Revolutionizing European law: A history of the Van Gend en Loos *judgment*

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Did the famous Van Gend en Loos *judgment constitute a breakthrough for a constitutional practise in European law or was it merely drawing the logical legal consequences of earlier case law and of the Treaties of Rome? Based on comprehensive archival studies, this article argues that neither earlier case law nor the Treaties of Rome can fully account for the judgment. Instead,* Van Gend en Loos *represented a genuine revolution in European law. Prompted by the legal service of the European Commission, the European Court of Justice (ECJ) took a decisive step towards addressing two major problems of international public law, namely the lack of uniform application of European law by national courts across the six member states and the lack of primacy granted to international law in several member states. The judgment was based on a new teleological and constitutional understanding of the Treaties of Rome developed by the legal service, and took the first step towards establishing an alternative enforcement system. The ECJ would already in 1964 take the second step by introducing primacy in the* Costa v. E.N.E.L. *judgment. The new enforcement system remained highly fragile, however, due to the dependency on the cooperation of national courts through the preliminary reference system. As a result, the full effects of the* Van Gend en Loos *judgment were only felt after the Single European Act (1986) pushed reluctant national governments and courts to finally come to terms with the legal order the ECJ had developed.*

1. Introduction

With the fiftieth anniversary of the seminal *Van Gend en Loos* judgment of the European Court of Justice (ECJ) it is time to reassess its history and legacy. The judgment constitutes one of the core doctrines underpinning what is often described as a European

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"constitutional legal order."[1] But it does much more than that. It occupies a key position in the canon of European law, used by the Court of Justice of the European Union (CJEU) in celebrations and *Festschrifts*,[2] and taught to young students of EU law as the most basic part of the curriculum. The *Van Gend en Loos* judgment is consequently not just a historical event of limited importance for contemporary affairs. It constitutes a focal point for a rich patchwork of constantly reproduced historical memory and myths used for ideological purposes. This makes the judgment particularly ripe for historical analysis.

In the last five years a new field of historical studies of European law have emerged.[3] While the field is still far from mature, it is possible to characterize it in several respects. The fact that almost all scholars of the new field originally came from the broader field of European integration history has decisively shaped it. First, the emphasis of the field has been on tracing archival evidence that could bring new light on the history of European law.[4] Second, historians have studied European law in a broad political and societal context. This has led to a strong emphasis of the ideological roots of the "constitutional practice"[5] of European law as well as the political implications of the battle over the nature of European law. However, at the same time, the new historical research has attempted to nuance the legal, academic and institutional dimensions of the history of European law.[6]

1 The classics are Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 47(1) Am. J. Int'l L. 1 (1981) and Joseph H. H. Weiler, *The Transformation of Europe*, 100 Yale L.J. 2403 (1990–91).

2 *See* Antoine Vauchez, *Keeping the Dream Alive: the European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence*, 4(1) Eur. Pol. Sci. Rev. 51 (2012).

3 Key publications are 14(2) J. Eur. Integration Hist. (Special Issue) (2008); 21(3) Contemp. Eur. Hist. (Special Issue) (2012); and 28(5) Am. U. Int'l L. Rev. (Special Issue) (2013). *See also* Morten Rasmussen, *Constructing and Deconstructing European "Constitutional" European Law. Some Reflections on How to Study the History of European Law*, *in* Europe. The New Legal Realism 639 (Karsten Hagel-Sørensen, Henning Koch, Ulrich Haltern and Joseph Weiler eds, 2010) and Bill Davies, Resisting the European Court of Justice: West Germany's Confrontation with European Law 1949–1979 (2012). From 2013 to 2015 a collective research project based at the University of Copenhagen brings together all historians in the new field in order to explore the history of European law between 1950 and 1993. Consult the homepage for the progressive results of the project, http://europeanlaw.saxo.ku.dk.

4 Historians have been the first to systematically explore archival sources in the general scholarship on European law. However, a number of important articles, based on archival documentation, but with a strong sociological bend and focused on the role of jurists, have been published by the Polilexes research group, For the best examples, *see* Antonin Cohen, *Constitutionalism without Constitution: Transnational Elites Between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s–1960s)*, 32 Law & Soc. Inquiry 109 (2007); Julie Bailleux, *Comment l'Europe vint au droit. Le premier congrès international d'études de la CECA (Milan–Stresa 1957)*, 60(2) Revue française de science politique 295 (2010); and Antoine Vauchez, *The Transnational Politics of Judicialization.* Van Gend en Loos *and the Making of EU Polity*, 16(1) Eur. L.J. 1, 10–11 (2010).

5 Historians have preferred to use the term "constitutional practice" to describe the attempt by the ECJ, the Commission and a broad community of legal scholars to cast European law in a constitutional light. By doing so historians have left open to what extent the "constitutionalist" actually succeeded to "constitutionalize" European law. For a more detailed explanation, *see* Bill Davies & Morten Rasmussen, *Towards a New History of European Law*, 21(3) Contemp. Eur. Hist. 305 (2012).

6 *See, e.g.*, Davies, *supra* note 4.

What can the new historical research offer the field of EU law?[7] At the most basic level, the systematic search for the best possible documentary evidence offers new crucial insights into the social processes that shaped the emergence and development of European law. These processes did not take place on the public scene prompting the systematic coverage by the contemporary press. Rather, they happened behind closed doors in the European institutions or national ministries, or in the full secrecy of the ECJ *délibéré*. Without the access to archival documentation or the oral testimony that gives insights into these processes, the true origins and dynamics behind the development of European law remain hidden. The empirical methodology of history, with its focus on finding the best possible evidence, is particularly well suited to uncover the real history of European law. As a result, historical research offers new insights into the nature of European law that ultimately will help revise existing social science theories as well as proposing new interpretations.

Beyond offering a much more accurate and better documented empirical understanding of the history of European law, the new historical research can be used by legal scholars and practitioners to improve their understanding of the broader societal context within which European law has historically operated. To consider law in context is not new, of course, but the new historical research does this in a manner that differs both quantitatively and qualitatively, due to the size and the nature of the archival sources. New insights into how key cases emerged and how the ECJ/CJEU judgments were produced might help improve the doctrinal analysis by legal scholars. Likewise, legal scholars might learn from a more accurate understanding of the dilemmas, which the ECJ, European institutions, and member states had to confront when making key legal decisions.

This article is an attempt to offer two of historical scholarship's classical contributions. First, it will outline a history of the *Van Gend en Loos* judgment based on the best possible documentary evidence drawn from relevant private, state, and European archives. This will enable us assess much more accurately the historical dynamics that shaped the event, the precise motives of key actors, and finally the legal nature of the judgment. Second, on the basis of the new historical study we shall briefly discuss the importance of the judgment in the broader history of European law. The classical account of the judgment, as well as the associated constitutional narrative, will be confronted with the new historical evidence.

2. The legal (and political) nature of *Van Gend en Loos*

A key question often debated in relation to the *Van Gend en Loos* judgment is the extent to which it was revolutionary in its reasoning. Did the judgment represent continuity

[7] For an interdisciplinary debate on this question consult the recent 28(5) Am. U. Int'l L. Rev. (Special Issue) (2013). In particular, *see* Michelle Egan, *Towards a New History of European Law: New Wine in Old Bottles*, 28(5) Am. U. Int'l L. Rev. (Special Issue) 1223 (2013); Mark Pollack, *The New EU Legal History: What's New, What's Missing?*, 28(5) Am. U. Int'l L. Rev. (Special Issue) 1257 (2013); Francesca Bignami, *Rethinking the Legal Foundations of the European Constitutional Order: The Lessons of the New Historical Research*, 28(5) Am. U. Int'l L. Rev. (Special Issue) 1311 (2013); and Bill Davis, *Why EU Legal History Matters—A Historian's Response*, 28(5) Am. U. Int'l L. Rev. (Special Issue) 1337 (2013).

from the Treaties of Paris and Rome or earlier ECJ case law? This is not merely a question of historical interest; it is also a key question for assessing the legitimacy of the judgment. It has typically been the position of ECJ judges and mainstream doctrinal analysis that the ECJ drew the only logical interpretation from the nature of the European Economic Community (EEC) Treaty.[8] Several more sophisticated arguments have been launched in favor of the continuity hypothesis. Citing both case law and advocate-general positions,[9] former ECJ judge, David Edwards, has emphasized how the ECJ established several of the core doctrines on which the *Van Gend en Loos* judgment rested before 1963.[10] These included most importantly an objective-based interpretation of the treaties,[11] the acknowledgment of direct effect of treaty articles,[12] the use of the principle of *effet utile* to fill in gaps in the treaty,[13] and the primacy of European law *vis-à-vis* national legal orders.[14] Similarly, in a recent contribution, Joseph H. H. Weiler has argued that "Van Gend en Loos and its progeny are not the result of a new hermeneutics and that the decision would, or at least could, be the same under the traditional rule of interpretation of public international law."[15] The key step towards establishing what the court would term "a new legal order of international law" in the judgment had already been made by the member states when they ratified the Treaties of Rome, due to the treaties' special legal and institutional nature. The ECJ merely made the courageous choice of reminding the member states of their obligations.[16] Finally, recent sociological research by Antonin Cohen on the

[8] Treaty establishing the European Economic Community, signed on Mar. 25, 1957, entered into force Jan. 1, 1958 [hereinafter 'Treaty of Rome']. *See, e.g.*, Pierre Pescatore, *Rôle et chance du droit et des juges dans la construction de l'Europe*, *in* La jurisprudence européenne après vingt ans d'expérience communautaire 9 (1976).

[9] To include advocate-general positions is highly problematic methodologically because they did not necessarily represent the views of the collegium of judges. In particular, Maurice Lagrange went much further in defining the legal order of the European Coal and Steel Community (ECSC) before 1958 than the ECJ ever did.

[10] David Edwards, *Judicial Activism—Myth or Reality?* Van Gend en Loos, Costa v. ENEL *and the Van Duyn Family Revisited*, *in* Essays in the Honour of Lord Mackenzie-Stuart 29 (Angus I. K. Campbell & Meropi Voyatzi eds, 1996).

[11] *Id.*, at 36–37. Edwards cites three judgments: Case 1/54, French Republic v. High Authority of the European Coal and Steel Community, 1954 E.C.R. 1. and Case 7–9/54, N. V. Kolenmijnen van Beeringen, N.V. Kolenmijnen van Houthalen, N. V. Kolenmijnen van Helchteren en Zolder v. High Authority of the European Coal and Steel Community, 1956 E.C.R. 311 and case 2–3/62 Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium, 1962 E.C.R. 425 [hereinafter Gingerbread].

[12] Edwards, *supra* note 11, at 37 and 42–43. Edwards cites two judgments: Case 7–9/54, Groupement des Industries Sidérurgiques Luxembourgeoises v. High Authority of the European Coal and Steel Community, 1956 E.C.R. 175 and Case 13/61, Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn, 1962 E.C.R. 45.

