law, was best suited to solving potential conflicts between European legal norms with direct effect and subsequent national legislation. He recommended that all member states find similar constitutional solutions to this serious problem or reconsider their membership of the EC. In contrast to Lagrange's approach, however, the ECJ held that the member states had in fact already accepted the principle of primacy with the ratification of the treaties – the principle was an unspoken part of this commitment.<sup>101</sup> Justifying this assertion, which was in fact similar to the argument in favour of primacy presented by the Legal Service in the *Van Gend* case, the ECJ cited the special nature of the Community and further refined the teleological interpretation first presented in the *Van Gend en Loos* ruling, tellingly now describing it not as a 'new legal order of international law' but as 'an integral part of the legal systems of the member states'.<sup>102</sup> Discussing the various articles of the EEC Treaty, which the nationalisation of E.N.E.L might have breached, the ECJ only attributed primacy to the articles, which it decided had direct effect, essentially emulating the model of the Dutch constitution instead of a general federal doctrine.<sup>103</sup>

<sup>98</sup> Aufzeichnung für den Herrn Präsidenten. Betr.: Urteil Nr. 14/1964 des Italienischen Verfassungsgerichtshofs; Durchsetzung des Gemeinschaftsrechts in Italien. HAC.BAC 371/1991.759.

<sup>99</sup> Walter Hallstein, 'La Communauté européenne, nouvel ordre juridique', 1964, Les documents de la Communauté européenne, HAC.CEAB.2.7284, 11.

<sup>100</sup> Davanti alla Corte di Giustizia delle Comunità Europee. Memoria dalla Commissione nella causa Avv. Flaminio Costa contro E.N.E.L, già Edisonvolta. HAC.BAC 371/1991. Affaire 6/64.

<sup>101</sup> Four days before the ruling at the Bernsheim-Auerbach seminar of the Gesellschaft für Europarecht, Hans Peter Ipsen had criticised Lagrange and favoured exactly the same argument as that adopted by the ECJ. Donner and German judge Walter Strauss were present at the meeting. See Wissenschaftliche Gesellschaft für Europarecht. Teilnehmer am Kolloquium der Wissenschaftlichen Gessellschaft für Europarecht am 10. und 11. Juli 1964 and Das Verhältnis des Rechts der Europäischen Gemeinschaften zum nationalen Recht, 10 Jul. 1964, Archive of Walter Strauss, Institut für Zeitgeschichte, Munich (AWS). Nachlasse ED94, no. 328. Karen Alter seems to imply that a link to the ruling does exist on basis of an interview with Hans Jörg Rabe. See Karen Alter, 'The European Court's Political Power', 78.

<sup>102</sup> Ole Spiermann, 'On Law and Policy in the European Court of Justice: Van Gend en Loos and Costa v. ENEL', in Koch et al., *Europe: The New Legal Realism*, 715–28, 726.

<sup>103</sup> Bignami, 'Comparative Law', 13–14.

The substance of the case was rejected; the Italian nationalisation of E.N.E.L was not in contradiction with the EEC Treaty.<sup>104</sup>

With the *Costa v. E.N.E.L* ruling, the ECJ took the second step and completed the legal system originally proposed by the Legal Service in the *Van Gend en Loos* case. If there had been any doubt about the nature of the *Van Gend en Loos* ruling and to what extent it reflected the position of the Legal Service, this was now removed. However, at the same time the two key doctrines were cautiously formulated. While the structure of the new European legal order had the appearance of a federal legal order, the core principles of enforcement and hierarchy were applied in a highly restricted way. Not all European legal norms would have direct effect and only those that did would have primacy vis-à-vis national legislation. The ruling was nevertheless generally praised by the legal commentary and seen as a logical confirmation of the *Van Gend en Loos* ruling.<sup>105</sup> Only a few critical voices, such as Belgian scholar M. Waelbroeck, did not find the ‘Dutch model’ suitable and regretted the limited fashion in which European legal norms would be applicable before national courts.<sup>106</sup> Costa and Stendardi shared this view and for this reason found the ruling disappointing. In addition Stendardi later argued the ruling did not respect the fundamentals of Italian law, which offered litigants the possibility to invoke all laws before national courts. With accession the Italian parliament had in one step inserted the entire treaties into the national legal order.<sup>107</sup> For the same reason the Italian Justice of Peace partly rejected the reasoning of the ECJ and held in its ruling in 1966 that Article 120 of the EEC Treaty, which the ECJ had not granted direct effect, actually could be invoked by litigants and moreover that the Italian nationalisation of E.N.E.L was in breach with this particular article.<sup>108</sup>

To ensure the broad acceptance of the two new legal doctrines, the Legal Service in various ways orchestrated what constituted a veritable campaign in favour of the revolutionary new doctrines. Two weeks before the ruling on 1 July, the Commission bulletin – *European Document* – published Hallstein’s speech from June together with an extract of an article by Catalano and the *Costa* position of Lagrange.<sup>109</sup> Likewise, immediately after the *Costa v. E.N.E.L* ruling, the Commission published another pamphlet in which Hallstein explained the importance of the new doctrines to the future of European integration, thereby turning a legal decision into a central question for the future of European integration.<sup>110</sup> The legal committee of the European Parliament, under the chairmanship of Fernand Dehousse, also took the initiative

<sup>104</sup> Aff. 6/64 Flaminio Costa v. E.n.e.l (1964), Recueil 1964, p. 1194.

