

Editorial

For History's Sake

On *Costa v. ENEL*, André Donner and the Eternal Secret of the Court of Justice's Deliberations

Fifty years ago, on 15 July 1964, the Court of Justice of what is now the European Union decided *Costa v. ENEL*. The judgment is often mentioned in one breath with the no less famous judgment of 5 February 1963 in *Van Gend & Loos v. Nederlandse Administratie der Belastingen*. Rightly so: together the two judgments brought about the Big Bang of the EU legal universe, providing it at the same time with a matrix to expand into. Certainly, alternate histories generally are a form of fiction, but it is no fantasy to say that if the Court had not recognised the (possibility of) direct effect of EU law in the national legal orders in *Van Gend & Loos* and of the (internal) primacy of EU law over national law in *Costa*, the EU legal order would not have developed as it has.¹

Roughly, two different narratives have been proposed to explain why the Court of Justice ruled as it did in the two judgments.² In the international law version, Community law is a subsystem of international law. To put it much too briefly, the Court of Justice did what any international court would have done with a treaty giving national courts the right and sometimes even the duty to ask questions, the answers to which are meant to guide the national courts' subsequent judgments: 'le droit international n'impose pas la primauté interne en tant que règle abstraite, mais elle impose une *primauté d'application* au stade administratif ou judiciaire'.³ In the competing *constitutional* narrative, the Community stands closer to national than to international law and constitutes a new, proto-federal

¹ Robert Lecourt, 'Quel eut été le droit des communautés sans les arrêts de 1963 et 1964?', *Mélanges en hommage à Jean BOULOUIS* (Daloz 1991) p. 349.

² In fact, there is a whole array of sometimes only slightly diverging qualifications of the Community legal order: for an early oversight, see J.L. Iglesias Buigues, 'La nature juridique du droit communautaire', *Cahiers de droit européen* (1967) p. 503.

³ This is the thesis of Bruno de Witte in his seminal 'Retour à "Costa". La primauté du droit communautaire à la lumière du droit international', *Revue trimestrielle de droit européen* (1984) p. 425 (p. 428-435). The citation is from p. 432.

kind of legal order, on account of which it can claim direct effect and primacy.⁴ Each narrative finds points of departure in subtle but unmistakable variations in the grounds given for the two judgments. While the Court in *Van Gend & Loos* labelled the Community 'a new legal order of international law', in *Costa* it apparently distinguished the Community legal order from international law ('by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply', etc.).

This shift in reasoning begs the question what happened in the seventeen months that passed between *Van Gend & Loos* and *Costa*. Again, the stories differ. In the international law narrative the demarcation of Community law from international law is a carrot, a means to persuade the German and Italian national courts to side with the Court of Justice. Differentiating Community law from international law could help these courts to find a way around the dualist attitude towards written international law held by their legal orders.⁵ In the constitutional, proto-federal perspective, the persuasion thesis is not absent, but it is not merely a trick. Instead, *Costa* marks the coming out of the Court of Justice, which in *Van Gend & Loos* had already committed itself to the constitutional reading of the EEC Treaty, but only confessed this publicly in *Costa*. Incidentally, in both readings a judgment of the Italian constitutional court dated 24 February – 7 March 1964 functions as a trigger. In this Italian version of the *Costa-ENEL* case, the *Corte costituzionale* treated the EEC Treaty as any other treaty: Community law only produced effect in the Italian legal order due to its incorporation by an act of parliament (no direct effect) and subject to the *lex posterior* principle (no primacy).

Fascinating historical research has brought to the surface that the constitutional law narrative may be closer to reality than the international law one. It also shows that *Van Gend & Loos* was delivered with the smallest possible majority of the seven judges of which the Court was composed at the time (one for each of the six member states and an extra one to prevent a tie). It tells us that at least three of the four judges in the majority adhered to the constitutional reading of

⁴ See for instance Jean Petot (1961): 'des lois fondamentales (...) auxquelles on adjoint des pouvoirs d'application, de révision et de contrôle juridictionnel. Sans être absolument original, ce fait revêt ici une importance particulière, vu l'ampleur des attributions qu'il implique. Il réintroduit les difficultés inhérentes à la superposition des ordres juridiques dans une fédération et, par là porte atteinte aux constitutions des Etats membres'; cited by Iglesias Buigues, *supra* n. 2, p. 508; Gerhard Bebr, *Development of Judicial Control of the European Communities* (Martinus Nijhoff Publishers 1981), p. 554: 'By its origin, the EEC Treaty is, of course, an international treaty. By its content and objectives, however, it is a constitution of an emerging Community which goes far beyond a mere traditional international treaty.'

