
From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa v. ENEL

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Abstract

Whilst Costa v. ENEL is the starting point for most accounts of the primacy of EU law, the story of that lawsuit is still relatively unknown. What drove Flaminio Costa to sue his electricity provider over a bill of as little as £1,925 (about €22 in 2019)? Why did the small-claims court of Milan decide to involve both the Italian Constitutional Court and the European Court of Justice in such a ‘petty’ lawsuit? Why did those two courts hand down rulings going in opposite directions? How did the lawsuit end when it came back to the Milan small-claims court? Relying upon previously undisclosed court documents and interviews with some of the actors involved, this article seeks to shed some light on the less-known aspects of the Costa v. ENEL lawsuit, against the background of electricity nationalization in Italy at the height of the Cold War, and to assess the contribution of that lawsuit and of its ‘architect’, Gian Galeazzo Stendardi, to the development of the doctrine of primacy of European Union law.

1 Setting the Scene: The Nationalization of Electricity in Italy

The nationalization of electricity production and distribution was ‘possibly the most far-reaching political initiative in Italy since the end of World War II’.¹ By all

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¹ G. Alpino and M. Trombetta (Italian Liberal Party), Italian House of Representatives, Special Committee on Electricity Nationalisation, Minority Report, 27 July 1962, at 3.

accounts, it was the *quid pro quo* that the left-wing Italian Socialist Party demanded in return for its external support to the centrist Cabinet chaired by the Christian Democrat Amintore Fanfani in 1962–1963,² which paved the way to a centre–left alliance that would dominate the Italian political landscape for several years.³ This political alliance played a key role at the height of the Cold War, as it enabled the Christian Democrats to remain in power in spite of declining electoral support⁴ and to consolidate Italy’s pro-American foreign policy. The crowning of that policy was the establishment of several US nuclear missile sites in Southern Italy,⁵ which gave Italy a relevant place in the geopolitical landscape despite its lack of an indigenous atomic weapons programme.⁶

At the beginning of the 1960s, when the Italian ‘economic miracle’ was in full swing,⁷ electricity production and distribution in Italy was a profitable oligopoly in the hands of two public and six private corporate groups (the so-called ‘electric barons’),⁸ each operating as a *de facto* monopolist over a part of the national territory.⁹ This gave rise to significant price differences between northern and southern Italy, which prompted the introduction of nation-wide electricity tariffs in August 1961.¹⁰ However, the Fanfani Cabinet claimed that government regulation alone could not ensure that Italy’s electricity production would keep up with the expansion of demand,¹¹ which was expected to double every 10 years as per Ailleret’s law.¹²

² See Mori, ‘La nazionalizzazione in Italia: il dibattito politico ed economico’, in P. Baldini and P. Hertner (eds), *La nazionalizzazione dell’energia elettrica: L’esperienza italiana e di altri paesi europei* (1989) 91.

³ See G. Tamburrano, *Storia e cronaca del centro-sinistra* (1990); Y. Voulgaris, *L’Italia del centro-sinistra: 1960–1968* (1998).

⁴ Electoral support for the Christian Democrats in the general elections for the Italian house of representatives decreased from 42.35 per cent in 1958 to 38.28 per cent in 1963. Conversely, votes for the main opposition party, the Italian Communist Party, increased from 22.68 per cent in 1958 to 25.26 per cent in 1963.

⁵ See Nuti, ‘Italy and the Nuclear Choices of the Atlantic Alliance, 1955–63’, in B. Heuser and B. Thomas (eds), *Securing Peace in Europe, 1945–62: Thoughts for the Post-Cold War Era* (New York: St. Martin’s Press, 1992) 222.

⁶ Italy’s Jupiter missile installations contributed to catalyse the 1962 Cuban Missile Crisis and, possibly, served as a bargaining chip in its resolution. See Letter from Chairman Khrushchev to President Kennedy, 27 October 1962: ‘Your missiles are located ... in Italy, and are aimed against us. ... You are disturbed over Cuba ... Do you consider ... that you have the right to demand ... the removal of the weapons you call offensive, but do not accord the same right to us?’. See also Anastasi, ‘Il quarto governo Fanfani e la crisi di Cuba del 1962’, 20 *Diacronie: Studi di Storia Contemporanea* (2014) 11.

⁷ See Nardozi, ‘The Italian “Economic Miracle”’, 19 *Rivista di storia economica* (2003) 139.

⁸ See E. Rossi, *Elettricità senza baroni* (1962).

⁹ See Bufarale, ‘Riccardo Lombardi e la nazionalizzazione dell’energia elettrica’, *Studi Storici* (2014) 645, at 646–647.

¹⁰ See Italian Council of Ministers, Interministerial Prices Committee, Decision no. 941, 29 August 1961, *Official Journal of the Italian Republic (OJIR)*, no. 214, 30 August 1961; see also Silari, ‘La nazionalizzazione elettrica in Italia: conflitti di interessi e progetti legislative 1945–1962’, 177 *Italia contemporanea* (1989) 56.

¹¹ Italian Council of Ministers, Explanatory Memorandum of Bill no. 3906 for the establishment of the National Electricity Board (ENEL) (Bill 3906), 26 June 1962, at 12.

¹² See P. Ailleret, *Énergétique, les besoins d’énergie* (1963).

The Fanfani Cabinet thus submitted a bill to introduce a centralized management of electricity production and distribution,¹³ which would enable the implementation of a comprehensive capacity expansion policy as well as the full exploitation of existing interconnection opportunities and economies of scale.¹⁴ This was to be achieved through the establishment a state-owned company, the National Electricity Board (Ente Nazionale per l'Energia Elettrica [ENEL]), which would take over the electricity-related assets of over 1,300 private electricity companies and would operate a nation-wide monopoly on the production, transport, transformation and distribution of electricity from all sources.¹⁵ The companies affected by the nationalization – which were allowed to carry on their business operations outside the electricity sector – would receive a monetary compensation based on their stock exchange prices.¹⁶ The final version of the nationalization statute gave the shareholders of the affected companies the option to swap their stocks in those companies with state-guaranteed ENEL bonds.¹⁷

The minority parties strongly opposed the nationalization bill. The centre-right Italian Liberal Party, the right-wing Italian Democratic Party of Monarchist Unity and the extreme-right Italian Social Movement claimed that the monetary compensation envisaged by the bill did not reflect the market value of the nationalized assets,¹⁸ thus harming the interests of the shareholders of the companies affected by the nationalization¹⁹ and undermining public confidence in the stock market.²⁰ The minority parties also argued that electricity nationalization was a dangerous concession by the Christian Democrats to the Italian Socialist Party,²¹ as it would trigger calls for the nationalization of other economic sectors, thus paving the way for Italy's transition to planned economy²² or even the establishment of a full-fledged communist regime.²³ Last but not least, some members of the Italian Parliament²⁴ claimed that the nationalization bill was inconsistent with Italy's commitments under the 1957

¹³ Bill no. 3906, *supra* note 11.

¹⁴ See D. De' Cocci (Christian Democrats), Italian House of Representatives, Special Committee on Electricity Nationalisation, Majority Report, 23 July 1962, at 25–26.

¹⁵ Bill no. 3906, *supra* note 11, at 15–18.

¹⁶ *Ibid.*, at 19–20. The monetary compensation would be paid in cash over a period of 10 years at a 5.5 per cent annual interest rate. See also G. Carli, *Cinquant'anni di vita italiana* (1993), at 291–297 (reporting that, as Governor of the Bank of Italy, he supported monetary compensation as an alternative to the issuance of ENEL bonds, in order to preserve the stability of Italy's financial markets).

¹⁷ See Law no. 1643 Establishing the National Electricity Board (ENEL Statute), 6 December 1962, *OJIR*, no 316, 12 December 1962, Arts 7, 10.

¹⁸ See Alpino and Trombetta, *supra* note 1, at 27–29.

¹⁹ See A. Covelli, A. Casalnuovo and O. Preziosi (Italian Democratic Party of Monarchist Unity), Italian House of Representatives Special Committee on Electricity Nationalisation, Minority Report, 27 July 1962, at 15.

²⁰ See Alpino and Trombetta, *supra* note 1, at 19, 22–23.

²¹ *Ibid.*, at 8–10.

²² *Ibid.*, at 57.

²³ See Covelli, Casalnuovo and Preziosi, *supra* note 19, at 17: 'The State arising from this undertaking will not be a socialist state proper, but a hybrid, shapeless, and contradictory entity that, to survive, will call for a full-fledged socialist regime.'

²⁴ See E. De Marzio (Italian Social Movement), Italian House of Representatives Special Committee on Electricity Nationalisation, Minority Report, 27 July 1962, at 32; G. Angioy (Italian Social Movement), Italian House of Representatives, Plenary Session Speech, 31 July 1962, at 32127–32134.