[13] Edwards, *supra* note 11, at 38–39. Edwards cites Case 8/55, Fédération Charbonnière de Belgique v. High Authority of the European Coal and Steel Community, 1956 E.C.R. 245.

[14] Edwards, *supra* note 11, at 42. Edwards cites Case 6/60, Jean-E. Humblet v. Belgian State, 1960 E.C.R. 559.

[15] Joseph H. H. Weiler, *Rewriting Van Gend en Loos: Towards a Normative Theory of ECJ Hermeneutics*, *in* Judicial Discretion in European Perspective 150, 150–151 (Ola Wiklund ed., 2003).

[16] Speech by Joseph Weiler made at the ECJ's 50 years' celebration of *Van Gend*, 12 May 2013, http://player.companywebcast.com/televicdevelopment/20130513_1/en/player

emergence of a constitutional practice has argued that the ECJ already before 1958 acquired a constitutional ideology.[17] This article will take the contrasting view that the *Van Gend en Loos* judgment should be understood as a decisive turning point in the history of the ECJ and of European law in general.[18]

3. The experience of the European Coal and Steel Community

Based on recent archive-based historical analysis, we now know that key members of the legal service of the High Authority (HA) as early as in 1954 had developed a constitutional interpretation of the nature of European law.[19] According to one of the leading figures in the service, Michel Gaudet, it was crucial that the ECJ assumed a constitutional responsibility and developed a teleological interpretation of the Treaty of Paris focusing on its inherent federal spirit.[20] This attitude shaped the different positions of HA before the ECJ from the very first case.[21] In general, the position of the legal service found little support among the member state governments or in legal academia.[22] Likewise, the ECJ remained conservative, in the eyes of Gaudet, due to the composition of the college of judges. However, beginning with the judgment in case 8/55[23] of November 29, 1956, Gaudet believed that the ECJ slowly began to build up "a line of interpretation based on a certain idea of the spirit and the aims of the Treaty."[24] Analyzing the case law of the ECSC ECJ before 1958 chronologically, it can be seen that the court did occasionally employ an objective-based interpretation of the treaties.[25] It introduced the direct applicability of certain treaty articles within the legal order established by the Treaty of Paris, but not in the member states.[26] It also

17 Cohen, *supra* note 5, at 125–128 and Antonin Cohen, *Scarlet Robes, Dark Suits; The Social Recruitment of the European Court of Justice*, EUI Working Papers, RSCAS Doc. No. 2008/35, at 10–11, http://cadmus.eui.eu/bitstream/handle/1814/10029/EUI_RSCAS_2008_35.pdf?sequence=1

18 Other scholars, particularly in the field of political science, have argued in a similar manner although not on the basis of a systematic reading of archival evidence. *See, e.g.*, Karen Alter, Establishing The Supremacy of European Law: The Making of an International Rule of Law in Europe 5–21 (2001).

19 For details, *see* Morten Rasmussen, *Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65*, 21(3) Contemp. Eur. Hist. 375 (2012).

20 Michel Gaudet, Letter from to Donald Swatland, Dec. 31, 1957, Archive of Jean Monnet, Fondation Jean Monnet pour l'Europe, Lausanne (AMK) 30/3.

21 *See* the very first HA position developed by Michel Gaudet and Jean Coutard before the ECJ in Case 1/54, High Authority of the European Coal and Steel Community. *See also* Affaire 1/54, Mémoire en Défence, Historical Archive of the European Commission (HAC). BAC371/1991.6.

22 For details, *see* Rasmussen, *supra* note 20, at 379–382. For German responses in the 1950s to the idea, *see* Davies, *supra* note 4, at 53–63 (legal academia), 100–110 (public opinion), and 146–159 (political).

23 Case 8/55 Fédération charbonnière de Belgique.

24 Gaudet, *supra* note 21.

25 Case 1/54, High Authority of the European Coal and Steel Community. The notion was further developed in Joined Cases 7–9/54, N. V. Kolenmijnen van Beeringen, N.V. Kolenmijnen van Houthalen, N. V. Kolenmijnen van Helchteren en Zolder v. High Authority of the European Coal and Steel Community, 1956 E.C.R. 311.

26 This runs counter to Edwards' argument that considers this judgment a precedent for the Van Gend en Loos case. Joined Cases 7–9/54, N. V. Kolenmijnen van Beeringen. Gerhard Bebr, *Directly Applicable Provisions of Community Law: The Development of a Community Concept*, 19(2) Int'l & Comp. L. Q. 257, 267 (1970).

launched the famous principle of "*effet utile*,"[27] and widened the access of individuals to the court.[28] One may argue that the court gradually established itself as an internal, administrative court with a discrete constitutional dimension.[29] However, at the same time, the ECJ was never explicit about the general nature of European law. It never addressed the key question of the extent to which the European legal order was autonomous *vis-à-vis* national legal orders.[30] Nor did it address the fundamental challenge of how to get national courts to apply European law in relevant cases.[31] Not even when advocate-general Maurice Lagrange expressed his federal views at great length did the ECJ respond.[32] A decisive breakthrough for the constitutional vision of the legal service was consequently not achieved before 1958.

4. The nature of the EEC Treaty

The negotiations and ratification of the Treaties of Rome, establishing the European Communities, would fundamentally change the nature of European law. However, at the time of the negotiations and in the immediate aftermath, it was by no means clear in what direction. European integration had been seriously endangered by the defeat of the European Defence Community (EDC) Treaty (and the associated plans for a European Political Community (EPC)) in the French National Assembly in July 1954. The ECSC experience was considered a partly economic and institutional failure, and without the establishment of two additional communities planned, the political importance of the ECSC diminished rapidly.[33] In this context, the establishment of two new communities, the European Atomic Energy Community (EURATOM) and the European Economic Community (EEC), constituted a fundamental breakthrough for the integration process. At the level of heads of states, in particularly French leader Guy Mollet and German chancellor Konrad Adenauer, the new treaties represented

[27] Case 8/55 Fédération charbonnière de Belgique.

[28] Case 3/54 Associazione Industrie Siderurgiche Italiane (ASSIDER) v. High Authority of the European Coal and Steel Community, 11 February 1955 E.C.R. 63 and Case 4/54, Industrie Siderurgiche Associate (ISA) v. High Authority of the European Coal and Steel Community,11 February 1955 E.C.R. 91.

[29] This was the conclusion of Willem Riphagen already in 1955. *See* Willem Riphagen, *The Case law of the European Coal and Steel Community Court of Justice*, 2 Nederlands Tijdschrift voor Internationaal Recht 384 (1955). *See also* Pierre Pescatore, Zehn Jahre Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften. La Cour en tant que juridiction fédérale et constitutionnelle. Rapport général (1965).

[30] This was a key question discussed at great length at the Stresa conference in July 1957. *See* the legal discussions of the conference, in 2–3 Actes officiels du congrès international d'études sur la Communauté Européenne du Charbon et de l'Acier, Milan-Stresa, 31 Mai–9 juin 1957 (1958–1959). For a sociological analysis of the conference, *see* Julie Bailleux, *Comment l'Europe vint au droit. Le premier congrès international d'études de la CECA (Milan-Stresa 1957)*, 60(2) Revue française de science politique 295 (2010).

[31] Gerhard Bebr, *The Relation of the European Coal and Steel Community Law to the Law of the Member States: A Peculiar Legal Symbiosis*, 58(6) Colum. L. Rev. 767 (1958).

[32] *See, e.g.*, Case 8/55 Fédération charbonnière de Belgique.

[33] Karen J. Alter & David Steinberg, *The Theory and Reality of the European Coal and Steel Community*, *in* 8 Making History. European Integration and Institutional Change at Fifty, The State of the European Union 89, 92–95 (Sophie Meunier & Kathleen R. McNamara eds, 2007).

an important political choice in favor of closer European military cooperation in the heat of the cold war.[34] In addition, for France, and most other member states, the EEC Treaty constituted a framework for economic modernization based on a controlled and gradual liberalization of trade.[35] Neither Mollet nor Adenauer cared much for institutional and legal niceties. Instead, they opted for an institutional structure dominated by state power. Even the German delegation largely abandoned the constitutional and democratic ambitions that had dominated the negotiations on the EPC in 1953. After all, the new treaties needed to be ratified in the French National Assembly.[36]

At the level of negotiations, the institutional and legal shape of the treaties was conditioned by these overall choices at the political level. Focusing on the EEC treaty, it was already hinted in the Spaak Report that the development of a common market, including all sectors of the economy, necessitated a recasting of the institutional setup of the ECSC.[37] Because the development of a common market by its very nature would constitute an open-ended and dynamic process, the treaty might define the general objectives but had to include a high degree of flexibility to how the common institutions would achieve these. It could not as in the Treaty of Paris provide a well-defined roadmap—a *traité de loi*. In addition, it was generally accepted that the Council had to be the central decision-making organ due to the sensitive and wide-reaching economic and political nature of building a common market, and as a result the Commission should take a more limited and different role than the HA.[38] It was obvious to most governments involved that national governments would have to take charge of the construction of the common market, since only they had the popular legitimacy to address potential social, economic, and political sensitivities that might arise from the process of liberalization. Only the Dutch government defended a model which retained the High Authority as sole executive organ. In the end, the Dutch had to accept that the Council took the key

[34] Recently Mathieu Segers has convincingly argued that the breakthrough in the negotiations on EURATOM and the EEC owed much to German interest in acquiring French-produced nuclear weapons, thereby rendering Germany independent of US military protection. The EEC Treaty was consequently accompanied with a secret deal between France and Germany to produce nuclear weapons. The deal was abandoned when Charles de Gaulle came into power in 1958. *See* Mathieu L.L. Segers, *The* Relance Européenne *and the Nuclear Dimension of Franco-German Rapprochement*, *in* A History of Franco-German Relations in Europe. From "Hereditary Enemies" to Partners 177 (Carine Germond & Henning Türk eds., 2008) and Jeffrey Vanke, Europeanism and European Union: Interests, Emotions, and Systemic Integration in the Early European Economic Community 224 (2009).

[35] Alan S. Milward, The European Rescue of the Nation State (1992) and Laurent Warlouzet, Le choix de la CEE par la France. L'Europe économique en débat de Mendès France à de Gaulle (1955–1969) (2011).

[36] The German Foreign Ministry under the leadership of Walter Hallstein had to compromise with the position of the Ministry of Economics under Ludwig Erhard that considered supranational institutions to be harboring French "*dirigiste*" tendencies. Hanns Jürgen Küsters, *West Germany's Foreign Policy in Western Europe, 1949–58: The Art of the Possible*, *in* Western Europe and Germany. The Beginnings of European Integration 1945–1960, at 55 (Clemens Wurm ed., 1995) and Warlouzet, *supra* note 36.

[37] Rapport des chefs de délégation aux ministres des affaires étrangères, Brussels, Apr. 21, 1956, at 25, http://www.unizar.es/euroconstitucion/library/historic%20documents/Rome/preparation/Spaak%20report%20fr.pdf [hereinafter Spaak Report].