<sup>105</sup> Vauchez, ‘Transnational Politics’, 20–1.

<sup>106</sup> Cited in Bignami, ‘Comparative Law’, 20–1.

<sup>107</sup> Gian Galeazzo Stendardi, *Il soggetto privato nell’ornamento comunitario europeo* (Milan: Giuffrè, 1967) 109 and 113–16. Cited in Bignami, ‘Comparative Law’, 15.

<sup>108</sup> Le juge conciliateur adjoint Fabri Vittorio Emanuele du tribunal de Milan, Nicolino Flaminio Costa contre L’Ente Nazionale per l’Energia Elettrica, 1 May 1966. HAC.BAC 371/1991.

<sup>109</sup> Europe agence internationale d’information pour la presse. Bulletin quotidiens et suppléments édités. Europe. Documents, no. 269, 1er juillet 1964. HAC.CEAB.2.7284.

<sup>110</sup> Hallstein, ‘La Communauté européenne’, 11.

to submit a report on the new doctrines in early 1965, and Gaudet met with the committee and provided both legal detail and strategic observations.<sup>111</sup> In the debate in Parliament on the committee report on 15–16 June 1965, Hallstein turned up again to bolster the consensus in favour of the new doctrines.<sup>112</sup>

To create support beyond the European institutions, the Legal Service could also now draw upon the legal networks established in FIDE as well as the national European law associations. With the new doctrines, this emerging field of law acquired a distinct identity that greatly helped differentiate European law as a field of study from other existing fields, such as comparative law or international law.<sup>113</sup> Key association members such as Ivo Samkalden (president of the NVER) and Catalano (now president of the Italian Associazione Italiana Giuristi Europei) contributed with legal commentary to legitimise the two rulings.<sup>114</sup> The national associations organised seminars on the most recent development such as the AJE, which had Lagrange discussing the *Van Gend en Loos* ruling at their annual meeting on 5 February 1963, and the German Gesellschaft für Europarecht, which organised a seminar at Bernsheim-Auerback on 10–11 July 1964 to deal specifically with the topic of the relationship between European and national law.<sup>115</sup> Finally, on the prompting of the Legal Service, the second and third FIDE conferences, in The Hague (1963) and Paris (1965) respectively, dealt squarely with direct effect and primacy, providing additional support for the two new doctrines.<sup>116</sup> In this way the first element of the Legal Service's strategy – developing the field of European law – greatly helped legitimise the second element – its effort to persuade the Court to adopt its 'constitutional' understanding of European law.

With the united front constituted by the ECJ, the Commission and the European Parliament, together with the emerging academic and professional world of European law behind the new doctrines, significant pressure would be applied in the following decades on the member states (and their judiciaries) to accept the new constitutional practice. However, the challenges involved in influencing the theory and practice of the inherently conservative world of national jurists, whether academic, professional or within the judiciary, were immense. Likewise, the difficulties were considerable in convincing national administrations and governments that European law went beyond the nature of traditional international law obligations. However, with the rulings of *Van Gend en Loos* and *Costa v. E.N.E.L.*, the ECJ had nevertheless finally formulated a set of doctrines which held the promise to become the founding stones of a

<sup>111</sup> Exposé de M. Gaudet devant la Commission juridique, 18 Feb. 1965. HAEU, Archive of Fernand Dehousse, 494.

<sup>112</sup> Vauchez, 'Transnational Politics', 26–7.

<sup>113</sup> *Ibid.*, 20–1.

<sup>114</sup> On the Costa case, for example, see Ivo Samkalden in *Sociaal-economische wetgeving* (1964), 489–96, and Nicola Catalano, *Il Foro Italiano* IV Col. (1964), 152–9.

<sup>115</sup> *Bulletin de l'Association des juristes européens* (1963), 13–14, and AWS. Nachlasse ED94, 328.

<sup>116</sup> *Deuxième colloque international de droit européen organisé par l'Association Néerlandaise pour le Droit Européen* (Zwolle: N. V. Uitgeversmaatschappij W. E. J. Tjeenk Willink, 1966) and 'Colloque de la Fédération Internationale pour le Droit européen', *Revue trimestrielle de droit européen*, 1 (1965), 618–20.