⁵ De Witte, *supra* n. 3, p. 442.

the EEC Treaty. They were Alberto Trabucchi (one of two Italian members of the Court), Robert Lecourt (France) and Louis Delvaux (Belgium); the position of the last member of the quartet, Rino Rossi (the other Italian), is not entirely clear.⁶

In a memorandum written for his fellow judges in preparation of *Van Gend & Loos*, Trabucchi proposed a 'constitutional' reading of the Treaty and to declare the Treaty provision under scrutiny directly applicable. Although the questions raised by the referring Dutch court certainly provided room for dealing with the issue of primacy as well, he suggested *not* to deal with that '*pour le moment*'.⁷ Courts in Germany and Italy would already find it difficult to swallow the direct effect and adding primacy could only aggravate their constitutional problems. Primacy could come later. It may be added that the recognition of the primacy of EU law would have troubled the governments of the Netherlands and the Belgium too. They had challenged the jurisdiction of the Court

on the ground that the reference relates not to the interpretation but to the application of the treaty in the context of the constitutional law of the Netherlands, and that in particular the court has no jurisdiction to decide, should the occasion arise, whether the provisions of the EEC Treaty prevail over Netherlands legislation.

Remarkable in this history of *Van Gend & Loos* is that of the three dissenting judges – Otto Riese (Germany), Charles-Léon Hammes and the president of the Court, André Donner – two came from member states in which the direct effect and primacy of treaty law was positive (but not practiced) constitutional law: Luxembourg (Hammes) and the Netherlands (Donner). Apparently Hammes and Donner were not convinced by the constitutional reading of the EEC Treaty (nor did they adhere to the presented international law narrative). Probably they held the same view as Advocate General Karl Roemer in his Opinion in *Van Gend & Loos*. Roemer admitted that 'the EEC Treaty contains (...) provisions which are clearly *intended to be incorporated* in national law and to modify or supplement it',⁸ but in his view the competence of the ECJ was strictly limited to elucidating that intention: whether a Treaty provision in a particular national legal order was

⁶Morten Rasmussen, 'The Origins of a Legal Revolution: The Early History of the European Court of Justice', 2(2) *Journal of European Integration History* (2008) p. 77 (p. 94-95); Morten Rasmussen, 'Revolutionizing European Law: A History of the *Van Gend en Loos* Judgment', *Icon* (2014) p. 136 (p. 154). See also Anne Boerger and Morten Rasmussen, 'Transforming European Law: The Establishment of the Constitutional Discourse from 1950 to 1993', in this issue of *EuConst*.

⁷Rasmussen 2014, *supra* n. 6, p. 154.

⁸Opinion of AG Karl Roemer of 12 Dec. 1962 in Case 26/62, ECLI:EU:C:1962:42, p. 20 (emphasis added); in the original German version p. 42 'Der EWG-Vertrag enthält (...) Bestimmungen, von denen sicher ist, daß sie unmittelbar in das nationale Recht einzugreifen und dieses zu ändern oder zu ergänzen bestimmt sind.'

given the intended effect was a matter of national constitutional law.⁹ Moreover, declaring that Article 12, the relevant provision in *Van Gend*, was intended to have direct effect would not increase the uniformity of application of EEC law or legal certainty for individuals and companies, as the Commission had submitted in its written and oral observations, but rather the opposite. The ‘far from uniform’ constitutional law perspectives of the member states ‘with regard to the determination of the relationship between supranational of international law and subsequent national legislation’ would split the Community in two: Luxembourg, The Netherlands and perhaps France would give primacy to Community law, while Germany, Italy and probably Belgium would not.¹⁰ In short, in Roemer’s view the Court could not prescribe to the national courts how they were to deal with conflicts between the Treaty and subsequent national law. That too would have to remain a question of national constitutional law.