[38] This was indeed the position of the French government as expressed by the highest ranking jurists working for the Foreign Ministry. George Vedel, Note, Sept. 11, 1956, Archive of Robert Marjolin 16/10/5, Fondation Jean Monnet pour l'Europe, Lausanne.

executive role and became the central decision making institution. But a complex balance was found that also turned the new Commission into a co-executive alongside the Council. In article 149 of the EEC Treaty, the Commission was granted a right of legislative initiative which, prompted by a Dutch demand, could only be circumvented by a unanimous vote in the Council. So while the EEC would be Council-dominated, the latter was partly furnished with a supranational motor. In addition, it was agreed that the ECSC assembly and court would be used in all three communities, but with the assumption that the competences of these two institutions would not expand significantly.[39]

The overall shape of the EEC Treaty clearly reflected the strengthening of the intergovernmental dimension in the institutional setup. In general, the EEC Treaty gave national governments a key role, insofar as any fulfillment of treaty objectives would rest on the backing of member states. This was of course most pronounced with the design of the dual executive structure just discussed above. The Council would consequently play a key role in deciding Community policies. Similarly, the treaty design also placed important responsibilities on the member states in the form of negative obligations (e.g., not to increase tariffs during the transitional period such as described in art. 12, EEC Treaty).[40] Similarly, the harmonization of national legislation relevant to the construction of a common market, which was a major element of what would constitute a common European legal order, was based on unanimous decisions by the Council (art. 100, EEC Treaty). Very few exceptions existed to this general intergovernmental trend, most importantly the articles 85–88 defining competition policy. Here, the Commission was expected eventually to assume a truly supranational role as key regulator (art. 87). Until then, article 85 would, according to a public statement of the head of delegations on May 6, 1957, have direct applicability.[41]

The legislative and enforcement system designed largely reflected the general nature of the treaty. The most prevalent legislative norm consisted in Council directives which offered autonomy to national administrations with regard to the choice of means of

[39] Anne Boerger, *Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome*, 21(3) Contemp. Eur. Hist. 339, 350–351 (2012).

[40] That a number of negative obligations was explicitly directed to national governments in the treaty text did not necessarily exclude that national courts would apply them directly. For a historical and legal analysis that demonstrates that national courts routinely applied international treaties in national legal orders, *see* Michel Waelbroeck, Traités internationaux et jurisdictions internes dans les pays du Marché commun 161–188 (1969). I have not been able to find documentary evidence that could help us determine the intention of the negotiating parties with any certainty. However, the negotiations between tariff experts certainly assumed that the establishment of the customs union would be handled by national administrations without interference by national parliaments (*see, e.g.*, art. 11, EEC Treaty). It seems likely that the negotiators were unaware that national courts might also play a role in the application of the treaty in this field. Archive of the Council of Ministers, (ACM), Brussels, NEGO3.114 and 218.

[41] Comité intérimaire pour le Marché Commun et l'EURATOM, *Relevé des déclarations interprétatives se rapportant à des dispositions du traité instituant la communauté économique européenne et de ses annexes, ou des protocoles, conventions et déclarations qui l'accompagnent*, Brussels, May 6, 1957, Archive of the Belgian Foreign Ministry (ABFM), Brussels, Doc. No. 18.881/IV/4. *See also* for the same conclusion of the Committee that negotiated the common market during the EEC treaty negotiations, Comité des chefs de délégation, *Projet de procès-verbal de la réunion du Comité des Chefs de délégations tenue à Bruxelles, le 6 décembre 1956*, ACM, Doc. No. NEGO3.114, at 7.

reaching the declared objective. The second type of legislation, Council regulations, did have direct applicability in national legal orders, but was used only in a limited manner.[42] Likewise, the enforcement of European legislation was in practice based on the continuing support of member states, since national courts were given exclusive competence to apply European law in the national legal order under the guidance of their respective constitutional orders.[43] The Commission and national governments, but not the ECJ, were given the task of monitoring member states' compliance. They had the option of bringing perpetrators to court under the infringement procedure (arts. 169–171). The producer was weakened, however, compared to article 88 of the Treaty of Paris due to the lack of fine for non-compliance.[44] Finally, as a result of the choice in favor of a state-dominated model of cooperation, the inclusion of basic rights for citizens was not considered relevant.[45] The direct access of individuals to the ECJ (art. 173, EEC Treaty) that had been a key element in the Treaty of Paris (art. 33) and had been subject to ECJ case law that expanded access, was deliberately restricted.[46] The governments had no interest in accepting a circumvention of a painstakingly negotiated Council compromise. The *groupe de rédaction* also agreed that the infringement mechanism should only be open to the Commission and member state governments, not individuals. It was deemed that individual rights were sufficiently protected against non-compliance on the part of member states, by the actions of the Commission and their own national government through the infringement procedure.[47]

The competences and institutional shape of the ECJ of the EEC were not supposed to differ significantly from the ECJ of the ECSC. Apart from this, the *groupe de rédaction* was given a relatively free hand. As a result, members of the committee such as Nicola Catalano (the Italian representative and former employee of the legal service of the HA), Michel Gaudet, and Pierre Pescatore (the Luxembourg representative), who supported a constitutional and federal approach to integration, attempted with some success to insert legal elements that went beyond international law.[48] Here we

[42] There is no doubt that Council and Commission regulations were an important innovation, streamlining the ECSC legislative system. *See* Pierre Pescatore, *Les travaux du "Groupe Juridique" dans la négociation des Traités de Rome*, 34(1–4) Studia Diplomatica 159 (1981) [hereinafter *Les travaux*]. But even the key author of art. 189, Pierre Pescatore, had to admit in 1959 that the use of regulations in the Treaty was limited. *See* Pierre Pescatore, *Les aspects fonctionnels de la Communauté Economique Européenne, Notamment les sources du droit*, *in* Les aspects juridiques du marché commun 51 (1958) [hereinafter *Les aspects fonctionnels*].

[43] National institutions were obviously obliged to fulfill their obligations in accordance with art. 5.

[44] This was proposed by Pierre Uri already in the Spaak report. *See* Boerger, *supra* note 40, at 353.

[45] The draft treaty of the European Political Community had a mechanism for this. *See* Morten Rasmussen, *The Origins of a Legal Revolution—The Early History of the European Court of Justice*, 14(2) J. Eur. Integration Hist. 77, 81 (2008).

[46] Boerger, *supra* note 40, at 353.

[47] Muhlenhöver, 'Aufzeichung … Hier. Gerichthof, Dec. 17, 1956. Archive of the German Foreign Ministry (AGFM), Berlin, Auswärtiges Amtes. Abt. 2, 225-30-04.

[48] For the most accurate history of the Groupe de redaction, *see* Boerger, *supra* note 40. *See also* Corinne Schroeder & Jérôme Wilson, Euroam esse construendam*: Pierre Pescatore und die anfänge der europäischen rechtsordnung*, 18 Historische Mitteilungen, Band 162 (2005). For an eye-witness account consult Pescatore, *Les travaux*, *supra* note 43.

shall mention two key examples.[49] One crucial element of constitutional law was article 164, which repeated the exact wording of article 31 of the Treaty of Paris: "The Court of Justice shall ensure the observance of law and justice in the interpretation and application of this Treaty." In German legal thinking, this sentence implied that the EEC was to be considered a *Rechtsgemeinschaft* based on law and justice, and not just an international organization.[50] The second element was a reform of the system of preliminary references in the Treaty of Paris (art. 41). When Catalano proposed to reform it, several alternative models were presented. The most far-reaching would have turned the mechanism into a true system of judicial review from the outset. It gave the ECJ exclusive competence to interpret European law in all cases where it played a role before national courts.[51] This was eventually rejected and a much more modest model was chosen. After long discussions in the committee it was agreed that national courts could—and courts of last instance were obliged to—send a preliminary reference to the ECJ. The latter would then have exclusive competence to interpret the validity and the general nature of European legal norms, but not how national courts applied European law.[52]

To conclude, the EEC Treaty remained a fundamentally ambiguous text. On the one hand, the treaty represented a fundamental shift in an intergovernmental direction as compared to the Treaty of Paris. The treaty was largely designed along the norms of international law directed to and controlled by member state governments, administrations, and courts. This reflected not only French resistance to supranational institutions, but also a general drift of most governments of the six founding states away from support to the supranational model. An element of automaticity may have been built into the establishment of the customs union, but national governments would largely control the politically sensitive process of building the common market.[53] On the other hand, the common market would—if created—have, over time, a transformative impact on the member states and their mutual relations. In combination with the still independent supranational institutions and the discrete elements

[49] Other examples of articles with constitutional elements include arts 7, 173, and 189. For a full exploration of these, *see* Boerger, *supra* note 40.

[50] This notion of a European rule of law was inserted from the very beginning in the work of the Groupe de rédaction apparently without controversy. *See* Groupe de rédaction. *Projet de rédaction d'articles relatifs aux institutions de la communauté pour le marché commun*, Dec. 15, 1956, Doc. No. ACM.NEGO, CM3.090. For an interesting article on the deeper implications of art. 164, *see* Henning Koch, *A Legal Mission: The Emergence of a European "Rationalised" Natural Law*, *in* Paradoxes of European Legal Integration 45 (Hanne Petersen, Anne Lise Kjær, Helle Krunke & Mikael Rask Madsen eds, 2008).

[51] From the handwritten notes in Michel Gaudet's own set of negotiations papers, it is clear that he preferred the first option. Michel Gaudet, *Communauté Européenne économique. Dossier 9. Cinquième partie: Les institutions de la communauté*, Groupe de rédaction. Projet de rédaction d'articles relatifs à la Communauté pour le marché commun. Doc. No. MAE 838 f/56 at 14, Archive of the Legal Service of the Commission (ALSC).

[52] Muhlenhöver, 'Aufzeichung . . . Hier. Gerichthof, Dec. 17, 1956. AGFM, Auswärtiges Amtes. Abt. 2, 225-30-04.

[53] The liberalization of intra-European trade had been at the heart of the national engines of economic growth and the construction of welfare states of the Western European nation state during the 1950s. Alan S. Milward, The European Rescue of the Member States 119–223 (1992).

of constitutional law inserted by the *groupe de rédaction*, the potential existed for the EEC to follow a different path institutionally and legally.[54] Nevertheless, the way the EEC would eventually develop in the legal arena, through the case law of the ECJ, was unexpected by the key observers. Pierre Pescatore, for example, predicted in 1959 that the European legal order, which the governments had not wanted to create through the text of the treaty, would instead be constructed by the normative acts of its institutions, the various ways member states would implement it and the harmonization of national legislation with a bearing on the functioning of the common market. Pescatore failed to highlight the role of the mechanism of preliminary references![55]

5. Towards the *Van Gend en Loos* judgment

The period from 1958 to 1962 would in fundamental ways pave the way for a breakthrough for the legal service's constitutional position in the case law of the ECJ, even if the prospects of success must have appeared relatively slim at first. The new branch of the EEC legal service was headed by Gaudet who could count on the firm backing of the new president of the EEC Commission, Walter Hallstein. As a result, the Commission would continue to pursue a breakthrough for the constitutional interpretation of European law before the ECJ. The core challenge of the legal service was how to construct a European legal order that would efficiently underpin the common market? How could the enforcement of European law be secured when national administrations and courts held the general competence to respectively implement or apply European law subject only to the threat of an infringement case? The *Van Gend en Loos* case struck at the heart of these matters.