Treaty Establishing the European Economic Community (EEC Treaty).²⁵ In spite of those criticisms, on 6 December 1962, the Italian Parliament enacted the Electricity Nationalization Statute (ENEL Statute).²⁶

2 Enter *l'eroe borghese*: Gian Galeazzo Stendardi

One of the most outspoken critics of the ENEL Statute was Gian Galeazzo Stendardi, a middle-aged lawyer, member of the Milan Bar and an assistant lecturer of constitutional law at the University of Milan.²⁷ Descended from the 16th-century military leader Goro Stendardi da Montebenichi, he was a man of legendary temper; during the student protests of 1968, he would carry on teaching even with only one student left in his lecture hall.²⁸ He was a known monarchist sympathizer with a good measure of political pragmatism,²⁹ as shown by his choice to run for the Milan City Council with the influential Italian Liberal Party rather than with one of the two largely insignificant monarchist parties.³⁰

Raised under the Gentilean ideal of the 'ethical state', Stendardi was deeply concerned about the status of representative democracy in Italy.³¹ He complained that the Italian Parliament had been hijacked by interest groups and that the Christian-democrat majority had allowed the Socialist minority to set the national political agenda.³² The only solution, in Stendardi's view, was an 'activist conception of the rule of law';³³ just as Rudolf von Jhering had theorized in *Der Kampf ums Recht*, Stendardi believed that every individual's struggle to assert his or her rights through judicial proceedings contributed to the progress of the legal order as a whole.³⁴

The author of one of the first scholarly treatments on judicial review of legislation by the Italian Constitutional Court (ICC),³⁵ in the mid-1950s Stendardi brought,

²⁵ Treaty Establishing the European Economic Community (EEC Treaty), 1957, 298 UNTS 11.

²⁶ ENEL Statute, *supra* note 17.

²⁷ For an account of Stendardi's relationship with his mentor, Egidio Tosato, see Stendardi, 'Egidio Tosato nel ricordo di un suo assistente volontario', in M. Galizia (ed.), *Egidio Tosato: costituzionalista e costituente* (2010) 43.

²⁸ Interview with Bruna Vanoli Gabardi (Stendardi's former associate), Milan, 27 October 2017.

²⁹ Interview with Luca Stendardi (Stendardi's son), Milan, 27 October 2017.

³⁰ See M. Emanuelli, *Accade a Milano 1945–2002* (2002). In the 1964 Milan City Council elections, the two monarchist parties reached less than 1 per cent, whereas the Italian Liberal Party was the third largest party, with over 21 per cent of the votes.

³¹ Interview with Luca Stendardi, Milan, 27 October 2017.

³² *Ibid.*

³³ A. Vauchez, 'Integration-through-Law Contribution to a Socio-history of EU Political Commonsense', European University Institute Working Papers, Robert Schuman Centre for Advanced Studies no. 10 (2008), at 17.

³⁴ See R. von Jhering, *The Struggle for Law*, translated by John J. Lalor (1915 [1872]), at 73–74: '[E]ach of us, in his own place, is called upon to defend the law, to guard and enforce it in his own sphere. ... In defending his legal rights he asserts and defends the whole body of law, within the narrow space which his own legal rights occupy.' Cf. G. Stendardi, *Il soggetto privato nell'ordinamento comunitario europeo* (1967), at 13: '[T]he private individual becomes, at a certain stage, not only the defender of himself or herself, but also the defender of the legal order': 'The best guardian and defender of the Community legal order (as well as of any other legal order) is the individual when his or her rights are violated' (at 109–110, n. 4).

³⁵ See G. Stendardi, *La Corte costituzionale: il giudizio di legittimità costituzionale delle leggi* (1957); Stendardi, 'L'eccezione ai sensi art. 23 L. 11 marzo 1953 n. 87 e l'ordinanza del giudice ordinario', 4 *Foro Padano* (1956) 90.

albeit unsuccessfully, one of the earliest constitutionality challenges against the strict liability regime for newspaper editors set out in the Italian Criminal Code and in the Italian Press Law.³⁶

Moreover, following the 1957 Stresa Conference on the European Coal and Steel Community (ECSC), which marked the schism of the ‘supranationalists’ from the international law academic community,³⁷ Stendardi wrote one of the first Italian treatises devoted entirely to the relationship between the legal order of the European Communities and the Italian one.³⁸ In that book, published in 1958, he took the view that the Community treaties included certain ‘constitutional provisions’³⁹ – such as the EEC Treaty’s common market freedoms⁴⁰ – that should be applied regardless of any contrary domestic statute, even if adopted subsequently.⁴¹ The enactment of incompatible Italian statutes constituted a violation of Community law, which any individual could request the Community’s executive⁴² or, ultimately, the European Court of Justice (ECJ) to establish.⁴³ Moreover, in Stendardi’s opinion, subsequent Italian statutes at variance with Community law were unconstitutional under Italian law, insofar as their adoption constituted, on the part of the Italian government, a re-appropriation of the sovereign powers transferred to the Communities under Article 11 of the Italian Constitution⁴⁴ upon the ratification of the Community Treaties.⁴⁵

In other words, Stendardi envisaged two ways to enforce the primacy of Community law over conflicting Italian statutes: first, a finding of unconstitutionality of those

³⁶ See Italian Constitutional Court (ICC), Case 39/56 (Reg. ord.), *Criminal Proceedings against Elio Barucco*, Judgment no. 3 (1956) (dismissing the constitutionality challenge against section 57(1) of the Criminal Code, Royal Decree no. 1398, 19 October 1930, and section 3 of the Press Law, Law no. 47, 8 February 1948). It is worth emphasizing that this was the third ruling ever handed down by the ICC.

³⁷ See J. Baillieux, ‘Comment l’Europe vint au droit’, 60 *Revue française de science politique* (2010) 295 (noting that, as most international law professors attending the 1957 Stresa Conference refused to recognize the *suoi generis* character of the European Communities, a group of dissidents assembled around Maurice Lagrange heralding a ‘supranational’ understanding of Community law). On Stendardi’s participation in the Stresa Conference, see Davies, ‘Resistance to European Law and Constitutional Identity in Germany: Herbert Kraus and Solange in its Intellectual Context’, 21 *European Law Journal* (2015) 448.

³⁸ G. Stendardi, *I rapporti fra ordinamenti giuridici italiano e delle Comunità europee* (1958).

³⁹ *Ibid.*, at 39: ‘[A]ll the provisions [of the Community treaties] that concern the goals of the Communities, the means to achieve them, and the Community organs should be regarded ... as constitutional norms.’

⁴⁰ *Ibid.*, at 103 (referring, by way of example, to the right of establishment and the free movement of capital).

⁴¹ Stendardi, *supra* note 38, at 50: ‘[I]n the context of the assessment of those conflicts, the Community constitutional norms should always be regarded as applicable.’

⁴² *Ibid.*, at 51 (arguing that ‘every natural or legal person, belonging to one of the Member States, is entitled to request the ... Commission to establish the existence of a national norm contrary to the Treaties’).

⁴³ *Ibid.*, at 107 (arguing that ‘it would be necessary to plead judicially such an illegality, in order to obtain a decision, for example of by the Court of Justice of the European Communities’).

⁴⁴ ‘Italy ... consents, on conditions of reciprocity with other States, to such limitations of its sovereignty as may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and supports international organisations pursuing that goal’. Italian Constitution, 27 December 1947, *OJIR* no. 298, 27 December 1947.

⁴⁵ Stendardi, *supra* note 38, at 106 (noting that ‘[t]he [EEC] Treaty is an act that entails a limitation of the sovereignty of the Italian State in certain matters, as per Article 11 of the Italian Constitution. Each statute that seeks to restore the State’s former sovereignty in an area where a limitation had been accepted thus constitutes the violation of a principle laid down in the Constitution’).

statutes, a power that the Italian legal order entrusted exclusively to the ICC (the ‘centralized’ model), and, second, the disapplication of the offending statutes, a task that could be carried out by any national court (the ‘decentralized’ model). In both cases, the involvement of the ECJ through the preliminary ruling procedure was essential, as it was for the ECJ to rule conclusively on whether Community law had to be interpreted as precluding the statutes concerned.

Stendardi threw down his gauntlet at the Fanfani Cabinet’s energy policy in a law review article published in 1962, where he clearly spelled out the legal consequences of a statute carrying out the nationalization of private companies: the violation of several articles of the Italian Constitution, to be established by the ICC, and the infringement of a number of provisions of the EEC Treaty, to be ascertained by the ECJ.⁴⁶

Individuals could not challenge an Italian statute directly before the ICC or the ECJ; they could challenge, however, an act based upon that statute before Italian ‘ordinary’ courts. That is where Flaminio Nicolino Costa came in; a lawyer at the Milan Bar of monarchist leanings and a fervent admirer of Stendardi, Costa happened to be both a shareholder and a customer of Edisonvolta, one of the companies involved in the nationalization process.⁴⁷ At Stendardi’s suggestion, Costa did not allow ENEL employees to read his meter and refused to pay the first £1,925 electricity bill⁴⁸ that he received from ENEL in the spring of 1963.⁴⁹

In the context of the ensuing lawsuit before the Giudice Conciliatore (small-claims court) of Milan, Stendardi, on behalf of Costa, argued that ENEL had not validly taken over Costa’s electricity supply contract with Edisonvolta because the ENEL Statute was both unconstitutional and incompatible with the EEC Treaty.⁵⁰ Stendardi thus requested the Giudice Conciliatore to refer the matter to the ICC to obtain a ruling on the constitutionality of the ENEL Statute and added that, since there was no right to appeal for claims worth less than £2,000,⁵¹ the Giudice Conciliatore was also required to seek a preliminary ruling from the ECJ under Article 177(3) of the EEC Treaty.⁵² However, by its order of 10 September 1963, the Giudice Conciliatore only referred the case to the ICC, noting that, ‘if anything’, it was for the latter to make a preliminary reference to the ECJ.⁵³

⁴⁶ See Stendardi, ‘Problemi in materia di leggi di legittimità di espropriazione d’impresa’, 5 *Foro Padano* (1962) 52.