In the very first article of the *Common Market Law Review* in 1963, André Donner commented upon *Van Gend* in the following way:

It must be stressed that the Court did not give a ruling on the question of priority in this case. If it had been competent to do so it would presumably have ruled that the E.E.C. Treaty has precedence over local law but it held that the determination at law of this priority belonged in this case not to the Court, but to the competence of the domestic courts. From the point of view of the relationship, not so much between local law and the law of the Community as between the domestic judicial competences and the competence of the Court of the Community, this ruling is remarkable for it indicates that a certain equilibrium still exists between local courts and the Court of the Community, and that the full federal form in which the latter would prevail over the domestic courts has not yet been achieved.¹¹

Clearly, the citation is redolent of the precariousness of the ‘still’ existing balance and seems to announce the advent of the ‘full federal form’, which ‘has not been achieved’, but probably will be in the future. But are we mistaken if we sense that there is another soul dwelling between these lines? Does it also echo Roemer’s and the Belgian and Dutch governments’ position that the ECJ had no jurisdiction to tell the national courts how to deal with conflicts between Treaty provisions and

⁹ *Idem.*, p. 18/19; see also p. 25/26 (English version); p. 38/39 and p. 51/52 (German version).

¹⁰ *Idem.*, p. 23-24 (English version); p. 47-48 (German version). The dominant view is that Roemer accepted direct effect in general, but not of Art. 12, see Franz C. Mayer, ‘*Van Gend & Loos: The Foundation of a Community of Law*’, in Miguel Poiars Maduro and Loïc Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) p. 16 (p. 17-18). When it comes to treaty provisions (in contrast to secondary law) this is in our view untenable, although we admit that Roemer’s position is not entirely clear.

¹¹ André M. Donner, ‘National Law and the Case Law of the Court of Justice of the European Communities’, *CML Review*, 1, 1 (1963), p. 8-16 (p. 14).

national law and that, taking into account *Van Gend*, the *juste-milieu* is that the ECJ decides on the direct effect of provisions of Community law and the national courts on the status of directly effective Community law *vis-à-vis* contrary national law? This is suggested by the intriguing 'If it had been competent to do so' and the reference to 'a certain equilibrium'. But indeed, there are other explanations for these expressions ('in this case' there was no competence to rule on primacy, but in another this might be different) and possibly we read too much into them, owing to our historic knowledge of Donner's individual position in *Van Gend*.

Be that as it may, the question remains of why Donner voted in favour of primacy in *Costa*. That is at least how the story goes: while the votes split in *Van Gend*, all judges voted in favour in *Costa*.¹² What, then, made Donner and more generally the three dissenters rally behind the other four this time? Were they of the opinion that now the ECJ had crossed the Rubicon by declaring Community law directly effective, they should complete the march to Rome to proclaim its primacy? Did they think that primacy was the logical or automatic follow up or consequence of direct effect? Or did they come round in the end to embracing the constitutional reading of the EEC Treaty? That does not seem likely; at least it does not for Donner, who never bought the constitutional reading of the Treaty and even downplayed it in his later writings:

people tend to assimilate the Treaties with national constitutions and to consider them as a sort of Community constitution. (...) Personally, as a former constitutional lawyer, I have some doubts about the justice of this assimilation. (...) To use an old-fashioned term: a real constitution puts limits on sovereign, that is in principle unlimited, powers (...) The Treaties go no farther yet than the conferring of limited powers (...).¹³

Another possible explanation for the (alleged) unanimity is that the *Costa v. ENEL* decision of the Italian constitutional court convinced the dissenters of the 'practical' need of direct effect and primacy to prevent the Treaty and the internal market from being nipped in the bud. But did they previously believe, then, that the split of the Community in two envisaged by Roemer in his Opinion on *Van Gend* was

¹²Thanks to Morten Rasmussen for providing this hearsay knowledge.