Three factors helped pave the road for the case. First, life was blown into the preliminary reference system detailed in article 177 of the EEC Treaty.[56] This development originated in the Netherlands, which had confirmed the primacy of "self-executing" international law *vis-à-vis* national law through two constitutional reforms in 1953 and 1956.[57] This particular constitutional setup and the Netherlands' traditionally open economy and internationally oriented community of lawyers, facilitated a drive among Dutch firms and advocates to explore the status of European law in the Dutch

[54] This would certainly be the ambition of the first European Commission under Walter Hallstein's leadership. *See* N. Piers Ludlow, The European Community and the Crises of the 1960s: Negotiating the Gaullist Challenge (2007).

[55] Pescatore, *Les aspects fonctionnels*, *supra* note 43.

[56] It was by no means clear how the preliminary reference mechanism would be used. Not even the judges of the EEC seemed to agree. In 1958, Nicola Catalano (ECJ judge 1958–1962) and Advocate-General Lagrange openly disagreed before Dutch officials, when the latter disputed Lagrange's recommendation that national courts avoided using the system too much. *See* Procès-verbal de la reunion tenue à La Haye le 11 juin 1959, à 15h30, entre la Cour de Justice des Communautés Européennes et les représentants du gouvernment néerlandais, Archive of the Dutch Foreign Ministry (ADFM), The Hague. Ministerie van Buitenlandse Zaken 1955–1964.913.I.Europa.913.10.Algemeen.19970.

[57] Karin van Leeuwen, *On Democratic Concerns and Legal Traditions: The Dutch 1953 and 1956 Constitutional Reforms "Towards" Europe*, 21(3) Contemp. Eur. Hist. 357 (2012) is a new archive-based history of these reforms.

constitutional context in the period between 1958 and 1962.[58] In a first wave of court cases, firms and advocates had focused on the status of European competition policy (arts. 85–88),[59] before the Council decided on how the latter would be administered by adopting Regulation 17 in early February 1962.[60] In late 1961, a second wave of cases concerning whether treaty articles dealing with the establishment of the customs union could have direct effect appeared before national courts and resulted in five preliminary references.[61] In May 1962, the Hoge Raad finally held that the ECJ had the competence to assess whether articles of the EEC Treaty had direct effect (and consequently had primacy) in the Dutch legal order.[62]

Second, the founding in 1961 of the *Fédération Internationale pour le Droit Européen* (FIDE) as an umbrella organization of national European law associations, constituted a

[58] I would like to thank Michel Waelbroeck for this point.

[59] The question of how to apply art. 85 was deeply contested in the Netherlands between 1958 and 1962. Dutch competition law did not outright forbid cartels or restrictive arrangements, as did art. 85. Cartels were not necessarily seen as something negative, and Dutch legislation therefore used a notion of "misuse" to decide which cartels should be banned. However, given the fact that the establishment of proper European level authorities to administer the policy would only take place within three years (art. 87), the Dutch government carried through a special law, the so-called *Sinterklaaswetje* after the day it was adopted (patron-saint Nicholas's day, Dec. 5, 1958), in connection with the ratification of the EEC Treaty. This law made sure that Dutch competition law could continue until the common policy was in place. The problem was that art. 85 was supposed to be directly applicable; this would indeed also become the opinion of the Commission from 1958 onwards. As a result, and despite the warnings of the Dutch government, Dutch firms did not accept the new law and brought cases to Dutch courts to enforce art. 85. The entire first wave of cases were so-called "*kort geding*," or interim injunction, cases that had to be dealt with quickly and only required provisional judgments: courts could not nullify competition agreements in such proceedings. Moreover, Dutch courts found that the application of art. 85 was not unambiguous; because ¶ 3 included an exception to the prohibition of cartels that necessitated an administrative capacity that had not yet been established in the Netherlands. The nature of the proceedings precluded the sending of preliminary references from Dutch courts and it was only when the first case was not a kort geding case, the first case that was not a *kort geding* case, the Bosch and Van Rijn v. De Geus en Uitdenbogerd case appeared before the Court of Appeal in The Hague that the latter finally sent a preliminary reference to the ECJ in June 1961 in order to get a definitive interpretation of art. 85 (Reference by the Hague Court of Appeal, June 30, 1961, *Nederlandse Jurisprudentie* 1961, No. 375). By sending the preliminary reference, the court ignored the opinion of General-Advocate Pieter Eijssen, who in the K.I.M.-Sieverding case before the Hoge Raad had argued against the use of preliminary references not only for cases of *kort geding*, but more generally. *See* Letter from Willy Alexander to Michel Waelbroeck of 25 January 1962, Archive of Michel Waelbroeck (private), and Karin van Leeuwen, *Dutch Courts and the ECJ "Legal Revolution" of 1963–1964: Reconsidering the Historical Narrative of Unproblematic Acceptance*, Paper presented at the UACES, The Academic Association for Contemporary European Studies conference, Leeds, Sept. 2–4, 2013.

[60] Sibylle Hambloch, *EEC Competition Policy in the Early Phase of European Integration*, 17(2) J. Eur. Integration Hist. 237, 244 (2012).

[61] The first cases were: College van Beroep voor het Bedrijfsleven, Jan. 10, 1962, S.E.W. (1962), 65—the case was eventually settled out of court—and four cases from the Tariffcommissie: Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, 1963 E.C.R. 1 and Case 28/62 Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v. Netherlands Inland Revenue Administration, 1963 E.C.R. 31; Case 29/62 N.V. Schuitenvoerderij en Expeditiekantoor v/h Jacob Meijer te Venlo, 1963 E.C.R. 31; and Case 30/62 Hoechst-Holland N.V. te Amsterdam tegen Nederlandse Administratie der Belastingen, 1963 E.C.R. 31.

[62] The Hoge Raad pronounced its judgment in an appeal against the preliminary reference issued by the Court of Appeal of The Hague in the Bosch and Van Rijn, *supra* note 60. *See* HR May 18, 1962, NJ 1965, 114–15, 437–45, Robert Bosch GmbH and ors v. De Geus and Uitdenbogerd (Neth.).

major step towards establishing a proper academic field of European law.[63] FIDE and the national associations would function as a source of information for the national application of European law to the Commission, and they would help produce, legitimize, and promote ECJ case law in the national contexts. Advocates from the Dutch European law association were the first to focus on the status of article 12 of the EEC Treaty and brought cases before Dutch courts that eventually resulted in preliminary references to the ECJ.[64]

Finally, the balance inside the ECJ changed in a constitutional direction. Already by 1958, Gaudet had high expectations of the young new president André Donner from the Netherlands, who, Gaudet found, understood the European vocation of the court.[65] However, the jurisprudence before 1962 did not decisively embrace the legal service's position.[66] It was only when two new judges, Robert Lecourt and Alberto Trabucchi, entered the court in spring 1962 that the attitude of the court seriously began to change. Lecourt, who had been a prominent Christian Democratic politician of the French Fourth Republic, was a known supporter of European federalism and a member of Jean Monnet's action committee.[67] Law professor Trabucchi from *Universita' degli studi di Padova* was less known, but came as one of Italy's leading authorities in private law.[68] Perhaps it was this background that made him prone to focus on the constitutional elements of European law.[69] One of the first effects of the change could be seen in the so-called *Gingerbread* judgment (Joined Case 2–3/62) in December 1962, where Lecourt functioned as rapporteur. The judgment used the general scheme of the EEC treaty to interpret a case that dealt with the re-emergence of duties equivalent of tariffs during the establishment of the customs union.[70]

[63] For the history of the oldest national association, the *Association des juristes européens* that helped set up FIDE, *see* Alexandre Bernier, *Constructing and Legitimating. Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950–1970*, 21(3) Contemp. Eur. Hist. 397 (2012).

[64] See Morten Rasmussen, *Establishing a Constitutional Practice: The Role of the European Law Associations*, *in* Societal Actors in European Integration. Polity-Building and Policy-Making, 1958–1992, at 173 (Wolfram Kaiser & Jan-Henrik Meyer eds, 2013).

[65] Fondation Jean Monnet pour l'Europe, Archive of Jean Monnet, (AJM).AMK C 30/3. Michel Gaudet, Letter to Jean Monnet of Dec. 18, 1958.

[66] The most important doctrinal case was probably Case 6/60 Jean-E. Humblet, which for the first time established that the European legal order was autonomous.

[67] Lecourt replaced Jacques Rueff, who as an economist had not been a champion of the constitutional approach. On the surprising nomination of Lecourt by an euro-skeptical French president Charles de Gaulle and prime minister Michel Debré, *see* Rasmussen, *supra* note 4, at 648.

[68] For a general discussion of the life and legal scholarship of Alberto Trabucchi, *see* La formazione del diritto europeo: Gionata di studio per Alberto Trabucchi nel centenario della nascita (Marco Azzalini & Claudia Sandei eds., 2008).

[69] Trabucchi replaced Catalano, who was an outspoken champion of the federalist cause. He had, however, a tendency to antagonize the other Italian judge Rino Rossi and consequently undermine his views in the collegium. This changed with the arrival of Trabucchi who quickly established friendly relations with Rossi. Interview with Paolo Gori, *référendaire* of Catalano and then Trabucchi, Apr. 2008 (conducted by Morten Rasmussen & Antoine Vauchez).

[70] Joined Cases 2–3/62, Gingerbread. *See* Pierre Pescatore, "Information Communication, Culture, Audiovisuel", *in 40 ans des Traités de Rome—Colloque universitaire organisé à la mémoire d'Emile Noël—Actes du colloque de Rome 26–27 mars 1997*, at 72–76 and 108–109 (Emile Bruylant 1997), and Pierre Pescatore, *Robert Lecourt (1908–2004)—Eloge funèbre par Pierre Pescatore ancien Juge de la Cour, à l'audience solennelle du 7 mars 2005*, 3 Revue trimestrielle de droit européen 589 (2005).