⁴⁷ Interview with Bruna Vanoli Gabardi, Milan, 27 October 2017.

⁴⁸ Equivalent to approximately €22 in 2019.

⁴⁹ See ICC, Case 192/63, *Costa v. ENEL*, Reply on behalf of Edisonvolta, 23 January 1964, at 2 (noting that the sum of £1,925 was only the fixed charge for the March–April 1963 billing period, as Costa had prevented the ENEL inspector from reading his meter and from charging him for his actual electricity consumption).

⁵⁰ See Vanoli Gabardi, ‘La “storia” della causa’, in B. Nascimbene (ed.), *Costa-Enel: Corte costituzionale e Corte di giustizia a confronto, cinquant’anni dopo* (2015) 82.

⁵¹ See Royal Decree no. 1443, 28 October 1940, *OJIR*, no. 253, 28 October 1940, Art. 339(4), as amended by Law no. 581, 14 July 1950, *OJIR*, no. 186, 16 August 1950, Art. 35.

⁵² See ECJ, Case 6/64, *Costa v. ENEL*, Opinion of AG Lagrange, 25 June 1964 (EU:C:1964:51), [1964] ECR 1171, at 1171 (French version) (noting that the Milan Giudice Conciliatore was ‘competent en premier et dernier ressort à raison du chiffre de la demande’).

⁵³ Giudice Conciliatore of Milan (Carones), Case 1350/63, *Costa v. ENEL*, Order, 10 September 1963, *OJIR*, no. 287, 2 November 1966.

3 Chronicle of a Defeat Foretold: The Italian Constitutional Court Proceedings

Stendardi opened the written procedure stage before the ICC with an 89-page brief that contained no statement of facts, only a barrage of constitutional challenges.⁵⁴ He claimed that the ENEL Statute infringed: Article 67 of the Italian Constitution,⁵⁵ as it had been approved by the majority in pursuance of an imperative mandate given by certain stakeholders rather than in the interest of the whole nation; Article 43 of the Italian Constitution,⁵⁶ because the ENEL Statute was not in the general interest since it unduly delegated to the executive essential aspects of the nationalization process and since the monetary compensation it provided was inadequate relative to the value of the nationalized assets; Article 41 of the Italian Constitution,⁵⁷ because the ENEL Statute established a monopoly on electricity production and distribution, thus limiting the freedom of enterprise; and Article 3 of the Italian Constitution,⁵⁸ because the ENEL Statute discriminated between large and small electricity companies (by exempting the latter from nationalization) as well as between listed and non-listed companies (by laying down different criteria for the calculation of the monetary compensation).

Most importantly, in line with the centralized primacy enforcement model outlined in his 1958 treatise, Stendardi argued that the ENEL Statute was unconstitutional under Article 11 of the Italian Constitution because it contravened several provisions of the EEC Treaty.⁵⁹ Namely, the ENEL Statute allegedly infringed: Articles 93 and 102 of the EEC Treaty, because the Italian government had failed to inform the Commission in advance of a measure liable, respectively, to favour certain undertakings and to distort competition within the common market; Article 53 of the EEC Treaty, because the ENEL Statute introduced new limitations on the right of establishment by entrusting exclusively to ENEL the production and distribution of electricity in Italy; and Article 37(2) of the EEC Treaty, insofar as the ENEL Statute established a new national

⁵⁴ ICC, Case 192/63, *Costa v. ENEL*, Brief on behalf of Flaminio Costa, 8 October 1963.

⁵⁵ 'Each Member of Parliament shall represent the Nation and shall carry out his or her duties with no imperative mandate.'

⁵⁶ 'For purposes of the common good, the law may establish that an undertaking or a category thereof be reserved *ex ante* or transferred, through expropriation and subject to compensation, to the State, to public entities, or to workers' or users' associations, provided that such undertaking operates in the field of essential public services, energy sources or monopoly situations and is of overriding general interest.'

⁵⁷ 'Private economic initiative shall be free. It may not be carried out against the general interest or in such a manner that could undermine safety, liberty, or human dignity. The law shall provide for appropriate guidelines and oversight so that public and private-sector economic activity may be coordinated to pursue social goals.'

⁵⁸ 'All citizens shall have equal social dignity and shall be equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social condition. It shall be the duty of the Republic to remove those obstacles of an economic or social nature which, by limiting the liberty and equality of citizens, hinder the full development of the human person and the effective participation of all workers in the political, economic, and social governance of the country.'

⁵⁹ ICC, Case 192/63, *Costa v. ENEL*, Brief on behalf of Flaminio Costa, 8 October 1963, at 79.

monopoly. However, Stendardi added that, as contended by several legal scholars,⁶⁰ it was exclusively for the ECJ to interpret the provisions of the EEC Treaty, and, accordingly, he requested the ICC to refer the case to the ECJ for a preliminary ruling.⁶¹

The Italian Council of Ministers, represented by State Deputy Attorney General Luciano Tracanna, objected that the only normative conflict at issue was the one arising between the ENEL Statute and the (earlier) Italian statute ratifying the EEC Treaty (EEC Statute),⁶² which enjoyed no privileged status in the Italian hierarchy of legal sources by virtue of Article 11 of the Italian Constitution and which could thus be amended, departed from or even repealed by subsequent statutes.⁶³ Citing one of the earliest Community law textbooks in Italian, published by former ECJ judge Nicola Catalano,⁶⁴ the Council of Ministers further argued that any possible infringement of the EEC Treaty, whilst liable to trigger the enforcement mechanisms laid down in the EEC Treaty, was irrelevant from the perspective of the Italian legal order.⁶⁵

In its Judgment no. 14 of 24 February 1964, the ICC dismissed all of the constitutionality challenges brought against the ENEL Statute.⁶⁶ As to the violation of the EEC Treaty, the Italian *juge des lois* took the view that Article 11 of the Italian Constitution was merely a ‘permissive’ provision; it enabled the Italian Parliament to ratify treaties implying a limitation of Italy’s sovereign powers through ordinary statutes *in lieu* of constitutional amendment, but it did not grant those statutes a higher rank relative to other statutes enacted by the Italian legislature.⁶⁷ Thus, although the infringement of the EEC Treaty could trigger Italy’s international liability, it could neither deprive the ENEL Statute of its effects in the Italian legal order nor render it unconstitutional.⁶⁸ Since the conflict between the (earlier) EEC Statute and the (later) ENEL Statute had to be solved on the basis of the *lex posterior derogat priori* rule,⁶⁹ there was no need to seek a preliminary ruling from the ECJ as to the interpretation of the EEC Treaty.⁷⁰

⁶⁰ ICC, Case 192/63, *Costa v. ENEL*, Reply on behalf of Flaminio Costa, 18 January 1964, at 23 (citing Migliazza, ‘La Corte di giustizia delle Comunità europee e i diritti degli Stati membri’, 5 *Foro Padano* (1963) 57–62; Gori, ‘Alcuni problemi d’interpretazione degli articoli 177 e 85 del Trattato della Comunità economica europea’, 5 *Foro Padano* (1962) 45; Zannini, ‘Dell’uniformità nell’interpretazione dei sistemi di diritto delle Comunità europee’, 44 *Rivista di diritto internazionale* (1961) 26; Catalano, ‘L’inserimento diretto delle disposizioni contenute nel Trattato istitutivo della CEE negli ordinamenti giuridici degli Stati membri’, 5 *Foro Padano* (1963) 33.

⁶¹ ICC, Case 192/63, *Costa v. ENEL*, Reply on behalf of Flaminio Costa, 18 January 1964, at 28–29.

⁶² Law no. 1203, 14 October 1957, *OJIR*, no. 317, 23 December 1957.

⁶³ ICC, Case 192/63, *Costa v. ENEL*, Reply on behalf of the Italian Council of Ministers, 23 January 1964, at 37–38.

⁶⁴ N. Catalano, *Manuale di diritto delle Comunità europee* (1962), at 144–146 (arguing that subsequent Italian statutes would repeal earlier provisions of the EEC Treaty within the Italian legal order and that, although this was illegal from the perspective of the Community legal order, said illegality would have been completely irrelevant within the Italian legal order).

⁶⁵ ICC, Case 192/63, *Costa v. ENEL*, Reply on behalf of the Italian Council of Ministers, 23 January 1964, at 38.

⁶⁶ ICC, Case 192/63, *Costa v. ENEL*, Judgment no. 14, 24 February 1964, *OJIR*, no. 67, 14 March 1964, paras 1–5.

⁶⁷ *Ibid.*, para. 6.

⁶⁸ *Ibid.*

⁶⁹ ‘A later statute shall take precedence over an earlier one.’

⁷⁰ ICC, Case 192/63, *Costa v. ENEL*, Judgment no. 14, 24 February 1964, *OJIR*, no. 67, 14 March 1964, para. 6.

The ICC judgment in *Costa v. ENEL*, for Stendardi, was the chronicle of a defeat foretold. From a legal perspective, the ICC embraced a dualist conception of the relationship between Community law and Italian law, in line with the largely predominant opinion of Italian international law scholars,⁷¹ and affirmed the precedence of subsequent domestic statutes over Community law, an outcome that even a fervent federalist like Nicola Catalano had anticipated in his scholarly writings.⁷² From a political perspective, the stakes of striking down the ENEL Statute – the very item of legislation upon which the Italian Socialist Party’s support to the Fanfani Cabinet was conditional – were simply too high for the ICC, a court established only a few years earlier,⁷³ which operated in an ‘inhospitable environment’⁷⁴ and which had hitherto focused more on cleansing the Italian legal system from Fascist-era legislation than on true counter-majoritarian judicial review.⁷⁵ By espousing the *lex posterior* thesis, thus, the ICC sought to pre-empt the ECJ’s ruling – that is, to affirm the (domestic) legality of the ENEL Statute regardless of what the judges in Luxembourg could say as to that statute’s compliance with the EEC Treaty.