¹³A.M. Donner, 'The Constitutional Powers of the Court of Justice of the European Communities', *CML Review* (1974) p. 127 (p. 129). Allow us to add a personal anecdote. In what will have been the late eighties of the last century, one of us phoned Donner to invite him for a lecture on *Costa* for students. Donner gently declined ('I am really too old'), but we talked for a while and he regretted that 'we' (= the Court) had used the word 'sovereignty' in *Costa*: 'That has only caused misunderstandings and trouble.' NB: the word sovereignty is only used in the Dutch (and in the not-authentic English) version of the judgment, not in the French, German, and Italian versions, which speak of 'sovereign rights'.

merely a theoretical possibility? Yet another possibility is that actually no voting took place at all: that the dissenters simply surrendered beforehand because they knew that their resistance would be to no avail. At least as far as Donner is concerned, the latter theory is perhaps the one that somehow fits best with the citation we discussed previously.

We will probably never know what really happened in the deliberations on *Costa*, unless of course the case-law archives of the Court of Justice can help us reconstruct the past and these archives open up. But will they ever? We have no indication of that. We know that these case-law archives exist: Regulation 354/83, amended by Regulation 1700/2003, obliges the Court to install and maintain them (Article 1). But that is all we know: we do not know, and we are not even allowed to know, what records they contain, and, more importantly, we do not even know *when* we will know that. While the archives of the other institutions become accessible to the public after 30 years, in principle, there is no such rule for the Court (Article 3(1)(c)). Also on the primary law level, the ECJ seems to be exempted, even though Article 42 of the EU Charter of Fundamental Rights gives EU citizens the right of access to documents of all institutions, without exception,¹⁴ and Article 15(1) TFEU obliges the Court, as any other institution, to conduct its work as openly as possible in ‘order to promote good governance and ensure the participation of civil society’. However, Article 15(3) TFEU, a *lex specialis*, only gives a right of access to documents related to the Court’s ‘administrative tasks’,¹⁵ thereby implicitly excluding those related to its ‘judicial tasks’. Moreover, Article 35 of the Statute of the Court of Justice of the European Union states that ‘[t]he deliberations of the Court of Justice shall be and shall remain secret.’ So it seems that disclosure of its case-law archives is at the complete discretion of the Court itself, and concerning the deliberations even forbidden. Upon inquiry, it also appears that the Court at this moment is not intending to unbolt the gates of this Garden of Eden for EU historians, who still have to rely on hearsay and more or less accidentally surfacing documents such as Trabucchi’s memorandum.

This stands in stark contrast to recent developments in several member states, as a quick survey reveals. Since September 2013, in Germany ‘Entwürfe von Urteilen, Beschlüssen und Verfügungen, Arbeiten zu ihrer Vorbereitung und Doku-

¹⁴ Art. 42 EU Charter: ‘Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.’

¹⁵ See on this the Decision of the Court of Justice of the European Union of 11 Dec. 2012 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (2013/C 38/02).

mente, die Abstimmungen' concerning judgments of the *Bundesverfassungsgericht* are accessible after a period of sixty years.¹⁶ In addition, dissenting or concurring opinions of judges of the German constitutional court occasionally allow us a direct glimpse into the kitchen, as the recent *OMT* judgment testifies.¹⁷ While the members of the *Conseil constitutionnel* in France are not allowed to write individual opinions, since 1 January 2009 the minutes of their deliberations already become accessible after 25 years.¹⁸ In the Netherlands, the *Hoge Raad* is legally obliged to disclosure after 75 years, but recently has decided to give full access to its records after 50 years, and under certain conditions even sooner.¹⁹ (Perhaps there are generally no terms regarding the disclosure of their archives for international courts. But that is not the standard against which the Court of Justice wants to be measured, is it?)

A series of publications has recently (once again) pleaded for more openness of the Court of Justice, be it during the proceedings or via the introduction of the possibility of individual opinions by the members of the Court.²⁰ We will not go into those issues here. However, on the occasion of the fiftieth anniversary of *Costa*, we want to make a very modest contribution to the overall discussion. We hereby table the question of whether there can be any justification for the lasting secrecy of the ECJ's case-law archives, including the deliberations, after – let us say – fifty years. Our premise is the adage of one of our colleagues that law is a form of history: indeed, it is man-made, for better and worse. If we ourselves do not have the right, then at least our posterity has the right to know how and why our public authorities made their decisions. In an open society this is no different for courts, unless it can be justified, and then only as long as it can be justified (we cannot believe that someone is willing to defend that the archives should remain closed or the deliberations secret *forever*).²¹ A reasonable interpretation of Article

¹⁶ Art. 35b(5) of the *Bundesverfassungsgerichtsgesetz*. Thanks to Mattias Wendel for bringing this to our attention.