What was the thinking and policy of the legal service during those first years of the life of the EEC? At first it seems quite clear that confusion existed not only in the legal service but also among scholars and practitioners of European law with regard to what would become the main source of a future European legal order. As comparative law scholars largely dominated the emerging field of European law,[71] the promise of harmonization of national legislation relevant to the establishment of the common market in article 100 caught their imagination.[72] One of the first major international conferences organized by the French association of European law in Paris in November 1960 dealt with arbitration law from a comparative law perspective.[73] Similarly, the first FIDE conference in Brussels of 1961 had a similar perspective on mergers and ententes.[74] Legal literature appeared promoting harmonization and was prompt to criticize the EEC for moving too slow in the field.[75] To Gaudet, the potential for harmonization was important only in the long term,[76] and since it also fell within the competence of Directorate-General IV (DGIV) there was little he could do to promote a field that was quickly blocked by reluctant national governments in the Council.[77] He made it quite clear to FIDE that he wanted the association to go beyond harmonization in its scientific focus.[78]

To Gaudet, the nature of the legal order was closely connected to the establishment of the common market. He felt early on that the direct application and primacy of the treaty within national legal order constituted a central objective.[79] Similarly, the mechanism of preliminary reference played a key role in assuring the uniformity of the interpretation and application of European law in the member states.[80] In order to follow the development in national courts' dealing with cases that included questions

[71] Rasmussen, *supra* note 65, at 176 and 178.

[72] There were even (unfulfilled) plans in 1958 proposed by Francois Hepp and William Garcin with the support of Donner, Catalano, and Pescatore among others to establish an independent association or institution of prominent jurists to study comparative law that could facilitate harmonization. *See* François Duchêne, Letter to Michel Gaudet of Dec. 8, 1958. AJM.AMK C 30/3 and Aide-Mémoire, Dec.1958, AJM. AMK C 30/3.

[73] Notes Gaudet sur colloque arbitrage, Nov. 19, 1960. ALSC, Doc. No. 347.96 (y) Association des juristes européens.

[74] This had been agreed Directorate General IV. *See* Archive of the Legal Service, 347.96 (493) Association belge pour le droit européen. *See also* the published report, Rapports au Colloque international de droit européen organisé par l'Association belge pour le droit européen, Bruxelles, 12–14 octobre 1961 (1962).

[75] *See, e.g.*, Robert Lecourt & Roger-Michel Chevallier, *Chances et malchances de l'harmonisation des législations européennes*, Recueil Dalloz 273 [1963].

[76] Michel Gaudet, *Les problèmes juridiques*, Lecture given on July 13, 1959, at La Comunita Economica Europea, Centro internazionale di studi e documentazione sulle comunita europee, Universitá degli studi di Ferrara, AMG, Conférences.

[77] For a story from inside Directorate General IV, *see* Hans von der Groeben, The European Community: The Formative Years: The Struggle to Establish the Common Market and the Political Union 65 (1987).

[78] Michel Gaudet. Letter to Maurice Rolland of Mar. 26, 1961, AMG, Chronos 1961.

[79] Michel Gaudet. Note pour Monsieur Biays, Dec. 19, 1960, AMG, Chronos 1960, and Gaudet, *supra* note 79.

[80] Michel Gaudet, *Le Marché Commun devant les juges*. Lecture given on Dec. 17, 1960 in Brussels, AMG, Conférences.

of European law, Gaudet hired the American legal scholar Gerhard Bebr[81] in 1959 and set up a small team to monitor in cooperation with the *Service de Documentation* of the ECJ national courts and summarize judgments in internal reports.[82] The impression from these reports was that national courts did not interpret the highly pertinent question of the first years namely the status of article 85 (that included a prohibition of restrictive agreements between firms) in a similar manner. According to Bebr's reports, there seemed to be a serious lack of adoption of European law and an unfortunate tendency to ignore the option to send preliminary references, for example but not exclusively, by Dutch courts.[83] In light of this finding, Gaudet strongly endorsed the idea that the planned FIDE congress in October 1963 in The Hague would address the self-executing nature of the EEC Treaty. This question seemed to be central to the development of European law.[84]

The *Bosch* case[85] brought before the Court of Appeal of The Hague constituted a crucial step forward in the use of the preliminary reference mechanism, and helped streamline interpretations of how to apply European competition policy. However, the legal service also made clear its general position on the direct effect—or self-executing nature—of treaty norms. It argued that the EEC Treaty was not a traditional international treaty, but had features of constitutional law such as a legal personality, an objective beyond traditional international law, and independent institutions the decisions of which create obligations directly for citizens. As a consequence, the treaty had a presumption in favor of being self-executing.[86] This point was not taken up by the ECJ.[87] The position on direct effect was, however, a central part of an internal memorandum developed by Gaudet in April 1962, probably prompted by the preliminary references sent by the Dutch *College van Beroep voor het Bedrijfsleven* in January

[81] Bebr was a Czech refugee of the late 1930s who had acquired American citizenship. He had done research on European law at the Yale Law School from 1954 onwards funded by the Stimson Fund. As part of this work he stayed in Luxembourg, where he finished the manuscript of his first monograph: Gerhard Bebr, Judicial Control of the European Community (1962). It was in Luxembourg that he became acquainted with Gaudet.

[82] Consult HAC.BAC.24.147 for these reports.

[83] *See also* Bebr, *supra* note 82, at 195 *et seq.* Bebr did not seem to have appreciated the finer nuances of Dutch case law and legal debate. The ambiguity surrounding the administration of art. 85(3) and the fact that all the early competition cases were interim injunction cases explain the Dutch lack of preliminary references just as much as any politically founded hesitation of using the mechanism.

[84] Nevertheless, in January 1962 Gaudet still seemed to believe that the infringement procedure would be the main source to ECJ case law. *See* Michel Gaudet. Letter to Jean Rey of Oct. 25, 1961, AMG, Chronos 1962.

[85] Case 13/61, Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn, 1962 E.C.R. 45.

[86] Mémoire, Oct. 25, 1961, HAC.BAC.371/1991.577–578.

[87] To argue that art. 85 had direct effect which the ECJ admitted was not controversial, considering how the Commission had consistently maintained this to be the case and how the design of the EEC Treaty clearly outlined a common competition policy to be set up at European level. However, in its judgment, the ECJ did not expand direct effect beyond art. 85 nor did it connect the principle to a broader vision of the status of the treaty *vis-à-vis* national citizens. The Bosch case consequently hardly set a precedent for the Van Gend en Loos case as argued by Edwards. Case 13/61, Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn, 1962 E.C.R. 45.

1962 which questioned whether article 12 had direct effect.[88] The case was settled out of court. In the memorandum, Gaudet reiterated that the obtainment of the direct applicability and primacy of the treaty, as a common and uniformly interpreted and applied body of law, within national legal orders was a central objective.[89] He did not feel certain, however, that the concept of self-executing treaty articles in public international law would be sufficient basis for a solid European legal order. Citing the perceived disparity between the application of art. 85 in Germany and the Netherlands, Gaudet found that the notion was only useful if the ECJ made sure its application and consequences were uniform across member states. Finally, on the question of primacy, he believed that member states' courts would have to grant primacy to European law or "*changer son droit national ou remettre en cause son appartenance à la Communauté*."[90]

When the *Van Gend en Loos* preliminary reference questioning the direct effect of article 12 finally reached the offices of the legal service in August 1962, it was considered the defining moment. Gaudet developed the position that the Commission would present before the court together with Leendert van der Burg and Gerhard Bebr.[91] To Gaudet it was clear that only a unique new legal system would ensure the objectives for the European legal order he had already developed.[92] In a memorandum, which eventually was adopted by the Commission collegium, Gaudet outlined three solutions.[93] The first was based on international public law. Here Gaudet envisaged that national courts, following the common tradition of the six member states with regard to the reception of international law, would give European legal norms immediate effect.[94] This system had several disadvantages, however, that undermined its usefulness. First, national courts would themselves decide which European norms had immediate effect. However, given the different constitutional contexts of member state courts, these

[88] College van Beroep voor het Bedrijfsleven, Tijdsschrift voor Europees en economisch recht, Jan. 10, 1962, at 65.

[89] In the memorandum he argued that one could not distinguish clearly between the legal force of single treaty articles, as many implied a free choice of the Council/Commission between regulations, directives or decisions. Instead, he found that since all European legal norms were part of the same legal order and emanated from the same institutions, they formed a homogenous ensemble with the same legal force. *See* Michel Gaudet, *Applicabilité du droit communautaire dans les États membres. I. L'objectif à atteindre*, AMG, Chronos 1962,

[90] *Id.*

[91] Interestingly enough, the American legal scholar and close friend of Gaudet, Eric Stein, had an office at the legal service at the time while spending a research semester in Brussels. Consequently, he could follow the debates between Gaudet and Bebr closely, the latter urging a quasi-federal and constitutional approach to the case. Eric Stein, Thoughts from a bridge—a retrospective of writings on New Europe and American Federalism 472 (2000).

[92] Michel Gaudet. Handwritten note "Il y a 3 questions—innovations . . .," HAC.BAC.371/1991.621.

[93] 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 des demandes préjudicielles de la "Tariefcommissie" néerlandaise, HAC.BAC.371/1991.620 [hereinafter Note à M. Jean Rey].

[94] This hypothesis was vindicated during the case, when the Italian *Consiglio dello Stato* directly applied art. 31 of the EEC Treaty in Biscotti Panettoni Colussi Milan v. Ministerio del Commercio con l'Estaro [1963] C.M.L.R. 133, Nov. 29, 1962 (It.), thereby removing an administrative decision of the Ministries of trade and finance, because it was considered to be in contradiction with the EEC Treaty. *See* Décision du Conseil d'État italien, Brussels, Dec. 3, 1962, HAC.BAC.371/1991.621.

decisions would hardly be identical, thereby making the uniform interpretation of European law impossible to achieve. It did not help that in France, for example, national courts had to answer to the Foreign Ministry with regard to the interpretation of international law. Second, several countries (i.e. Germany and Italy) would not give primacy to European law over subsequent parliament legislation. The second system outlined by Gaudet was based on the notion that treaty articles were addressed to member states and consequently article 12 would not be enforceable by national courts. To Gaudet this solution seemed unfortunate because it would take away any opportunity of citizens to legally question national legislation in contradiction to the treaty. Moreover, it also placed the entire burden of treaty enforcement on the infringement procedure, which administratively was extremely onerous for the Commission.

None of these systems would ensure the coherent enforcement of European law, nor the uniformity of interpretation and application that was essential for the legal security of citizens and economic actors so essential for the establishment of the common market. Instead, Gaudet proposed a third system. It would address the weaknesses identified with the two more traditional approaches already outlined and Gaudet also found it more in line with the spirit and nature of the EEC treaty. In this system, any treaty provision, which was clearly formulated and could be construed as a proper "*règle de droit*," should be directly applicable in the legal orders of the member states on the condition that the ECJ interpreted it as such through the mechanism of preliminary reference. To give the ECJ the final word on the direct effect of European legal norms was necessary to ensure the uniformity of interpretation. In addition, Gaudet proposed European legal norms should have primacy *vis-à-vis* prior and antecedent national law. Gaudet argued that this solution followed the traditions of the member states with regard to the reception of international law, while at the same time drawing the logical conclusion of the nature of the treaty. It differed, however, from how national courts normally received international law based on specific constitutional rules that differed between member states. Now both the direct effect and primacy of European law would be based on an interpretation of the EEC Treaty by the ECJ. The solution Gaudet proposed to ensure the efficient enforcement of European law in the national legal orders, and a solid and coherent legal basis for the establishment of the common market, thus constituted an original legal order drawing with a teleological approach from what the legal service itself in its position in the *Bosch* case had called the constitutional elements in the EEC Treaty.[95] Hallstein and the Commission collegium, presented with Gaudet's analysis, agreed that the legal service could present this third option before the ECJ.[96]

Before the ECJ, Leendert van den Burg presented Gaudet's new design in a thorough legal analysis. The core logic was that European law went beyond international law, based on mutual contracts between states, and constituted genuine *droit*

[95] Note à M. Jean Rey, *supra* note 94.