Yet, the ICC did not declare the reference by the Giudice Conciliatore inadmissible, as some of the parties had requested.⁷⁶ Rather, the Italian justices took advantage of the *Costa v. ENEL* case to assert their authority to review nationalization statutes under the ‘overriding general interest’ criterion laid down in Article 43 of the Italian Constitution.⁷⁷

⁷¹ See D. Anzilotti, *Corso di diritto internazionale* (1955), at 56–61; G. Morelli, *Nozioni di diritto internazionale* (1958), at 66–88; R. Monaco, *Manuale di diritto internazionale pubblico* (1960), at 126–143; but see R. Quadri, *Diritto internazionale pubblico* (1963), at 41–68 (supporting a monist approach).

⁷² See N. Catalano, *La Comunità economica europea e l’Euratom* (1957), at 63–64 (arguing that the *lex posterior* principle warranted the application of subsequent domestic statutes regardless of conflicting provisions of the Community treaties); Catalano, *supra* note 64, at 145–146; Catalano, *supra* note 60. Remarkably enough, although the ICC’s Judgment no. 14 of 1964 largely reflected Catalano’s scholarly writings, he strongly criticized that judgment and espoused the thesis of the unconstitutionality of Italian statutes contrary to Community law. See Catalano, ‘Portata dell’art. 11 della Costituzione in relazione ai trattati istitutivi delle Comunità europee’, *Foro Italiano* (1964) 4:465.

⁷³ Although the ICC was expressly foreseen by the Italian Constitution, it was not until 1955 that the Italian Parliament appointed the final five justices needed to complete the membership of the ICC, thus effectively enabling it to carry out judicial review of legislation.

⁷⁴ Cartabia, ‘Of Bridges and Walls: the “Italian style” of Constitutional Adjudication’, 8 *Italian Journal of Public Law* (2016) 38 (adding that during the early years of the ICC ‘the major political parties in parliament were hostile; the judiciary was suspicious; and the majority of legal scholars were wary’ of judicial review of legislation); see also Simoncini, ‘The Success of a Constitutional Experiment: When History Matters – The ICC in Global Context’, 8 *Italian Journal of Public Law* (2016) 81 (analysing the initial political and judicial hostility to the ICC).

⁷⁵ See ICC, *Statistiche relative alle dichiarazioni di incostituzionalità di leggi statali*, vol. 1 (2014), available at www.cortecostituzionale.it/documenti/convegni_seminari/stu261_a.pdf.

⁷⁶ See ICC, Case 192/63, *Costa v. ENEL*, Reply on behalf of Edisonvolta, 23 January 1964, at 3–4 (arguing that the *Giudice Conciliatore*’s reference was inadmissible, as the lawsuit could have been decided on the basis of Art. 1189 of the Italian Civil Code, whereby Costa’s payment to the apparent creditor – ENEL – would have relieved him of his obligation towards the true creditor – Edisonvolta). ICC, Case 192/63, *Costa v. ENEL*, Brief on behalf of the Italian Council of Ministers, 12 October 1963, at 4–5 (outlining the same ‘apparent creditor’ argument but not raising a formal plea of inadmissibility).

⁷⁷ See Cheli, ‘Corte costituzionale e iniziativa economica privata’, in N. Occhicupo (ed.), *La Corte costituzionale tra norma giuridica e realtà sociale* (1978) 306 (noting that the price of upholding the ENEL Statute was an extension of the ICC’s judicial review powers).

Also, the ICC took that opportunity to put an end to the dispute over the constitutionality of the EEC Statute,⁷⁸ by endorsing the ‘permissive’ reading of Article 11 of the Italian Constitution that the ICC Chief Justice Gaspare Ambrosini had put forward 12 years earlier during the parliamentary proceedings on the ratification of the ECSC Treaty.⁷⁹

However, the ICC ruling in *Costa v. ENEL* caused significant dismay in EEC circles;⁸⁰ for the Commission legal service, it constituted an existential threat to the EEC, as it entailed a permanent imbalance between the member states that had accepted internal primacy and the ones that had not.⁸¹ In addition, the ICC judgment seemingly deprived the preliminary ruling procedure of its purpose, at least for the Italian courts; if the latter were required to apply domestic law regardless of conflicting Community law, what use could they possibly have for a ruling on the interpretation or validity of the latter?⁸² It is possibly for that reason that even the ECJ president Andreas Matthias Donner took the liberty of criticizing the ‘ancient theory’ underlying the ICC judgment at a conference in March 1964 – that is, while the *Costa v. ENEL* case was still pending before the ECJ.⁸³

4 Stendardi Goes All-In: The ECJ Proceedings

Stendardi had another card up his sleeve. As soon as he learned that the Giudice Conciliatore would not request a preliminary ruling from the ECJ, he lodged a complaint with another Giudice Conciliatore challenging the second £1,925 electricity bill that Costa had received from ENEL.⁸⁴ In his brief of 15 November 1963, Stendardi reiterated his arguments that the ENEL Statute was unconstitutional and contrary to the EEC Treaty, but he hinted at the decentralized primacy enforcement model – that is, he claimed that the inconsistency with Community law would render the ENEL

⁷⁸ See G. Itzcovich, *Teorie e ideologie del diritto comunitario* (2006), at 213 (highlighting that the ICC ruled on the constitutionality of the EEC Statute without being expressly asked to do so by the parties and the referring court). On the debate of Article 11 of the Italian Constitution as Italy’s ‘European Clause’, see Cartabia and Chieffi, ‘Art. 11’, in R. Bifulco, A. Celotto and M. Olivetti (eds), *Commentario alla Costituzione* (2006) 266.

⁷⁹ G. Ambrosini and G. Quarello (Christian Democrats), Italian House of Representatives, Industry and Foreign Affairs Committees, Majority Report on Bill of 15 March 1952, no. 1822, for the Ratification and Execution of the Paris Treaties, 18 April 1951, at 6–7 (arguing that Article 11 of the Italian Constitution enabled the Italian Parliament to transfer part of its sovereignty to the ECSC via an ordinary statute, thus obviating the need for a constitutional statute adopted on the basis of Article 138 of the Italian Constitution).

⁸⁰ See Vauchez, *supra* note 33, at 18 (examining the pre-*Costa* ‘dramatization strategies’).

⁸¹ See Rasmussen, ‘From *Costa v ENEL* to the Treaties of Rome: A Brief History of a Legal Revolution’ in M. Poiras Maduro and L. Azoulai (eds), *The Past and Future of EU Law* (2010) 71 (recalling that the director of the European Commission’s Legal Service, Michel Gaudet, recommended pressuring the ICC ‘to revise its position with all means available, both at the political level and through legal contacts’).

⁸² See de Witte, ‘Retour à *Costa*: La primauté du droit communautaire à la lumière du droit international’, 20 *Revue trimestrielle de droit européen* (1984) 434.

⁸³ A.M. Donner, *Le rôle de la cour de justice dans l’élaboration du droit européen* (1964), at 14 (calling upon domestic courts to recognize the primacy of EEC law and criticizing ‘certain judgments of national courts’ supporting the ‘ancient theory that subsequent national legislation takes precedence over treaties’).

⁸⁴ Giudice Conciliatore of Milan (Fabbri), Case 1907/63, Complaint on behalf of Flaminio Costa, 7 October 1963 (claiming that Costa did not owe £1,925 to ENEL, ‘with which he had never entered into any contract’).

Statute inapplicable even in the absence of a prior finding of unconstitutionality by the ICC.⁸⁵

The Giudice Conciliatore, this time, was Vittorio Emanuele Fabbri, a former lawyer at the Milan Bar and a monarchist sympathizer like Stendardi. It is not certain whether and to what extent the two were actually acquainted⁸⁶, but by his lengthy order of 16 January 1964 Fabbri unreservedly embraced Stendardi's argument that, as there would have been no judicial remedy under Italian law against his decisions,⁸⁷ he was legally required to refer the case not only to the ICC but also to the ECJ.⁸⁸

The ICC proceedings are of little interest to this account, as they did not deal with the EEC Treaty; suffice it to say that, by its Judgment no. 66 of 23 June 1965, the ICC dismissed all of the constitutionality challenges brought against the ENEL Statute.⁸⁹ Turning to the ECJ proceedings, Stendardi reiterated his claim that the ENEL Statute was incompatible with Articles 37, 53, 93 and 102 of the EEC Treaty.⁹⁰ Unlike the measured tones of his written submissions to the ICC, in his brief to the ECJ Stendardi had no qualms about defining the ENEL Statute as 'a terrible, prejudicial, and nefarious precedent for the future of Community integration',⁹¹ a 'measure worthy of the Late Middle Ages, when tyrants sought to tear up Europe'⁹² and 'an attempt to undermine Italy's free market economy ... to pave the way for the doctrines of Marx, Engels, and Lenin'.⁹³

Stendardi also went all in with respect to the legal consequences of the alleged conflict between the ENEL Statute and the EEC Treaty; as an alternative to the centralized primacy enforcement model, which the ICC had expressly ruled out in Judgment no. 14 of 24 February 1964, Stendardi championed the decentralized model, *viz.* he argued that a preliminary ruling by the ECJ would have enabled Italian courts to immediately disapply the ENEL Statute.⁹⁴

The Italian government, represented by Luciano Tracanna and the eminent international law professor Riccardo Monaco, matched Stendardi's all-in by claiming that the request for a preliminary ruling was 'absolutely inadmissible'; since the referring court had to apply the ENEL Statute regardless of any conflicting provision of the EEC Treaty, that court had no use for the interpretation of the EEC Treaty requested from

⁸⁵ Giudice Conciliatore of Milan (Fabbri), Case 1907/63, *Costa v. ENEL*, Brief on behalf of Flaminio Costa, 15 November 1963, at 8.