¹⁷ See, on that judgment, Mattias Wendel in this issue of *EuConst*.

¹⁸ Art. 58 *Ordonnance organique* of 7 Nov. 1958 *portant loi organique sur le Conseil constitutionnel*, as amended by *loi organique* 2008-695 of 15 July 2008 *relative aux archives du Conseil constitutionnel*, jo. Art. L 213-2 *Code du patrimoine*. However, there are different periods for other courts.

¹⁹ Information provided by the registrar of the *Hoge Raad* to one of the authors; the decision has not yet been put into writing.

²⁰ See for instance Hjalte Rasmussen and Louise Nan Rasmussen, 'Comment on Katalin Kelemen – Activist EU Court "Feeds" on the Existing Ban on Dissenting Opinions: Lifting the Ban Is Likely to Improve the Quality of EU Judgments', *German Law Journal* (2013) p. 1374; Vesna Naglič, 'National Practices with Regard to the Accessibility of Court Documents', study for the European Parliament, <www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64965/20130423ATT64965EN.pdf> (2013); Alberto Alemanno and Oana Stefan, 'Openness at the Court of Justice of the European Union: Toppling a Taboo', *CML Review* (2014) p. 97.

²¹ The principle that the secrecy should one time be lifted is implicitly reflected in Regulation 354/83: what is the use of obliging the ECJ to keep archives if they are not meant to be opened ever?

15(3) TFEU and Article 35 of the Court's Statute, in conjunction with Article 42 of the Charter, can only lead to the same conclusion.²² Well then, is there any such justification for the still-lasting secrecy of the Court's case-law records of fifty years and older?

The secrecy of the deliberations of the Court, which the judges swear to uphold upon their appointment,²³ and which also underpins the prohibition of individual opinions, is primarily meant to fence off the judges from possible pressure from nominating governments and other actors, and to allow them to discuss and decide the juridical questions put to them without any strings attached but the law and their own conscience. Other arguments have been put forward too, such as safeguarding the authority of the judgments and of the Court, enhancing the clarity of the judgments and preserving the collegiality among the members.²⁴ Can any of these arguments provide justification for keeping the ECJ archives closed after fifty years?

We submit that no one will really be afraid that the prospect that their deliberations will become public after such a period of time will expose the current members of the ECJ to the danger of outside pressure, keep them from open and frank discussions, or harm the members' collegiality. As we see it, of the arguments proposed in favour of the secrecy of the deliberations, only two are possibly of any avail: that of the authority of the Court and of its judgments. But then, what is there to hide? Would it really harm the authority of *Costa v. ENEL* or the ECJ if historians were able with the help of the remaining records, if any, to reconstruct the discussions that took place during the deliberations? Has that decision itself not become part of the realm of facts, of history? In short, is it not time for the Court of Justice to give access to the records, including the deliberations, of cases that are fifty or more years old, or at least to let us know when it will do that? That is the small and rather rhetorical question that we pose, this time not to scholarship, but to the Court of Justice itself, for the sake of history.

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²² Cp. Naglič, *supra* n. 19, p. 55.

²³ Art. 4 of the Rules of Procedure of the Court of Justice of 25 Sept. 2012: 'Before taking up his duties, a judge or AG shall, at the first public sitting of the Court which he attends after his appointment, take the following oath provided for in Article 2 of the Statute: 'I swear that I will perform my duties impartially and conscientiously; I swear that I will preserve the secrecy of the deliberations of the Court.'

²⁴ See Rosa Raffaelli, 'Dissenting Opinions in the Supreme Courts of the Member States', study for the European Parliament's Committee on Legal Affairs, <[www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462470/IPOL-JURI_ET\(2012\)462470_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462470/IPOL-JURI_ET(2012)462470_EN.pdf)> (2012), p. 8 ff.