[96] Questions préjudicielles posées à la Cour de Justice par la "Tariefcommissie" néerlandaise en vertu de l'article 177—CEE (doc. S/06803/62). Projet de P.V. 204ème réunion Commission, HAC. BAC.371/1991.620.

communautaire. This assertion was justified both by the objective of the treaty and the special nature of the institutions. While the application of European law fell within the competence of national courts, the ECJ had exclusive competence to interpret European law. As a consequence, how European legal norms were to be enforced in the member states was not decided by national constitutional law, but through the interpretation by the ECJ. Due to the special nature of European law, article 12 could not be considered solely an obligation of member states. It was crucial for the legal security of social and economic actors that it be given direct effect so they could draw upon it before national courts. Finally European law would lose any purpose if it did not also have primacy *vis-à-vis* national law prior or antecedent.[97]

The Commission's daring position was not well received. The three governments, representing Germany, Belgium, and the Netherlands, all rejected the notion of direct effect of article 12, considering it only an obligation addressed to states. Belgium and the Netherlands also disputed the jurisdiction of the ECJ contending that the question related to Dutch constitutional law, whereas the preliminary reference procedure supposedly dealt with the interpretation of European law exclusively.[98] Advocate-General Karl Roemer apparently sympathized with the broad description of the institutional and legal nature of European law given by the Commission. He disputed, however, the consequences drawn in the Commission memorandum, which he found would not ensure legal security for national citizens and economic actors but rather endanger it. In his presentation, Roemer emphasized how a whole range of treaty articles were explicitly directed to member states' governments and consequently did not have direct effect. If article 12 had direct effect, it would have serious constitutional ramifications at the national level since not all member states would handle the consequences (primacy) similarly within their constitutional systems. As a consequence, direct effect would introduce legal uncertainty for companies in the complex field of tariff harmonization, which was mostly regulated by means of national legislation.[99]

Within the ECJ, the *juge rapporteur* from Luxembourg, Charles-Léon Hammes, supported by German judge Otto Riese and Donner, came out against direct effect of article 12. Trabucchi[100] opposed this tendency together with Lecourt, each presenting a memorandum. They clearly shared the core concerns of Gaudet and the legal service. Trabucchi's memorandum, which is the only surviving document of the *délibéré*, began by stating that apparently the rapporteur and the court were about to accept the fact that the EEC Treaty was merely a traditional international treaty, along with the implications

[97] Mémoire de la Commission de la Communauté Economique Européenne, Brussels, Nov. 7, 1962, HAC.BAC.371/1991.620.

[98] Stellungnahme der Regierung der Bundesrepublik Deutschland. E 2—Jan. 11, 1998, Mémoire du Gouvernement du Royaume des Pays-Bas, Case 26/62, at n. 71; Mémoire de l'État belge, Doc. No. D. 123/E.L./N.126/S.F.1; and Rapport d'audience dans l'affaire 26/62, HAC.BAC.371/1991.621.

[99] Conclusions de M. l'avocat général Karl Roemer dans l'affaire 26/62. HAC.BAC.371/1991.621, and Noreen Burrows & Rosa Greaves, The Advocate General and EC Law 192–194 (2007).

[100] Trabucchi was *juge rapporteur* in the similar cases on article 12 and consequently had a more developed view on the matter: Case 28/62 Da Costa en Schaake NV; Case 29/62 N.V. Schuitenvoerderij en Expeditiekantoor; and Case 30/62 Hoechst-Holland N.V. I would like to thank Vera Fritz for making me aware of this.

this would have for its value and enforcement. Trabucchi also found that the ECJ—if silent on the fundamental question of the rights of citizens *vis-à-vis* their states and the EEC Treaty—could be accused of deliberately avoiding taking a position. To Trabucchi, it was clear that article 12 was self-executing under international public law; the key question was whether it also created rights for citizens before national courts. Discussing the various options within public international law, Trabucchi was not satisfied with the legal security it offered economic actors in the common market mostly due to the lack of uniformity in its application across member states. Instead, he recommended that the direct effect of article 12 be based in the underlying system of the EEC Treaty, which he understood as fully autonomous and going beyond international law. The constitutional problems that the judgment would encounter in Italy and Germany meant that it would be wise to respect the national jurisdiction with regard to the question of primacy "*pour le moment*."[101] Eventually, the two remaining judges, Rossi and Louis Delvaux would back Trabucchi and Lecourt and secure a narrow 4:3 majority.[102]

The judgment had three elements. The ECJ did what Trabucchi had feared it would not: it took a clear stance on the nature of European law. It essentially chose the model proposed by Gaudet and the legal service.[103] First, it rejected the contention by two member states that the court did not have jurisdiction. As long as the question from the national court concerned the interpretation of European law in general, the ECJ was willing to accept it. Second, concerning the core question of the case, the court largely repeated the legal service analysis and argued that the objective of the EEC was to create a common market, the functioning of which directly concerned national citizens. This implied that European law constituted a "new order of international law"[104] and went beyond the contractual relation of international law. The legal and institutional shape of the Community confirmed this. As a consequence, article 12 created rights that national citizens could pursue before national courts. The ECJ remained cautious, however. It did not comment on the direct effect of other articles of the EEC Treaty, thereby potentially implying that the direct effect of treaty norms applied to negative obligations solely, and it did not introduce the primacy of European law. If we believe the only surviving document from the *délibéré* discussed above, the omission of the doctrine of primacy was a tactical choice by the majority of judges behind the judgment. However, even when the *Costa v. E.N.E.L.* case introduced the primacy of European treaty norms, that had direct effect, the legal order designed would still have a limited effect on the member states because of the relatively few treaty articles that in this early period were granted direct effect.[105]

[101] The memorandum is reproduced in La formazione del diritto europeo, *supra* note 69, at 213–223.

[102] Lecourt convinced Delvaux, while Trabucchi managed to sway Rossi in favor of the judgment. *See supra* note 70.

[103] Affaire 26/62, Service juridique des exécutifs européens, Brussels, Feb. 25, 1963, Note à l'attention de MM. les membres de la Commission, HAC.BAC.371/1991.621.

[104] Gaudet did not like the word "international" in this phrase. *See* Michel Gaudet, Letter to Pescatore, May 16, 1963, AMG, Chronos 1963. The ECJ would omit the word in the Costa v. E.N.E.L. judgment.

[105] For further detail consult: Rasmussen, *supra* note 20. It would take the expansion of direct effect to additional treaty articles and eventually to certain categories of Council directives by the ECJ in the 1970s to establish a more coherent enforcement system.

In the immediate aftermath of the *Van Gend en Loos* and *Costa v. E.N.E.L.* judgments,[106] the Commission, the European Parliament, and FIDE promoted the two judgments. Conferences were organized, pamphlets were published, and parliamentary reports were issued to discuss the judgments and support the new European legal order.[107] The impact on the member states of this comprehensive campaign by the European institutions and FIDE is yet to be studied, but it is clear that it did not make any serious dent in the generally skeptical attitude towards European law maintained by national administrations and legal elites in several member states, including France, Germany, and Italy.[108]

How should we assess the *Van Gend en Loos* judgment historically and legally? Arguably, the new documentary evidence on which this article is based makes it clear that the judgment represents a decisive turning point in the history of European law. This is not to argue that the judgment appeared out of the blue without any doctrinal precursors or foundation in the EEC Treaty. There is no doubt that some of the doctrinal points involved in the *Van Gend en Loos* case had appeared in earlier case law of the ECJ, although not to the extent argued by Edwards.[109] Likewise, the judgment did to some degree draw on key elements of the EEC treaty, but in a different way than claimed by Weller. The evidence suggests that the judgment in doctrinal terms advanced significantly beyond existing case law both with regard to the nature of the key doctrines introduced and perhaps most importantly the vision of the overall European legal order. Likewise, the analysis of the EEC Treaty negotiations suggests that elements in the *Van Gend en Loos* judgment, most importantly the use of the preliminary reference system as an alternative enforcement mechanism, contradicted the original design of the EEC Treaty. Finally, there is ample evidence to conclude that the ECJ had not developed a fully fledged constitutional ideology prior to 1958, contrary to what Cohen claimed.

The judgment constituted at the most fundamental level an attempt to differentiate European law from what was perceived as traditional international public law. A process completed when the ECJ in the Costa v. E.N.E.L. judgment termed the European legal order merely as a "new legal order". This had been hinted at in the case law of the Treaty of Paris and in the so-called Gingerbread judgment of December 1962.[110] But now it was finally formulated as a coherent vision inspired by and following the memorandum presented by the legal service. So while article 12, on the basis of international public law, would be self-executing, and national courts would be able to draw on it in their court cases, what the ECJ did was not merely a superfluous repetition of an already established doctrine in international public law. Rather, the ECJ attempted to address what both the legal service and the ECJ perceived as key weaknesses of international public law, namely a lack of uniformity in the interpretations of European law and of primacy. Even if the ECJ did not go for primacy in one step as suggested by the legal service, the model they adopted and the internal thinking of the majority behind the judgment implied that

[106] Case 6/64 Costa v. E.N.E.L., 1964 ECR 1141.

[107] For the first comprehensive analysis of this process consult Vauchez, *supra* note 5. For a slightly different interpretation that emphasizes the central role of the legal service, *see* Rasmussen, *supra* note 65.

[108] *See, e.g.*, Bernier, *supra* note 64, and Davies, *supra* note 4.

[109] Edwards, *supra* note 11, at 36–45.

[110] Cases 2–3/62, Gingerbread.

European law would have primacy *vis-à-vis* national law.[111] In this sense, the *Van Gend en Loos* judgment constituted a revolution in the case law of the ECJ and a final endorsement of the constitutional approach to European law long promoted by the legal service. Finally, the new European legal order essentially constituted a new enforcement system in the member states. However, using the preliminary reference system as a mechanism of European law enforcement at the hands of private litigants and their advocates in collaboration with European friendly national courts had not been part of the treaty design. As a result, the new system had one major weakness—which still persists to this day—namely that the application and uniform interpretation of European law depended entirely on the cooperation of national courts with the ECJ. In the aftermath of *Van Gend en Loos* and *Costa v. E.N.E.L.*, the key question was therefore how efficient the new enforcement system would be. Would national courts cooperate with the ECJ? And perhaps even more crucially, would national governments and administrations pay heed tho the case law of the ECJ? The history of national court reception of European law has been covered elsewhere, so in the following sections we shall consequently focus mostly on the role of national governments and administrations.