⁸⁶ Interview with Bruna Vanoli Gabardi, Milan, 27 October 2017 (suggesting that Stendardi and Fabbri might have met through Milanese monarchist circles).

⁸⁷ Giudice Conciliatore of Milan (Fabbri), Case 1907/63, *Costa v. ENEL*, Order, 16 January 1963, at 12 (expressly noting that he was legally required to refer the matter to the ECJ, as he acted as court of last instance in that particular lawsuit).

⁸⁸ *Ibid.*, at 15–16.

⁸⁹ ICC, Case 122/64, *Costa v. ENEL*, Judgment no. 66, 23 June 1965, *OJIR*, no. 178, 17 July 1965.

⁹⁰ ECJ, Case 6/64, *Costa v. ENEL*, Brief on behalf of Flaminio Costa, 15 May 1964.

⁹¹ *Ibid.*, at 38.

⁹² *Ibid.*, at 36.

⁹³ *Ibid.*

⁹⁴ *Ibid.*, at 8–9, 14–15.

the ECJ.⁹⁵ The Italian government added that the order for reference, in fact, sought a ruling on the consistency between the ENEL Statute and the EEC Treaty, a type of pronouncement that could only be obtained, at the request of the Commission or of another member state, through the infringement procedure laid down in Articles 169 and 170 of the EEC Treaty.⁹⁶

The European Commission, represented by its legal counsel Giuseppe Marchesini, shared the reservations expressed by the Italian government as to the referring court's 'alternative use' of the preliminary ruling procedure,⁹⁷ but deemed it appropriate to submit its observations to the ECJ in light of the 'troubling' findings set out in ICC's Judgment no. 14 of 24 February 1964.⁹⁸ The Commission took the view that the ICC's refusal to recognize the internal primacy of the EEC Treaty *vis-à-vis* subsequent domestic statutes was not only liable to undermine the functioning of the common market in Italy, but also could have inevitable repercussions on the whole Community.⁹⁹ The Commission also expressed the wish that the ICC's jurisprudence would not be regarded as final until the ECJ had had the opportunity to rule on the scope of the commitments undertaken by the member states as to the effects of the EEC Treaty in their respective legal orders.¹⁰⁰

At the hearing of 11 June 1964, both Costa and Stendardi took the floor, but only the former addressed the issue of primacy.¹⁰¹ After a bombastic salute to the 'supreme judiciary of the Community, our new great motherland',¹⁰² Costa challenged the Italian government's contention that the referring court was obliged to apply only the ENEL Statute and insisted on the admissibility of the request for a preliminary ruling.¹⁰³ He also averred that the Commission's concerns about the ICC ruling were well founded but added that the ICC might change its mind in light of the ECJ's findings on primacy.¹⁰⁴ Finally, he noted that it would be absurd for the Italian government to insist on applying the EEC Treaty only insofar as it was advantageous but not to the extent that it was inconvenient, as such a selective application of Community law was clearly at odds with the principle *qui habet commoda, ferre debet onera*.¹⁰⁵

⁹⁵ ECJ, Case 6/64, *Costa v. ENEL*, Brief on behalf of the Italian government, 20 May 1964, at 5.

⁹⁶ *Ibid.*, at 5–6.

⁹⁷ The 'alternative use' of the preliminary ruling procedure consists in seeking a ruling from the ECJ on the compatibility with EU law of a domestic provision. See Tizzano, 'Foglia-Novello atto II, ovvero la crisi dell' "uso alternativo" dell'art. 177 CEE', *Foro Italiano* (1982) 4:308; D. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (2011), at 82–83.

⁹⁸ ECJ, Case 6/64, *Costa v. ENEL*, Brief on behalf of the European Commission, 22 May 1964, 4–5.

⁹⁹ *Ibid.*, at 5.

¹⁰⁰ *Ibid.*

¹⁰¹ ECJ, Case 6/64, *Costa v. ENEL*, Transcript of the public hearing, 11 June 1964.

¹⁰² *Ibid.*, at I/1.

¹⁰³ *Ibid.*, at III/2.

¹⁰⁴ *Ibid.*, at III/5.

¹⁰⁵ *Ibid.*, at III/6: 'He who takes the benefits must [also] bear the burdens'. This principle is related to the prohibition of retaliatory self-help, a topic that one of the ECJ judges of the *Costa v. ENEL* ruling, Robert Lecourt, had previously investigated in his scholarly writings. See Phelan, 'The Revolutionary Doctrines of European Law and the Legal Philosophy of Robert Lecourt', 28 *European Journal of International Law* (2017) 935, at 953 (highlighting Lecourt's own connection between primacy and the prohibition of retaliatory self-help).

In contrast, ENEL's attorney, professor Massimo Severo Giannini, one of the most prominent Italian scholars of administrative law of all times,¹⁰⁶ downplayed the importance of the ICC's judgment.¹⁰⁷ He claimed that the ICC had refused to rule on a conflict between Community law and Italian legislation because its jurisdiction was very limited compared to, say, that of the US Supreme Court; the ICC, indeed, could only resolve conflicts between the Italian Constitution and Italian statutes.

Finally, the lawyer for the Italian government, Luciano Tracanna, took the floor. In a somewhat convoluted oral argument, he reiterated the claim that the preliminary ruling procedure did not enable individuals to request a pronouncement on the violation of the EEC Treaty¹⁰⁸ and that, in any case, national courts were not entitled to suspend the application of Italian laws.¹⁰⁹

In his Opinion in *Costa v. ENEL*, Advocate General Maurice Lagrange, who had replaced Advocate General Karl Roemer in that lawsuit on 9 June 1964,¹¹⁰ took the view that the resolution of a conflict between the EEC Treaty and subsequent domestic legislation was 'a constitutional problem'.¹¹¹ Whilst some member states, such as the Netherlands, had solved it 'in a most satisfactory manner', there were still 'difficulties of principle' in Italy.¹¹² In particular, the ICC's Judgment no. 14 of 24 February 1964, which had granted precedence to an Italian subsequent statute inconsistent with the EEC Treaty, could have 'disastrous consequences' for the functioning of the common market.¹¹³ Nonetheless, Advocate General Lagrange hoped that Italy could 'find a constitutional means of allowing the Community to live in full accordance with the rules created under its common charter'.¹¹⁴ Advocate General Lagrange also invited the ECJ to dismiss the plea of inadmissibility. 'The only problem which could possibly arise', he added, was whether Italian courts could autonomously refuse to apply national statutes at variance with the EEC Treaty or they were bound to refer the matter to the ICC first.¹¹⁵ The Advocate General noted that this was a matter of the division of internal jurisdiction between Italian courts and that the ECJ should still provide a preliminary ruling since, 'even if premature as regards domestic procedure', it 'will have effect also as regards the Constitutional Court' and thus 'will even have saved time'.¹¹⁶

The contents of the ECJ's landmark judgment of 15 July 1964 in *Costa v. ENEL* are well known.¹¹⁷ In line with *Van Gen en Loos*, the ECJ distinguished the EEC Treaty from

¹⁰⁶ See Sandulli, 'Administrative Law Scholarship in Italy (1800–2010)', *Rivista Trimestrale di Diritto Pubblico* (2010) 1089.

¹⁰⁷ ECJ, Case 6/64, *Costa v. ENEL*, Transcript of the public hearing, 11 June 1964, VI/4.

¹⁰⁸ *Ibid.*, at VII/6.

¹⁰⁹ *Ibid.*, at IX/6.

¹¹⁰ ECJ, Case 6/64, *Costa v. ENEL*, Order of the President of the Court, 9 June 1964 (based on a joint request by M. Lagrange and K. Roemer).

¹¹¹ ECJ, Case 6/64, *Costa v. ENEL*, Opinion of AG Lagrange, 25 June 1964 (EU:C:1964:51), [1964] ECR 600, at 604, Advocate General Lagrange.

¹¹² *Ibid.*

¹¹³ *Ibid.*, at 605.

¹¹⁴ *Ibid.*, at 606.

¹¹⁵ *Ibid.*, at 607.

¹¹⁶ *Ibid.*

¹¹⁷ ECJ, Case 6/64, *Costa v. ENEL*, Judgment of 15 July 1964 (EU:C:1964:66), [1964] ECR 585.