European legal order that would be significantly stronger than classical international law.

### Conclusion

On basis of new archival evidence, we can now see the key importance of the Legal Service of the Commission in the establishment of a constitutional practice in European law, and finally vindicate Stein's claim. Indeed, if one felt the need to identify an author of the two new doctrines, the archival evidence strongly points to Michel Gaudet and the Legal Service. The Legal Service early on developed a federal and constitutional interpretation of European law, which it promoted both inside and outside the courtroom. Moreover, after 1958 it laboured intensively to establish a professional and academic field of European law to underpin the development of a strong European legal order. While the actions by the Legal Service were important, it would ultimately take a combination of unique factors in order for the Legal Service to succeed in its objective. Dutch constitutional reforms of the 1950s, in combination with a mobilised network of pro-European Dutch advocates from the NVER, would provide the key test cases on the applicability of European law in the member states. In addition, the composition of the ECJ decisively changed in favour of a more activist stance. These factors came together in the *Van Gend en Loos* case, where the new Court finally adopted the constitutional interpretation recommended by the Legal Service.

However, if the Legal Service position and judicial politics were of key importance, the ECJ put its own stamp on the key doctrines and on the legal order created. First, the majority inside the ECJ that developed the *Van Gend en Loos* ruling proceeded with great caution, limiting the practical effects of the doctrine of direct effect and postponing the adoption of the doctrine of primacy for a later occasion. Second, when the doctrine of primacy was finally adopted, this was done following the Dutch constitutional model, which meant that European law only had primacy vis-à-vis national legislation if the ECJ had granted it direct effect. The result was that although the ECJ adopted the teleological methodology and the constitutional interpretation of the treaties recommended by the Legal Service, the result was not fully a proto-federal legal order. The federal structure in terms of enforcement and hierarchy were arguably in place, but the doctrines were restricted to the extent where they would have relatively little practical consequence. It would ultimately take future case law to flesh out the doctrines more fully in the course of the 1960s and the 1970s.

**L'établissement d'une pratique  
constitutionnelle de la loi  
européenne: l'histoire du service  
juridique de l'exécutif européen,  
1952–65**

Les origines de la pratique constitutionnelle européenne sont nettement évidentes dans deux décisions de la Cour de justice européenne, *Van Gend en Loos* (1963) et *Costa v. E.N.E.L* (1964). Et pourtant, la genèse de l'interprétation de la cour et la dynamique qui la régissait à l'époque sont mal connues. On a jusqu'ici surtout examiné le rôle de la Cour de justice dans les changements révolutionnaires de la loi européenne. Cet article, par contre, mine des archives récemment ouvertes, et décèle le rôle joué par le service juridique de l'exécutif européen dans le développement de la pratique juridique. Il montre que le service juridique contribua de façon décisive à l'élaboration de la philosophie juridique informant ces deux décisions, ainsi qu'à l'établissement du champ professionnel et scientifique du droit européen qui sous-tendrait la pratique constitutionnelle. L'article indique aussi que la Cour de justice adopta bien la philosophie juridique prônée par le service juridique, mais qu'elle s'y prit avec doigté et retenue, de façon à minimiser la résistance des états membres.

**Die verfassungsrechtliche Praxis von  
Europarecht: Die Geschichte des  
Juristischen Dienstes der  
europäischen Exekutive,  
1952–65**

Die Ursprünge der verfassungsrechtlichen Praxis des Europarechts finden sich in zwei berühmten Entscheidungen des Europäischen Gerichtshofs (EuGH), *Van Gend en Loos* (1963) und *Costa v. E.N.E.L* (1964). Dennoch wissen wir recht wenig auf sicherer Grundlage über die Genese der Interpretation des Gerichtshofs oder die Dynamik innerhalb des EuGH zu jener Zeit. Die meisten Berichte betonen die revolutionierende Rolle des EuGH im Fall des europäischen Rechts. Auf der Grundlage von neuem Archivmaterial beschreibt der Artikel die Rolle des Juristischen Dienstes der Europäischen Kommission im Aufbau der Verfassungspraxis. Der Artikel zeigt, wie der Juristische Dienst eine entscheidende Rolle gespielt hat, nicht nur in der Entwicklung der juristischen Philosophie, die diese zwei Entscheidungen hinterlag, sondern auch im Aufbau der professionellen und wissenschaftlichen Fachgebiet des europäischen Rechts, das die Verfassungspraxis unterstützen würde. Der Artikel zeigt auch, dass der EuGH die vom Juristischen Dienst empfohlene juristische Philosophie adoptierte, aber ganz vorsichtig und beschränkt, um den Widerstand der Mitgliedstaaten zu minimieren.