6. The legal revolution and the member states

With the ratification of the Treaties of Rome, member state governments, administrations, and parliaments, perhaps with the exception of constitutionalist elements inside the German Foreign Ministry,[112] subscribed to a consensus view that the EEC Treaty, despite the important and far-reaching objectives, was to be largely considered as an international treaty.[113] The view of the Luxembourg foreign minister Joseph Bech on the nature of the treaty was exemplary of the general understanding of the EEC Treaty. In his speech to the national parliament during the ratification debate, he argued that the EEC was a community of international law, not a federation based on public law. As a result, it was only natural that the national executives through the Council would have the decisive decision-making power and that the entire

[111] ECJ president Donner seemed to agree with this when he argued that the ECJ (the majority—my interpretation) presumably would have ruled in favor or primacy if it had been part of the case. André M. Donner, *National Law and the Case Law of the Court of Justice of the European Communities*, 1(1) Common Mkt L. Rev. 8, 14 (1963).

[112] Hallstein helped shape the German report before parliament. *See* Entwurf eines Gesetzes zu den Verträgen vom 25 März 1957 zur Gründung der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaf, (1953) Deutscher Bundestag, 2 Wahlperiode May 4, 1957 (Drucksache no. 3440). 2 Schriftlicher Bericht des 3. Sonderausschusses . . . Deutscher Bundestag, July 5, 1957, 2224 sitzung at 13.178–13.429.

[113] *See* the national reports on the nature of the EEC Treaty: Belgium: Chambre des Représentants No. 727, May 9, 1957; France: Assemblée Nationale, Rapport No. 5266, fait au nom de la Commission des Affaires Etrangères sur le projet de loi (No. 5266) . . . par MM. Savary & July, June 26, 1957 and Assemblée Nationale, Rapport No. 4676—Exposé des Motifs du Gouvernement March 26, 1957; Italy: Camera dei Deputati No. 2814, Mar. 24, 1957 (Legislatura II—1957); Luxembourg: Ministère d'État, Service Information et Presse: Le Grand-Duché de Luxembourg et la Communauté Economique Européenne (Dec. 1957), Exposé des Motifs du Gouvernment, Avis du Conseil d'État, Chambre des Députés, Commission Spéciale: Rapport; and The Netherlands: Bijlagen Tweede Kammer, Memorie van Toelichting No. 3 (Zitting 1956–57, Doc. No. 4725).

institutional setup was structured accordingly. With regard to the new European legal order, it would primarily consist in Council regulations and the harmonization of national legislation through the use of Council directives.[114] The question was, however, what consequences the fundamental legal ambiguity and institutional flexibility of the EEC treaty would have once life was blown into the new community.

To contextualize how member states reacted to the *Van Gend en Loos* case and the legal revolution in general, it is worth taking a brief look at the reactions to the first preliminary reference the *Bosch* case, where the French, Belgian, Dutch, and German governments all presented opinions. Considering these two rounds of national opinions together gives key insights into the early understanding by the national governments of the nature of the EEC treaty and the preliminary reference system. Further, it reveals how national administrations produced the opinions before the ECJ. It should be remembered, however, that national positions were not primarily formulated on the basis of general doctrinal principles, but mostly determined by the content of the court case. In the case of the *Bosch* case, the question how to interpret article 85, with its prohibition of all restrictive agreements, was potentially important to the nature of European Competition policy, the structure of which the national governments negotiated at the same time as the court case played out. Government positions thus reflected the type of competition policy they supported.

Member states held very different views on whether article 85 could be attributed direct effect, with France and the Netherlands objecting to this interpretation. The Netherlands did not have a prohibition of restrictive practices as part of the national competition law, while the French did not systematically apply the prohibition included in French legislation, and consequently both governments pursued a modification of the original text of article 85 in the ongoing negotiations on the shape of the European competition policy.[115] In the court case, the French representative warned the ECJ about not circumventing a sensitive political process and compromise through a legal process. In contrast, Germany and Belgium, together with the Commission, argued in favor of direct applicability of article 85. To Germany, for example, this made sense since the German legislation of 1958, administered by the *Bundeskartellamt*, was similar to article 85 in its prohibition of restrictive practice, and consequently the government wanted this expanded to the European level to protect German firms. With regard to the acceptance of the preliminary reference by the ECJ, while the other member states seemingly accepted the case as admissible, France found this deeply problematic. The French oral presentation was telling. If the ECJ were to pronounce itself on matters that squarely belonged to the national jurisdiction, it would go against the spirit of article 177.[116] At this early stage in the development of European law, the

[114] Discours de M. le président du gouvernement (prononcé par Pierre Werner) à la Chambre des Députés, séance du 19 novembre 1957, *in* Ministère d'Etat, Service Information et Presse, *Le Grand-Duché de Luxembourg et la Communauté Economique Européenne, Marché Commun*, 12 Bulletin de Documentation du Service Information et Presse (Dec. 1957), at 154.

[115] Hambloch, *supra* note 61.

[116] For the French oral presentation where these points have been taken consult: Plan d'exposé oral. Objet: Affaire Bosch, Jan. 15, 1962. Archives Nationales, Secrétariat general du Comité interministériel pour les questions de coopération économique européenne (SGCI). Ministère de l'économie et des finances. 19771466/244. Paul Reuter played the role of key advisor to the French government during the case.

French position in the *Bosch* case was remarkably clear. The French administrations believed the system of preliminary references should not be used for circumventing the political process at the European level nor interfere in the application of European law in the member states. The ECJ should merely interpret European law at the general and theoretical level, whereas national courts which held the "*pleines compétences sur les faits et les moyens*," should apply European law in the concrete cases. The preparation of the position was centralized through the inter-ministerial committee SGCI (Secretary General of the Interministerial Committee for Questions of European Economic Cooperation) and systematically involved all relevant ministries. From the conscientious way the position was prepared, it is clear that the French administration did not ignore the *Van Gend en Loos* case out of ignorance, but most likely because the subject matter of the case had little direct impact on French economic interests.[117]

How did the three member states that presented their position in the *Van Gend en Loos* case develop their views? Let us begin with the Netherlands from which the case originated. At the origins of the series of cases addressing article 12 was the Benelux decision to transpose their common tariff to the new Brussels nomenclature by the means of an international protocol. The changes in classification resulted in tariff increases for a number of products. During the Dutch parliamentary debates on the reform, the question was raised whether it would be in breach of article 12 of the EEC Treaty. The Dutch government ensured parliament, however, that since the general aim of the reform (Benelux tariff harmonization) was in line with the objective of the EEC, some leeway could be expected in such a complex operation as a tariff reform.[118] Clearly, the Dutch firms behind the preliminary references from respectively the *College van Beroep voor het Bedrijfsleven* and the *Tariffcommissie* did not agree with this assessment. When the *Van Gend en Loos* case was received by legal councilor Willem Riphagen, who headed the legal section of the Dutch foreign ministry, his first instinct was that the Dutch government should not submit any opinion because the ECJ would most likely find that article 12 had no direct effect.[119] Riphagen had been part of the *Groupe de rédaction* negotiating the EEC treaty and consequently had an intimate knowledge of the logic of the treaty. However, even if the ECJ declared that article 12 had direct effect, the Netherlands could live with it. The Ministry of Finance had a different opinion and wanted to defend the tariff reform.[120] As a result, the Ministry of Finance was given the task of preparing the position, which included the views that the preliminary reference was not admissible because it dealt with Dutch constitutional law and that article 12 did not have direct effect.[121]

[117] See the entire dossier on the case in the French administration. Archives Nationales, SGCI, Ministère de l'économie et des finances 19771466/244.

[118] Handelingen van de Tweede Kamer der Staten-Generaal 1958–9 Bijlage 5314 no. 7 and HTK 1958–9 (02-12-1958) 334.

[119] Hof van Justitieaangemaakt: SCHWERTMANNA (30-08-2006 11:01). 21197, Memorandum 31-08-1962 Plv JURA (Hubée) to DIE (Directie integratie Europa). ADFM, Nummer Toegang 2.05.117.996.24.

[120] Memorandum Wnd Jura (Hubée) to DIE, 25 September 1962. ADFM. Nummer Toegang 2.05.117.996.24. Hof van Justitieaangemaakt: SCHWERTMANNA (30-08-2006 11:01). 21197,

[121] Mémoire du Gouvernement du Royaume des Pays-Bas. Affaire 26/62. HAC.BAC.371/1991.621.

Unfortunately, the archival documentation covering the Belgian administrative treatment of the *Van Gend en Loos* case is too insufficient to enlighten us. As a result, we cannot explain why the Belgian Foreign Ministry, which had accepted the admissibility of the *Bosch* preliminary reference, found the preliminary reference of the *Van Gend en Loos* case problematic.[122] It should come as less of a surprise that Belgium, like the other two member states, rejected the direct effect of article 12, considering the material interest the Belgian government had in rejecting it.[123]

In the German administration the Economics Ministry led by Ludwig Erhard, which had been rather skeptical about the EEC Treaty due to its geographically limited market and opposed supranational institutions, dominated European policy after Chancellor Adenauer had granted it the *Richtlinien Kompetenz* to deal with all the economic aspects of the integration process. The Foreign Ministry was now led by state secretary Karl Carstens, after having lost the two most prominent supporters of a constitutional approach to integration, Hallstein (to the Commission) and Carl-Friedrich Ophüls (to the German Permanent Representation in Brussels). As a result of these administrative battles over competence, the *Van Gend en Loos* case was received by the law section of the Economics Ministry, and more precisely by the young Ulrich Everling.[124] To Everling, the Treaties of Rome were no different than standard international law that, in his opinion, generally only bound the public authorities of states, but not their citizens. Article 12 was as a consequence directed only to states. Moreover, it was not within the competence of the ECJ to decide on the applicability of norms for citizens, and citizens did not have the right to use European legal norms to challenge national legislation. The key underlying issue was to protect German citizens and their rights under the national constitution against European legal norms.[125] The other ministries, including the legal section of the Foreign Ministry, agreed with the views of Everling, and consequently Germany submitted a position that rejected the direct effect of article 12, but not the admissibility of the preliminary reference as such. While Carstens of the Foreign Ministry reacted with surprise and anger to the position taken by Germany, a couple of months after the ECJ judgment, this did not fundamentally change the administrative constellation that had produced it.[126] When Erhard replaced Adenauer

[122] The questions asked in the two preliminary references differed to be sure, but both arguably concerned the application of European law in the national legal order.

[123] See the dossier on the case: ABFM.Dossier 6229.