‘ordinary international treaties’ and averred that the Community legal order, to the benefit of which the member states had ‘limited their sovereign rights’, had become an ‘integral part’ of national legal systems, that Community provisions bound member states and their nationals alike and that also domestic courts were ‘bound to apply’ Community norms.¹¹⁸ From such ‘integration into the laws of each Member State’ and from the ‘terms and the spirit of the Treaty’, the ECJ inferred that it was ‘impossible’ for member states’ organs to accord precedence to domestic measures over Community law,¹¹⁹ as doing so would jeopardize the attainment of the objectives of the EEC Treaty contrary to the principle of loyal cooperation, give rise to discrimination on the basis of nationality, deprive of their purpose the specific procedures laid down in the EEC Treaty to authorize member states to derogate therefrom, undermine the ‘direct applicability’ of regulations, and call into question the ‘legal basis’ and the very ‘character’ of the EEC.¹²⁰ Therefore, the ECJ dismissed the plea of inadmissibility and ruled that Article 177 of the EEC Treaty, on the preliminary ruling procedure, had ‘to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise’.¹²¹ Member states’ courts were thus entrusted with a European ‘mandate’¹²² to ‘disapply’ domestic statutes at variance with the EEC Treaty.¹²³

On the merits, however, the ECJ essentially upheld the ENEL Statute. The Community judges took the view that Articles 93 and 102 of the EEC Treaty, requiring member states to inform the Commission of prospective measures favouring certain undertakings or liable to distort competition, had no direct effect and thus could not be relied upon by individuals;¹²⁴ that Article 53 of the EEC Treaty was satisfied as long as no new measure made the establishment of nationals from other member states subject to more severe rules than those applying to the nationals of the country of establishment;¹²⁵ and that Article 37 of the EEC Treaty was not infringed as long as domestic monopolies did not entail any new cases of discrimination regarding the conditions under which goods were procured and marketed, an issue the ECJ left to the referring court to determine.¹²⁶

Again, this outcome comes as no surprise. Establishing that nationalizations and monopolies in the utilities sector were contrary to EEC law would have alienated not only Italy, but also other member states that had implemented or planned to introduce similar measures, such as France.¹²⁷ Also, the ECJ would have been unable to enforce a ruling to that effect, considering that, at the time, it could not impose sanctions on

¹¹⁸ *Ibid.*, at 593.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*, at 594.

¹²¹ *Ibid.*

¹²² This apt expression belongs to M. Claes, *The National Courts’ Mandate in the European Constitution* (2006).

¹²³ The ECJ further clarified the scope of this duty in Case 106/77, *Simmenthal* (EU:C:1978:49), para. 21.

¹²⁴ ECJ, Case 6/64, *Costa v. ENEL*, Judgment of 15 July 1964 (EU:C:1964:66), [1964] ECR 585, at 595–596. The ECJ, however, did recognize the direct effect of Art. 93(3) of the EEC Treaty. See also ECJ, Case 120/73, *Gebrüder Lorenz GmbH v. Federal Republic of Germany and Land Rheinland-Pfalz* (EU:C:1973:152), para. 8.

¹²⁵ ECJ, Case 6/64, *Costa v. ENEL*, Judgment of 15 July 1964 (EU:C:1964:66), [1964] ECR 585, at 596–597.

¹²⁶ *Ibid.*, at 597–598.

¹²⁷ See Vuillermot, ‘La nationalisation de l’électricité en France en 1946: le problème de l’indemnisation’, *Annales historiques de l’électricité* (2003) 53; Einaudi, ‘Nationalisation in France and Italy’, 15 *Social Research* (1948) 22.

member states via the infringement procedure¹²⁸ and that the doctrine of state liability would only be introduced several years later.¹²⁹ By opting for a politically low-profile ruling¹³⁰ and a narrow understanding of the direct effect and pre-emptive scope of the EEC Treaty provisions at issue, the ECJ could thus affirm a strong version of internal primacy (and safeguard the *effet utile* of the preliminary ruling procedure) without triggering any significant opposition from member states' governments.¹³¹

Remarkably enough, when the case was referred back to the Giudice Conciliatore, the latter turned out to be 'more Catholic than the Pope'; in its judgment of 4 May 1966, he found that the ENEL Statute introduced a new monopoly entailing discrimination between Italian citizens and citizens of other member states in the market of electricity supply contrary to Article 37 of the EEC Treaty.¹³² Accordingly, Judge Fabbri ruled that the ENEL Statute and its implementing decrees had 'no effects in the case at issue' and that Costa did not owe ENEL the sum of £1,925 shown on the impugned electricity bill.¹³³

Although that ruling was reported by a handful of legal commentators, it did not set a legal precedent for subsequent lawsuits.¹³⁴ The ENEL Statute, thus, remained firmly in place, prompting Stendardi's bitter remark that, all in all, the ECJ ruling in *Costa v. ENEL* had limited the instances in which individuals could claim that domestic statutes infringed the EEC Treaty, thus denying the central role that, in Stendardi's view, individuals were meant to have in the protection and development of the EEC legal order.¹³⁵

5 Epilogue: The Contribution of *Costa v. ENEL* and Stendardi to the *Approfondissement* of EU Primacy

*Tout va par degrés dans la nature, et rien par saut.*¹³⁶ Likewise, the principle of EU primacy did not emerge all at once with the ECJ ruling in *Costa v. ENEL*, but did so gradually and through a number of small steps.¹³⁷

¹²⁸ The ECJ's power to impose sanctions in the context of the infringement procedure was introduced by the Treaty of Maastricht, which entered into force on 1 November 1993.

¹²⁹ ECJ, Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and Others v. Italian Republic* (EU:C:1991:428), para 46.

¹³⁰ See Vauchez, *supra* note 33 (noting that the ECJ judgment in *Costa v. ENEL* was in fact 'quite moderate, if not protective of states' interests').

¹³¹ K. Alter, *Establishing the Supremacy of European Law* (2001), at 186–192; Mangold, 'Costa v. ENEL (1964), On the Importance of Contemporary Legal History', in E. Augusti *et al.* (eds), *Inter-Trans-Supra? Legal Relations and Power Structures in History* (2011) 229.

¹³² Giudice Conciliatore of Milan (Fabbri), Case 1907/63, *Costa v. ENEL*, Judgment, 1 May 1966, at 12.

¹³³ *Ibid.*, 17–18.

¹³⁴ Ferrari Bravo, 'L'issue de l'affaire *Costa c. E.N.E.L.* devant le Conciliatore de Milan', *Cahiers de droit européen* (1967) 200, at 221. See also Persico, 'Giudizio d'equità, contrasto tra legge interna e norme comunitarie e poteri del giudice nazionale', *Rivista trimestrale di diritto e procedura civile* (1967) 1650.

¹³⁵ G. Stendardi, *Il soggetto privato nell'ordinamento comunitario europeo* (1967), at 120–121 (noting that the ECJ's judgment in *Costa v. ENEL* marked 'a dangerous turning point for the Community legal order: indeed, the Community is based on the principle that the protection of the legal order takes place through the initiative of private individuals who are part of that legal order').

¹³⁶ G. Leibniz, *Nouveaux essais sur l'entendement humain* (1765), vol. 4, at 16.

¹³⁷ See Arena, 'Curia non facit saltus: origini ed evoluzione del principio del primato prima della sentenza *Costa c. ENEL*', in E. Triggiani *et al.* (eds), *Dialoghi con Ugo Villani* (2017) 949.

In the early 1960s, the ‘international’ primacy of treaties – that is, the prevalence of treaty provisions over domestic legislation in the relations between the contracting parties – was already well established.¹³⁸ In contrast, the ‘internal’ primacy of treaties – that is, the prevalence of treaty provisions over domestic law within the municipal legal orders – was far from settled, at least in countries of long-standing dualist tradition like Italy.¹³⁹

Turning to the law of the then European Communities, although in 1960 the ECJ had ruled in *Humblet* that the provisions of the ECSC Treaty ‘have the force of law in the Member States following their ratification and ... take precedence over national law’,¹⁴⁰ the prevailing view was that the rank of Community law within the member states’ legal orders was a matter of national law.¹⁴¹ In Italy, in particular, most authors agreed that Community law took precedence over earlier domestic statutes but could be overridden by subsequent statutes.¹⁴²

However, in 1962, the director general of the European Commission’s Legal Service, Michel Gaudet, argued that such a piecemeal approach was incompatible with the specific characteristics of the EEC¹⁴³ and that the effects of Community law within member states’ legal orders had to be inferred from the EEC Treaty itself, as interpreted by the ECJ.¹⁴⁴ Gaudet took the view that EEC Treaty provisions

¹³⁸ See International Law Commission, *Draft Declaration on Rights and Duties of States* (1949), annexed to the United Nations General Assembly Resolution 375 (IV), 6 December 1949, Art. 14: ‘Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law’; see also Morgenstern, ‘Judicial Practice and the Supremacy of International Law’, 27 *British Yearbook of International Law* (1950) 43: ‘It appears to be generally agreed that international law is binding upon states ... and that the latter cannot rely upon [their] constitution[s] as an excuse. These facts alone are sufficient to establish the supremacy of international law over municipal law.’

¹³⁹ See D. Anzilotti, *Corso di diritto internazionale* (1955), at 56–61; G. Morelli, *Nozioni di diritto internazionale* (1958), at 66–88; R. Monaco, *Manuale di diritto internazionale pubblico* (1960), at 126–143; but see R. Quadri, *Diritto internazionale pubblico* (1963), at 41–68 (advocating a monist approach entailing the primacy of international treaties over domestic statutes).

¹⁴⁰ ECJ, Case 6/60, *Humblet*, Judgment of 16 December 1960 (EU:C:1960:48), 1960 ECR 559 at 569. Cf. N. Catalano, *Actes officiels du Congrès d’études sur la CECA* (1957), at 329–330: ‘[D]u fait même de la ratification et de l’insertion du Traité [CECA] dans l’ordre juridique national, ce Traité est devenu une loi nationale ... il a une force d’abrogation des lois antérieures incompatibles.’ It is worth remembering that Catalano was one of the ECJ judges in *Humblet*.

¹⁴¹ See P. De Visscher, *Actes officiels du Congrès d’études sur la CECA* (1957), at 46 (noting that the authority of the provisions of the Community Treaties within the domestic legal orders had to be determined ‘in accordance with the constitutional principles of the different Member States’); see also Erades, ‘Rapport Général’, in Association Néerlandaise pour le Droit Européen, *Deuxième colloque international de droit Européen: La Haye 24–26 octobre 1963* (1966) 29 (providing a summary of the authority of the Community Treaties in the various member states).

¹⁴² See Catalano, *La Comunità*, *supra* note 72, at 63–64; Catalano, *supra* note 64, at 145–146; A. Migliazza, *La Corte di giustizia delle Comunità Europee* (1961), at 421; Monaco, ‘Norme comunitarie e diritto statutale interno’, *Rivista di Diritto Europeo* (1962) 13; Catalano and Monaco, ‘Le probleme de l’applicabilité directe et immédiate des normes des traités instituant les Communautés Européennes’, in Association Néerlandaise pour le Droit Européen, *supra* note 141, at 127.

¹⁴³ Memo by M. Gaudet to J. Rey and M. Caron, European Commission’s Legal Service, 23 October 1962, at 4.

¹⁴⁴ *Ibid.*, at 5.

should take precedence over domestic statutes, even if adopted subsequently.¹⁴⁵ The president of the European Commission, Walter Hallstein, publicly reaffirmed that view at a speech before the European Parliament delivered on 18 June 1964 – that is, less than a month before the ECJ rendered its judgment in *Costa v. ENEL*.¹⁴⁶

The ECJ's judgment in *Van Gend en Loos*,¹⁴⁷ of 5 February 1963, clarified that certain EEC Treaty provisions 'create[d] individual rights which national courts must protect'.¹⁴⁸ In order to facilitate the acceptance of the doctrine of direct effect at the national level, the ECJ judges deliberately chose not to address the issue of internal primacy,¹⁴⁹ also because Netherlands constitutional law autonomously enabled domestic courts to set aside national legislation that was incompatible with self-executing international agreements.¹⁵⁰ Yet, the ECJ's silence was a particularly 'deafening' one, as it begged the question whether, in a similar situation, also courts from a dualist member state like Italy would have been able to apply directly effective Community provisions notwithstanding incompatible subsequent statutes.¹⁵¹

The ECJ ruling in *Costa v. ENEL* is thus appropriately regarded as a 'legal revolution'¹⁵² because, whilst it did not create the principle of internal primacy of what is now EU law *ex nihilo*,¹⁵³ it did constitute an essential step in the *approfondissement* of

¹⁴⁵ *Ibid.*, at 12.

¹⁴⁶ Speech by Walter Hallstein to the European Parliament, European Commission, 18 June 1964, at 11–12 (arguing that Community law took precedence not only over earlier national law but also over subsequent national law).

¹⁴⁷ ECJ, Case 26/62, *Van Gend en Loos*, Judgment of 5 February 1963 (EU:C:1963:1), [1963] ECR 1.

¹⁴⁸ *Ibid.*, at 16 (para. 1 of the operative part).

¹⁴⁹ See Weiler, 'The Community System: The Dual Character of Supranationalism', 1 *Yearbook of European Law* (1981) 276 (speaking of a 'deliberate and politically wise attempt to phase in the progressive evolution of normative supranationalism so as to ensure as far as possible a smooth reception in the national legal and political order'); see also Rasmussen, 'Revolutionizing European Law: A History of the Van Gend en Loos Judgment', 12 *International Journal of Constitutional Law* (2014) 154 (suggesting that ECJ Judge Alberto Trabucchi expressly asked the other judges not to address the issue of primacy in *Van Gend en Loos* due to possible constitutional obstacles in Germany and Italy).

¹⁵⁰ See Case 26/62, *Van Gend en Loos* (EU:C:1962:42), at 20, Opinion of AG Roemer (referring to Art. 66 of the Netherlands Constitution as the source of the domestic primacy of international agreements); see also Erades, 'Rapport Général', in Association Néerlandaise pour le Droit Européen, *supra* note 141, at 29.

¹⁵¹ See Catalano, *supra* note 60 (arguing that Italian courts had no need to seek a preliminary ruling as they had no power to resolve that normative conflict); Ronzitti, 'L'art. 12 del trattato istitutivo della C.E.E. ed i rapporti tra ordinamento comunitario e ordinamenti degli Stati membri', *Foro Italiano* (1964) 4:97, at 100 (arguing that, against an Italian statute introducing new custom duties, there would have been no judicial remedy in the Italian legal order).

¹⁵² See Rasmussen, 'From *Costa v ENEL* to the Treaties of Rome: A Brief History of a Legal Revolution', in M. Poiras Maduro and L. Azoulai (eds), *The Past and Future of EU Law* (2010) 68.

¹⁵³ See Arena, 'The Twin Doctrines of Primacy and Pre-emption', in R. Schütze and T. Tridimas (eds), *Oxford Principles of European Union Law* (2018) 311; A. Pellet, *Les fondements juridiques internationaux du droit communautaire* (1997), at 263; de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order', in G. de Búrca and P. Craig (eds), *The Evolution of EU Law* (2011) 361.

that doctrine,¹⁵⁴ by empowering national courts to set aside domestic statutes at variance with EU law.

It cannot be ruled out that, without the *Costa v. ENEL* saga, the internal primacy of EU law would have emerged anyway.¹⁵⁵ After all, a growing body of legal scholarship,¹⁵⁶ the European Commission's Legal Service¹⁵⁷ and even some ECJ members¹⁵⁸ had already leaned in that direction before 1964.

But it seems fair to say that, in such a counterfactual scenario, EU primacy would be significantly different from the doctrine we know today. In particular, it seems doubtful that, without the ICC's judgment in *Costa v. ENEL* of 24 February 1964 – which, as noted above, posed an existential threat to the EEC and a direct challenge to the ECJ's preliminary jurisdiction – the ECJ would have entrusted national courts with the mandate to disapply national statutes incompatible with Community law as early as in 1964.¹⁵⁹

Had the ICC been requested to rule on a conflict between Community law and an item of domestic legislation of lesser importance for Italy's political and economic stability than the ENEL Statute, the Italian justices might have been willing to review it under Article 11 of the Italian Constitution, thus extending their power of judicial review to conflicts involving Community law without deviating from the well-established dualist understanding of the relations between the Community legal order and the Italian one.¹⁶⁰ In fact, the centrist Ambrosini Court might have taken that

¹⁵⁴ See Weiler, 'The Community System: The Dual Character of Supranationalism', 1 *Yearbook of European Law* (1981) 267, at 275–276.

¹⁵⁵ On the use of counterfactual reasoning in legal research in general, see Mitchell, 'Case Studies, Counterfactuals, and Causal Explanations', 152 *University of Pennsylvania Law Review* (2004) 1517; on its consistency with the international law methodology, see Mushkat, 'Counterfactual Reasoning: An Effective Component of the International Law Methodological Armor?', 18 *German Law Journal* (2017) 59; on its application to EU competition law, see Robertson, 'A Counterfactual on Information Sharing: The Commission's Horizontal Guidelines 2011 Applied to the Leading Cases', 36 *World Competition* (2014) 459.

¹⁵⁶ See Fédération Internationale pour le Droit Européen, 'Resolution of 25 October 1963', in Association Néerlandaise pour le Droit Européen, *supra* note 141, at 288 (unanimously stating that it was 'absolutely necessary to ensure the primacy of Community law over subsequent national law in all Member States' to be achieved 'either through constitutional amendments or via a development of the case-law based on the transfer of Member States' competences').

¹⁵⁷ Memo by Gaudet to Rey and Caron, *supra* note 143, at 4; Speech by Hallstein, *supra* note 146, at 11–12.

¹⁵⁸ See Donner, 'National Law and the Case Law of the Court of Justice of the European Communities', 1 *Common Market Law Review* (1963) 14 (stating that, if asked to do so, the ECJ in *Van Gen den Loos* 'would have presumably ruled that the EEC Treaty has precedence over local law'). For an assessment of Donner's 1963 statements, see Reestman and Claes, 'For History's Sake: On *Costa v. ENEL*, André Donner and the Eternal Secret of the Court of Justice's Deliberations', 10(2) *European Constitutional Law Review* (2014) 194.

¹⁵⁹ *Ibid.*, at 192 (noting that the ICC judgment in *Costa v. ENEL* acted as a 'trigger' for the emergence of the primacy doctrine in the ECJ jurisprudence).