[124] Everling would become ECJ judge from 1980 to 1988.

[125] In the October 1963 FIDE conference in The Hague, Everling admitted in the debate that he had been surprised by the judgment. He then went against the trend of the debate and argued that the widening of direct effect would be problematic. Why not accept that the enforcement of the EEC Treaty consisted of two levels, one of general principle in the Treaty and one of subordinate legislation by the Council? *See* Deuxième colloque international de droit Européen 271–272 (1966). For a similar argument, *see* C. J. Hamson, Methods of Interpretation—A Critical Assessment of the Results, Court of Justice of the European Communities. Paper presented at Judicial and Academic Conference Sept. 27–28, 1976. Hamson, Professor at Cambridge University, created quite a scandal at the court for criticizing the consequences of the Van Gend en Loos judgment, which he found had created legal insecurity.

[126] Carstens demanded that all German positions before the ECJ would pass his table. *See* Davies, *supra* note 4, at 157–158.

as German Chancellor on October 16, 1963, the Economics Ministry was further strengthened *vis-à-vis* the Foreign Ministry on European policy.[127]

Taken together, the member state positions in the *Bosch* and *Van Gend en Loos* cases demonstrate a relatively coherent understanding of the nature of the EEC Treaty, who it was primarily directed to, and of how the mechanism of preliminary references was originally designed. In the cases of France and Germany (and quite possibly also Belgium and the Netherlands), the positions developed involved all the relevant ministries, and consequently reflected the broad administrative views of the involved states. When the ECJ had pronounced the *Van Gend en Loos* judgment, legal experts in the member state administrations (to which we have had archival access) were well aware of the importance of the judgment and its potential consequences. This did not mean that the new legal order launched by the ECJ, which would be further consolidated in the *Costa v. E.N.E.L.* case little more than a year later (against the opposition of the Italian government), was necessarily accepted by all member state administrations. In the German case, the skeptical stance of Everling continued until he left the ministry in 1971 to become a lecturer and later a professor at the University of Münsters. The inter-ministerial battles over the competence in the field of European policy meant that Germany never developed a coherent policy *vis-à-vis* the constitutional practice of the ECJ in the 1960s.[128] In France, both the national administration as well as French courts continued to hold a deeply skeptical attitude for the next decades, often ignoring or sidestepping the case law of the ECJ.[129]

7. The role of *Van Gend en Loos* in the history of European law

As the historical analysis presented above clearly demonstrates, there is no doubt that the *Van Gend en Loos* judgment constituted a turning point in the history of European law. In the judgment, the ECJ finally embraced the constitutional approach to European law promoted by the legal service and took the decisive first step towards embracing the new design of the European legal order originally formulated by Gaudet. By doing this, the court tried to differentiate European law from international public law and attempted to address the perceived weaknesses of the latter, namely the lack of uniform interpretation and primacy (in some member states). However, the alternative enforcement mechanism, which the new legal order essentially amounted to, depended on the cooperation of national courts. As national courts across the member states gradually began to coooperate during the 1970s and 1980s, ECJ case law could begin to strike down on national legislation at odds with European law as well as further develop the doctrines of the constitutional practise that shaped the European legal order.

[127] *Id.* at 154 *et seq.*

[128] *Id.*

[129] *See, e.g.*, the revealing analysis of the early 1980s. Note. Objet: Cour de Justice, 10 mai 1979. Premier Ministre, Comité interministériel pour les questions de coopération économique européenne, Archives Nationales, Fontainebleau, Ministère de la Justice, Numéro de versement CAC950411. L207.2.Cour de Justice. Modification de son fonctionnement. 1978–1981.L207.

In existing research on European law, it has been a key puzzle why national governments accepted this fundamental transformation of the European legal order.[130] Most importantly, the question concerning national governments' lack of action has given rise to the so-called equilibrium theory developed by Weiler, according to which the strengthened enforcement of European law was accepted by national governments because of the parallel—if causally unrelated—introduction of the informal right of the national veto.[131] Eventually, the Single European Act (SEA) would fundamentally change the dynamics of legal integration in the EC from 1986 onwards. But that is a different story.

Emerging historical scholarship now suggests a different interpretation.[132] The core argument is that the *Van Gend en Loos* judgment did not succeed in the short or medium term despite increasing national court cooperation. The alternative enforcement system, which until the mid-1970s was based on a very small number of preliminary references, was easy to ignore or contain for the majority of national administrations, some of which even found the systematic implementation of Council legislation extremely difficult to accomplish.[133] Instead, the economic and political reality of the EC was one of segmented national markets. Whereas the customs union had successfully been established by 1967, a complex web of national standards, tax system and other restrictive practices continued unabated to limit free trade not to speak of the free movement of labor, service, and capital.[134] In light of this general situation, the explanation why national governments did not intervene against the ECJ must be found in a different set of reasons than those proposed by the equilibrium theory.

Perhaps the most fundamental reason why national governments did not actively try to redress the constitutional practice was, first, that the latter simply did not have the same degree of saliency compared to other more important political and economic questions of European integration. Second, the complex and interrelated deals on the Common Agricultural Policy, the financial regulation of the Community and British membership in the EC made any fundamental renegotiation of the EEC Treaty politically impossible during the period from 1963 to 1984, and consequently limited what could be done about the ECJ.[135] Third, there probably never existed a strong and

[130] The only major exception was the Aurillac amendment by the French National Assembly in 1981, which urged French courts to consult the Foreign Ministry on the application of European law. The amendment did not pass the senate and provoked a virulent response from the European institutions. *See* Alexandre Bernier, *Facilitating and Challenging European Law: The Struggle of Two Competing Networks of Jurists and Politicians in France, 1975–1989*. Paper presented at the EUSA conference, Baltimore, MD, Apr. 10, 2013.

[131] Weiler, *supra* note 2.

[132] Bill Davies & Morten Rasmussen, *From International Law to a European* Rechtsgemeinschaft: *Towards a New History of European Law, 1950–1979*, *in* Institutions and Dynamics of the European Community, 1973–1983 (Johnny Laursen ed., forthcoming 2014).

[133] Key member states such as France, Great Britain, Germany, and Italy also remained highly skeptical of the constitutional practice of the ECJ in general.

[134] For the period until the early 1970s, *see* The European Commission, 1958–1972: History and Memories (Michel Dumoulin ed., 2007).

[135] This state of affairs also explains the widespread use of art. 235 as a shortcut to include new policy fields in the Community in the 1970s. It would take a CAP reform (milk quotas), a rebate on the British financial contribution, as well as the broad support for the single market project to make treaty reform a real possibility from the Fontainebleau summit in 1984 onwards.

unanimous wish by all member state governments to fundamentally attack the constitutional practice.[136]

With time, ECJ case law, despite its relative lack of practical impact in the member states, gradually became an integral part of the general *acquis communautaire*, underpinning European public policies. When the SEA and the new dynamics of European integration in the last half of the 1980s and early 1990s (together with the end of the Cold War) changed the political landscape of Europe, the constitutional practice was locked in.[137] Two factors largely explains this. First, member state policies on national markets changed with the SEA, turning their focus more towards the need for liberalization, and away from comprehensive national protection. This shift in focus changed the extent to which national administrations and courts would systematically resist the implementation and application of European law. Second, in the late 1980s, no national government could live with the accusation that it did not respect European law. How could the French president and government, for example, make the case that France was ready for Economic and Monetary Union if French courts systematically ignored ECJ case law? As a result, the *de facto* acceptance of the constitutional practice became a necessity.[138] So it was only in the long run that the potential of the *Van Gend en Loos* judgment truly revealed itself.

To conclude, what has the historical analysis of the *Van Gend en Loos* judgment offered? It is true that historical scholarship has a knack for dispelling the mythmaking always produced to legitimize public institutions whether national or European. This article has demonstrated that the *Van Gend en Loos* case was certainly not the simple application of the EEC Treaty by an apolitical court, as ECJ judges traditionally have argued. Rather, it was a breakthrough step toward a particular, deeply political, reading of European law, promoted by the legal service of the Commission, that attempted to strengthen the enforcement of European law.[139] Arguably, and again in contrast to established wisdom, the weaknesses of the system—the dependency on national courts—inhibited the effectiveness of the new legal order until the fundamental transformation of European integration provoked by the Single European Act

[136] This was, for example, the case when the member states negotiated the Luxembourg protocol to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed in Brussels on Sept. 27, 1968. During these negotiations, the French government entertained plans to use a modified system of preliminary references designed for the convention as a precedent for reform of the EEC preliminary reference mechanism. However, the majority of member states were not inclined to undermine the ECJ and fundamentally reform European law. *See* Vera Fritz, *The First Member State Rebellion. The European Court of Justice and the Negotiations of the "Luxembourg protocol" of 1971*. Paper presented at the EUSA conference, Baltimore, MD, Apr. 10, 2013.

[137] This did not mean that the constitutional claim of the ECJ with regard to the nature of the European legal order was accepted by national high courts as would be discovered in the late 1980s and 1990s.

[138] In the case of France, this forced a deeply skeptical Conseil d'État to accept the enforcement system. Tellingly, this happened with basis in the French constitution and not by accepting the ECJ's argument of the special nature of European law. The Conseil d'État did this in the Nicolo case: Conseil d'État, Raoul Georges Nicolo and another? Oct. 20, 1989, Recueil Lebon 190 (1990) (Fr.).

[139] As Paul Reuter would tell Eric Stein in 1958, the constitutional interpretation of the Treaties of Rome was merely "une position politique qui peut être dementie par la politique." *See* Eric Stein Papers, University of Michigan, Box 12, "Observations," 1.

in 1986. In fact, the level of cooperation by national courts after 1990 still remains unclear.[140] In this sense, this article has started to unravel a rich patchwork of reproduced historical memories and established myths that the ECJ and the field of EU law have utilized to legitimize European law.[141]

It is probably exactly the fear of the ECJ that historical scholarship might undermine the legitimacy of the court which has caused the delay in opening the archive of the ECJ.[142] However, we can only hope that the court rises to the challenge and embraces the more complex and nuanced history of European law that is nowadays produced by historians. If it does, it will not only be able to learn from its own history, but also address current and future challenges on basis of a much more solid understanding of the dilemmas, successes and failures of past decisions. This indeed is the role of historical scholarship in democratic societies: to provide a nuanced understanding of the past so the general public and public institutions can make better choices for the future.

[140] *See, e.g.*, Michal Bobek, *Of Feasibility and Silent Elephants: Legitimacy of the Court of Justice and National Courts*, *in* Judging Europe's Judges: The Legitimacy of Case Law of the European Court of Justice Examined 197 (Maurice Adams, Johan Meeusen, Gert Straetmans & Henri de Waele eds., 2013).

[141] *See also* Rasmussen, *supra* note 4.

[142] Fortunately, the richness of a number of private archives, state archives, as well as the archive of the Commission have made historical scholarship possible despite the lack of cooperation by the ECJ.