¹⁶⁰ The ICC actually reached that conclusion in Joined Cases 50, 296, 297 and 298/75, *Industrie chimiche Italia centrale (I.c.I.c.) v. Ministero del commercio con l'estero*, Judgment no. 233 (1975) (declaring certain provisions of a decree-law at variance with EEC law unconstitutional under Article 11 of the Italian Constitution).

empowerment opportunity as an ‘insurance policy’ against the risks inherent in Italy’s recent political shift to the left. And the ECJ, at least for some time, might have regarded centralized judicial review as an appropriate ‘constitutional means’ to ensure the primacy of Community law over subsequent domestic statutes, a solution entertained even by a first-hour supranationalist¹⁶¹ such as Advocate General Lagrange.¹⁶²

But the ICC’s judgment in *Costa v. ENEL* of 24 February 1964 signalled that, at least for the time being, centralized primacy enforcement was out of the question. This prompted the ECJ to sidestep the ICC by forging an alliance with national lower courts. According to the influential ‘judicial empowerment’ thesis, this alliance proved successful because lower courts were enticed by the ‘heady’ prospect of ‘engag[ing] with the highest jurisdiction in the Community’ and of exercising ‘*de facto* judicial review of legislation’,¹⁶³ a power that national legal orders typically entrusted exclusively to constitutional courts. Lower courts thus became the ‘motors’ of European integration¹⁶⁴ through a ‘wide and enthusiastic’ use of the preliminary ruling procedure.¹⁶⁵

However, the procedural history of *Costa v. ENEL* tells, at least in part, a different tale. The attitude of the first Giudice Conciliatore *vis-à-vis* the preliminary ruling procedure was, arguably, more one of resistance than one of empowerment. From his order of 10 September 1963, it is quite apparent that Judge Carones was *not* looking forward to delving into the intricacies of the relationship between the Italian and the EEC legal order, so he followed Pilate’s example and stated that, ‘if anything’, it was for the ICC to make a preliminary reference to the ECJ.¹⁶⁶

Recent studies suggest that this was anything but an isolated case.¹⁶⁷ Quite the contrary, Judge Carones’ attitude reflects a ‘path-dependent institutional consciousness resisting Europeanisation’, deeply embedded in the judiciaries of several member states.¹⁶⁸ One of the causes of this *habitus* of non-referral to the ECJ is that domestic

¹⁶¹ See Bailleux, ‘Comment l’Europe vint au droit’, 60 *Revue française de science politique* (2010) 317 (noting that in 1958 Maurice Lagrange published the inaugural manifesto for the supranationalists following the schism from international law scholarship that occurred at the 1957 Stresa Conference: Lagrange, ‘L’ordre juridique de la CECA vu à travers la jurisprudence de sa Cour de Justice’, 5 *Revue du droit public et de la science politique en France et à l’étranger* (1958) 841).

¹⁶² ECJ, Case 6/64, *Costa v. ENEL*, Opinion of AG Lagrange, 25 June 1964 (EU:C:1964:51), [1964] ECR 600, at 606–607 (claiming that whether Italian courts could disapply subsequent domestic statutes at variance with Community law or those courts were bound to refer the matter to the ICC was just ‘a matter relating to the division of internal jurisdiction between the courts of a Member State’, which was of no concern to the ECJ).

¹⁶³ See Weiler, ‘The Transformation of Europe’, 100 *Yale Law Journal* (1991) 2426.

¹⁶⁴ See Alter, ‘The European Court’s Political Power’, 19 *West European Politics* (1996) 467.

¹⁶⁵ See Weiler, *supra* note 163, at 2426.

¹⁶⁶ Giudice Conciliatore of Milan (Carones), Case 1350/63, *Costa v. ENEL*, Order of 10 September 1963, in *OJIR* of 2 November 1966, no. 287.

¹⁶⁷ See Pavone, ‘In This Bureaucratic Silence EU Law Dies: Fieldwork and the (Non)-Practice of EU Law in National Courts’, in M. Madsen, F. Nicola and A. Vauchez (eds), *Researching EU Law: New Approaches and Methodologies* (forthcoming); T. Pavone, ‘The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe’ (2019) (PhD dissertation on file at Princeton University).

¹⁶⁸ Pavone, *supra* note 167, at 57.

judges are often unfamiliar with the preliminary ruling procedure;¹⁶⁹ in a survey conducted by the European Parliament in 2011, as many as six national judges out of 10 admitted to lacking sufficient knowledge as to how to make a preliminary reference to the ECJ.¹⁷⁰ Another reason is that national lower courts are frequently under significant work pressure, so they might regard dialogue with the ECJ as a distraction from their duty to deliver justice in concrete situations within a reasonable time.¹⁷¹

The actions of the second Giudice Conciliatore in the *Costa v. ENEL* saga, Judge Fabbri, appear more consistent with the ‘judicial empowerment’ narrative. Indeed, he referred the case to the ECJ and, following the preliminary ruling, he disapplied the ENEL Statute and ruled in favour of Costa, thus enforcing the primacy of Community law, notwithstanding a strong ruling in the opposite direction by his brethren in *Via della Consulta*. Yet, having regard to the very beginning of this empowerment tale, it is clear that Judge Fabbri’s reference to the ECJ stemmed not so much from the *motu proprio* initiative of an ambitious judge, who took advantage of an existing dispute over an electricity bill to raise the question of the primacy of Community law, but was prompted by a carefully constructed lawsuit brought by a profound connoisseur of the relationship between Italian and Community law such as Stendardi.

In fact, all evidence suggests that there would have been no *Costa v. ENEL* without Stendardi: first, he sought out and found Costa, a customer and shareholder of one of the nationalized electricity companies and, thus, the perfect complainant for a lawsuit against ENEL; second, Stendardi persuaded Costa not to allow ENEL employees to read his meter and not to pay two ENEL electricity bills, thus giving rise to two lawsuits that, because of their limited value, had to be handled by the Giudice Conciliatore as a court of last instance, thus triggering the obligation to make a preliminary reference under Article 177(3) of the EEC Treaty; third, he cajoled two Italian magistrates – who presumably were not familiar with Italian constitutional justice, let alone with the preliminary ruling procedure – to refer the matter to the ICC and, in one case, also to the ECJ;¹⁷² fourth, he faced off against some of Italy’s most prominent lawyers and academics of the time – and ultimately prevailed;¹⁷³ finally, he obtained an ECJ

¹⁶⁹ For instance, the Italian lower court hearing the famous *Francovich* case made a preliminary reference to ... the European Court of Human Rights in Strasbourg! It was only ‘thanks to the initiative of an astute postman’ that the reference was ‘redirected to the correct recipient’ in Luxembourg. See Bartolini and Guerrieri, ‘The Pyrrhic Victory of Mr. Francovich and the Principle of State Liability in the Italian Context’, in F. Nicola and B. Davies (eds), *EU Law Stories* (2017) 341.

¹⁷⁰ Directorate General for Internal Policies, *Judicial Training in the European Union Member States* (2011), at 26.

¹⁷¹ Pavone, *supra* note 167.

¹⁷² See Pavone, ‘Revisiting Judicial Empowerment in the European Union’, 6 *Journal of Law and Courts* 303 (2018) at 315–316 (suggesting that insufficient training, workload pressures and cultural aversion to judicial review can induce lower domestic courts to resist Europeanization through the preliminary ruling procedure even when it would lead to judicial empowerment).

¹⁷³ ENEL was represented, *inter alia*, by Italian academic heavyweights Francesco Santoro Passarelli, Luigi Galateria and Massimo Severo Giannini as well as by Leopoldo Piccardi, an attorney and former judge of the Italian Council of State; the Italian Council of Ministers was assisted by Deputy State Attorney General Luciano Tracanna and by Riccardo Monaco, an eminent professor of international law who, in October 1964, would be appointed judge to the ECJ.

judgment that not only reflects his views on primacy but also contains a passage that matches – almost verbatim! – a sentence from his 1958 treatise on the relationship between Italian and Community law.¹⁷⁴

In sum, Stendardi not only prophesized EU primacy but also saw to it that his prophecy would be fulfilled. Yet his name still lies in obscurity – as so often happens, *nemo propheta in patria sua*.¹⁷⁵ It is thus time to finally recognize Stendardi as one of the earliest ‘Euro-lawyers’¹⁷⁶ – that is, a number of entrepreneurial attorneys who constructed ad hoc lawsuits and sometimes even ghost-wrote preliminary references to further Europe’s ‘integration through law’¹⁷⁷ by exploiting the appeal that judicial empowerment had to some national courts¹⁷⁸ – and, arguably, as the ‘prime architect’ of the primacy of EU law.

¹⁷⁴ Cf. Stendardi, *supra* note 38, at 59: ‘[T]he establishment of the Community would be quite meaningless, if the acts of its institutions could be nullified by means of a unilateral measure of a Member State which could prevail over Community law’; ECJ, Case 6/64, *Costa v. ENEL*, Judgment of 15 July 1964 (EU:C:1964:66), [1964] ECR 585, at 594 (stating that the binding effects of Community legislation ‘would be quite meaningless, if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law’).

¹⁷⁵ ‘Nobody is a prophet in his own country’. Cf. John 4:44, Matthew 13:57, Mark 6:4, Luke 4:24.

¹⁷⁶ See A. Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (2015); see also W. Mattili and Slaughter, ‘Constructing the European Community Legal System from the Ground Up: The Role of Individual Litigants and National Courts’, Harvard Jean Monnet Working Papers Series no. 96(6) (1996). For a comprehensive assessment of the role of Euro-lawyers, see Pavone, *supra* note 167.

¹⁷⁷ See Byberg, ‘The History of the Integration through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe’, 18 *German Law Journal* (2017) 1531; D. Augenstein (ed.), *‘Integration through Law’ Revisited: The Making of the European Polity* (2012).

¹⁷⁸ See Weiler, *supra* note 163, at 2426; Alter, *supra* note 164, at 467.